

Ineffective Legal Assistance

**Redress for the Accused in Dutch Criminal Procedure and
Compliance with ECHR Case Law**

Ineffectieve rechtsbijstand

Redres voor de verdachte in het Nederlandse strafproces en naleving van EHRM-jurisprudentie
(met een samenvatting in het Nederlands)

PROEFSCHRIFT

ter verkrijging van de graad van doctor aan de Universiteit Utrecht op gezag van de rector magnificus, prof. dr. G.J. van der Zwaan, ingevolge het besluit van het college voor promoties in het openbaar te verdedigen op vrijdag 4 maart 2016 des middags te 2.30 uur

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Dit proefschrift werd (mede) mogelijk gemaakt met financiële steun van de Nederlandse Organisatie voor Wetenschappelijk Onderzoek (NWO).

Dit is de proefschrifteditie van dit boek; een commerciële editie zal uitkomen bij Koninklijke Brill | Nijhoff Publishers onder ISBN-nummer 9789004319363.

ACKNOWLEDGEMENTS

The picture on the cover of this book is a papyrus role that represents Ma'at, the Ancient Greek Goddess of Truth and Justice.¹ I chose this image not only because my family and I saw these roles in the British Museum following my G.J. Wiarda scholarship-funded visit to Oxford University, but also because truth and justice were important motivations to conduct this research. I firmly believe that, if not for truth and justice, I would not have been able to finish my PhD fellowship.

It is also against this background that I would like to thank my esteemed reading committee: Prof. dr. W.J.M. van Genugten (University of Tilburg); Prof. mr. M.S. Groenhuijsen (University of Tilburg); Prof. dr. F. de Jong (University of Utrecht); Prof. mr. A.J.M. Machielse (Advocate-General to the Hoge Raad and University of Nijmegen); and Prof. mr. R.J.G.M. Widdershoven (University of Utrecht). I also want to express my appreciation to my supervisor, Prof. mr. F.G.H. Kristen. My genuine thanks, moreover, to my two paranimfen, Dr. Joukje Oosterman and MD Tirza Springeling.

Prof. A. Ashworth, thank you for allowing me to visit you at Oxford University, and thanks also to the G.J. Wiarda Foundation for granting me the scholarship that gave me this unique experience.

I would also like to express my sincere gratefulness to the criminal law department of the law firm Borsboom & Hamm in Rotterdam, the Netherlands. Thanks to Mr. Frank van Ardenne and his colleagues Nathalie, Martine, Astrid, Maaïke, as well as colleagues from other departments such as Hans. With their help I was able to see what proper, effective legal assistance looks like and what a stark contrast that is with the kind focussed on in my book. Although ultimately this legal research could not include the findings of what I believe did constitute actual participatory observation, this thesis is nonetheless a testament to my appreciation for your stimulating and encouraging environment.

Additionally, I would like to thank my former colleague-friends at the Willem Pompe Institute, SIM other departments of Utrecht University and our befriended universities and organizations: Chana, Dessy, Lianne, Marianne, Marieke, Tessa, Rianka, Masha, Brianne, Marthe Lot, Réno, Verena, Tom, John, Ton, Ferry, Michiel, and Jonathan. A heartfelt thanks also to Wiarda Institute colleagues and colleagues on the editorial board of the *Utrecht Law Review* as well as our team on the *Delikt en Delinkwent EHRM column* and the *EVRM and Commentaar*. Further thanks must go to my dear colleagues at The Hague Institute for Global Justice: I hope I am able to work with you on interesting and important projects for many years to come and I am grateful for the encouraging and motivating international environment in which we work.

Last but not least, the people to whom I want to express most gratitude are my family and friends. I would love to thank my parents, who are the two most caring persons I know; I am grateful to be your daughter! I would also like to expressly thank my brother, sister in law, and their two little ones who I hold so dear: Olivier – who I know will now be able to read his own name in this preface – and Florens – who will soon be able to do so. A penultimate word of thanks to my jaarclub, hockey team, secondary school friends, Unitas S.R. Senate and other friends, and all others! Finally – as the most important expression of gratitude that a book can ever provide, knowing I can never appreciate you enough; as a small token of my gratefulness and with all my love – I dedicate this book to my parents.

¹ 'Book of the Dead', Papyrus of Ani (sheet 3), © British Museum.

For my parents

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PART I

INTRODUCTION AND CONCEPTUAL FRAMEWORK

CHAPTER 1. INTRODUCTION TO THIS RESEARCH

1.1. The main research themes

Ineffective assistance by counsel – or simply ineffective legal assistance – in Dutch criminal proceedings appears to raise several concerns, as illustrated by the following examples.² In 2012, a prosecutor asked for the removal from the case of a lawyer who had purportedly provided inadequate legal services to the accused.³ In 2013, a convicted person criticised his defence team in a national newspaper for their supposed below-par legal assistance.⁴ Again in 2013, a newspaper⁵ reported on an increased number⁶ of complaints between 2009 and 2014 of judges to disciplinary courts about advocates who they claimed had “(...) not performed well.” As a last example, in 2016, another newspaper reported on a disciplinary complaint lodged by the prosecution against counsel who had supposedly influenced a witness, in addition to a criminal investigation into the same allegation.⁷ These examples, which are quite different in nature, all allude to the need to study ineffective legal assistance in Dutch criminal proceedings and possibly also redress for the accused, at least in the most serious instances.

This study will take a twofold approach to these two main research themes. First, the initial exploration as to what (negative) conduct of counsel in Dutch criminal proceedings can reasonably be construed as ineffective legal assistance will predominantly involve an analysis of Dutch law, deontology and case law of the highest court, the Hoge Raad. This analysis will emphasise how counsel ought *to not perform* in Dutch criminal proceedings. In other words, this research will focus on (negative) conduct of counsel in, rather than outside of, the criminal process in the Netherlands. This also means that both the lawyer’s positive contribution to the criminal process and ineffective self-representation by a necessarily unassisted accused *per se*, will fall mostly outside of the scope of this study. However, this does not mean that these two issues will not be used at all to come to a better understanding of ineffective legal assistance and find solutions in the form of redress in Dutch criminal proceedings. Rather, this research will use positive norms that regulate how counsel ought to perform in Dutch criminal proceedings as benchmarks that help to assess when counsel falls short from what is being expected of him. Similarly, comparisons between a defence activity by either an unassisted, self-representing accused or an assisted accused who has a lawyer on his⁸ side will help to evaluate three further relevant issues for this research. First, such comparisons can indicate what can reasonably be expected of the lawyer. Second, such comparisons can give insights into whether or not too much is currently being demanded from counsel. Third, such comparisons will help to explore how the judge deals with an ineffective defence by the accused and counsel, on the one hand, and the unassisted accused, on the other. All these comparisons are important to assess ineffective legal

² For scholarly attention, see Prakken (1999) particularly at 14; Bal, in: Klip et al (2004), at 103-114, particularly at 114; Franken (2004) at 5-47 and particularly at 26-40; Spronken (2005), at 414-419; Prakken (2005) at 1-136 and particularly at 69-71; Brouwer, in: Harteveld et al (2005) at 39-70; Franken (2007) at 360-369; Boksem (2007) at 1-35 particularly at 35; and Franken (2011) at 1109-1117.

³ AG Westerhuis *OM verzoekt om andere advocaat in strafzaak*, 28 August 2012, available at <http://www.advocatie.nl/westerhuis-de-zaak-veel-belangrijker-dan-waar-het-om-nu-mee-bezig> [last accessed on 18 October 2015]; a removal that was later retracted on 5 September 2012, see <http://www.advocatie.nl/om-trekt-verzoek-vervanging-advocaat-wij-hebben-ons-vergaloppeerd> [idem].

⁴ Editorial, *OM tekent beroep aan in zaak-Van den Nieuwenhuyzen*, *NRC Handelsblad*, 2 August 2013.

⁵ N. de Fijter and R. Pietersen, *Rechtters klagen steeds vaker over slecht presterende advocaten*, *Trouw*, 13 January 2013.

⁶ There has been an estimated absolute 17% increase in complaints, when comparing the annual reports of the disciplinary courts for 2010 and 2011 with still more complaints than in 2009 in the year of 2014, available at www.raadvandiscipline.nl [last accessed on 18 October 2015]; http://www.hofvandiscipline.nl/admin_assets/content/content_files/public/Jaarverslag%202014%20Hof%20en%20raden%20van%20discipline.pdf.

⁷ E. Jorritsma, *OM klaagt advocaat tuchtrechtelijk aan*, *NRC Handelsblad*, 8 January 2016.

⁸ From now on the terms “his”, “he” or “him” will often be used where referring to a person in a gender-neutral way for better legibility of the book.

assistance and especially to assess whether or not it is fair that the accused has to bear the consequences of instances of such (negative) conduct of counsel. To conclude, this research will use these internal benchmarks that find their origin in, rather than outside of, the criminal process, in order to conclude on what can reasonably constitute ineffective legal assistance in Dutch criminal proceedings.

These assessments will take into consideration, of course, that more can reasonably be expected of counsel than a lay accused. Also, this study will not overlook that some conduct of counsel should come at the procedural risk of the accused because of the unity of the defence and the freedom of the accused to decide upon how he wants to be legally assisted. The aforementioned notions are important to the accused who should obtain an effective defence in fair Dutch criminal proceedings. However, this research will also assess whether it is fair that the accused suffers twice from ineffective assistance by his lawyer and the fact that this harm is not remedied in the criminal process. Therefore, this research will explore – often on the basis of all the facts and circumstances of a given case – how the court deals with ineffective legal assistance and whether or not the accused suffers harm by instances of such (negative) conduct of counsel.

Second, the aforementioned aspect of harm to the accused is also significant for the examination in this research into possible solutions for the most serious manifestations, at least, of ineffective legal assistance. This examination confronts this study with a difficult task. While the assessment of what constitutes ineffective legal assistance is already a complex endeavour, determining the most serious instances of this (negative) conduct of counsel is even more challenging. Given these complexities, this study will assess ineffective legal assistance from a rights-based approach, mostly by turning to benchmarks outside of Dutch criminal procedure. This research will especially explore whether the most serious manifestations of ineffective legal assistance can be inferred from case law of the European Court of Human Rights (hereafter: the Court). The Court sets minimum guarantees for an effective defence and holds the two guarantees of equality of arms and adversariality to be essential for fair criminal proceedings. Therefore, the most serious manifestations of ineffective legal assistance might arise when this (negative) conduct of counsel harms not only the rights of the accused but also these two fair trial guarantees. By extension, this may also mean that fairness demands solutions to ineffective legal assistance in Dutch criminal proceedings require redress for the accused that remedies damage done by this (negative) conduct of counsel to the course and outcome of the process. The aforementioned benchmarks will be called external benchmarks, because they find their origin in the case law of the Court and thus outside of, rather than in, Dutch criminal proceedings.

Seeing that this introduction has already touched upon the aforementioned internal and external benchmarks, it is important to return to how they are relevant for the main research themes. These benchmarks can be used in order to first gain a better understanding of what constitutes ineffective legal assistance in Dutch criminal proceedings and then extend to possible solutions for its most serious instances at least, because they provide the following focus to this study. The focus of this research combines the main themes of ineffective legal assistance, redress for the accused in Dutch criminal proceedings, and compliance with case law of the Court, as the title of this book also reflects. As this introduction alludes to, redress will be construed as a remedy for ineffective legal assistance in Dutch criminal proceedings that repairs the damage done to the course and outcome *and* complies with minimum guarantees regarding an effective defence as set by the Court. The aforementioned central notion for this study of an effective defence for the accused and a fair trial has already been referred to repeatedly in this introduction and has been held to be essential for fair Dutch criminal proceedings in a case of 2009 of the Hoge Raad.⁹ Three of the elements of an effective defence will be elaborated upon below, because they may potentially have a bearing on this entire research into ineffective legal assistance and its redress in Dutch criminal proceedings.

⁹ HR 17 November 2009, ECLI:NL:HR:2009:BI2315 (*Hoogerheide*). See also its annotation by Schalken in *NJ* 2010, 143 m.nt. Schalken and Franken (2011).

Three elements of an effective defence in Dutch criminal proceedings

The first element of an effective defence of the accused in Dutch criminal procedure is his free choice. This means that the accused should in principle be able to decide how he wants to be defended in the criminal proceedings. Accordingly, the accused can usually decide to represent himself in the criminal proceedings.¹⁰ Or the accused can opt for legal assistance by either a retained or appointed counsel. Alternatively, the accused can even opt for legal representation, necessarily in his absence. In sum, this means that the accused in principle has a free choice for self-representation, legal assistance or legal representation in the Netherlands.¹¹ It follows from this description that much importance is attached to the free choice of the accused as to how he wants to be defended in Dutch criminal proceedings as a first element of an effective defence.

Two generally held beliefs can assist in further explaining how much significance is attached to this first element of free choice of the accused in relation to his defence in Dutch criminal proceedings. First, where the accused opposes legal assistance by a lawyer, it is assumed that the potential advantage of counsel can be realised only imperfectly, if at all.¹² Second, when a lawyer is being imposed on the accused, it is believed that he may think that the law contrives against him.¹³ Both examples indicate that this first element of free choice might be placed on a higher level than legal assistance against the accused's will in Dutch criminal proceedings at least.¹⁴ These two generally held beliefs demonstrate how the accused's free choice in relation to his defence is considered to be an important fair trial guarantee.

Although this description indicates the importance of this first element of free choice for an effective defence and, by extension, a fair trial, this does not mean that either the right to self-representation or the right to legal assistance are absolute in Dutch criminal proceedings.¹⁵ Rather, these two rights can be legitimately restricted. Two examples of permissible restrictions to these two rights by statute and by court ruling will be mentioned below, in order to come to a better understanding of how neither right is absolute in Dutch criminal proceedings.

First, Dutch law does not allow the accused to defend himself at *all* criminal procedural stages.¹⁶ For example, the accused can only resort to cassation before the Hoge Raad when assisted by counsel. Second, in a given criminal case, the bench can disallow an unassisted accused who violates the law or court order to proceed *pro se*.¹⁷ Under such circumstances, the accused can no longer represent himself, even though he chose freely for this form of defence of self-representation. These are two examples of permissible restrictions to the right to self-representation. The aforementioned examples show how this first element of free choice is not absolute when the accused opts for self-representation.

As with the aforementioned permissible restrictions to the right to self-representation, the right to legal assistance is also not absolute in Dutch criminal proceedings. First, Dutch law and case law permits restrictions to the right to assistance by counsel. For example, if the accused wants to proceed *pro se*, he can in principle waive his right to counsel and defend himself in the criminal proceedings.¹⁸ Second, if counsel and the accused disagree about the content or course of the proposed defence, the lawyer can withdraw from the case.¹⁹ Under these circumstances, the accused who freely opted for

¹⁰ E.g. see for the emphasis on the accused's own role in an effective defence by counsel, Prakken and Spronken (2009) at 8-9. See chapters 4 and 6 in particular.

¹¹ E.g. HR 24 March 1998, ECLI:NL:HR:1998:ZD0987 (The right to defend oneself in person). See also AG Jörg, ECLI:NL:PHR:2009:BI2315 as an advice to the Hoge Raad in its case of HR 17 November 2009, ECLI:NL:HR:2009:BI2315 (*Hoogerheide*), *NJ* 2010, 143 m.nt. Schalken. AG Knigge also mentions in para. 10: HR 16 February 1982, ECLI:NL:HR:1982:AC7519, *NJ* 1982, 426; HR 24 March 1998, ECLI:NL:HR:1998:ZD0987, *NJB* 2008, 1084; and HR 26 May 1998, ECLI:NL:HR:1998:ZD1048, *NJ* 1998, 677.

¹² See chapter 4 and for exceptions 6 in particular.

¹³ Prakken and Spronken (2009) at 15-16. HR 17 November 2009, ECLI:NL:HR:2009:BI2315 (*Hoogerheide*). See also its annotation in *NJ* 2010, 143 m.nt. Schalken. Also central to Franken (2011).

¹⁴ See chapters 4 and 6 in particular.

¹⁵ Exceptions under Dutch law make a lawyer both competent and obliged to act for minors who have not reached the age of 16 years old (under Article 503 (2) Sv) and for persons who suffer from a mental illness (under Article 509a in conjunction with Article 509d (3) Sv). See chapters 4 and 6 in particular.

¹⁶ See chapters 4 and 6 in particular.

¹⁷ See chapters 4 and 6 in particular.

¹⁸ E.g. HR 22 April 2008, ECLI:NL:HR:2008:BC6813 in *NJ* 2008, 387 m.nt. Reijntjes.

¹⁹ Prakken and Spronken (2009) at 18.

legal assistance by a certain counsel will then have to decide whether to continue alone or obtain another lawyer. These two aforementioned examples indicate, just as we have seen for the right to self-representation, that the right of the accused to legal assistance is also not absolute in Dutch criminal proceedings. The aforementioned examples demonstrate how this first element of free choice is not absolute when the accused opts for legal assistance.

Seen in conjunction, these aforementioned examples of permissible restrictions by statute and court ruling to the rights of legal assistance and self-representation are relevant for this study into ineffective legal assistance and its redress in Dutch criminal proceedings. This is because both the right to legal assistance and self-representation can be restricted without resulting in an unfair trial *per se*. Therefore, this research will pay particular attention to the effects of restrictions to the right to legal assistance on the fairness of the proceedings such as legal assistance against the accused's will. Moreover, as explained in the description of the research approach, comparisons between restrictions to the right to legal assistance and self-representation can help to explain how much and whether not too much is being demanded from counsel in Dutch criminal proceedings. Therefore, this study will revisit this first element of free choice and its relation to the right to assistance by counsel, in order to gain a better understanding of ineffective legal assistance and solutions for its more serious manifestations at least.

The second element of an effective defence of the accused in Dutch criminal proceedings is a negatively formulated generally held belief that, without proper knowledge of the law, an accused will not normally be able to make effective use of the rights provided to him.²⁰ This belief is grounded in the underlying assumption that an accused, who will usually be a lay person, will find it difficult to assert himself in the proceedings and is therefore entitled to assistance by counsel.²¹ If legally assisted, the accused will supposedly benefit from his lawyer. In turn, this lawyer is assumed to contribute positively to the defence by giving each case his best efforts.²²

While this aforementioned assumption of the supposed added value of counsel for the accused represents the general rule, in practice there can of course be exceptions that this research into ineffective legal assistance focuses on. After all, when the accused suffers from ineffective legal assistance, the accused might be in danger of experiencing not benefit, but rather harm from counsel's services. There can be several reasons why ineffective legal assistance can occur. For instance, a lawyer might not have devoted sufficient time to prepare a given case. Or counsel might not have followed the requisite courses needed to update his legal knowledge. Also, a statute or court ruling might hinder the lawyer from providing adequate legal assistance to the accused. For instance, the authorities can intrude into the lawyer-client relationship so that the accused does not entrust his lawyer with proper instructions. Also, a lawyer might advise his client incorrectly about how to exercise his right to remain silent in the criminal process so that the accused ends up being harmed in his rights, rather than defence strategy. Under these circumstances, the rights of the accused – which are also important for the fair trial guarantees of equality of arms and adversariality – might also end up being damaged.

These quite different examples show some exceptions to the general rule that legal assistance can in principle help the accused to assert his rights. They also allude to the importance to not *assume* that an accused will always benefit from the mere situation of a lawyer on his side. Rather, counsel can provide ineffective legal assistance for the many reasons that were mentioned. Therefore, this research will focus not only on the assumption that legal assistance can benefit the accused, but also whether the legal assistance provided was effective in practice. This examination will be complex and can only

²⁰ E.g. Blok and Besier (1925) at 139, “It has been recognised for a long time now that providing an accused with the competences to lodge a defence does not guarantee that his defence will be sufficiently ensured. After all, many accused persons will not fully comprehend the allegations against them and, rather, will often lack the requisite skills and agility to respond to such allegations and to have them examined further, so that another light will be shed on the case. Not only that, they will often lack the legal knowledge that is required to lodge a good defence [author's translation].” See also Cleiren and Nijboer (2005) Article 331 Sv, aant. 3, at 825.

²¹ Under Article 28 Sv, respectively in conjunction with *inter alia* Articles 40-43 Sv.

²² E.g. HR 16 February 1982, ECLI:NL:HR:1982:AC7519 (Ex officio appointment of a lawyer), *NJ* 1982, 426. See also Spronken (2003b) who also mentions at 180, under footnote 4, *MvT, TK* 1913-1914, 286, nr. 3, explanation of Article 29 Sv; HR 24 March 1998, *NbSr* 1998, 61; and HR 26 May 1998, 116 in two cases that do not concern *ex officio* appointment of a lawyer.

be made with full consideration of the facts and circumstances of a given case. Therefore, this research will take into consideration two important aspects of this second element: first, legal assistance is deemed to be important for an effective defence and by extension a fair trial because of the supposed benefit of counsel's services to the accused; and, second, under exceptional circumstances it will have to be assessed in practice whether or not the lawyer of the accused provided effective legal assistance in the specific case.

The third and final element of an effective defence in essence is a combination of the two aforementioned elements.²³ It is based on the following assumptions about both the accused and his preferred lawyer. The accused will supposedly have a higher level of trust in the lawyer of his choice and will therefore confide in him and give him the best possible instructions. In turn, thanks to this trust and these proper instructions, the lawyer of the accused's preference can purportedly lodge the best possible defence for the accused. Therefore, free choice and legal assistance combined, the third element entails the generally held belief that assistance by a lawyer of the accused's *choice* will guarantee the best possible defence.

As with the second element, there are exceptions to this general rule. One important exception is that Dutch law does not require the authorities to *appoint* the legal aid lawyer of the accused's preference.²⁴ For example, if the accused is deprived of his liberty by order of the prosecutor pre-trial and is therefore entitled to a legal aid lawyer, the authorities can in principle appoint another legal aid counsel than the one of the accused's choosing. This example indicates a permissible restriction to this third element of assistance by the lawyer of the accused's choice.

Just like for the other two elements of an effective defence, this study with its focus on ineffective legal assistance will have to explore the effects of restrictions to the third element of an effective defence on the fairness of Dutch criminal proceedings. Seeing that there is a generally held belief that the best possible defence can be provided by counsel of the accused's choosing, most attention will be paid to the impact of restrictions to the free choice of the accused to get assistance by the retained or appointed lawyer of his preference.

This description of the three elements of an effective defence are important. This study will explore these separately and in combination. Also, while these elements already give an initial indication of the importance of this research, its theoretical and societal relevance has not yet been explained. Given that this introduction will also have to justify why this study has been conducted in the first place, the subsequent sections will turn to both aspects.

The theoretical relevance of this research

This study derives its theoretical relevance from the fact that, in the course of conducting this research, little scholarly work has been encountered that addresses the specific issues of ineffective assistance by counsel and its redress in Dutch criminal procedure.²⁵ Previous academic work did concentrate on related positive norms that regulate the conduct of counsel and the defence in the Dutch criminal proceedings.²⁶ Moreover, important studies have focused on defence and fair trial rights in general terms.²⁷ However, in both related research areas ineffective legal assistance in Dutch criminal proceedings was usually only discussed as, at most, a side-issue. As a consequence of this relative lack of academic attention to ineffective legal assistance, both this research theme and its solutions in the form of redress in Dutch criminal procedure for its most serious manifestations still appear to be relatively understudied.²⁸ This book will seek to fill that gap.

²³ Cleiren and Nijboer (2005) Art. 28 Sv, aant. 1a.

²⁴ Article 28 Sv, respectively Article 28 Sv in conjunction with Articles 40 and 41 Sv. HR 20 October 1987, ECLI:NL:HR:1987:AD0001, *NJ* 1988, 446. See a similar use in section 1.1.

²⁵ E.g. Franken, in: Jordaans et al (2005) at 161-169.

²⁶ Although there is little scholarly work and case law on the defence, according to Prakken (1999) at 14.

²⁷ E.g. Spronken (2001) at 435-489; mostly explaining that the Court has not yet done what the United States Supreme Court had established on ineffective legal assistance but without much application to Dutch criminal procedure by Bal, in: Klip et al (2004) at 103-114 particularly at 114; Brouwer, in: Harteveld et al (2005) at 39-70; Franken (2007) at 360-369; Prakken and Spronken (2009) at 1-28; Boksem (2009) at 1-19; and Franken (2011) at 1109-1117.

²⁸ Prakken (1999) at 27-28: "The discussion about the position of the defence indicates little insight in the role of the defence as it ought to be, and therefore means there is a need for research. Seeing the shifts in the criminal procedure, partly because of structural factors that were caused by a seriously changed culture of investigation and prosecution,

The description given above indicates the theoretical relevance of this research because it addresses relatively understudied issues, and contains elements that have two further implications for the approach taken in this book. This section will give a first overview of such implications.

A first relevant implication is that its focus on relatively novel topics can be sustained in the aforementioned academic work. In particular, this study can benefit from the PhD research conducted by Spronken, who has dealt with how counsel ought to positively contribute to Dutch criminal proceedings.²⁹ Her explanation of positive norms that regulate how counsel ought to perform in the Netherlands can be used as benchmarks for ineffective legal assistance. Moreover, her interpretations of case law of the Court regarding a fair trial can be used as points of reference. Finally, her brief references to the negative theme of ineffective legal assistance, as a corollary to her work about the positive norms, can also be used as a check to findings presented in this book. Therefore, this study into ineffective legal assistance and its redress in Dutch criminal proceedings will often revisit Spronken's findings.

A second relevant implication of the aforementioned considerations about the theoretical relevance of this research is that the present study will be chiefly exploratory (in Dutch: *verkennend onderzoek*). For example, this book will often have to establish itself what ineffective legal assistance in Dutch criminal procedure entails.³⁰ Also, an integral part of this research will be to assess whether or not it is fair for the accused to bear the consequences of a specific instance of ineffective legal assistance. These considerations of fairness call for an in-depth examination of redress that can remedy harm done by ineffective legal assistance to the course and/or outcome of the criminal process. Thanks to this specific angle of the present research, this book also has the potential to add to a growing body of literature. This literature, in essence, focuses on the criminal procedural triangle. This triangle represents an idea of a balance between on the one hand, the judge, and on the other, the two sides of defence and prosecution.³¹ More specifically, these discussions touch upon the best possible roles of the lawyer and the judge in this triangle. This study – with its focus on ineffective legal assistance and its redress in Dutch criminal procedure – could potentially bring a relevant, slightly different perspective to these discussions because issues surrounding conduct of counsel that does not live up to the best possible role, as well as the judge's solutions to such instances, are largely missing. The remainder of this overview will explain further how this study might add to either debate about the best possible role of the lawyer and the judge respectively.

In some discussions about the best possible role of counsel, scholars voice the concern that *too much* is currently being demanded from the advocate in Dutch criminal proceedings.³² They submit that the defence – and *de facto* professional counsel – has become responsible for making requests and submitting substantive defences, repeatedly and with reasons, to prompt the judge to exercise even his *ex officio* responsibilities.³³ Frequently, these scholars relate this supposed increase of responsibilities of counsel to the overall shift towards a more adversarial, rather than inquisitorial, Dutch criminal procedure.³⁴ They claim that this shift has been caused by a combination of case law of the Court and a change in competences of the investigative and prosecuting authorities in the Dutch criminal process. As a consequence, they argue the defence has purportedly become a “party” and that counsel especially has to be assertive and alert. Instead, if the lawyer would play his supposed more traditional

partly because of the influence of the Convention, it is necessary to contemplate the professional role of the lawyer in the context of the criminal procedure in which the defence has to function. It is natural to conduct comparative criminal procedural research, and in the way that has been advocated by Damaška, because that view does justice to the different types of criminal proceedings and the organization of State authority. (...) Also, the principles of a good defence, whose broad outlines I have addressed, call for research into the procedural rights that comprise the conditions for an effective defence, such as access of lawyers to detained accused in the early phases of the criminal procedure and their competences pre-trial, the internal publicity of the procedure, and the checks on the investigation opsporing. As a final remark, research has to be conducted as to the means that can strengthen the defence, which is necessary when the trend towards a more adversarial criminal procedure, accusatorial or not, persists, or to establish the preconditions that are required for the defence to perform their new tasks adequately [author's translation]”.

²⁹ Spronken (2001), particularly at 464.

³⁰ E.g. Franken (2011) at 1109-1117.

³¹ E.g. Groenhuijsen and Knigge (1999) at 21-28; Groenhuijsen and Knigge (2004) at 7-26; Kooijmans (2011a) at 2.

³² E.g. Franken (2007) at 360-369; Franken (2011), at 1109-1117. Franken (2015), at 1-8, particularly at 7-8.

³³ Brouwer, in: Harteveld et al (2005), at 39-70.

³⁴ Prakken (2005) at 69-71 and Boksem (2011) at 106-113.

reactive and relatively marginal role, he would risk being held responsible for not having brought an issue to the attention of the judge. Such conduct would allegedly come at the procedural risk of the accused, who would have to bear the consequences of those alleged instances of ineffective legal assistance.

While increased responsibilities of counsel would not be problematic under all circumstances, these scholars worry that, especially during the pre-trial stage, the accused has not been afforded the rights that would enable counsel to perform anything other than that traditional role. An often used example for this thesis is that currently in the Netherlands the (adult) accused is not entitled to have a lawyer present during police interrogations.³⁵ Consequently, these scholars claim that, without counsel attending at this crucial procedural moment when the case is being built against the accused, it is not fair to expect the defence to be active or be assumed to have renounced procedural options – or even rights – later on in the proceedings at a more adversarial trial. They conclude that the role of the defence – and especially of the criminal defence lawyer – is not consistent from pre-trial to particularly the trial stage.

This study can possibly add to these scholarly debates about the best possible role of counsel thanks to its focus on what constitutes ineffective legal assistance in particular. While this research is therefore also relevant for the aforementioned ongoing discussions, it will *not assume* that these scholars have correctly identified an increase of responsibilities of the advocate. Instead, original research will be conducted that will focus on the rather specific issues of ineffective legal assistance and its redress in Dutch criminal proceedings mostly casuistically. To clarify even further, this study will also *not suppose* that the alleged increase of responsibilities of counsel or the supposition that too much is currently being demanded from counsel in the criminal process were caused by a shift towards more adversarial proceedings.³⁶ Rather, this study will examine both the existence of the trend and, if found to occur, its possible cause on its own terms. This research will explore both issues with the focus, explained above, on the (negative) conduct of counsel and the importance attached to an effective defence for fair Dutch criminal proceedings.

In addition to these observations about the academic debate about the best possible role of counsel, this study might also complement such discussions about another participant: the judge. In essence, two positions can be discovered in these discussions about the best possible role of the judge in the procedural triangle. First, some scholars submit that there is a need for a “more contradictory”³⁷ Dutch criminal procedure that requires the judge to be more passive in the proceedings.³⁸ They believe that the judge should determine how to respond (more) to the positions that are brought forward by both “sides” of the defence and the prosecution. Second, other academics argue that the judge should continue to play his purportedly original and more active role as a truth finder and guarantor of a fair trial.³⁹ In their view, the judge should not limit his reliance on the positions brought forward by the defence and prosecution but be (more) independent as to his own position. They want the judge to be active because supposedly the defence and prosecution should not be elevated as if they are “parties” to the proceedings. In particular, they argue that the defence should not be given the responsibility of a “party” because of lacking procedural competences pre-trial. They use the same example as mentioned in the context of the discussions about the best possible role of counsel that, due to the absence of counsel during police interrogations, the judge should play a more active role at trial.⁴⁰ In their opinion, the consistency of the criminal process requires that the defence cannot be a “party” during the trial if counsel could not attend an essential pre-trial moment such as police interrogations.

Most of these scholars arguing for an active role of the judge also link their ideas about his best possible role to the more inquisitorial *origins* of Dutch criminal proceedings. They emphasise the risks for fairness for the accused and for the process in its entirety if the judge were to take a more passive position in the supposedly increasingly contradictory trial. In their opinion, a role of the judge who decides upon his position as a response to the submissions by the defence and the prosecution

³⁵ This will change as of 1 March 2016 because of HR 22 December 2015, ECLI:NL:HR:2015:3608.

³⁶ See also Coster van Voorhout (2008b).

³⁷ For this term, see also e.g. Foqué and 't Hart (1990) at 122.

³⁸ E.g. Groenhuijsen and Knigge (1999) at 21-28; Groenhuijsen and Knigge (2004) at 7-26.

³⁹ E.g. Spronken (2001) at 629-636; Franken (2012) at 361-368; and Kooijmans (2011a) at 2.

⁴⁰ This will change as of 1 March 2016 because of HR 22 December 2015, ECLI:NL:HR:2015:3608.

would not fit well with the more inquisitorial criminal process in the Netherlands. The criminal procedure should be a consistent judge-led inquest with limited assistance from the two sides, rather than “parties”, that the defence and prosecution represent.

As with the scholarly debates about the best possible role of counsel, this research, that explores redress for ineffective legal assistance in Dutch criminal proceedings, also has the potential to add to these discussions regarding the best possible role of the judge. The specific focus on how the judge might have to respond when confronted with ineffective legal assistance in Dutch criminal proceedings seems largely missing in the aforementioned discussions about the best possible role of the judge. While this research might be able to add this angle to these debates, it will not *assume* that either of the two aforementioned perspectives are correct. Rather, original research will be conducted in order to explore whether there are any indications that the judge has become more passive when confronted with ineffective legal assistance, at least, and how this relates to the best possible role of the judge in the criminal procedural triangle. This study will therefore also focus on how the judge should deal with ineffective legal assistance in Dutch criminal proceedings and what might be circumstances under which redress for the accused by the judge can be reasonably expected.

These two academic debates about the best possible roles of counsel and the judge in the criminal procedural triangle were, until now, addressed mostly separately, but their combination also gives a final indication of the theoretical relevance of this study. This research will be even more relevant if counsel has gained more responsibilities and the judge can be passive when confronted with ineffective legal assistance. After all, if both supposed trends occur simultaneously, at worst the accused can be harmed twice: first, by the advocate who provides ineffective assistance and, second, by the judge who remains passive when confronted with ineffective legal assistance.

The underlying reason for the importance of original research into these two supposed trends is twofold. First, if counsel has gained more responsibilities, a wider range of defence activities can constitute ineffective legal assistance. Second, if the judge responds to the position of the defence, rather than actively intervenes in the case, the accused risks having to bear the consequences for more instances of ineffective legal assistance. Therefore, the present study into ineffective legal assistance and its redress in Dutch criminal proceedings also has the potential to add to the growing body of literature on the procedural triangle by examining whether or not these two aforementioned supposed trends occur simultaneously while being mutually reinforcing.

As when discussing the two supposed trends separately, so also for their combination will *no assumptions* be made about the essential points that underpin these debates. This research will examine on its own terms whether either trend occurs and/or whether they result in the supposed aforementioned additional risk for the accused. Such an exploration is needed because the increase of responsibilities of one participant within criminal proceedings *does not* necessarily mean that another actor has less responsibilities. In other words, even if the trial judge can decide to have his role depend on the defence and prosecution, it cannot be assumed that *therefore* counsel has gained (more) responsibilities in the proceedings.⁴¹ Or, vice versa, it cannot be supposed that an increase of counsel’s responsibilities makes the judge more passive. Given that both trends *can* happen in parallel without being mutually reinforcing, if they occur at all, this study seeks to explore both supposed trends separately and in combination without making assumptions.

In all these examinations, this study will be careful not to equate all grievances of the accused after his defence with ineffective legal assistance. For example, some accused persons might, in hindsight, have wished that counsel had opted for another defence strategy. If an accused indeed argues that such conduct of counsel amounts to ineffective legal assistance, it might rather be alleged, rather than actual, ineffective legal assistance for which the judge should provide redress. Therefore, this study will have to determine what constitutes ineffective legal assistance and might have to reserve redress for very specific instances. Potentially, such instances occur when the accused, unfairly, ends up bearing the consequences of counsel’s (negative) conduct which had deleterious effects for the protection of the rights of the accused and the criminal proceedings in their entirety because of the negative impact on equality of arms and adversariality. Then, the court might have a

⁴¹ E.g. with less recognition that these two trends can possibly occur in tandem, Franken (2011) at 1109-1117; and Franken (2012) at 361-368. Prakken does discuss both trends separately, see Prakken (2005) at 69-71.

duty to inquire into ineffective legal assistance with a view to providing redress to the accused in Dutch criminal proceedings so that the accused does not end up being harmed in terms of his rights, rather than his defence strategy. This is also how this research is relevant for the growing body of literature on the procedural triangle and the specific academic debates about the best possible role of counsel and the judge respectively.

While the explanation given above of the theoretical relevance of this research goes a long way to justify the conduction of this study, this does not yet touch upon the other requirement of its societal relevance. Therefore, the next section will explore whether this research deals with an issue that is of relevance for day-to-day criminal cases in the Netherlands as well.

The societal relevance of this research

Ineffective legal assistance has been relatively understudied in the Netherlands, but research on wrongful convictions especially indicates its possible negative effects on day-to-day criminal cases.⁴² For example, innocence projects in the US strongly suggest that ineffective legal assistance has correlated with, or even caused, miscarriages of justice.⁴³ Before exploring the importance of this potentially comparable or similar effect in Dutch criminal proceedings, two points have to be raised.

First, a miscarriage of justice is usually caused by a myriad of reasons. For example, the criminal investigation might not have really explored alternative scenarios and suspects, or have been affected by tunnel vision in another way; there might have been issues with disclosing evidence by the prosecution and the judiciary might not have compensated for these difficulties for the defence especially. Therefore, isolating ineffective legal assistance as a single or main cause is usually complex, if not impossible. This has been the underlying reason for the careful language used of a correlation or cause.

Second, criminal proceedings in the US and the Netherlands are quite different. Therefore, not all difficulties with ineffective legal assistance as encountered in the US are necessarily relevant for this study. However, it would also be unhelpful to not even explore whether ineffective legal assistance can have similar negative effects on Dutch criminal proceedings. This study is legal and not empirical, and can therefore not extend to assessments of miscarriages of justice. However, this research will explain some differences between criminal proceedings in the US and the Netherlands first and then turn to the possible negative effects of ineffective legal assistance in either process.

Criminal proceedings in the US appear to emphasise the parties before a passive judge.⁴⁴ Quite differently, in Dutch criminal proceedings the judge can actively examine the case – especially during the trial stage – by posing questions to the accused, witnesses and experts, for example. In the US, it would rather be the defence and prosecution that would pose, at least, the first substantive case-related questions to the accused, witnesses and experts, as opposed to the judge. Dutch criminal procedure thus appears to be quite different from the proceedings in the US, if only because of its more inquisitorial origin. There certainly does not appear to be as much of an adversarial tradition in the Netherlands as in the US, to say the least.

While these differences between criminal proceedings in the US and the Netherlands are present, the consequences of ineffective legal assistance for the accused are not necessarily very different in these two countries. Research in the US suggests, at least, that ineffective legal assistance can negatively affect both the course and outcome of the criminal procedure.⁴⁵ This problem might also arise when ineffective legal assistance occurs in Dutch criminal proceedings.

⁴² Buruma (2010) particularly on the wrongful conviction the Schiedammer Parkmoord. It will remain to be seen how ineffective legal assistance will be dealt with by the commission that deals with applications regarding alleged wrongful convictions, in Dutch the *Adviescommissie afgesloten strafzaken*, available at <http://www.rijksoverheid.nl/nieuws/2012/11/29/minister-opstelten-benoemt-adviescommissie-afgesloten-strafzaken.html> [last accessed on 27 April 2015].

⁴³ E.g. Ineffective assistance by counsel as a “significant cause” of wrongful convictions, e.g. in a study in the United States in 21% of cases in which a reversal of conviction occurred, as the primary error, see the Report of the Governor’s Commission on Capital Punishment; Submitted to George H. Ryan, Governor of Illinois, the 15th of April, 2005 (State of Illinois, 2002), <http://www.state.il.us/defender/report.pdf> at 105 [Ryan Report, last accessed on 27 April 2015]. See also Gross (2008) at 186.

⁴⁴ Israel and LaFave (2006) at 392-409.

⁴⁵ E.g. Schwarzer (1979-1980) at 649; Burnett and Greene Burnett (1999-2000) at 1353; Grunis (1973-1974) at 289; Gable and Green (2003-2004) at 756; Israel and LaFave (2006) at 392-409; Luban (2007) at 1-331, particularly at 65-95.

The latter observation has an impact on the second component of this research regarding redress for ineffective legal assistance in the criminal process in the Netherlands. In other words, *if* the authorities do not actively intervene in the case when confronted with ineffective legal assistance, the accused's right to an effective defence by counsel and related rights may end up being damaged, just as it appears to do in the US.⁴⁶ Under such circumstances, a wrongful conviction or other harm to the rights of the accused may indeed be the ultimate result, even though the criminal procedural design is different.⁴⁷

Focussing on the possible effects of ineffective legal assistance, this study takes into consideration that, out of fairness, redress might have to repair damage done to the course and outcome of the criminal procedure.⁴⁸ For this reason, it is important to note that outer-criminal procedural measures do not have such an influence on criminal proceedings. First, Dutch disciplinary law can hold any counsel who provides ineffective legal assistance in violation of deontological norms.⁴⁹ Second, tort law in the Netherlands can offer the accused compensation for harm caused by his lawyer's ineffective legal assistance in a damages suit.⁵⁰ Therefore, both disciplinary and tort law neither affect the course nor outcome of Dutch criminal proceedings, since there would not be, open to the accused, either a remittal of the case, for example, or another criminal procedural stage at which a complaint of ineffective legal assistance would be examined on its merits. Even more so, even if under disciplinary or tort law a lawyer has been *proven* to have provided ineffective legal assistance, there will be no domestic legal avenue open to the accused to get a re-trial or reopen the case.

As a consequence, the lack of impact identified above of disciplinary or tort law on Dutch criminal procedure for the accused when confronted with ineffective legal assistance, indicates that solutions will have to be found *within* the criminal process or ultimately before the Court. As implied in this description, the reason for relying on the active judge to offer that redress is that any outer-criminal procedural solutions will not prevent the accused from having to bear the consequences of ineffective legal assistance or the entire criminal proceedings from being affected due to a lack of equality of arms and adversariality.

Therefore, the remainder of this research will have to assess what constitutes ineffective legal assistance in Dutch criminal proceedings and how the bench offers redress in Dutch criminal proceedings if it occurs. The societal relevance for the present research lies in its focus on the prevention of deleterious effects for the accused, which includes at worst miscarriages of justice.

Given that this introduction has been able to establish both the theoretical and societal relevance of this study, it seems that this research has been justified, at least in principle. For a further justification, the next sub-section will elucidate the central research question that will be leading in this book (section 1.2.).

1.2. Central research question

Ineffective assistance by counsel in Dutch criminal procedure is not only an important topic *per se*, but appears to be particularly relevant when it results in damage to the accused's rights rather than defence strategy as explained in the previous section (section 1.1.). Therefore, a rights-based approach to the issue of ineffective assistance by counsel in Dutch criminal procedure seems especially pertinent.⁵¹ In this book, emphasis will be put on rights that originate in the Convention, because this human rights treaty is directly binding in the monist country of the Netherlands.⁵² This means that this study will pay particular question to the question whether authorities might have to intervene under the Convention out of fairness when confronted with an instance of ineffective legal assistance, even if

⁴⁶ E.g. This aspect of ineffective legal assistance at the procedural risk of the accused seems also to underlie the ongoing legislative process under the general framework aimed at the revision of criminal procedure (in Dutch: *Algemeen kader herziening Wetboek van Strafvordering*) in TK 2003/04, 29 271, nr. 1.

⁴⁷ E.g. Sjöcrona (1999) at 81-86; Franken and Prakken (1999) at 114-117.

⁴⁸ See for norms, which do include norms from disciplinary law and less so civil law, regarding the positive notion of effective legal assistance in Dutch criminal procedure, e.g. Spronken (2001) at 491-628.

⁴⁹ See chapter 4.

⁵⁰ See chapter 4.

⁵¹ See chapter 2.

⁵² See also Spronken (2001) at 629-636 and particularly at 464.

Dutch criminal procedural law would not require that they do so. Both aspects have therefore been combined in the following research question, which is central to this study:

To what extent does the current approach to ineffective legal assistance and its redress for the accused in Dutch criminal procedure comply with the minimum guarantees regarding the right to an effective defence in a fair trial set by the Court?

Inherent in this essentially evaluative central research question are two descriptive sub-questions. The first sub-question relates to the Convention and the second sub-question to the current approach to ineffective legal assistance and its redress in Dutch criminal procedure. After providing answers to these two descriptive sub-questions, a shift will have to be made to provide a normative answer to the innately evaluative central research question (Part IV Conclusion, Recommendations and a Summary). The relevant norms will be sought for in the Convention minimum guarantees and, where possible, in the approach to ineffective legal assistance in Dutch criminal proceedings itself. For a further explanation, the remainder of this section will give an indication as to how the study will be conducted.

A. First sub-question: What are the Convention minimum guarantees for the right to an effective defence in a fair trial?

To answer this first sub-question, several cases will be studied that indicate the Convention minimum guarantees for an effective defence in a fair trial, particularly under Articles 5, 6, 8 and 10 of the Convention. In its expansive case law predominantly regarding Article 6 of the Convention, the Court sets basic fair trial standards that are binding on all Member States. However, this does not mean that the Member States would not have discretion as to *how* to devise a fair procedure. They have a “margin of appreciation” that allows all signatories to the Convention the liberty to design their own criminal proceedings as they see fit, as long as they respect those minimum guarantees. These basic fair trial standards have been laid down in the Court’s case law. Of course, an analysis of case law is casuistic. Overall guidelines for Member States on how to deal with, for example, the negative issue of ineffective legal assistance or the positive issue of adequate defence participation, will hardly be given outright. However, thanks to the large body of case law on Article 6, the landmark cases and their doctrines, some conclusions on relevant minimum guarantees can be inferred. This study will seek to do so with a focus on how the Court approaches the accused’s effective defence by counsel and fair trial guarantees, especially with regard to the general principles that underpin its casuistic decisions. This focus will be on the two related main research themes: ineffective legal assistance and its redress in Dutch criminal proceedings.⁵³

B. Second sub-question: What is the current approach to ineffective legal assistance and its redress in Dutch criminal procedure?

For an answer to this second sub-question, the book will have to describe the current approach to ineffective legal assistance and its redress within the criminal process under Dutch law and case law. Within this context, most attention will be paid to legal provisions pertaining to the accused’s effective defence by counsel in particular, as opposed to self-representation.⁵⁴ Some contrasts will be made between defence activities performed by either unassisted or assisted accused, because they can serve as internal benchmarks that aid the exploration of what constitutes an effective defence and what types of redress are needed when it is lacking due to ineffective legal assistance. This study will therefore focus not just on determining what conduct by counsel can apparently qualify as ineffective legal assistance. Rather, the emphasis will also be on, in summary, how an ineffective defence by counsel is dealt with by the judge.

C. Central research question: Compliance of the Dutch approach with the Court’s minimum guarantees?

⁵³ See chapter 5, 7, 9 and 11.

⁵⁴ See chapter 6, 8, 10 and 12.

In order to provide an answer to the central research question, the answers to the two aforementioned sub-questions will be built upon, for example by evaluating how ineffective legal assistance should be approached by the judge. These two sub-questions are mainly descriptive in nature and their comparison will facilitate, but not yet constitute, the evaluation needed to answer the central research question. Therefore, a shift will be made – on the basis of the two descriptive answers – to a normative approach at the end of this study into ineffective legal assistance and its redress in Dutch criminal procedure. External benchmarks will be inferred from the minimum guarantees under the Convention relating to the right to an effective defence of the accused in a fair trial. Internal benchmarks, though more limited, will be arrived at by comparing how Dutch criminal proceedings deal with defence activities by assisted and unassisted accused. To do this successfully, the answers to both descriptive sub-questions will be “mirrored” as far as possible. For this reason, a conceptual framework will be laid out in the next chapter in order to structure the often casuistic research that will follow in the substantive research chapters in this book (Parts III to VI). At the end, this study will provide an answer to the central research question (Part VII). An essential element for even beginning to address the answer to the central research question is a description of the methodology that will be used in this book, which will be done in the next section (section 1.3.).

1.3. Research methodology

This research into ineffective legal assistance and its redress in Dutch criminal procedure calls mainly for a legal analysis.⁵⁵ Given that ineffective legal assistance in criminal proceedings is best explored in its context and with an emphasis on casuistic assessments⁵⁶, this study will resort to an analysis of the relevant Dutch law and deontology, as well as case law from both the Hoge Raad and the Court. The original case law analysis that will be conducted in this book will help to ensure a better understanding of the context of Dutch criminal proceedings. After all, case law is where the “character” of a procedure can be found, as opposed to “only” in formal legal rules, as Nijboer argues.⁵⁷ Also, thanks to the rich case law about the right to a fair trial, the case law of the Court can be a wealthy resource for an exploration of the Convention minimum guarantees regarding an effective defence of the accused within fair criminal proceedings.

This desk study will predominantly describe and analyse the actions and interactions of all participants, including – but not limited to – counsel and the judge. Most attention will be paid to how participants make “key” decisions at several important stages of the criminal procedure that can affect or interfere with the rights of the accused.⁵⁸ Such “key” decisions require that the accused has been identified and will take into consideration how the authorities will, thereupon, deal with the accused under the Convention and in Dutch criminal proceedings (see also section 1.4.).

For the suggested rights-based analysis of the main research themes⁵⁹, it is important to determine whether ineffective legal assistance in Dutch criminal procedure actually occurred and was not just alleged. Therefore, this research will often compare what the Convention and Dutch law require for an effective defence of the accused and takes into account that not only the accused but also authorities can allege that counsel performed below par, while counsel himself can argue that he

⁵⁵ See Raz (2009) at 1-208, particularly at 168-208.

⁵⁶ Hodgson, in: Grunewald et al (2008) at 45-59.

⁵⁷ Nijboer (1993) at 299-338.

⁵⁸ Ashworth and Redmayne (2010) at 2-3.

⁵⁹ This research has progressed from its original NWO proposal, which was entitled “Error and negligence on the part of the defence counsel: a comparative study (between the criminal procedure in the Netherlands and England and Wales respectively). This proposal did not include a central research question, but did identify the topic of a problematic defence by counsel as a theme that could be studied comparatively. When the formulation of the central research question was being undertaken, the Court rendered the case of *Salduz v. Turkey* about legal assistance at the stage of police interrogations and *Ebanks v. the United Kingdom* and *Sakhnovskiy v. Russia* about ineffective legal assistance within criminal proceedings in the course of this study. In order to respond to actualities but also because the original research proposal paid less attention to binding norms on the Netherlands, the research was adapted in order to make an evaluation of the approach to ineffective legal assistance in Dutch criminal proceedings on compliance with the Convention’s fair trial standards. This does not mean that comparative criminal procedure has lost all of its bearing on this research. Rather, the analysis of Dutch criminal procedure and of the Court’s case law, which cuts across the civil law-common law divide, will not overlook lessons learned in comparative criminal procedure. The resulting modest comparative research as adopted in this book has been made possible by the Wiarda Travel Fund of Utrecht University and the very much appreciated help of Prof. A.A. Ashworth and the Bodleian Library at Oxford University.

is being hindered by the authorities from providing an effective defence to the accused. A further contrast will have to be made between an effective defence by means of self-representation or assistance by counsel. In this respect, it is only reasonable that “more” will be required from a lawyer than a lay accused. After all, counsel has been trained to provide professional services and can be deemed to have legal expertise and knowledge. However, how *much* more can reasonably be accepted of the lawyer than a lay accused, will have to be studied in detail. This research will do so by frequently benchmarking what is being expected of counsel in contrast with the expectations placed on an unassisted accused. This will not mean that the same must be expected of counsel as of an unassisted accused. However, it *does* mean that it can be examined on a per defence basis whether fair additional expectations are being placed on counsel if compared with similar actions or omissions by lay accused. The contrast between defence activities of assisted and unassisted accused is not only relevant for the determinations about the expectations placed on the lawyer. It will also help to determine under what circumstances the accused can equitably be expected to bear the consequences of instances of ineffective legal assistance. In other words, whilst there might not be as many difficulties with counsel’s conduct in relation to the defence strategy that would come at the procedural risk of the accused, it will be more problematic if rights of the accused end up being breached. That end-result has the potential to negatively affect not only the accused personally, but also the fairness of the proceedings and procedural truth finding. Because, as (explained above) an effective defence is assumed to benefit both the accused and a fair trial, both aspects will feature in this research. The fairness of the criminal procedure will be measured against the case law of the Court. Therefore, this research will use the two benchmarks of the normative framework provided by the contrast between expectations placed on unassisted and assisted accused on the one hand, and Court’s case law, on the other. In summary, they will be referred to as internal and external benchmarks due to their place in Dutch criminal procedure, the contrasts between unassisted and assisted accused, and outside of it, the Convention. The centrality of both Dutch law and the Convention is further demonstrated by the choice of this book title.

Given the significance attached to an effective defence for the accused in Dutch criminal proceedings, it is important to explore the potential consequences of ineffective legal assistance for the accused’s rights, as they seem to be communicating vessels. The greater the value is attached to the assistance by counsel for the accused’s effective defence, the more impact ineffective legal assistance will likely have on the accused’s rights. In particular, if the authorities afford no redress for an accused who is confronted with ineffective legal assistance in the criminal procedure, there is a real risk that the accused will end up bearing the consequences – even for ineffective assistance by counsel. However, it will be hard to maintain that a fair trial has been guaranteed if counsel damages the accused’s rights, which in turn might negatively affect the course and/or outcome of the proceedings themselves.⁶⁰ Therefore, this research, which emphasises the rights of the accused in light of the problem of ineffective legal assistance, will take into consideration not only Dutch criminal procedural law and case law, but also the Convention.

On the issue of how ineffective assistance by counsel should be approached in Dutch criminal proceedings, the scholarly work of Spronken (which appears to be heavily based on the Convention), appears to have most authority.⁶¹ She states *inter alia* that “(t)he independence of the Bar would be endangered when the State would become responsible for every shortcoming of the lawyer” because that would mean that the “State would be required to intervene in the case if, in its view, the interests of the accused would not be sufficiently guaranteed”.⁶² If the authorities were to do so, “(t)his would not comply with the freedom of the defence”, she contends. Therefore, she argues that “(a)s a corollary, the accused shall have to bear the potentially negative consequences of the negligence of the lawyer or a chosen defence strategy”.⁶³ She infers this reasoning from Dutch law and case law as well as the case law of the Court. With regard to the latter, she refers to repeated Court judgments that require that “(...) within the ambit of criminal proceedings, the competent national authorities are required under Article 6 to intervene only if a failure by counsel to provide effective legal assistance is

⁶⁰ See for a suggestion of a *desaveu* procedure that nullifies specific activities by the defence when proven to have been ineffective, e.g. Spronken (2001) at 308-310 and 644-645; as well as Prakken (2005) at 69-71.

⁶¹ Spronken (2001) at 464.

⁶² *Ibid.*

⁶³ *Ibid.*

manifest or sufficiently brought to their attention in some other way”.⁶⁴ Spronken has interpreted what in this research will be called the *Artico*-rule, which in her opinion entails that the authorities are “merely” required to intervene in the case when “(...) the lawyer is absent or otherwise does practically nothing at all for the accused”.⁶⁵ Supposedly the Court would only deal with absenteeism of counsel and almost absolute passivity, rather than the more substantive lack of effective legal assistance. AG⁶⁶ Jörg has cited Spronken’s interpretation of the Court’s case law when giving non-binding advice on the issue to the highest court of the Netherlands, the Hoge Raad. The AG submits that “(...) potential shortcomings in the assistance by counsel should in principle come at the procedural risk of the accused” and that “there has to be blatant inadequacy of counsel” for the authorities to be required to intervene in the case.⁶⁷ Furthermore, AG Machielse cited Spronken’s work so as to substantiate that “(i)t has to be incredibly bad for there to be ineffective legal assistance by counsel” in the sense that authorities are required to redress it. He contends that such circumstances only arise when “the lawyer is fully absent so that the accused does not even get the opportunity to bring across his opinion”.⁶⁸ Likewise, Spronken until today appears to conclude that the authorities should only intervene in the case when the lawyer is absent or is almost fully inactive, as evidenced by her work in 2009 which she co-authored with another Dutch lawyer, Prakken.⁶⁹ Therefore, it seems crucial to determine whether this rather broadly accepted interpretation as to how to approach ineffective assistance by counsel in Dutch criminal procedure actually abides by the minimum guarantees set by the Court regarding the right to counsel under the Convention.

This initial description alludes to an important first task for this research, which will be to distinguish between actual ineffective assistance by counsel and mere allegations thereof in Dutch criminal proceedings. Such distinctions cannot always easily be made. For instance, what might appear to a judge to be ineffective assistance by counsel, might rather be part of an agreed upon defence strategy between the lawyer and the accused. Additionally, it will depend on the facts and circumstances of the case whether an action or omission of counsel can be ascribed to defence strategy or not. For example, it might depend on who can decide whether or not certain conduct of counsel will be considered to be part of a defence strategy or not. That is, in certain cases the judge might consider it to be negligence of the lawyer to not submit a certain request or substantive defence. However, in that same case, the accused and the lawyer might consider this conduct part of the defence strategy. All these aforementioned points lead to the observation that courts will have to be reticent in that they should not compromise the independence of the Bar from the State. Under many circumstances, they may have to assume that counsel might have worked under a defence strategy, rather than assume there was ineffective legal assistance, because of this independence. However, this reticence may also require that the domestic court explore whether the *accused* should have to bear the consequences of *actual* – as opposed to alleged – ineffective legal assistance. A careful balance has to be struck because the accused might not always realize that his lawyer provides him with ineffective legal assistance. However, the court should also not assume there must have been ineffective legal assistance while counsel acted under a defence strategy. Moreover, the accused might naturally be aggrieved if the defence strategy failed. However, that might not mean that this accused indeed suffered from ineffective legal assistance in the sense that he should not bear the consequences of that

⁶⁴ See chapters 11 and 12 in particular for this general principle, which has also been adopted *inter alia* in *Kamasinski v. Austria*, Judgment of 19 December 1989, HUDOC no. 9783/82, para. 65.

⁶⁵ Spronken (2001) at 447 and 464. See also this same view reiterated in Prakken and Spronken, in: Prakken and Spronken (2009) at 15.

⁶⁶ Connected to the Hoge Raad is a “parket”, of which Advocates-General and the (replacement) Procureur-General are members. The main task of this “parket” is to give non-binding advice, so-called conclusions, to the Hoge Raad. The parket is independent and is being led by the Procureur-General. The conclusions are being taken by three Advocates-General (AG’s) on behalf of the Procureur-General (PG). This book contains some cases in which the case law refers to the conclusion by the PG.

⁶⁷ AG Jörg, ECLI:NL:PHR:2004:AO6270, as an advice to the Hoge Raad’s case of HR 23 March 2004, ECLI:NL:HR:2004:AO6270, para 10. He refers in para. 5 to the case of HR 26 May 1998, ECLI:NL:HR:1998:ZD1048, *NJ* 1998, 677 and under para. 6 to Spronken (2001) at 447-449 and 463-469.

⁶⁸ Ag Machielse ECLI:NL:PHR:2007:AZ8413, as an advice to the Hoge Raad’s case of HR 5 June 2007, ECLI:NL:HR:2007:AZ8413, *NJ* 2007, 424 m.nt. Schalken.

⁶⁹ Prakken and Spronken, in: Prakken and Spronken (2009) at 15. Despite the fact that Prakken earlier explained that the Court does not just require a formal right to legal assistance but a substantive right to *effective* legal assistance in Prakken (1999), at 12-13.

particular conduct of counsel. All the aforementioned difficulties have the following consequence for this research. This study will seek to emphasise, as far as possible, actual – as opposed to alleged – ineffective assistance by counsel, which it almost inevitably can only do on a case to case basis. Given the facts of the case and the legal issues involved, it will have to be determined whether or not specific conduct of counsel can be deemed to have amounted to ineffective assistance by counsel in Dutch criminal proceedings.

A second task for this study arises from the aforementioned idea that ineffective assistance by counsel in Dutch criminal proceedings should supposedly come, in principle, “at the procedural risk” of the accused. If the accused is damaged unfairly by his lawyer’s performance, it might not only raise issues regarding his right to an effective defence but also with the right to a fair trial. Consequently, it might well be reasonable that not all consequences of actual ineffective assistance by counsel have to be borne by the accused. If the accused is to avoid paying the price for all conduct of counsel, particularly if such conduct results in harm to the rights of the accused that counsel is required to protect, then redress might have to be afforded for the harm in a manner that the negatively affected process and/or outcome of the criminal procedure can be remedied. Therefore, this research seeks to determine under what circumstances the accused is entitled to what types of redress *in Dutch* criminal procedure in order to prevent him from having to bear the consequences of ineffective legal assistance by his lawyer – consequences that negatively affect his rights. Therefore, a rights-based approach will feature in this research, with an emphasis on the directly binding Convention in the monist country of the Netherlands. This was also the reason to highlight the *Artico*-rule in this section about the methodology adopted to conduct this research.

Inherent limitations of this normative research⁷⁰ lie in its focus on ineffective assistance by counsel in Dutch criminal procedure and how it should be dealt with. Consequently, much less attention will be paid to more positive norms as to how counsel ought to provide adequate services to the accused within fair criminal proceedings.⁷¹ Moreover, because of the central topic being studied, the case law descriptions are restricted to actual or alleged failures of counsel to provide the accused with an effective defence.⁷² As explained above, this research will hardly address counsel’s positive contribution to Dutch criminal proceedings or proceedings in which counsel does not play a role at all.

This book was written in English, amongst other reasons because this study will hopefully be of interest to scholars and practitioners who are not fluent in Dutch. The manuscript has been completed on 31 October 2015 and only some major issues of Dutch law and case law as well as of the Court’s case law has been included after that date.⁷³

1.4. Key terms in this research

At the outset of this book, four key terms have to be elaborated upon that play an important role in this entire research. The explanations of these terms will set the stage for later parts of this study, which will be revisited in the relevant substantive research chapters.

Criminal procedure

A first key term that has to be explained is “criminal procedure”. Although often used as an uncontested notion, differences of opinion do exist concerning some of the criminal procedure’s identifying elements.⁷⁴

⁷⁰ Some of the findings of the desk research, particularly those pertaining to developments in Dutch criminal procedure, have been validated thanks to informal participatory observations and interviews with various Dutch defence lawyers, judges and scholars. Unfortunately, changes to the research proposal that would include social scientific research methods to study ineffective legal assistance, were not accepted. Nonetheless, I would like to thank all of those who have taken the time to help me during such informal work and interviews, acknowledging that their views have inspired me. All possible mistakes or errors are mine, of course. Thanks to a position as a paralegal at the criminal law firm Borsboom and Hamm in Rotterdam during my PhD fellowship.

⁷¹ For that perspective, see e.g. Spronken (2001) and Cape et al (2010).

⁷² See chapter 9 in particular.

⁷³ After submission to the reading committee on 1 November and before printing this PhD edition of the book on Monday 15 February 2016, chapters 1 and 13 have been edited and two important cases have been added (HR 1 December 2015, ECLI:NL:HR:2015:3428 and HR 22 December 2015, ECLI:NL:HR:2015:3608).

⁷⁴ E.g. Spencer (2002a) at 1-81.

Usually there is no disagreement that the legitimate imposition by the State of a sanction on the accused is a defining element for the criminal procedure.⁷⁵ In the Netherlands, the trial judge imposes, as a rule, a sanction on the convicted accused which can be a punishment and/or a criminal measure.⁷⁶ Therefore, when referring to the criminal procedure, the proceedings in court will certainly be implied.

However, not all criminal cases make it to court. Some cases will be settled before the trial starts. Hence, in principle, it would also be important to include, within research on ineffective legal assistance, the conduct of counsel in cases that do not end up in court. However, this particular research is not best suited for this subject, considering its nature as legal research that predominantly deals with case law.

Of the cases that do make it to court, the trial stage or stages are certainly not the only important aspects of the entire criminal procedure. If this research were to be limited to the phases in court, many other important issues concerning ineffective legal assistance in Dutch criminal procedure would not be captured. For instance, during the pre-trial stage the lawyer can give erroneous advice, neglect to ask for an expert before the case goes to court or omit to gather evidence that can be presented in court.⁷⁷ The pre-trial phases are often covered in case law, although sometimes more limited than the phases in court. Nonetheless, attempts will be made to include the pre-trial stages as far as possible, with, as will be explained, some limitations on the basis of commonly recognised definitional issues with the pre-trial phase.⁷⁸

The pre-trial preventative or proactive investigative measures⁷⁹ can hardly be covered in this study, unless an accused has already been identified and the lawyer can play a role. Also, this only applies to out-of-court settlements in so far as the accused can get legal assistance.⁸⁰ As a definitional issue, preventative or proactive investigative measures and out-of-court settlements are part of the term of criminal procedure in this research because they can result in a sanction on the accused, imposed by the state.

Defence counsel

A second term that is crucial in this study is “defence counsel” (hereafter often simply referred to as “counsel”, “(the accused’s) lawyer” or “advocate”). There are two Dutch legal terms for counsel who acts for the accused (i.e. *advocaat* and *raadsman*).⁸¹ However, because of the English language no difficulties with that specific use of terminology arise in this book. Here, it will always concern the lawyer who acts for the accused.⁸²

Because of the focus on ineffective assistance by counsel for the accused, no reference will be made to lawyers who act for other individuals such as witnesses, victims or complainants who disagree with the prosecutor’s decision to not prosecute (Article 12 Sv).⁸³ I certainly do not want to suggest that ineffective legal assistance by such lawyers is irrelevant or less important.⁸⁴ Yet, seeing that this study focuses on the possible consequences for the *accused* rather than on such other persons in Dutch criminal proceedings, I have excluded here ineffective legal assistance by such lawyers.

⁷⁵ E.g. and Ricoeur (2000) at 133-146. See differently Feeley (1979) at 278-283.

⁷⁶ The Dutch distinction between punishment predominantly aimed at retribution (*straf*) and, amongst other goals, at reparation and resocialisation (*maatregel*).

⁷⁷ E.g. Franken (2010: 4.1), in: Mevis et al (2010) and Franken and Boksem (2011) at 106-113.

⁷⁸ Following the distinction between process and procedure made by Ashworth and Redmayne (2010) at 2-3.

⁷⁹ E.g. Borgers (2007) at 7-111, particularly at 13 and 99-111 and Van Sliedregt (2009) at 171-195, particularly at 183ff.

⁸⁰ E.g. Act on a sanction that can be imposed by the prosecutor as a pre-trial out-of-court “settlement” (in Dutch: *Wet OM-afdoening*, Statute of 26 April 2007, *Staatsblad* 2007, 160, entry into force 1 April 2013). Hereafter *Stb*. Cf. Sikkema and Kristen, *Strafbeschikking en ZSM: verschuivingen binnen de strafrechtshandhaving*, in: De Jong and Kool (2012) at 185-189 and Ashworth and Redmayne (2010) at 2-3. See similarly for the inclusion in the definition of criminal procedure, Corstens/Borgers (2014) at 5-6.

⁸¹ Spronken (2001) at 4, explaining the term *advocaat* is being used to refer to the individual who performs the profession, which can thus be the person who provides assistance to others than the accused. She also explains that the notion of *raadsman* has a particular functional meaning, i.e. counsel who acts for the accused, such as the lawyer who has been retained or appointed to act for the accused.

⁸² Generally referred to in Dutch as *raadsman*.

⁸³ Generally referred to in Dutch as *advocaat*.

⁸⁴ Dutch lawyers are now required to specialize in assistance to victims, as a mandatory specialization. The victim has gained a right of speech and advice, resulting in a mandatory basic vocational training.

Where I refer to counsel, both privately paid and state-paid lawyers are implied. Privately paid lawyers can also be referred to as retained counsel. State-paid counsel will be referred to as an appointed legal aid lawyer, in order to make the best possible distinction.

The difference between retained and appointed lawyers of the accused's choosing has already been mentioned (sub-section 1.1.). Here, its legal basis will be addressed shortly.

Dutch law affords the accused a free choice to retain both who and how many lawyers he wants to assist him (Articles 28 and 38 Sv).⁸⁵ As a rule, mandatory legal assistance in the Netherlands is prohibited.⁸⁶ The accused can opt for self-representation at first and second instance. There are some exceptions to this rule, which will also have to be discussed in the introductory chapter on Dutch criminal proceedings (chapter 4).⁸⁷

Dutch law does not provide the accused with these same two rights concerning both the person and number of appointed, legal aid lawyers.⁸⁸ Dutch law entitles a detained accused to be appointed legal aid counsel (Article 41 Sv). For example, a suspect who is being detained on remand in another case, or who is serving a custodial sentence for another adjudicated case, is eligible for legal aid even if he is not indigent. In comparison, a detained accused who is subjected to proceedings concerning the proceeds of crime is entitled to legal aid. To these proceedings the legal fiction applies that they are the continuation of the "normal" criminal procedure. All other accused persons who are at liberty should be indigent in order to be eligible for legal aid.⁸⁹ Under such circumstances, the accused has to meet a means test, so that he is demonstrably indigent. Moreover, the accused in Dutch criminal procedure can be made to pay a personal contribution to their appointed, legal aid lawyer.⁹⁰ Despite the absence of the right to legal aid counsel of the accused's choosing, in practice (according to Dutch scholar Spronken) the authorities often do in fact appoint the person whom the accused prefers.⁹¹

The accused

The penultimate term, which has to be clarified at the outset of this research, is the accused. Under Dutch law, an accused can be a suspect – who is a person against whom a reasonable suspicion of having committed a criminal offence, has arisen (Article 27 in conjunction with Article 29 Sv). In addition to this, an accused can be a defendant: a person who has already been indicted. Counsel can act in court, either in the presence or absence of the defendant (e.g. Article 331 Sv, respectively for appeal Article 331 Sv in conjunction with Article 415 Sv and Article 279 Sv regarding *in absentia* legal representation⁹² of the accused who opts not to come to trial).⁹³

Throughout this study, the term accused will refer to both a suspect and a defendant, whether or not he attends his trial. Explicit references will be made to either assisted or unassisted accused, for instance when comparing case law, which can often point out what is needed for their defence to be effective.

Before turning to the use of the term effective defence by counsel, as opposed to self-representation (and particularly the lack thereof in case of actual – as opposed to alleged – ineffective legal assistance), the notion of defence warrants a further explanation.

Defence

⁸⁵ Article 28 Sv and Article 38 Sv. See a similar use in section 1.1.

⁸⁶ See chapters 4 and 6 in particular.

⁸⁷ See chapter 4 in particular.

⁸⁸ Article 28 Sv in conjunction with Articles 40 and 41 Sv. See also HR 20 October 1987, ECLI:NL:HR:1987:AD0001, *NJ* 1988, 446. See a similar use in section 1.1.

⁸⁹ Article 42 (3) Sv, respectively Article 43 (1) in conjunction with Article 35 (2) Legal Aid Act (in Dutch: *Wet op de Rechtsbijstand*).

⁹⁰ E.g. Article 43 Legal Aid Act (in Dutch: *Wet op de Rechtsbijstand*). See for a comparison of the Dutch legal aid system, an overview of various legal aid systems on the basis of other criteria: Cape et al, in: Cape et al (2007a) at 1-26.

⁹¹ Spronken (2001) at 220-223.

⁹² E.g. Spronken (2001) at 296-315; and Prakken and Wörentshofer, in: Spronken and Prakken (2009) at 488-491.

⁹³ E.g. Van de Griend and Woensel (1999), at 46-52 and Haentjes (2002) at 173-181. When the accused and his lawyer appear on appeal, the court cannot consider the appeal void if they argue on appeal that the accused mandated the lawyer to work on his behalf for the purpose of the appeal, e.g. HR 20 March 2012, ECLI:NL:HR:2012:BV6999, *NJ* 2012, 426, HR 22 January 2013, ECLI:NL:HR:2013:BY8357, *NJ* 2013, 75 and HR 28 January 2014, ECLI:NL:HR:2014:190, *RvdW* 2014, 270.

A last term that is central to this research, is the notion of “defence”. The English term of defence can either be construed formally or substantively (the Dutch code does not refer to defence in the formal sense, e.g. Articles 279 Sv and 51j (4) Sv).

As a formal notion, defence will imply either the unity of both the accused and counsel or else imply the accused alone when he has opted for self-representation. I will, in all instances, be explicit whether I refer to the unassisted accused or the assisted accused, whose defence will take place in a lawyer-client relationship.

As a material concept, the term of defence either refers to the entire defence case pleaded on behalf of the accused or a specific defence motion. The latter can refer to, to list just two examples, the lack of reliability of a piece of evidence or the submission of mitigating circumstances for the behaviour of the accused. For the ease of a ready distinction, I shall refer to the defence case and, for such defence motions, to substantive defences.

1.5. Outline

Chapter 2 will introduce the conceptual framework. In addition, it will be pointed out how to examine (i) more context-specific issues of Dutch criminal procedure, (ii) more generic notions of the fundamental right of the accused to an effective defence in a fair trial, and (iii) universal elements which are almost by necessity relevant for most studies into ineffective legal assistance within criminal procedure. These three themes, which will be presented in the remainder of the current Part I Introduction and Conceptual Framework, have a bearing on the entire research presented in this book.

Part II: Introductions to the Convention and Dutch criminal procedure will commence with an exploration of the factors that impact on the analysis of the Court’s case law (chapter 3). Subsequently, there will be an overview provided of the basic elements of Dutch criminal procedure, in order to explain what ineffective legal assistance actually entails in its context (chapter 4). Both introductory chapters are relevant for all four subsequent parts (Parts III to VI). These four parts will first establish the benchmarks of the Convention case law and thereupon describe the subject under Dutch criminal procedural law and case law.

Part III: Right to counsel will examine the obligations of the authorities to set preconditions for an effective defence, particularly in relation to defence by counsel, under the Convention and in Dutch criminal procedure (chapters 5 and 6 respectively).

In Part IV: Lawyer-client relationship, an analysis will follow of the role and responsibilities of counsel in the lawyer-client relationship under the Convention and in Dutch criminal procedure (chapters 7 and 8 respectively).

Part V: State interference with counsel will go into detail about State action, whether by statute or court ruling, that interferes with counsel in such a way that the right of the accused to effective assistance by counsel is denied under the Convention and in Dutch criminal procedure (chapters 9 and 10 respectively).

Part VI: Intervention due to ineffective legal assistance studies whether the authorities owe a further obligation to the accused when, despite the preconditions for an effective defence, ineffective legal assistance occurs under the Convention and in Dutch criminal procedure (chapters 11 and 12 respectively).

In Part VII: Conclusion, Recommendations and a Summary, a concluding chapter will present the final conclusions on the basis of the discussed findings (chapter 13). Chapter 13 will build on the descriptive earlier parts in order to come to an evaluation that allows the central research question to be answered. That evaluation concerns the compliance of the current approach to ineffective legal assistance in Dutch criminal procedure with the Court’s minimum guarantees regarding the accused’s right to an effective defence. This chapter will also present some recommendations. Finally, a summary of the findings of this study will bring this book to a close.

CHAPTER 2. CONCEPTUAL FRAMEWORK

2.1. Introduction

This chapter builds on chapter 1, the introduction to this research, in which it was explained that this study into ineffective legal assistance and its redress in Dutch criminal procedure is predominantly exploratory (chapter 1; in Dutch: *verkennend onderzoek*).⁹⁴ Given its exploratory nature, original research will be conducted. This original research will be embedded as far as possible in earlier scholarly work on defence participation within (Dutch) criminal proceedings⁹⁵ and effective defence rights in a fair trial under the Convention.⁹⁶ Both bodies of academic work, along with other studies into ineffective legal assistance within criminal proceedings, can serve as building blocks for a conceptual framework that guides the predominantly casuistic analysis. Those building blocks will be derived from chapter 1 and presented here in order to structure the research that will be elaborated upon in the substantive research chapters (Parts III to VI).

In the previous chapter, three lines of further inquiry which can be useful for the conceptual framework have already been implied. They will be made explicit here so that they can assist in structuring the substantive research chapters of this book (Parts III to VI). They are, first, the examination of the relevant rights under Dutch law followed by the Convention. Principally, it will be explored whether Dutch law and the Convention do not require only a “formal” right to counsel – which would be fulfilled through the mere presence of a lawyer – but also a *material* right that would require that the legal assistance by the lawyer is *effective* for the right to be respected. Second, it will have to be determined how the context of Dutch criminal procedure should be studied.⁹⁷ For this purpose, the extent to which this study has to take into consideration the civil law origin of Dutch criminal proceedings will be explored. The use of an often deployed research tool – the contrast between civil law and common law and the corresponding inquisitorial-adversarial contrast – will be touched upon. Third and finally, relevant cross-cutting notions and perspectives will be addressed that are important for this research into the related main research themes of ineffective legal assistance and its redress in Dutch criminal procedure. Cross-cutting notions and perspectives will be examined that help to determine what actually entails ineffective legal assistance in Dutch criminal procedure, rather than allegations thereof by the accused, the judge or the prosecutor for example, and what the appropriate means for redress, if any, can be. All three issues of rights, context and cross-cutting notions and perspectives will ultimately be incorporated in the conceptual framework, which will be created as follows. At the outset, the most important parameters for an analysis of ineffective legal assistance and its redress in Dutch criminal procedure will be identified, so that the research can be structured accordingly. This chapter will discuss all three parameters, and then conclude with the conceptual framework in the final section.

The aforementioned themes should not be understood as exhaustive. Instead, the conceptual framework “merely” lays the foundations for the substantive research chapters. This study is intentionally structured in such a way that the chapters on the Convention and Dutch criminal procedure will be “mirrored” as far as possible. In this way, an evaluation can ultimately be made on whether the current approach to ineffective legal assistance and its redress in Dutch criminal procedure complies with the Convention. The framework itself will already be presented in this chapter because it will guide the entire research before it is conducted. As implied in this description, its most important use will be when the central research question is answered in Part VI: Conclusion, Recommendations and a Summary.

⁹⁴ E.g. Prakken (1999) at 27-28 and Geelhoed (2007) at 1-2.

⁹⁵ E.g. Spronken (2001) at 629-636; Prakken and Spronken, in: Prakken and Spronken (2009) at 8-9; Cape et al, in: Cape et al (2010) at 3-21 especially; Jackson (2005) at 740.

⁹⁶ Duff et al (2007) 1-306, particularly at 97-102; Jackson in: Jackson et al (2008) at 227-235 especially; Israel and LaFave (2006) at 344-409; Luban (2007) at 1-331, particularly at 65-95.

⁹⁷ For more comprehensive studies of the context in which defence rights operate, see Cape et al (2007a) at 155-180 especially and Cape et al (2010) at 3-21 especially.

Outline

This chapter is divided into four more parts. The first section explores whether both Dutch law and the Convention construe the right to legal assistance “only” formally or rather materially (section 2.2.).⁹⁸ Second, to what extent this study has to take into consideration the civil law origin of Dutch criminal proceedings will be examined, as well as the analytical tool that is often used in this respect: the inquisitorial-adversarial contrast (section 2.3.). In the penultimate part, key features will be discussed within the specific topic of ineffective legal assistance, with references to values underlying the most relevant legal debates, mostly in the Netherlands (section 2.4.). Finally, several concluding remarks will be made about how this conceptual framework assists the execution of this entire study (section 2.5.).

2.2. Relevant fair trial rights

2.2.1. Right to counsel

This study into ineffective legal assistance will have to determine not only when the accused has a right to assistance by counsel in Dutch criminal procedure, but also what the scope of that right is. In particular, this research will have to assess whether the accused is entitled to a “formal” right to have assistance by counsel, or whether the right is construed substantively so that the performance of counsel must be *effective* for this right to be guaranteed. Both issues – when the accused has a legal basis for legal assistance and the scope of this formal or material right – are part of the substantive research that will follow in the chapters regarding the Convention and Dutch criminal procedure. It need only be pointed out here that there is common agreement about the right to counsel *per se*, although its scope is being debated in the Netherlands.⁹⁹

With regard to the right to counsel in Dutch criminal procedure itself, it is being granted under three headings. First, the Dutch Constitution affords the accused this right under Article 18 (1) Gw (an abbreviation of the word for Constitution, which in Dutch is *Grondwet*). Second, Dutch criminal procedural law also entitles the accused to legal assistance under Article 28 Sv (an abbreviation of the word for Criminal Procedural Code, which in Dutch is *Wetboek van Strafvordering*). Third, Article 6 (3) (c) of the Convention also directly provides this same right to the accused in Dutch criminal procedure. The latter means that, even if Dutch law “only” construes the right to counsel formally while the Convention also does so substantively, the latter right to *effective* legal assistance would have to be ensured in Dutch criminal proceedings.

One relevant explanation of the *scope* of the right to counsel as a formal right is included in a case note by annotator Reijntjes who commented on a case of the Hoge Raad of 2008.¹⁰⁰ He states that, under all three headings above, the accused in Dutch criminal procedure is *entitled* to legal assistance, rather than obliged. For this same reason, the accused can refuse the services of appointed counsel at any stage of the proceedings.¹⁰¹ On this basis, Reijntjes concludes that with regard to the right to legal assistance there is no distinction between either retained or appointed lawyers’ services.¹⁰²

Because of the right to a free choice of the accused in relation to his defence, Reijntjes contends that the accused is not entitled to a right to *effective* legal assistance and especially not entitled to an intervention in the case by the authorities when confronted with a lack thereof. His

⁹⁸ E.g. Articles 18 and Article 48 (3) (c) Dutch Constitution (in Dutch: *Grondwet*); Article 6 (3) (c) of the Convention, Article 14 (3) (d) International Covenant for Civil and Political Rights. Hereafter ICCPR; Article 47 (2) and (3) European Charter of Fundamental Rights; Articles 55 (2) (c) and 66 (1) Rome Statute of the International Criminal Court.

⁹⁹ E.g. See particularly Reijntjes in his annotation about the advice by AG Knigge to the Hoge Raad’s case of HR 22 April 2008, ECLI:NL:HR:2008:BC6813 in *NJ* 2008, 387 m.nt. Reijntjes.

¹⁰⁰ E.g. See particularly Reijntjes in his annotation about the advice by AG Knigge to the Hoge Raad’s case of HR 22 April 2008, ECLI:NL:HR:2008:BC6813 in *NJ* 2008, 387 m.nt. Reijntjes.

¹⁰¹ For this foundation, Reijntjes does not only refer to “old” case law of HR 28 April 1890, W. 5872, but also to the confirmation of this guiding principle by the so-called Commission of Ort who drafted the original Code of 1926, citing report dl. 2 p. 66, as later also adopted in the *Memorie van Toelichting* to that Code. See also Reijntjes/Minkenhof (2009) at 80.

¹⁰² See further chapters 4 and 6 in particular.

interpretation of the right to counsel appears to correspond with that of Prakken and Spronken.¹⁰³ Their main reason for this formal interpretation of the right to counsel is that, if the right were to be construed materially, this would mean that the authorities would interfere in the lawyer-client relationship. Almost inevitably the authorities would, supposedly, necessarily drive a wedge between the accused and the lawyer and harm their corresponding freedom of the defence. This description that already addresses the issue of State interference in the lawyer-client relationship is worth discussing in-depth, which will be done in the next sub-section (sub-section 2.2.2.).

2.2.2. Right to a lawyer-client relationship without State interference?

On the issue of ineffective assistance by counsel and its redress in Dutch criminal proceedings, Spronken states that:

“The independence of the Bar would be endangered when the State would become responsible for every shortcoming of the lawyer. Were the State to be responsible [for any shortcoming of the lawyer], this would require the State to intervene in the case if, in its view, the interests of the accused would not be sufficiently guaranteed. Such intervention does not comply with the freedom of the defence. The corollary is however that the accused shall have to bear the potentially negative consequences of the negligence of the lawyer or a chosen defence strategy [Added by the author].”¹⁰⁴

The specific issue of responsibility of the State for “every shortcoming of the lawyer”, as Spronken calls it, will have to be the subject of further study in the remainder of this book. However, at this point in the research it is important to stress the cited principle of independence of the Bar from the State.¹⁰⁵ This principle, as indicated by the citation, is connected to what is being called by many Dutch scholars and practitioners the “freedom of the defence”.

There appears to be common agreement about the importance of the independence of the Bar from the State and the individual lawyer from the authorities, as well as the corresponding freedom of the defence in the Netherlands. However, further questions are raised by the scope of these notions and particularly the issue of what types of State interference with counsel are prohibited. For instance, what does the notion of the freedom of the defence entail and is it the same for unassisted and assisted accused? How does the independence of the Bar from the State and the corresponding independence of lawyers from the authorities relate to the freedom of the defence of, in particular, an assisted accused? How does the privileged lawyer-client relationship relate to both notions of the freedom of the defence and the independence of the Bar from the State? Moreover, what restrictions upon counsel’s assistance, such as his access to law enforcement information or his client, would harm the freedom of the defence and/or the independence of the Bar from the State?¹⁰⁶ What types of “invasions” of the privileged lawyer-client relationship, such as an informant’s participation in a lawyer-client meeting or intercepted privileged communication, can amount to impermissible hindrance to the freedom of the defence and the independence of the Bar from the State?¹⁰⁷ Can the authorities also hamper the independence of the Bar from the State more structurally, for example, by means of a system of direct supervision of lawyers by the authorities by statute, rather than by court ruling?¹⁰⁸ Finally, can there be types of defective appointment of legal aid lawyers which can damage the freedom of the defence and the independence of the Bar from the State, so that even perfect performance of that legal aid lawyer cannot repair the damage done to the rights of the accused?¹⁰⁹

¹⁰³ Spronken (2001) at 447 and 464. See also this same view reiterated in Prakken and Spronken, in: Prakken and Spronken (2009) at 15.

¹⁰⁴ Spronken (2001) at 464. The author’s translation.

¹⁰⁵ E.g. also laid down in The Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, in Havana, Cuba, 27 August to 7 September 1990, Resolution 45/121; Code of Conduct for European Lawyers, Council of Bars and Law Societies of Europe, 31 January 2008; Dutch Rules of Conduct for lawyers 1992. See also further chapter 10 in particular.

¹⁰⁶ Spronken (2009a), in: Prakken and Spronken (2009) at 29-81.

¹⁰⁷ Prakken and Spronken, in: Prakken and Spronken (2009), at 21-22 and Israel and LaFave (2006) at 391.

¹⁰⁸ Docters van Leeuwen (2010), particularly at 36 and Israel and LaFave (2006) at 387-389.

¹⁰⁹ Spronken (2009b), in: Prakken and Spronken (2009) at 921-962 and Israel and LaFave (2006) at 389-391.

Such questions cannot yet be answered here. At this stage of the book it does show that Spronken's cited passage indicates the relevance of these questions, amongst others, for the purposes of this research into ineffective legal assistance and its redress in Dutch criminal procedure. These questions will therefore be revisited in the substantive research chapters regarding Dutch criminal proceedings and the Convention, particularly in Part V: State interference with counsel and Part VI: Intervention out of ineffective legal assistance. Before getting to this issue of the right to a lawyer-client relationship and the possibilities of State interference, it is important to turn to another important related right that Reijntjes argued does not exist (sub-sections 2.2.1. and 2.2.3.).

2.2.3. Right to effective legal assistance?

AG Knigge construes the right to counsel to entail a right to "adequate" legal assistance in his advice to the Hoge Raad (material interpretation), unlike the annotator Reijntjes in this same case, who warned against this interpretation of the right to counsel (Reijntjes rather opts for a formal interpretation; see above in sub-section 2.2.1.).¹¹⁰ If the accused is not ensured "adequate" legal assistance, Knigge finds that the judge has "a duty of care"¹¹¹ (as Reijntjes coins this obligation put on the authorities by the AG¹¹²). That duty of care dictates that the judge has to guarantee that the accused has waived his right to assistance by counsel, check whether the accused's decision to proceed *pro se* is deserving of respect, and provide information to the formerly assisted accused who thereupon will be unassisted. In other words, AG Knigge appears to argue that the authorities cannot remain passive in the case when confronted with an ineffective defence by equally ineffective assistance by counsel to the assisted accused out of protection of the right to "adequate" legal assistance.

Both issues of the right of the accused to "adequate" legal assistance and the activity required from the court result in criticism by Reijntjes, as implied in this description (see also sub-section 2.2.1.). Reijntjes disagrees emphatically: "(the adjective [of adequate to the right to assistance by counsel] is of great importance! [added by the author])".

In this respect, it is noteworthy that both Knigge and Reijntjes claim that their reading of the right to legal assistance follows from and corresponds with the Convention. The differences of interpretation of the right to assistance by counsel as a formal right or as a substantive right to "adequate" legal assistance on its own and its relation to the claim regarding compliance with the Convention thus raise two important questions for this research in two further ways.

First, in and of itself, the aforementioned difference of opinion between Knigge and Reijntjes about the interpretation of the right to assistance by counsel in Dutch criminal proceedings is vital for this research into ineffective legal assistance and its redress (formal as opposed to material interpretation). Clearly, different Dutch lawyers can hold distinct ideas about the scope of the right to either "just" assistance by counsel or *adequate* performance by the lawyer.¹¹³ Second, this difference of views between Dutch jurists prompts a further inquiry into the interpretation of the right and in particular its possible consequences on ineffective legal assistance and its redress. This inquiry will start with the Convention because, as shown above, Spronken and Reijntjes argue, at least, that Article 6 (3) (c) does not encompass a right to *effective* legal assistance (formal interpretation), whereas Knigge implies it does (material interpretation).

Before this study will conduct its own original case law analysis, this chapter on the conceptual framework will refer to the relevant drafting history and scholarly opinions about the Convention right to legal assistance, in order to structure the subsequent substantive research chapters on the Convention (chapters 5, 7, 9 and 11) and Dutch criminal proceedings (chapters 6, 8, 10 and 12). The question of whether or not legal assistance has to be effective for the Convention right to be

¹¹⁰ See annotation of Reijntjes in para. 2 to HR 22 April 2008, ECLI:NL:HR:2008:BC6813 in *NJ* 2008, 387 m.nt. Reijntjes.

¹¹¹ See conclusion of AG Knigge, ECLI:NL:PHR:2008:BC6813, to the Hoge Raad's case of HR 22 April 2008, ECLI:NL:HR:2008:BC6813, *NJ* 2008, 387 m.nt. Reijntjes.

¹¹² See annotation of Reijntjes in para. 2 to HR 22 April 2008, ECLI:NL:HR:2008:BC6813 in *NJ* 2008, 387 m.nt. Reijntjes.

¹¹³ See also AG Vellinga who refers to the right to "effective representation" in his conclusion, ECLI:NL:PHR:2012:BU7644, to the Hoge Raad's case of HR 11 June 2012, ECLI:NL:HR:2012:BU7644, *NJ* 2012, 381. See also scholars Groenhuijsen and Knigge refer to the right to a "decent or reasonable" defence in: Groenhuijsen and Knigge (2004) at 58 and 89. See also *Kruslin and Huvig v. France*, Judgment of 24 April 1990, HUDOC no. 11105/84 and 11801/85 respectively. See also Coster van Voorhout (2008b).

guaranteed will be an important matter for the subsequent sub-sections (sub-sections 2.2.3.1. to 2.2.3.3.).

2.2.3.1. *Different interpretations by the drafters of the fair trial right to legal assistance?*

The drafters of Article 6 (3) (c) of the Convention could make use of the proposed fair trial right as laid down in the International Covenant on Civil and Political Rights, ICCPR, which they included in the Convention's *travaux préparatoires*. From its first draft, Article 14 (3) (d) of the ICCPR included the right to legal assistance under the right to a fair trial¹¹⁴, which entitled the accused "(...) to refuse the assigned counsel and ask for another if the assigned counsel does not perform properly".¹¹⁵ Accordingly, the drafters of the ICCPR foresaw situations of improper performance of counsel, which here will be referred to as ineffective legal assistance within criminal proceedings. They found it fit to require that the authorities would intervene in the case, when confronted with ineffective assistance by counsel, by appointing a replacement counsel at a minimum. Both sides of the possibility that counsel might not always provide the accused with effective legal assistance and that therefore redress should be provided within the criminal proceedings under the ICCPR were known to the drafters of Article 6 (3) (c) when they codified this Convention right.

The Convention drafters must also have been aware of the fact that the ICCPR drafters, from the start, paid particular attention to the right to counsel when laying down the overall right to a fair trial. As of early drafts, Article 14 (3) (b) of the ICCPR connected the right to "(...) have adequate time and facilities for the preparation of his defence" to the right "to communicate with" counsel of the accused's "own choosing" and mentioned that "(e)veryone is entitled to the aid of counsel".¹¹⁶ Moreover, when the right to legal assistance had already been included, it took four more drafting sessions for the right to self-representation by the accused to be adopted.¹¹⁷

The Convention drafters do not explicitly mention the specific interpretation, explained above, of the right to legal assistance as laid down in Article 6 (3) (c) so as to include a requirement of the authorities to intervene in the case where counsel's performance is "improper". However, they did structure Article 6 (3) (c) to encompass the same three rights as included under Article 14 (3) (d) of the ICCPR: (i) the right to self-representation, (ii) the right to legal assistance by a retained lawyer of the accused's choosing, and (iii) the right to an appointed lawyer.¹¹⁸ The drafters did not intend there to be a hierarchy of these three rights¹¹⁹, which were all meant to contribute to a fair trial. As the drafters explained:

"(...) We had not, therefore, thought of guaranteeing Europeans against the judicial errors of their courts. We simply desired to secure for them freedom of defence, and procedural safeguards, because those safeguards are the very expression of individual liberty and of individual rights".¹²⁰

The notions of freedom of defence and procedural safeguards will have to be returned to in the substantive research chapters on the Convention. However, the knowledge that its drafters had about the right under the ICCPR should be emphasised at this point in the study already. This is an important starting point for a further exploration in this book as to whether, at present, the Court construes Article 6 (3) (c) as either a formal or material right. The drafting history is only one point of reference, which admittedly is limited in scope and present-day validity. The scholarly opinions about today's interpretation of Article 6 (3) (c) constitute another such point of reference, which will be explored in the next sub-section (sub-section 2.2.3.2.).

¹¹⁴ Weissbrodt (2001) at p. 54 quoting the Summary Record of the 110th Meeting, UN doc. E/CN.4/SR.110 (1979), at p. 8.

¹¹⁵ Weissbrodt (2001) at 57 referring to how this was stressed by the United States delegation at the Sixth Session.

¹¹⁶ Weissbrodt (2001) at 45, e.g. quoting the Comments on the Secretariat Outline, UN doc. E/CN.4/AC.3/SR.9 (1947), at 7.

¹¹⁷ Weissbrodt (2001) at 44-45, e.g. quoting the Comments on the Secretariat Outline, Art. 6, UN doc. E/CN.4/AC.1/8 (1947), at 1, and the Comments on the Secretariat Outline, Art. 27, at 5.

¹¹⁸ See Harris et al (2014) at 474.

¹¹⁹ *Travaux préparatoires of the European Convention on Human Rights and Fundamental Freedoms*, DH(56)11, available at: www.echr.coe.int/Documents/Library_TravPrep, at 7.

¹²⁰ *Travaux préparatoires of the European Convention on Human Rights and Fundamental Freedoms*, DH(56)11, available at: www.echr.coe.int/Documents/Library_TravPrep, at 8.

2.2.3.2. Different scholarly interpretations of Article 6 (3) (c)?

For one scholarly interpretation of Article 6 (3) (c) of the Convention, it is helpful to revisit the study of the aforementioned scholar Spronken of the positive norms regulating the performance of counsel in Dutch criminal proceedings.¹²¹ For her research into the role and conduct expected of counsel within the proceedings, Spronken has focused on the unity between the accused and counsel.¹²² She submits that, whether retained or appointed, counsel cannot act as a “substitute” for the accused in Dutch criminal procedure. The importance of the accused as the leading person in the defence is also addressed in her research, suggesting that a lawyer should assist and thus not be seen as a “surrogate” for the accused. By the term *dominus litis*, she has indicated how the accused is the principal person in the defence, whether he is assisted by counsel or opts for self-representation.

Spronken’s research did not directly touch upon the more negative topic of alleged or actual ineffective legal assistance in Dutch criminal procedure. However, in her book on positive norms, she did make several observations about ineffective legal assistance. An important component of her normative framework for the two related main research themes appears to be the case law of the Court.

First, as demonstrated above, Spronken stresses the requirement that the authorities respect the important principles of the independence of the Bar from the State (see sub-section 2.3.2.). Second, she underlines the importance of respect of the authorities for the freedom of the defence of the assisted accused when interacting with counsel, in general, and in situations of ineffective legal assistance, in particular.¹²³ To briefly summarise her views, Spronken quotes the general rule laid down by the Court, which has consistently held that “(...) within the ambit of criminal proceedings, the competent national authorities are required under Article 6 to intervene only if a failure by counsel to provide effective legal assistance is manifest or sufficiently brought to their attention in some other way”.¹²⁴ She argues that this rule (which in summary is referred to in this study as the *Artico*-rule, as explained in chapter 1) entails that, when confronted with ineffective legal assistance, the authorities are required to intervene “only” in the case when “(...) the lawyer is absent or otherwise does practically nothing at all for the accused”.¹²⁵ She bases that inference not only on both Dutch law and case law, but also on an analysis of the Court’s case law.

Spronken has taken this position about ineffective legal assistance without examining the possible responsibilities of *counsel* with regard to the accused’s right to an effective defence in a fair trial. She argues that, in her opinion, she could not take such “a horizontal perspective” because the Convention does not deal with the (private law) contract between counsel and the accused.¹²⁶ This is an important underlying reason because Dutch scholars disagree about the question of whether or not a horizontal perspective can be applied to Article 6 (3) (c).¹²⁷ For example, Spronken distinguishes her perspective from Meijers¹²⁸, who deduces from Article 6 (3) (c) that counsel is obliged to comply with professional demands.¹²⁹

¹²¹ Spronken (2001) at 244.

¹²² Spronken (2001) at 438 and 464.

¹²³ See further chapter 10 in particular.

¹²⁴ Spronken (2001) at 447.

¹²⁵ Spronken (2001) at 447 and 464. See also this same view reiterated in Prakken and Spronken, in: Prakken and Spronken (2009) at 15.

¹²⁶ E.g. Spronken (2001) at 637. See also Prakken and Spronken, in: Prakken and Spronken (2009) at 15.

¹²⁷ E.g. Spronken (2001) at 637. See also Prakken and Spronken, in: Prakken and Spronken (2009) at 15. See differently, Meijers (2000) at 703-710.

¹²⁸ Meijers (1993) at 1-24, particularly at 12-14 at 12: “The Convention counts on an active criminal defence lawyer. This does not mean that the judge should wait to see what counsel does. Obviously the judge maintains, and I shall revisit this observation later, his independent responsibility in particular about the quality and the completeness (Articles 315 and 422 Sv) of the criminal investigation and its progress.”; at 13-14: “The explanation by the court of Article 26 does not mean that the judge normally has to wait for the accused or counsel to say or do something. The law, including the Convention, sets demands on the activity of the judge. In this respect, I do not only think of the judge to respond to substantive defences or of the duty of the judge to respond with reasons in its verdict because of the Constitution, the Statute on the Judicial Organization and the Criminal Procedural Code; nor of the formal logic that underpins these formal rules. Criminal procedural law entails rules that are so fundamental that they have to be respected, even if the accused or counsel does not appeal to those rules. This concerns the few strict guarantees of fair (criminal) procedure which the procedural parties cannot waive. To name some examples: the accused does not have to ask for the last word during the court session. He should get it. Rules of national law about the composition of the court that has to try the case have to be complied with and, most importantly, the impartiality of judge have to be respected at all times. The judge who wants to use the statement of an anonymous informant as evidence in the case against the accused, must, also in the

Spronken goes against Meijers by holding that the Convention right does not entail such a “(...) horizontal effect with so many implications”.¹³⁰ She contends that neither domestic authorities nor the Court ought to examine the way in which counsel conducted the defence or the choices made in the light of defence strategy.¹³¹ She argues that even if the conduct of the accused or the facts of the case demonstrate that the accused was not provided with effective legal assistance, such an examination would amount to State interference. As evidenced by her work in 2009 which she wrote together with Prakken, Spronken appears to still be of the same opinion that the authorities should not intervene in the case when confronted with ineffective legal assistance unless the lawyer is absent or is almost fully inactive.¹³²

Different to Spronken – and Prakken for that matter – Harris, O’Boyle and Warbrick contend that Article 6 (3) (c) encompasses a “(...) right to effective legal assistance”, which is explained further in an entire section of their Convention handbook to what they call “(...) the right to practical and effective legal assistance”.¹³³ ¹³⁴ This section comes in addition to their overview of “(...) the rights of private access to a lawyer and to sufficient visits by a lawyer”.¹³⁵ The scope and content of this section can be summarised by indicating the purpose of the guarantee of Article 6 (3) (c): criminal proceedings against an accused “(...) will not take place without an adequate representation of the case for the defence”.¹³⁶ Where the accused has legal assistance, the lawyer serves, as they put it, as the “(...) watchdog of procedural regularity”¹³⁷ “(...) both in the public interest and for his client”.¹³⁸ This aforementioned perspective appears to be quite different from the aforementioned view of Spronken – and Prakken. Spronken negatively formulates aspects of a formal interpretation of the right to legal assistance, i.e. full absenteeism or unwillingness to act of counsel. In summary, this a bar below which counsel should not fall. Rather, Harris, O’Boyle and Warbrick positively formulate ideas in relation to a material interpretation of the right to *effective* legal assistance. In other words, they stress minimum guarantees in relation to an effective defence for which counsel has to play the role of watchdog of procedural regularity. They suggest that counsel has to protect the rights of the accused so that, by extension, a fair trial can also be guaranteed.

Along the same lines as Harris, O’Boyle and Warbrick, Trechsel submits that, when confronted with ineffective legal assistance, the authorities have to intervene in the case due to the accused’s “contingent” right to an effective defence under Article 6 (3) (c).¹³⁹ He explicitly states that the authorities have to “(...) bear some responsibility for ensuring the effective performance of counsel in a given case” under the Convention.¹⁴⁰ To put it another way, the authorities cannot always shift the blame onto the lawyer, finding no problem with a horizontal and vertical reading of Article 6 (3) (c), unlike Spronken. From both perspectives, Trechsel concludes that all participants including counsel

absence of a complaint about the demands that are set on its use, reason in his verdict why he uses it (e.g. HR 14 September 1992, DD. 93.058) [translation by the author].”

¹²⁹ E.g. Spronken (2001) at 637. See also Prakken and Spronken, in: Prakken and Spronken (2009) at 15.

¹³⁰ *Ibid.*

¹³¹ Spronken (2001) at 637.

¹³² Prakken and Spronken, in: Prakken and Spronken (2009) at 15. Despite the fact that Prakken earlier explained that the Court does not just require a formal right to legal assistance but a substantive right to *effective* legal assistance in Prakken (1999), at 12-13.

¹³³ Harris et al (2014) at 481-483.

¹³⁴ Harris et al (2014) at 481 with a reference to *Artico v. Italy*, Judgment of 13 May 1980, HUDOC no. 6694/74, para 33.

¹³⁵ Harris et al (2014) at 475

¹³⁶ Harris et al (2014) at 474, with a reference to *Pakelli v. Germany*, Judgment of 25 April 1983, HUDOC no. 8398/78.

¹³⁷ Harris et al (2014) at 474, with a reference to *Ensslin, Baader and Raspe v. Germany*, Judgment of 8 July 1978, HUDOC nos. 7572/76, 7586/76 and 7587/76.

¹³⁸ Harris et al (2014) at 474.

¹³⁹ See for example the European Commission for Human Rights verifies whether national jurisdictions have effectively provided the accused with adequate legal assistance, in: *Koplinger v. Austria* (dec.), Commission decision of 29 March 1966, HUDOC no. 1850/63 (dismissal of motion): “The Commission recalls that, in accordance with its established precedents, the courts have a duty to provide the accused with *adequate legal assistance* (emphasis added by the author). In the case “*F. v. Switzerland*, the Commission stated: “(...) it is up to the authorities responsible for providing free legal assistance and assigning defence counsel to make sure that counsel can defend the accused effectively”, in: *F. v. Switzerland* (dec.), Commission decision of 9 May 1989, HUDOC no. 12152/86.

¹⁴⁰ Trechsel (2005) at 286.

are required to ensure that the accused benefits from an effective defence – in their different ways, that is.¹⁴¹

Instead of the word of effective legal assistance under Article 6 (3) (c), Van Dijk, Van Hoof, Van Rijn and Zwaak refer in their Convention handbook to “*real assistance*” by counsel.¹⁴² Jacobs, White and Ovey mention that the aim of Article 6 (3) (c) is to “(...) ensure that defendants have the possibility of presenting an effective defence”.¹⁴³ These scholars also emphasise the degree to which shortcomings in the legal representation have to be “(...) imputable to the authorities” for a State to violate the accused’s right to a fair trial.¹⁴⁴ Also, Vande Lanotte and Haeck construe Article 6 (3) (c) to encompass the right of an accused to a defence that is “practical and effective” where assisted by “appointed counsel”.¹⁴⁵ They explain that, for an accused whose appointed counsel “(...) clearly neglects the interests of his client”, the authorities have to “(...) appoint another counsel or stay the proceedings”.¹⁴⁶

Because of the traction of Spronken’s conclusions in Dutch criminal proceedings, these different scholarly opinions about the right under Article 6 (3) (c) are of particular importance for this study into ineffective legal assistance and its redress in the criminal process in the Netherlands. As mentioned in the introduction to this book, Dutch scholars and practitioners often seem to follow Spronken’s interpretation when dealing with issues of both actual and alleged ineffective legal assistance in Dutch criminal proceedings (see chapter 1). Consequently, the next sub-section will explore in some more detail how scholars arrive at their conclusion that Article 6 (3) (c) should be construed substantively, rather than formally. These scholarly perspectives might help with structuring the original case law analysis that will follow in the substantive research chapters regarding the Convention (chapters 5, 7, 9 and 11), as well as subsequently as benchmarks for Dutch criminal proceedings (chapters 6, 8, 10 and 12).

- *How do scholars conclude on a substantive right to effective assistance by counsel under Article 6 (3) (c)?*

Most detail for their conclusion that Article 6 (3) (c) encompasses not only a formal right to legal assistance but also a substantive entitlement, is given by Trechsel as well as Harris, O’Boyle and Warbrick. Their interpretations are based on the case law of the Court, of course. Given that an original case law analysis will follow in the substantive research chapters, these scholarly interpretations will only be presented here along the lines of their reasoning. No case law explanations will be given at this stage of the research except for in footnotes, since the case law examinations of this research will be presented in the remainder of this book (chapters 5, 7, 9 and 11).

Starting with Trechsel, his book construes Article 6 (3) (c) as encompassing four aspects: technical, psychological, humanitarian, and structural.¹⁴⁷ Technically, the best possible outcome for the accused has to be guaranteed. Psychologically, the defence has to be carried out with sufficient (emotional) detachment. As a humanitarian aspect, the accused, who will usually be in distress, is entitled to aid. Lastly, the structural aspect means that the accused should not be reduced to an object and thus be a means to an end. Rather, the accused should be a subject who can actively exercise his rights and serve his interests in the proceedings. All four aspects can be guaranteed in principle by an accused who defends himself in person, Trechsel submits. However, there are circumstances when these four aspects can best be ensured by a lawyer’s assistance. He argues that for such a defence by counsel to be *effective*, the lawyer’s services have to be “practical and effective”.

In order to explain the importance of Article 6 (3) (c), Trechsel stresses that both the right to self-representation and the right to assistance by counsel are not absolute.¹⁴⁸ First, with regard to the right to the accused’s self-representation, domestic authorities are best placed to determine whether the interests of justice require that an accused will have to resort to counsel, rather than conduct his own

¹⁴¹ See for these perspectives section 2.5.

¹⁴² Harris et al (2014) at 642.

¹⁴³ Rainey et al (2014) at 292.

¹⁴⁴ Rainey et al (2014) at 292.

¹⁴⁵ Vande Lanotte and Haeck (2004) at 606.

¹⁴⁶ Vande Lanotte and Haeck (2004) at 607.

¹⁴⁷ Trechsel (2005) at 244-247.

¹⁴⁸ E.g. *Croissant v. Germany*, Judgment of 25 September 1992, HUDOC no. 13611/88.

defence.¹⁴⁹ An accused who opted for self-representation may fail to abide by his “duty to show diligence” in the way he conducts his defence. Under such circumstances, the Court considers the accused’s capability and knowledge, but as a rule does not hold the State in violation of Article 6 (3) (c).¹⁵⁰ Once the trial court is assured that the accused opted for self-representation, it matters not that counsel could have given the accused a better defence than he had given himself. Other permissible limitations on the right to self-representation are that the accused does not have a right to perform each defence activity personally.¹⁵¹ For example, the Court can accept that a pre-trial judge examines a witness whilst allowing the accused’s lawyer an opportunity to pose questions on the accused’s behalf. However, this means that the accused could not hear that witness himself. Moreover, the Court can accept that the personal access of the accused to evidence, which threatens national security¹⁵², is being restricted. Where necessary to protect certain sources¹⁵³, or because certain police methods cannot be disclosed, the accused does not have to get personal access. For such arrangements to conform to the Convention, a lawyer of the accused should be given an opportunity to examine the evidence on the accused’s behalf. If the lawyer has done so adequately, both the right to the disclosure of evidence and the right to a defence are usually held to have been respected.¹⁵⁴ These are a few illustrations by means of which Trechsel concludes that some restrictions to right of the accused to self-representation are acceptable under the Convention right to an effective defence. Of course, not all limitations are permissible. Harris, O’Boyle and Warbrick argue that the authorities are in breach of Article 6 (3) (c) if they “genuinely prohibit” the accused from exercising his right to defend himself in person by placing limits on his right to self-representation.¹⁵⁵

Trechsel makes explicit that the right to legal assistance is not absolute, just like permissible restrictions on the right to self-representation under Article 6 (3) (c) that do not impede on the underlying right to an effective defence. Permissible limitations on the right to counsel are, for example, that the authorities “only” allow members of the Bar to provide an accused with assistance, rather than lay relatives of the accused.¹⁵⁶ The authorities can also restrict the number of lawyers on a certain defence team without violating the Convention right.¹⁵⁷ Moreover, the authorities can legitimately set stricter rules on lawyers acting before the highest domestic courts than for those who act before lower courts.¹⁵⁸ In addition, when retained counsel has systematically failed to appear in court and has thereby caused the first instance trial hearing to be repeatedly postponed, the authorities can appoint a new lawyer to replace the previous counsel without being held in violation of Article 6 (3) (c).¹⁵⁹ On the basis of these examples, Trechsel concludes that as long as the accused has had an effective defence and the entire criminal procedure has been fair, certain limitations on the right of the accused to assistance by counsel are acceptable under the Convention.

Therefore, it is important to note as an interim conclusion that neither the right to legal assistance nor the right to self-representation are absolute, as long as the right of the accused to an effective defence and, by extension, the right to a fair trial has been respected. Trechsel explains that this notion of an effective defence is case-specific. Nonetheless, some of its aspects can be inferred from cases in which the authorities were found in violation of Article 6 (3) (c) when they placed limitations on the right of the accused to assistance by counsel that were then held to violate this Convention right.

For example, domestic authorities are prohibited from barring a lawyer of the accused’s choosing from the courtroom, if they thereby coerce the accused into self-representation at trial.

¹⁴⁹ Trechsel (2005) at 476, with a reference to *Correia de Matos v. Portugal*, Court’s inadmissibility decision of 15 November 2001, HUDOC no. 48188/99.

¹⁵⁰ Trechsel (2005) at 476 with a reference to *Melin v. France*, Judgment of 22 June 1993, HUDOC no. 12914/87, para 25 containing a footnote that mentions “However, there is a duty to intervene where the accused’s lawyer is not diligent”.

¹⁵¹ E.g. *S.N. v. Sweden*, Judgment of 2 July 2002, HUDOC no. 34209/96.

¹⁵² E.g. *A. and others v. the United Kingdom* [GC], Judgment of 19 February 2009, HUDOC no. 3455/05.

¹⁵³ E.g. *Doorson v. Netherlands*, Judgment of 26 March 1996, HUDOC no. 20524/92.

¹⁵⁴ E.g. *Van Mechelen and others v. the Netherlands*, Judgment of 17 April 1996, HUDOC nos. 21363/93 21364/93 21427/93 22056/93.

¹⁵⁵ Trechsel (2005) at 476 with a reference to *Brandstetter v Austria*, Judgment of 28 August 1991, HUDOS nos. 11170/84 12876/87 13468/87, para 51 and 53.

¹⁵⁶ E.g. *Mayzit v. Russia*, Judgment of 20 January 2005, HUDOC no. 63378/00, para. 68.

¹⁵⁷ E.g. *Croissant v. Germany*, Judgment of 25 September 1992, HUDOC no. 13611/88.

¹⁵⁸ E.g. *Meftah and others v. France*, Judgment of 26 July 2002, HUDOC nos. 32911/96 35237/97 34595/97, para. 45.

¹⁵⁹ E.g. *Croissant v. Germany*, Judgment of 25 September 1992, HUDOC no. 13611/88.

Moreover, the authorities are not allowed to refuse effective representation by the attending lawyer in the accused's absence if by doing so they thereby penalise the accused, who freely chooses to remain absent from the trial.¹⁶⁰ These are two examples of restrictions on the "contingent" right to effective legal assistance, as Trechsel calls it.¹⁶¹ They are impermissible limitations to the right to legal assistance, which contravene the right of the accused to an effective defence or other related fair trial rights.¹⁶² These aspects will have to be explored further in the substantive research chapters regarding the Convention. However, at this stage of the research an inference can already be drawn from this overview.

There is an apparent difference of opinion between scholars regarding Article 6 (3) (c) on the issue of whether or not this right encompasses a right to *effective* legal assistance. Spronken does not read such a right into Article 6 (3) (c), but several authors of Convention handbooks, including Trechsel and Harris, O'Boyle and Warbrick, do construe the Convention right materially (such as Knigge's "adequate" assistance by counsel in sub-section 2.2.3.). This latter group of scholars find that the performance of counsel will have to meet, at least, a minimum level of effectiveness for the right to a fair trial to be guaranteed. In this research, a case-by-case analysis will follow in order to determine whether or not the Court construes the right to counsel as a material right. Special attention will have to be paid to the related question of whether or not the authorities are required under the Convention to intervene in the case when counsel does not meet, at least, a minimum level of proficiency by his services to the accused. This examination needs to follow in the substantive research chapters, because this study also focuses on redress for ineffective legal assistance in Dutch criminal proceedings.

2.2.3.3. *Interpretational difficulties regarding the right to effective legal assistance*

Sometimes criticism has been made in jurisdictions that have construed the right to counsel substantively so as to encompass *effective* legal assistance. This can be summarised as the "foggy mirror test".¹⁶³ Instead of an aspirational bar for counsel, in those jurisdictions the courts have been faulted for supposedly having set the standard for effective legal assistance very low.¹⁶⁴

They submit that this constitutional standard has become a floor below which a lawyer may not fall, rather than a standard to which the lawyer should aspire. Worse yet, even if a court finds that a lawyer's performance fell below that bar, to succeed in obtaining a new trial the accused must show prejudice. Consequently, critics argue that the bare minimum of counsel's presence would be sufficient to fulfill the right to effective legal assistance, as evidenced by a mirror put in front of a lawyer whose breath would stain it. Simply put, not only does the accused have to establish the incompetence of counsel, but he also has to demonstrate that, but for counsel, he would have been acquitted.

Critics worry that the resulting low bar of ineffective legal assistance within criminal proceedings has caused the situation whereby an accused who is assisted by a lawyer – who does not have to provide services that meet at least a minimum of effectiveness – can potentially be "worse off" than an unassisted accused.¹⁶⁵ This is particularly true if the authorities do not want to come between the accused and his lawyer or are non-interventionist for other reasons.¹⁶⁶ It is believed that an accused

¹⁶⁰ Trechsel (2005) at 270-276. See also Spaniol (1990) at 63-64.

¹⁶¹ Trechsel (2005) at 251; Reid (2008) at 153; and Van Dijk et al (2006) at 641.

¹⁶² Trechsel (2005) at 270-276.

¹⁶³ E.g. Dripps (1997) at 242-308; Blume and Neumann (2007) at 38. Both make references to *Gideon v. Wainwright*, 1.372 U.S. 335 (1963) and *Strickland v. Washington*, 2.466 U.S. 668 (1984). For an ineffective legal assistance of counsel claim, the accused must prove (1) that the lawyer's performance fell below an objective standard of reasonableness; and (2) the substandard representation so prejudiced her that there is a reasonable probability that the outcome would have been different. A defendant does not have to show that the outcome more likely than not would have been different, but rather that counsel's errors undermine confidence in the outcome. *Gideon*, para 687 and *Strickland*, para. 694 respectively.

¹⁶⁴ E.g. Garrett (2013) at 927.

¹⁶⁵ E.g. Marceau (2011) at 1161.

¹⁶⁶ E.g. Schwarzer (1979-1980) at 649; Primus (2006-2007) at 700; Burnett and Greene Burnett (1999-2000) at 1353; Grunis (1973-1974) at 289; Gable and Green (2003-2004) at 756; and Bines (1973) at 929.

might rather benefit from an effective defence by adequate self-representation rather than by legal assistance if it can be allowed to be of such sub-standard quality.¹⁶⁷

These scholars are afraid that the objective of equal protection for assisted and unassisted accused cannot be guaranteed because the bar for the effectiveness of the assistance provided is set too low. Equal protection is important because an accused who will be appointed counsel should not be “worse off” than an accused who can retain private counsel.¹⁶⁸ In other words, they argue that it is not acceptable to discriminate against an accused who is entitled to an appointed legal aid lawyer on the one hand and an accused who can opt for a retained counsel on the other.

These scholars do point out the benefit of “a” substantive interpretation of the right to legal assistance over no such reading of the right: the authorities, rather than the lay accused, can assess the quality of counsel’s services.¹⁶⁹ They appreciate this positive aspect because an accused without legal training, expertise and skills will often be unaware or unfamiliar with the requirements for adequate performance of the lawyer. Rather, it is believed that the trial judge and other participants will be able to assess the work by another professional in their field.

In the remainder of this research, both this potential difficulty of a low bar for the effectiveness required of counsel’s assistance to the accused and this positive point about the assessment of counsel’s services will be returned to. These issues will be particularly relevant for the concluding chapter (chapter 13).

- *How is this overview relevant for the Convention and Dutch criminal procedure?*

In the previous sub-sections, different interpretations of the right to (effective) legal assistance have been highlighted already. In summary, a difference of opinion has been noted between annotator Reijntjes and AG Knigge, with Prakken and Spronken on Reijntjes’s “side”.¹⁷⁰ On the other hand, there are Trechsel and Harris, O’Boyle and Warbrick, Ovey and White – and, it seems at least, AGs Knigge and Vellinga – who find that the Convention leaves at least some responsibility with the authorities to ensure that the accused receives “adequate” legal assistance. As explained, Trechsel finds there to be a “contingent” right to effective legal assistance which sets qualitative demands on the assistance provided by counsel¹⁷¹, while Ovey and White go one step further by arguing that effective legal assistance will usually be provided by the lawyer of the accused’s choosing.¹⁷²

This discussion about the scholarly readings of a formal or substantive interpretation of the right to (effective) legal assistance has to be examined in the context of the difficulties with the interpretation of the more general right to a fair trial. These complexities will be discussed on the basis of three remarks that can be made thanks to the scholarly work of Ashworth.¹⁷³

First, Ashworth emphasises that fair trial rights are often misleadingly construed as “merely” individual rights of the accused rather than also as procedural guarantees for a fair criminal procedure with truth finding.¹⁷⁴ In summary, he explains that one should not interpret international human rights law and particularly fair trial rights, as personal rights versus procedural guarantees. This position of Ashworth will be illustrated with an example about the right to remain silent.

If the right to remain silent is interpreted “only” as an individual right, it is merely deemed to serve as protection for the human dignity of the accused. However, the right to remain silent can also assist in preventing an accused from giving a false confession that might (wrongly) be deployed as supposedly reliable evidence for his conviction and thus, as a result, ensure a fair trial with truth

¹⁶⁷ For the “role of the trial judge, in particular the failure of the trial courts to act to ensure that the constitutional guarantees to the effective assistance of counsel and to a fair trial are indeed honored”, see Klein (2006) at 195.

¹⁶⁸ E.g. Article 28 Dutch Code of Criminal Procedure of 1926; Article 6 (3) (c) of the European Convention on Human Rights and Fundamental Freedoms. Hereafter the Convention; Article 14 (3) (b) and (d) ICCPR; national legislation implementing the Rome Statute for the International Criminal Court (hereafter the Rome Statute); Article 18 (2) Dutch Constitution on free legal aid. See for other requirements of appointed counsel in Dutch criminal proceedings such as detention. See section 1.4.

¹⁶⁹ E.g. Schwarzer (1979-1980) at 649; Primus (2006-2007) at 700; Burnett and Greene Burnett (1999-2000) at 1353; Grunis (1973-1974) at 289; Gable and Green (2003-2004) at 756; and Bines (1973) at 929.

¹⁷⁰ Spronken (2001) at 291. See also, for a similar position later in time, Prakken and Spronken (2009) at 15.

¹⁷¹ See section 2.3. Trechsel (2005) at 251. See Reid (2008) at 153 and Van Dijk et al (2006) at 641.

¹⁷² Ovey et al (2006) at 205.

¹⁷³ Ashworth (2001) at 13ff.

¹⁷⁴ Ashworth (2001) at 13ff.

finding.¹⁷⁵ Under such a reading of the right to remain silent, it is not only deemed to be supportive of the accused alone, but also of a fair trial with truth finding. Similarly, the right to remain silent can be understood to entail an obligation for the authorities to avoid using coercion or otherwise make the accused give answers to questions or a full statement against his will – e.g. by deceit or by misleading the accused. Under such a reading, the right to remain silent protects both the accused and fair criminal proceedings with truth finding. From this perspective, Ashworth warns against an interpretation of the right to remain silent as “merely” an individual right of the accused, and instead sees it as a guarantee for a fair trial with truth finding as well. Therefore, Ashworth submits, a fair trial right such as the right to remain silent should not be simplified as either a personal right or a procedural guarantee.

Although Ashworth does not do so, his perspective can also shed light on the right to (effective) legal assistance. As with the right to remain silent, the right to counsel can be construed as “only” an individual entitlement of the accused rather than also as a procedural guarantee for the fairness of the procedure “as a whole”.¹⁷⁶ However, like the right to remain silent, the right to assistance by a lawyer cannot only benefit the accused individually but also equality of arms and an adversarial hearing (e.g. *audi et alteram partem*, as it is often referred to in civil law).¹⁷⁷ There are few criminal proceedings without a lawyer on the side of the prosecution. Consequently, equality of arms and an adversarial hearing may often call for “levelling” the lawyer on the side of the prosecution to the same level as counsel for the defence. With lawyers on both sides of the prosecution and defence, the goals of fact-finding and a fair trial might be achieved, because arguably, under such conditions, the court will benefit from hearing both perspectives by trained lawyers. Often, this is also the argument used in favour of having a lawyer on the side of the accused during the cassation phase of the criminal procedure. However, in practice, there will be no benefit of having a lawyer present in all the aforementioned instances, if counsel does not provide effective legal assistance. Therefore, under such circumstances, the right to counsel as both a personal right of the accused and a procedural guarantee for the fairness of the criminal procedure “as a whole”, might require an intervention by the authorities in the case in order to prevent it damaging the accused and the process itself.

This position about the complex nature of fair trial rights, which should not simply be distinguished as *either* personal rights *or* procedural guarantees, may become clearer still when the right to legal assistance and the right to remain silent are seen in conjunction. For instance, early adequate assistance by counsel during police interrogations has the potential to be supportive of the right to remain silent. Counsel will usually be unable to determine how the authorities conduct police interrogations. It is the prerogative of the police and the other authorities to determine how to pose questions to the accused. However, the lawyer can protect the accused by informing him about his right to remain silent and his right not to incriminate himself. For example, the lawyer can explain to the accused that he can choose how to answer police questions, can refrain from answering certain police questions, or can answer all questions and make a full statement. The presence of counsel during police interrogations might also protect an accused from being treated contrary to his will by the authorities and thus coerced into potentially false confessions. In other words, counsel can ensure that the accused will only answer questions or make a statement that can be assumed to have been made freely if he knows of the possible consequences that will be attached to his early procedural position in advance to subsequent trial and later phases. This is often summarised with the notion of prior and informed consent. Moreover, his latter aspect indicates how pre-trial guarantees can also be important for subsequent stages of the proceedings. For instance, a court that uses statements that were made pre-trial with the participation of counsel, can benefit from statements that can be assumed to have been fairly taken. Under such circumstances, the court can suppose that the accused answered police questions voluntarily rather than against his will, unless the defence can argue with reasons that this was not the case. As a side-effect, early participation by a lawyer might also benefit efficiency at

¹⁷⁵ E.g. *John Murray v. the United Kingdom* [GC], Judgment of 8 February 1996, HUDOC no. 18731/91, para. 54 and *Salduz v. Turkey*, [GC], Judgment of 27 November 2008, para. 53. See also *Gerechthof 's-Gravenhage*, ECLI:NL:GHSGR:2002:AE0013, 8 March 2002, subsequently HR 15 April 2003, ECLI:NL:HR:2003:AF5257, NJ 2003, 364 and, when overturned, *Gerechthof 's-Gravenhage*, 22 November 2005, ECLI:NL:GHSGR:2005:AU6566. See also how this miscarriage of justice known as the Schiedammer Parkmoord case, as commented upon by Buruma (2010) at 2288.

¹⁷⁶ Trechsel (2005) at 286.

¹⁷⁷ See for this old, natural law principle, Lucas (1980) at 1-263, particularly at 84.

trial, because the trial judge who hears a request to examine a witness, a substantive defence or other argument, can take into consideration earlier defence work. However, for fairness to be guaranteed, this should not mean that the defence should have done work pre-trial which it could not do in all reasonableness without knowing how the prosecution would meet its burden of proof at trial. The fairness of the criminal proceedings in their entirety requires that the activities of the defence are seen at the time they are being performed, rather than, for example, in hindsight with the benefit of knowledge of what happened subsequently at trial. Similarly, if there is to be an evaluation of whether or not a fair trial right has been guaranteed pre-trial, it should not be examined with the benefit of hindsight but the assessment should be based on what can reasonably be said to have been known at the time of its occurrence.

The aforementioned examples are only illustrations of how a lawyer can protect the rights of the accused at police interrogations or other pre-trial investigating measures during which the authorities put questions to the accused. Under such circumstances, the right to legal assistance is not only important *per se* but can also benefit the right to remain silent under Article 6 (1) and thus the fair trial “as a whole”. Similarly, if counsel assists the accused during the pre-trial examination of witnesses or gathering of other evidence, the right to legal assistance may also be supportive of Article 6 (3) (d) in terms of a minimum defence right of the overall right to a fair trial. Consequently, if counsel’s assistance ensures the fairness of the procedure in its entirety, the right to legal assistance is not only important as a personal right of the accused but it can also constitute, by extension, a procedural guarantee for a fair trial “as a whole”.¹⁷⁸

It is noteworthy that, in all the aforementioned examples, the formal right to counsel was emphasised, rather than the *right to effective* legal assistance. *If* the Court construes the right under Article 6 (3) (c) substantively, it will therefore be even more important to gauge the connection between the right to *effective* assistance by counsel and other fair trial rights, such as the right to remain silent, the right not to incriminate oneself, the right to examine witnesses and the procedural guarantees of equality of arms and adversariality. In Part III, attention will have to be paid to the question of whether the Court equates the presence of counsel during police interrogations with *effective* legal assistance in so far as the right to remain silent as read into Article 6 (1) is concerned.¹⁷⁹ It will be examined whether the Court requires more than “mere” attendance of counsel during police interrogations for the right to *effective* legal assistance – and thus the right to remain silent and the right not to incriminate oneself – to be ensured.¹⁸⁰ For instance, when counsel does not adequately advise an accused who has to take a decision about whether or not to remain silent during police interrogations, does the Court hold that the right under Article 6 (1) has been guaranteed? Given all these considerations, this study will explore how ineffective legal assistance can harm fair trial rights and thus negatively influence truth finding, fair proceedings, or both.

Second, Ashworth also brings an important perspective to that last topic: harm to truth finding, fair proceedings, or both.¹⁸¹ The theoretical nexus between fair trial rights and truth finding is important¹⁸², but complex.¹⁸³ Some scholars hold the truth to be an autonomous notion, while others consider truth finding to be “only” the search for the answer to a much more limited question; the question being the guilt of an identified person concerning a certain indictable offence.¹⁸⁴ Nonetheless, uncovering the truth through fair proceedings is the central aim of all criminal justice systems, in all democratic states. For this same reason, it is important to note a final distinction about the interpretation of fair trial rights made by Ashworth, which can be useful for this research.

¹⁷⁸ See for example section 1.1.

¹⁷⁹ See for an empirical study into legal assistance during police interrogations in different common and civil law countries, Hodgson (2014) at 37-49, an empirical study in the Netherlands, Stevens and Verhoeven (2010) at 1-157; an evaluation of the first Dutch directive on counsel at police interrogations, Stevens and Verhoeven (2013) at 13-331; and a literature review with focus groups, VanderHallen et al (2014) regarding the Netherlands, the United Kingdom and Belgium at 11-178.

¹⁸⁰ See for an examination of whether ineffective assistance by counsel indeed harms in and of itself the right of the accused to an effective defence in a fair trial as well as those related fair trial rights, Parts III to IV.

¹⁸¹ Ashworth (2001) at 13ff.

¹⁸² Corstens/ Borgers (2014) at 96ff.

¹⁸³ Corstens/ Borgers (2014) at 98 particularly.

¹⁸⁴ Foqué and 't Hart (1990) at 122; Cleiren (2001) at 9-31; and Corstens/ Borgers (2014) at 98.

Third and finally, a consequentialist and anti-consequentialist perspective can be distinguished in terms of the interpretation of fair trial rights.¹⁸⁵

On the one hand, the distinction between individual rights and procedural guarantees can be connected to the notion of “procedural justice”.¹⁸⁶ Procedural justice, often unwarrantedly, gives the impression that fair trial rights should be respected “only” to the degree that they assist in furthering the outcome of truth being found in fair proceedings. To illustrate this point of contention, one can, for instance, construe the right to effective legal assistance “objectively” or else determine to what extent ineffective legal assistance resulted in the “wrong” outcome of the procedure. This is a consequentialist perspective.

On the other hand, there is an alternative, which is an anti-consequentialist perspective. This view values a fair trial right in and of itself, rather than tying it to an accurate outcome of the criminal process. Given that an accurate outcome is, by definition, a difficult notion which is illegitimate when achieved through unfair proceedings, the starting point of this anti-consequentialist perspective is that a fair trial has value in its own right rather than being seen in relation to the extent that it benefits an accurate outcome of the criminal procedure.

Hence, the substantive chapters will have to deal with these issues of consequentialist or anti-consequentialist perspectives. However, at this stage of the research it should be stated once more how important it is to take into account the difficulties with the interpretation of the right to effective legal assistance and other fair trial rights.

Seeing the State is the primary holder of human rights obligations, the question arises whether the authorities have duties to ensure the accused has an effective defence by counsel, even if the lawyer is the initial responsible participant thanks to his profession and relationship with the accused. Therefore, for this research into ineffective legal assistance within the criminal procedure in the Netherlands, it will be examined in the substantive research chapters regarding Dutch criminal proceedings and the Convention whether the accused has a right to *effective* legal assistance and what the corresponding obligations of the authorities are.¹⁸⁷

2.3. Relevant criminal procedural context

2.3.1. Dutch criminal procedure: Tradition and the civil law-common law divide

This research into ineffective legal assistance in Dutch criminal procedure has to take into consideration context-specific factors, such as the most relevant aspects of its legal tradition. The Netherlands has a long-standing legal tradition, possessing a criminal procedural code from 1926 that will most likely be modernised this year (at least, that was the ambition the former Minister of Justice expressed).¹⁸⁸ Dutch criminal procedure is often found to have its origins in the civil law tradition, because of the Napoleonic code that long applied to the Dutch territory, for example.¹⁸⁹

In comparative criminal procedure, the contrast between the civil law and common law traditions is frequently used.¹⁹⁰ For comparative criminal procedure in Europe this contrast has also been deployed.¹⁹¹ One such study on defence rights did add a third post-socialist tradition.¹⁹²

The civil law tradition is often associated with a more inquisitorial criminal procedure, while the common law tradition is linked with a more adversarial criminal procedure.¹⁹³ Some scholars include socialist and Islamic traditions to conclude a total of four criminal procedures.¹⁹⁴ Nonetheless,

¹⁸⁵ Ashworth (2001) at 13ff.

¹⁸⁶ Although not perfect procedural justice as in the example of a guaranteed fair end result by having a cake cut by the one who will get his slice last: Rawls (1971) at 85.

¹⁸⁷ See chapters 5, 6, 9, 10, 11 and 12.

¹⁸⁸ See chapter 4.

¹⁸⁹ Corstens/Borgers (2014) at 10-11.

¹⁹⁰ E.g. Vogler (2005) at 1-16 especially.

¹⁹¹ Spencer (2002a), in: Delmas-Marty and Spencer (2002) at 1-81, particularly at 20ff.

¹⁹² Cape et al, in: Cape et al (2007a) at 5.

¹⁹³ E.g. Vogler (2005) at 1-16 especially; Ashworth and Redmayne (2010) at 88; and Spencer (2002a), in: Delmas-Marty and Spencer (2002) at 1-81, particularly at 20ff and, though using the term accusatorial instead of adversarial, Corstens/Borgers (2014) at 10-11.

¹⁹⁴ E.g. Roach (1999) at 680-681 and R Vogler (2005) at 89-124.

there is common agreement that there is a civil law-common law divide with a correspondingly inquisitorial versus adversarial criminal procedure.

Most scholars who specialise in comparative criminal procedure argue that, these days, a “purely” inquisitorial or adversarial procedure is hardly ever encountered.¹⁹⁵ For that reason, I shall refer to *more* inquisitorial or adversarial criminal proceedings, because they differ in degree rather than in kind.¹⁹⁶ Even in the past, no pure inquisitorial and adversarial criminal procedures may ever have existed,¹⁹⁷ several academics raise as a warning¹⁹⁸, and a criminal procedure should therefore not be measured against an ideal type of either model.¹⁹⁹

One scholar who issued this warning is often referred to in Dutch scholarly work on defence rights and the role of counsel: Damaška.²⁰⁰ Damaška has explained the differences in the laws of procedure and evidence of different countries around the world by demonstrating the relations between a State’s legal procedural system, the organisation of authority and political ideology.²⁰¹ His scholarly work has constructed two basic models of legal procedure that fit two archetypes of government.²⁰²

The first, policy-implementing model fits a State with, as its main objective, the implementation of State policy through justice. He refers to this model as the activist State. An activist government supposedly uses the organisation of its justice system, its hierarchical structure and its governmental goals for policy-implementation.

The second, conflict-solving model suits a State which pursues the objective of remaining neutral, whilst helping its citizens solve their disputes. He summarises this model as the reactive State. The government, which seeks to govern least, uses the coordinate organisation of the justice system and its neutrality in its justice system.

Accordingly, an activist government that prefers a policy-implementing model is more likely to have organised its criminal proceedings along an inquisitorial, judge-led inquest. Instead, a reactive State, that prefers a coordinate model, usually has adversarial criminal proceedings which can be best described as a two-party contest before a passive umpire. Each of these two main models produces different views on justice and on the role of the participants in the proceedings – including counsel.

Therefore, it seems that Damaška’s work enriches the simple contrasts between civil law and common law traditions and the inquisitorial-adversarial contrast. Thanks to these two additional features of the organisation of authority and political ideology, Damaška’s work extends beyond “easy” characterisation of the role of counsel in criminal proceedings that either resemble a more adversarial, two-party contest model,²⁰³ or a more inquisitorial, judge-led inquest.²⁰⁴ Thanks to these two aforementioned models and insights in political ideology, the different roles of counsel and the lawyer’s relationship with the authorities²⁰⁵ can be contextualised as well. The latter can be particularly relevant for this research into the two related main research themes of ineffective legal assistance and its redress in Dutch criminal proceedings.

As a first example, for a determination as to whether there has been ineffective assistance by counsel or not, the lawyer has to violate a legal, deontological or other norm. Such norms are different in more inquisitorial proceedings than they are in adversarial criminal ones. In this respect, the civil law-common law contrast as explained by Damaška is significant for this research which examines the current approach to ineffective legal assistance and its redress in Dutch criminal proceedings in its relevant context.

Prakken has made it most explicit why the question of whether Dutch criminal procedure is more inquisitorial or adversarial is particularly relevant for this study into ineffective legal assistance

¹⁹⁵ E.g. Corstens/Borgers (2014) at 8-12. See also Tulkens (1995) at 9-10 and Brants et al, in: Fennell et al (1995) at 41-56.

¹⁹⁶ Ashworth and Redmayne (2010) at 40.

¹⁹⁷ E.g. Spencer (2002a), in Delmas-Marty and Spencer (2002) at 1-81.

¹⁹⁸ E.g. Damaška (1973) at 506-589.

¹⁹⁹ Damaška (1986) at 1-242, particularly at 3-8 and Damaška (1973) at 506-589.

²⁰⁰ E.g. Spronken (2003) at 9 and De Vocht (2009) at 3-5 and, 99-106, 425-426 and 483-521. For international criminal justice, Temminck Tuinstra (2009) at 7-8 and 132-150.

²⁰¹ Damaška (1986) at 1-242, particularly at 3-8.

²⁰² Damaška (1973) at 506-589.

²⁰³ Hodgson (2008) at 45-59.

²⁰⁴ Clark, in: Barceló and Cramton (1999) at 9-155, particularly at 25-26; Hodgson (2008) at 45-59 and Field and West (2003) at 261-316.

²⁰⁵ Hodgson, in: Grunewald et al (2011) particularly at 411 and 419.

in the criminal proceedings in the Netherlands.²⁰⁶ She submits there have been changes in the nature of Dutch criminal procedure, which “(...) partly are caused by structural factors that changed the culture of policing and prosecution fundamentally, and partly are triggered by the Convention that made the process more adversarial”. In this respect, she argues that “(...) research is required into the means to enforce the defence, which are necessary when the trend towards a more adversarial criminal procedure, accusatorial or not, persists, in order to delineate the preconditions under which the defence is up to its new tasks”.

As such, this research will stand in a tradition, since Dutch scholars have explored the more general topic of defence rights and participation comparatively²⁰⁷ – though not yet on these two specific research topics *per se*.²⁰⁸ However, this does not mean that all Dutch scholars agree with the importance of the inquisitorial-adversarial contrast, of course. For example, a research group which made an analysis of Dutch criminal proceedings – including reform proposals with an effect on defence participation – explicitly did not use the contrast (research project *Strafvordering 2001*).²⁰⁹ It is precisely for this reason that its findings have attracted criticism.²¹⁰ Allegedly the civil law tradition²¹¹ and the relatively long-standing, more inquisitorial, design of the Dutch criminal procedure²¹² had not been sufficiently accounted for.²¹³ Both types of scholarly work will be taken into consideration in the study that will follow in this research.

2.3.2. The effect of the Court’s case law across the civil law-common law divide

Having seen the importance of comparative criminal procedure for this research into ineffective legal assistance in Dutch criminal procedure, another important context-specific factor has to be noted. The Convention, and particularly the case law of the Court on Article 6 (3) (c) of the Convention, has an impact on different criminal proceedings of Member States such as the Netherlands. One of the reasons for this effect across the common law-civil law divide is that the Court adjudicates cases from both civil and common law countries with a correspondingly more inquisitorial or adversarial criminal procedure. For example, the Court has had to deal with the right to legal assistance during police questioning early on in its case law in both common law and civil law countries and appeared not to make a distinction on the basis of an inquisitorial-adversarial contrast in adjudicating this fair trial right (e.g. *Imbrioscia v. Switzerland* and *Murray v. the United Kingdom*).²¹⁴

Perhaps, this research can even go one step further. For comparative criminal procedure in the European countries which are Member States to the Convention, Jackson submits that the Court has rooted its case law in principles from both civil and common law traditions.²¹⁵ The Court has thereby given a vision on defence participation in the decision-making in justice systems, which cuts across the common law-civil law divide, he claims. Jackson puts forward the view that the case law is founded in both common law principles of natural justice and due process and in the continental principle of the “contradictory” proceedings (*la procédure contradictoire*). He argues that the Court has used its principles of “equality of arms” and “adversarial proceedings” as a way of standard setting that can be accommodated in both common law more adversarial *and* civil law more inquisitorial criminal proceedings. Therefore, he concludes that the Court has caused criminal proceedings in Europe to become “re-aligned”. To explain this terminology, Jackson means that the Court causes to form *new* arrangements that give traditionally common law adversarial *and* civil law inquisitorial

²⁰⁶ Prakken (1999) at 27-28.

²⁰⁷ E.g. Spronken (2003) at 9 and De Vocht (2009) at 425-426 and 483-521.

²⁰⁸ E.g. Prakken (1999) at 27-28. See also more indirectly Bal who mostly explains that the Court has not yet done what the United States Supreme Court had established on ineffective legal assistance but without much application to Dutch criminal procedure by Bal, in: Klip et al (2004) at 103-114 particularly at 114. Also relevant are Spronken (2005) at 414-419; Prakken (2005) at 69-70; Brouwer, in: Harteveld et al (2005) at 39-70; Boksem (2009) at 1-19; Franken (2011) at 1109-1117; and Franken (2015), at 1-8.

²⁰⁹ E.g. Groenhuijsen and Knigge (1999) at 1-55 (common part /algemeen deel), particularly at 31.

²¹⁰ Brants et al, in: Brants et al (2003) at 1-136, particularly at 1-27.

²¹¹ E.g. Corstens/Borgers (2014) at 8-9. The discussion is not new, as it was already adopted in the *Memorie van Toelichting* of the *Wetboek van Strafvordering 1926*, *TK 1913-1914*, 258, nr. 3. As a word of caution, the terms inquisitorial and accusatorial adopted therein had a slightly different meaning than their current interpretation.

²¹² The Napoleonic *Code Pénal* was not replaced by the Dutch Criminal Code until 1886.

²¹³ C Brants et al, in: Brants et al (2003) at 1-136, particularly at 1-27, mostly on 6-13.

²¹⁴ See Part III The Convention.

²¹⁵ Jackson (2005) at 737-764 especially at 740.

criminal proceedings a novel *orientation* (re-alignment). He believes the Court does not make these proceedings depart from their original more common point (divergence) or rather bring them more towards this point (convergence). Instead, he submits that the Court sets minimum guarantees regarding a fair trial that cause traditionally common law more adversarial *and* civil law more inquisitorial criminal proceedings to find new solutions to, for example, introduce earlier participation by the defence lawyer (e.g. *John Murray v. the United Kingdom* and *Salduz v. Turkey*). Rather than a trend of either converging or diverging of the “European” more adversarial and inquisitorial proceedings about which the Court rules²¹⁶, this newly emerging orientation moreover has relevance for ineffective legal assistance.²¹⁷ Jackson argues that the Court’s case law has particular impact on defence rights and participation in criminal proceedings.²¹⁸ Therefore, this research will explore this possibility of “re-alignment” because it also examines the compliance of Dutch criminal proceedings on the issue of ineffective legal assistance with the minimum guarantees set by the Court for the right of the accused to an effective defence in a fair trial.

Jackson is not the only scholar who points out that criminal proceedings in Europe are no longer as different as to warrant “only” a description as either more adversarial or more inquisitorial.²¹⁹ Some of these scholars also point out international human rights law as a reason for their re-alignment. For example, a comparative study regarding the combat of fraud, known as *Corpus Juris*, found that changes in national systems had paved the way for mixed procedures where hybridisation could take the best from each system.²²⁰ For instance, this research points out the abolition of the investigating magistrate in a number of European continental systems and the introduction of public prosecutors in England and Wales. Although this study was led by continental scholars, Ashworth and Redmayne from the other side of the civil law-common law divide also come to such conclusions. For example, they observe that if party control is the essence of adversarial criminal proceedings, today’s process in the United Kingdom is not (or is no longer) entirely adversarial.²²¹ For instance, they submit that in this procedure, which is “well-embedded in the common law tradition” and has to abide by the Convention, the defence and the prosecution have deontological duties towards the court which makes the proceedings less party-controlled than often assumed. Also, exclusionary rules limit the ability of the parties to conduct proceedings fully on their own terms.²²² Moreover, the judge in a more adversarial criminal procedure may no longer be as passive at the trial stage as theoretically assumed, due to his role as the gatekeeper for the admissibility of evidence and as ultimate decision-maker when it comes to imposing a sentence.²²³ Furthermore, Spencer and Williams deem that, at present, prosecuting authorities in the United Kingdom have to act as “ministers of justice”.²²⁴ Consequently, the prosecutors cannot proceed to secure convictions at all costs, because they have to present the case fairly in accordance with the accused’s rights. There is also growing awareness in England and Wales of the ability for a judicial review of the decisions and policies concerning criminal prosecutions.²²⁵ For instance, the House of Lords in the case of *R. v. Purdy* identified the need for clearer policy detailing when prosecutions would be brought in the context of assisted suicides.²²⁶ This decision for the courts to “tell” the prosecution when they might bring charges has been viewed as having significant constitutional effects.²²⁷ Thanks to the Human Rights Act of 1998 – the national implementation legislation of the Convention²²⁸ – all authorities are thus compelled to act in accordance with the rights of the accused in the aforementioned ways.

²¹⁶ E.g. for the divergence or convergence thesis, Brants et al, in: Fennell et al (1995) at 41-56 and Bradley (1996) at 471-484.

²¹⁷ See for a different perspective than Jackson’s thesis, Brants (2008) at 231 as opposed to Jackson (2005) at 737-764.

²¹⁸ Jackson (2005) at 737-764.

²¹⁹ E.g. Brants et al, in: Fennell et al (1995) at 41-56 and Bradley (1996) at 471-484.

²²⁰ Delmas-Marty and Vervaele (2000/2001) at 1-28.

²²¹ Ashworth and Redmayne (2010) at 418.

²²² Ashworth and Redmayne (2010) at 418.

²²³ Ashworth and Redmayne (2010) at 418.

²²⁴ E.g. Spencer (2009) at 493-495; Williams (2010) at 181-203.

²²⁵ Spencer (2002b), in: Delmas-Marty and Spencer (2002) at 1-80.

²²⁶ E.g. *R. v. Purdy* [2009] UKHL 45.

²²⁷ Spencer (2009) at 493-495.

²²⁸ Human Rights Act 1998, entry into force on 2 October 2000, available at www.legislation.gov.uk.

Therefore and to conclude on this issue of the contextual study of the two related main research themes, this research will have to take into consideration not only the civil law-common law contrast but also the possibility that the Court has caused a re-alignment²²⁹, rather than divergence or convergence, of more inquisitorial and adversarial criminal proceedings.²³⁰ This possibility would be particularly relevant for this study because it might require Dutch criminal procedure to comply with the Convention on this specific issue of ineffective legal assistance, even if its legal tradition supposedly would find it difficult to accommodate for these obligations.

2.3.3. No assumptions about the divide and implications of ineffective legal assistance

This overview of legal tradition and the impact of the Court's case law should not be misunderstood. This research will not assume that, because counsel is not so much involved in the crucial decisions in more inquisitorial criminal proceedings than adversarial ones, that therefore counsel's ineffective legal assistance therefore has *less* rights implications.²³¹ Likewise, there is no assumption that, in more adversarial proceedings with a passive judge and the defence as a party to the proceedings, ineffective assistance by counsel will be *more* likely to be fatal for the protection of the rights of the accused. Perhaps an accused who is being provided legal protection by an active judge in more inquisitorial proceedings might not face the consequences of ineffective legal assistance. However, a particular appeal procedure might redress ineffective legal assistance better than proceedings in which the judge, in practice, is not as active as he supposed to be when confronted with ineffective legal assistance. Therefore, from the outset of this research, it has to be noted that this study does not make any *assumptions* about the criminal procedural context and the risk associated with ineffective legal assistance. In particular, this research will not assume anything regarding the potential consequences of ineffective legal assistance for the accused's rights in more adversarial versus more inquisitorial criminal proceedings. As stated consistently in the previous sections of this chapter as well as in the introduction to this research, this study will explore most casuistically whether or not the accused has to bear the consequences of ineffective legal assistance in Dutch criminal proceedings, without making any assumptions as to the effects in more inquisitorial or adversarial criminal processes. This final observation regarding these types of assumptions brings us to the penultimate but last substantive section of this chapter regarding relevant cross-cutting notions and perspectives that are almost always out of necessity important for any and therefore also this research into ineffective legal assistance and its redress within (Dutch) criminal proceedings (section 2.4.).

2.4. Relevant cross-cutting notions and perspectives

Several key features that are specific to ineffective legal assistance and its possible redress in Dutch criminal proceedings have already been implied in the preceding sections of this book. For the finalisation of the conceptual framework that will structure this research, three other notions and perspectives that cut across both the relevant rights and context for ineffective legal assistance and its intra-process redress will be made explicit here.

2.4.1. Three universal elements inherent in ineffective legal assistance

Counsel's appropriate role and conduct are governed by domestic norms and are thus context-specific²³², but whenever and wherever ineffective assistance by counsel within criminal proceedings occurs, elements are present that help to structure this study into the main research themes.²³³ These elements are inevitably very basic in nature.²³⁴ Here, they will be called universal elements because they exist out of necessity where ineffective legal assistance within criminal proceedings takes place and are consequently mostly context-unspecific. Despite their basic nature they are nonetheless helpful for the in-depth law and case law analysis that will have to be conducted in order to explore the main research themes: ineffective assistance by counsel and its redress in Dutch criminal proceedings. They

²²⁹ Jackson (2005) at 737-764, at 740 especially. See differently Brants (2008) at 231.

²³⁰ See Spencer and Delmas-Marty, in: Spencer and Delmas-Marty (2002) at 62-65 and Delmas-Marty, in: Jackson et al (2008) at 251-260.

²³¹ See also Ashworth and Redmayne (2010) at 9-16.

²³² See chapters 4, 6, 8 and 10 especially.

²³³ See Raz (2009) at 1-208, particularly at 168-208.

²³⁴ See chapters 4, 6, 8 and 10 especially.

will therefore be used as building blocks for the conceptual framework and ultimately contextualised when answering the central research question.

2.4.1.1. *Conduct of counsel*

For a study into ineffective legal assistance within criminal proceedings, it is important to explore the conduct of the lawyer in any case.²³⁵ Most importantly, for there to be ineffective assistance by counsel, the lawyer's behaviour within criminal proceedings has to constitute a violation of a norm or norms. Such norms can be legal, deontological, or of a different nature.

Such norms are relevant in a positive and negative sense. Positively speaking, norms can indicate what role and conduct can be expected of counsel within criminal proceedings. Negatively speaking, there has to be a *violation* of a norm or norms of a legal, deontological or other nature, for there to be ineffective assistance by counsel within criminal proceedings. Because of the focus of this research on ineffective assistance by counsel within the criminal process in the Netherlands, norm breaches will be emphasised, rather than norm compliance.

In relation to ineffective legal assistance and norm breaches, it is, moreover, noteworthy that it will often *depend* on the specific situation as to whether or not it will be explicable or even "right" for counsel to behave in a way that fails to respect one of the aforementioned norms. For example, a lawyer can refuse a case or resign. If he does so, counsel might live up to a norm rather than violate it, because counsel can consider that the authorities hinder him to such an extent that he cannot ensure that the accused has an effective defence. Moreover, counsel can allow another lawyer to take over the case²³⁶ or withdraw. If he does so, there might be no norm violation in the sense of this research at all, because the authorities can thereupon appoint a lawyer to represent this accused under better conditions. Therefore, this research will have to take into account that what might seem to be a norm breach at face value might not, in fact, constitute ineffective legal assistance within criminal proceedings at all. Rather, it seems, the lawyer instead lives up to what can be expected of professional counsel under the aforementioned specific circumstances.

Depending on whether the right to counsel is construed formally or materially, it may also have to be examined whether or not counsel acted in good faith and sought to provide the accused with an effective defence. If the right to counsel is construed substantively so as to encompass a right to *effective* legal assistance by the lawyer in question, then it may be relevant whether the conduct of counsel was not reasonably done only to frustrate the course or outcome of the proceedings but rather to uphold the rights, wishes and interests of the accused. This does not mean that a court cannot, after all, decide that other interests rather than the right of the accused to an effective defence would prevail in a given case. For example, if authorities can reasonably conclude that the right to a speedy fair trial needed to trump what would be perceived as stalling by the defence, under certain circumstances that can be justified. However, this particular point does not mean that the conduct of counsel cannot be examined in this material sense. Rather, under such circumstances, the authorities judge the conduct of counsel to be stalling for no purpose of a material effective defence.

Therefore, in a specific way to be explained, this research will take into consideration the conduct of counsel within criminal proceeding as a universal element, especially where violating a norm or norms. This particular examination of the conduct of counsel within criminal proceedings will be important, especially to assess ineffective assistance by counsel and its redress within fair Dutch criminal proceedings. Before getting to further explanations as to how this exploration will take place, the next sub-section will address a second universal element first (sub-section 2.4.1.2.).

2.4.1.2. *The assumption that counsel's services benefit the accused*

A second universal element, which appears to exist whenever and wherever ineffective assistance by counsel within criminal proceedings occurs, is the assumption that counsel, rather than harming him, can be trusted to protect the accused in an independent and partisan manner.²³⁷ It seems only

²³⁵ E.g. Hodgson, in: Grunewald (2008) at 45-59; Field and West (2003) at 261-316.

²³⁶ E.g. Hof van Discipline Amsterdam, 11 June 2010, *LJN*: YA0975, No. 5576.

²³⁷ See The Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, in Havana, Cuba, 27 August to 7 September 1990, Resolution 45/121; Code of Conduct for European Lawyers, Council of Bars and Law Societies of Europe, 31 January 2008; Dutch Rules of Conduct for lawyers 1992.

reasonable to believe that, as a starting point, a lawyer can be expected to provide services that benefit the accused, as opposed to causing him damage. Why else would a lawyer work for the defence? This assumption that counsel's services benefit, rather than harm, the accused's rights, wishes and interests, is relevant as a universal element for this research. In other words, the accused will also have to overcome this assumption if ineffective legal assistance within criminal proceedings is to be recognised and redressed.

Although this assumption about the supposed added value of counsel for the accused is only reasonable, in practice of course a lawyer might not always be able to live up to this expectation. Reasons why counsel does not provide the best possible defence to the accused can be manifold. For example, counsel can have a lack of time to properly prepare the case, fail to meet with the accused, or disagree with his client about the best procedural course in the case. These are only a few possibilities of conduct of counsel that can constitute ineffective legal assistance, depending on whether or not the behaviour has violated a relevant norm, as explained in the previous sub-section (see sub-section 2.4.1.1.).

In addition to examples of conduct of counsel that do not correspond with the reasonable assumption that the lawyer benefits the accused, it might also be important if, for example, the lawyer's conduct causes the accused to openly disagree with counsel in court, or to fire his lawyer. Under such circumstances, it will be difficult for the authorities to maintain that the lawyer has indeed lived up to the assumption that the accused agreed to legal assistance that corresponds with his wishes at least in the case in question. There may be situations in which such open contestation between counsel and the accused would not require the authorities to act. However, if those are relevant indications that contradict the assumption that the accused benefits from counsel, it might be reasonable for authorities to not maintain that the accused *agreed* with the legal assistance provided by counsel, at least.

Consequently, this second universal assumption – that counsel in principle does all in his power to have the accused benefit from his services and thus from the best possible defence – will be taken into account during the remainder of this research in the yet explained manner. The assumption can be made in good faith and constitutes a universal element that is relevant to any study into ineffective legal assistance within fair criminal proceedings. It will therefore be taken into consideration in the law and case law analysis that will seek to explore what constitutes ineffective assistance by counsel and its redress within fair criminal proceedings. Before getting to that further exploration, the third and final universal element will be elaborated upon first (sub-section 2.4.1.3.).

2.4.1.3. Potential harm done to the accused

The two previous sub-sections on counsel's conduct and the assumption that a lawyer will benefit, rather than harm, the accused, already implied the last issue of damage by ineffective legal assistance to the accused. That harm can be done to the accused and perhaps, by extension, to the proceedings in their entirety. There therefore appears to be a third and last universal element, because damage to the accused will almost inevitably be topical whenever and wherever ineffective legal assistance will be studied.

With regard to such harm to the accused, it might be unacceptable that some types of damage hurt the accused in such a manner that they require reparation within fair criminal proceedings, whilst lesser forms might not. For instance, it might be reasonable to require redress when counsel's ineffective legal assistance damages rights that are central to a fair trial with truth finding. However, such redress might not be needed when the damage did not negatively affect the course or outcome of the criminal procedure. Naturally, an accused might feel aggrieved if the chosen defence strategy was unsuccessful, for example. Under such circumstances, the accused might of course feel as if his lawyer was to blame. However, as explained above, the conduct of counsel and the above-explained assumption that counsel will benefit the accused have to be taken into account in order for ineffective legal assistance within fair criminal proceedings to be redressed (sub-sections 2.4.1.1. and 2.4.1.2.). Consequently, redress might be required where the harm is not "just" in terms of the defence strategy by counsel but rather to rights that are so personal that the accused – instead of counsel – has an ultimate say about them. If such "personal" rights of the accused end up being harmed, perhaps a trial cannot be fair without redress for the damage done to the accused – depending of course on the circumstances of the case.

This description implies that a distinction will have to be made between the conduct of counsel and the *object* of the damage done. That is, in light of all the facts of the case, the services provided by counsel can potentially fall below an objective standard of professionally competent legal assistance that can reasonably be expected of counsel (incompetency). Such a statement about supposed incompetency of counsel raises several difficulties in and of itself. First, it might be best if others rather than the lawyer do not “second-guess” counsel’s performance and value the professional judgement of counsel in making decisions for the defence strategy, for example. Second, it might be complex to come to such a conclusion during the proceedings, whilst an assessment after ineffective legal assistance within the criminal case might have happened, risks being subject to the distorting effects of hindsight. Perhaps the latter is not an insurmountable issue because the evaluation of the conduct of counsel can be made on the basis of the perspective of the lawyer at the time that he performs. However, that does not mean that these are not examples of difficulties inherent in making the evaluation of whether or not ineffective assistance by counsel within criminal proceedings took place. For that same reason it only seems fair that, if such an assessment is being made, there should be a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance and that counsel has performed services that were part of a sound defence strategy. Consequently, this subject of harm should be seen in conjunction with the aforementioned universal elements of counsel’s conduct and a norm violation (sub-sections 2.4.1.1. and 2.4.1.2.).

This leads to the second issue: the object of the harm done by ineffective assistance by counsel within criminal proceedings. Regardless of the difficulties with the assessment as to whether or not counsel provided ineffective legal assistance to the accused, if the harm to the accused’s rights is “grave” enough it, it might only be fair to provide redress to the accused within criminal proceedings. The damage might be “grave” when the ineffective legal assistance provided by counsel affects the rights of the accused which constitute procedural guarantees that make a criminal procedure fair. In other words, it might not be reasonable to have the complexity of the assessment of whether or not counsel provided his client with ineffective legal assistance stand in the way of repairing damage done to an accused who can reasonably be said to have not had his right to an effective defence protected by counsel at all. Under such circumstances the assumption that counsel’s conduct benefits the accused cannot stand, after all (sub-sections 2.4.1.2.).

This issue is relevant in the context of the following three examples that can illustrate the possible damage ineffective assistance by counsel within criminal proceedings can cause to the accused and, by extension, to the proceedings themselves. A first example is a request for a stay of proceedings. A lawyer can make a professional judgment that new facts have arisen in the case so that he needs more time to prepare an effective defence for the accused. The court can interpret such a request as an attempt by the defence to stall the proceedings. If the latter is the case, two things can happen, both with a different result. First, the court can refer a complaint about the lawyer to a disciplinary court. Under such conditions, the accused will not bear the consequences of his lawyer’s behaviour and will thus not be harmed in terms of his rights. Second, the judge can decline the request by the lawyer in the case against the accused and have the accused bear the consequences of counsel’s conduct. This rejection of a request for a stay might still be repaired in the course of the proceedings, depending on the facts of the case. Therefore, another example will be presented of damage that can usually not be restored as easily as a rejection of a request for a stay by a court.

A lawyer can request to hear a crucial witness for the defence. The court can refuse this request because it interprets it, again, as an attempt of the defence to stall the proceedings. If the court indeed rejects to hear this key witness, it is likely that the harm has an impact on the rights of the accused to confront witnesses, to examine the evidence against him and to present his own evidence in the case against him. This example of damage done to both the accused and his rights can best be seen in the context of a third and final example.

Counsel can be inactive when a key witness could be examined at trial. The court can interpret the lawyer’s passivity as ineffective legal assistance. If the court finds thereupon that it cannot assess whether or not the lawyer lived up to what reasonably can be expected of professional counsel, the lawyer’s inaction can result in damage to the accused in terms of his rights, rather than the defence strategy. By extension, this lack of examination of a key witness might not only cause damage to the accused, but also to a fair trial with truth finding. In other words, if as a consequence of counsel’s passivity the evidence against the accused has not been examined from the defence perspective or

potential evidence in favour of the accused has not come to light, this may also have a bearing on equality of arms and adversariality of the proceedings. In this way both the right to a fair trial and truth finding can be disrespected.

Having seen these three examples that touch upon different types of harm that can result from ineffective assistance by counsel within criminal proceedings, the distinction between the damage and its object can be explained further. A first object of the harm is known as “prejudice”.²³⁸ Prejudice entails that, *but for* counsel’s unprofessional errors, the result of the proceeding would have been different. The standard of proof for prejudice usually is reasonable probability. This means that the assessor of ineffective legal assistance should be able to conclude with reasonable confidence that counsel’s assistance to the accused undermined the result of the proceedings. In other words, it will have to be found that, for instance, if not for counsel’s ineffective legal assistance an acquittal would reasonably have followed, rather than a conviction.

While prejudice requires a consequentialist approach, a second object of the harm done by ineffective legal assistance can also be thought of under an anti-consequentialist approach. The damage done cannot “only” affect the outcome of the proceedings, but also its course. For instance, ineffective legal assistance might result in harm done to the accused’s right to confront witnesses, as shown above in the example of a lawyer who remained passive when that opportunity arose without necessarily damaging the outcome of the proceedings. Under such circumstances, the assessor would not have to judge that but for counsel’s conduct the accused would be acquitted, but that a witness would be heard whose evidence would be important for the guarantee of an effective defence and fair trial. It appears that although an assessment of “prejudice” might already be complex, an anti-consequentialist approach to ineffective legal assistance will raise even more difficulties. Such an anti-consequentialist approach cannot use, as a benchmark, the outcome of the proceedings but would have to determine that, but for counsel’s conduct, an effective defence and fair trial would have required an activity in the course of the proceedings that did not harm the accused’s rights, rather than defence strategy.

Two of the difficulties of an anti-consequentialist approach will be pointed out here. First, if it has to be assessed whether or not ineffective legal assistance has negatively impacted the rights of the accused during the criminal proceedings so that he might not have had a fair trial, the question arises whether the accused’s consent is a relevant factor for that determination.²³⁹ Although it might not always be easy to infer whether or not the accused agreed to his lawyer’s assistance, there might be indications to the contrary when the accused openly disagrees with the substance or strategy of the defence as executed by his lawyer. Moreover, if the lawyer takes, for instance, a significantly different course than the accused’s earlier position displayed pre-trial, there might be reasonable doubt as to the consent of the accused to his lawyer’s conduct.

Second, because of the centrality of the rights of the accused, it might be necessary to distinguish between ineffective legal assistance that harms the defence strategy, on the one hand, from damage to rights that are so “personal” to the accused that only he – and not his lawyer – has a final say about them. After all, if fair trial rights are renounced by counsel on the accused’s behalf this may also have negative impact on the fairness of the proceedings. “Personal” rights are held by the accused alone – and not by his lawyer – for that same reason. Therefore, if ineffective legal assistance amounts to damage to such rights, it may be reasonable to expect that redress will be offered to the accused in fair criminal proceedings. How such redress might be afforded is therefore an important matter for further research that will, amongst other issues, rely on the following two core values which will be explored in the next sub-section (see sub-section 2.4.2.).

2.4.2. Two core values with a bearing on possible redress for ineffective legal assistance

Before discussing two core values that could possibly be relevant in order to indicate an approach to ineffective legal assistance in Dutch criminal proceedings, they will have to be contextualised. For that purpose, the many debates in the Netherlands about the role and conduct expected of counsel will be briefly noted. Essentially, most scholars agree that within criminal proceedings counsel has to protect

²³⁸ E.g. *Artico v. Italy*, Judgment of 13 May 1980, HUDOC no. 6694/74, para. 35.

²³⁹ Franken (2015) at 1-8.

the accused's rights, interests and wishes in a partisan and free manner.²⁴⁰ However, disagreement does arise as to *how* counsel should offer this protection to the accused.

Some scholars complain that counsel fails to take into account "the public interest" where "only" serving the accused's rights, interests and wishes in Dutch criminal procedure.²⁴¹ However, these same scholars neglect to explain what such a public interest entails and do not appear to clarify how counsel should fulfil this "public responsibility".²⁴² Other Dutch jurists argue that counsel who acts as a partisan professional serves the public interest because a lawyer has to act zealously for the accused when confronted by the State with all its powers that tries to hold the accused accountable for criminal behaviour.²⁴³ They see no duty for counsel to abide by an ill-defined "public interest" that does not lie in protecting the express or apparent will of the accused.

This debate can be explored practically by examining *how* counsel, in addition to serving the rights, interests and wishes of the accused, should act in accordance with this aforementioned notion of "public responsibility".²⁴⁴ Those scholars who advocate the public responsibility of counsel highlight the prevention of decelerating, or even of hindering, the criminal procedure and especially its objective of truth finding. However, as Spronken argues, the deceleration and hindrance of the criminal procedure are difficult notions because, depending on one's perspective, a smooth-running criminal procedure does not necessarily equate to a fair one.²⁴⁵ It all comes down to explaining in detail what would amount to counsel's hindrance or deceleration and this is, as many scholars recognise, a complex issue.²⁴⁶ Therefore, it is understandable that many Dutch lawyers subscribe to Simons's contention that an important responsibility of counsel in Dutch criminal proceedings can be related to counsel's task, which he explains as follows:

"The task of the criminal defence lawyer is often misunderstood and many want to see in the lawyer the person who pleads that black is white and avoids that the guilty are punished. For those who have such an opinion, and they are not just a few, it has to be said, and it has to be said with emphasis: Yes, the task of the lawyer is to prove that under what seems black, white might in fact be hidden; the task of the lawyer is to suggest everything that can make his client's innocence probable and to 'soften' his guilt, and this remains as his task even when he himself is convinced that his client should be considered guilty of the offence, because also then the possibility remains that he himself is, as others can be, mistaken, and as long as there is any doubt he should present it to the court for its decision. Raising doubt upon doubt, that is the task of counsel; a judge who has not had to overcome any doubt has decided without sufficient contemplation".²⁴⁷

In essence, the difference of opinions about the role and conduct expected of counsel appears to be displayed when the lawyer makes *extensive* use of the accused's procedural rights.²⁴⁸ This disagreement may not be that surprising because, under such circumstances, the tension is often most visible between on the one hand defence rights and on the other the need to find the truth in an efficient criminal procedure. It is contended here that such debates cannot be solved in the abstract. Therefore, this study, which will also analyse possible redress for ineffective legal assistance in Dutch criminal procedure, will focus on distinguishable core values that underpin possible solutions in the remainder of this section. Admittedly, the points of reference from which these different perspectives depart will be magnified, in order to serve as anchoring points to structure the substantive research into ineffective assistance by counsel and its redress in Dutch criminal proceedings as clearly as possible.

²⁴⁰ Spronken (2001) at 629-660.

²⁴¹ Mols, in: Adriaans (1993) at 11-24, particularly at 16.

²⁴² E.g. Prakken (1999), at 15-25.

²⁴³ E.g. De Roos (1991) at 32: "Because the accused is not a functionary under public law, counsel – whose competences at trial are derived from those of the accused – is not either [translation by the author]".

²⁴⁴ E.g. Loth (2003) at 24-30.

²⁴⁵ Spronken (2001) at 201. See also Verkijk (2011) at 44-58.

²⁴⁶ Seen from a comparative perspective, e.g. Hodgson, in: Grunewald (2008) at 45-59.

²⁴⁷ E.g. Simons, in: Buruma (1999) at 301-319, e.g. The author's translation of p. 311. See also De Roos (1999) at 34-38.

²⁴⁸ E.g. Loth (2003) at 24-30.

2.4.2.1. *Autonomy of the accused*

A first important core value is the autonomy of the accused.²⁴⁹ The central idea underlying this core value is that the accused should be able to defend himself in the way he deems fit, whether he opts for self-representation or assistance by counsel. This notion is connected to the explanation about the accused's *right* to legal assistance, rather than an obligation, as already illustrated by the discussed annotation of Reijntjes (above in sub-section 2.2.1.).²⁵⁰ Another aspect of Reijntjes's case note, as well as other practitioners' perspectives and scholarly opinions about the relevance of the autonomy of the accused for ineffective legal assistance, will be elaborated upon here.

First, Reijntjes argues that even a minor or a person who suffers from a mental illness should be given all options to ensure that he can instigate his own defence.²⁵¹ He submits that every person, including such minors and persons who might not be fully *compos mentis*, has a right to defend themselves – and not to defend themselves at all.²⁵²

Second, Reijntjes takes this reasoning about the autonomy of the accused one step further when the accused might not be capable of organising his own defence, whether by self-representation or legal assistance. Under such circumstances, Reijntjes submits, the accused "(...) should be able to defend his right to defend himself, or not to defend himself against all actors including his own counsel – despite the consequences this might have for the accused".²⁵³ The accused's autonomy should prevail "(e)ven if counsel has another idea about this [the defence] than his client [added by the author]".²⁵⁴

Finally, Reijntjes translates this core value of autonomy of the accused into the following responsibilities of the authorities: "(c)onsequently, the judge, who allows an accused to defend himself on his own, can never be faulted for that decision – even more so he would display a serious shortcoming, if he acted differently".²⁵⁵ Even if "there is a great deal riding on the case", "it must not amount to paternalism – and the relationship between counsel and his client is prohibited terrain for the judge".²⁵⁶ Hence, Reijntjes argues, in summary, that the accused's autonomy is vital – if not absolute in the sense that it should prevail even if the accused would not be capable of making judgments about his defence alone or with counsel.

Reijntjes stretches the core value of autonomy somewhat, because Dutch law lays down mandatory legal assistance for the minors and persons who suffer from a mental illness, whom he believes should be allowed to defend themselves or not at all (above in sub-section 2.3.1.). Therefore, and at odds with Reijntjes' proposal, Dutch law does not construe the autonomy of the accused in relation to his right to defend himself that widely.

However, that does not mean that Reijntjes is incorrect in assuming that the accused and his lawyer have a great deal of freedom as to how to organise the best possible defence. This he implies at least when he designates the relationship between counsel and the accused off limits for the judge.²⁵⁷ The accused and his counsel should be able to discuss the optimal defence without even the threat of State interference with counsel which would breach the freedom of the defence.²⁵⁸ They should also be able to decide, in all freedom, on how to ultimately present the defence case in court. This legal fiction of the unity of the defence also encompasses an assumed agreement between the accused and his lawyer. Therefore, this common interpretation of the autonomy of the accused as a core value has an impact on possible interventions by the authorities, which are confronted with ineffective legal assistance. AG Jörg explains that effect with a reference to the yet cited work of Spronken²⁵⁹:

²⁴⁹ See particularly the annotation of Reijntjes to the Hoge Raad's case of HR 22 April 2008, ECLI:NL:HR:2008:BC6813, *NJ* 2008, 387, in which he explicitly argues, as a response to the advice given by AG Knigge, that if an accused clearly indicates that he wants to opt for self-representation, the trial judge will have to accept it.

²⁵⁰ Reijntjes's annotation to the Hoge Raad's case of HR 22 April 2008, ECLI:NL:HR:2008:BC6813, *NJ* 2008, 387.

²⁵¹ Reijntjes's annotation to the Hoge Raad's case of HR 22 April 2008, ECLI:NL:HR:2008:BC6813, *NJ* 2008, 387.

²⁵² Reijntjes's annotation to the Hoge Raad's case of HR 22 April 2008, ECLI:NL:HR:2008:BC6813, *NJ* 2008, 387, para. 1.

²⁵³ Reijntjes's annotation to the Hoge Raad's case of HR 22 April 2008, ECLI:NL:HR:2008:BC6813, *NJ* 2008, 387, para. 3.

²⁵⁴ Reijntjes's annotation to the Hoge Raad's case of HR 22 April 2008, ECLI:NL:HR:2008:BC6813, *NJ* 2008, 387, para. 3.

²⁵⁵ Reijntjes's annotation to the Hoge Raad's case of HR 22 April 2008, ECLI:NL:HR:2008:BC6813, *NJ* 2008, 387, para. 1.

²⁵⁶ Reijntjes's annotation to the Hoge Raad's case of HR 22 April 2008, ECLI:NL:HR:2008:BC6813, *NJ* 2008, 387, para. 3.

²⁵⁷ Prakken and Spronken, in: Prakken and Spronken (2009) at 15.

²⁵⁸ Prakken and Spronken, in: Prakken and Spronken (2009) at 15.

²⁵⁹ Spronken (2001) at 447-449 and 463-469.

“(…) potential shortcomings in the assistance by counsel should in principle come at the procedural risk of the accused.(5) This will only be different in exceptional circumstances. (...) For it to be an exceptional case, there has to be blatant inadequacy of counsel.(6) (...) There was no such blatant inadequacy of counsel in this case (...).”²⁶⁰

Under this approach, ultimate safeguards for an accused have been adopted.²⁶¹ Spronken argues that respect for the autonomy of the accused means that the authorities “only” have to intervene in the case when the lawyer is completely absent or does practically nothing at all for the accused.²⁶² It remains to be seen whether AG Jörg agrees that “blatant inadequacy of counsel” is indeed as strictly construed as proposed by Spronken (see further in sub-section 2.4.2.3.). However, at this stage of the research it is important to stress the significance of this core value of the autonomy of the accused because of its importance for the phenomenon of ineffective legal assistance within the criminal process in the Netherlands. For the sake of easy reference, an approach to ineffective legal assistance and its redress in Dutch criminal procedure that centralises the autonomy of the accused will be referred to here as “liberal”.²⁶³

2.4.2.2. *Intervention in the case because of a lacking “effective defence”*

Another core value of an intervention in the case can be inferred at least from case law about ineffective defence by self-representation²⁶⁴, though it will have to remain to be seen in this study whether this perspective is also used in cases regarding a possible ineffective defence by equally ineffective assistance by counsel. There is some indication as to AGs using this reasoning. For example, AGs Knigge and Silvis argue in two separate cases, such an intervention in the case, is legitimised because of the protection of “(...) the right of the accused to an effective defence”.²⁶⁵

To highlight the advice by the last mentioned AG, AG Silvis had to advise the Hoge Raad in a case in which the accused argued that he decided to waive his right to counsel despite earlier having had assistance by counsel.²⁶⁶ According to the accused, his lawyer had advised him that her presence as counsel allegedly would harm his case. As one of the considerations, the AG stressed that “(...) the earlier appeal sessions did not demonstrate that the accused has had *an effective defence*”²⁶⁷ apparently by the lawyers who had represented the accused during those instances, because the facts of the case according to the AG did “(...) not indicate *the assistance of a well-prepared, involved lawyer* [Italics by the author]”. In other words, the AG appears to advise that the Hoge Raad should quash the case because the accused had not had “an effective defence” due to the conduct of his lawyers. The Hoge Raad overturned the appeal court’s decision, but on the basis of another ground. The AG also mentioned this other ground, i.e. that the court had not checked with reasons in its verdict whether the accused had waived his right to counsel up to the standard of “unequivocally, certainly and voluntarily”.²⁶⁸

²⁶⁰ AG Jörg, ECLI:NL:PHR:2004:AO6270, as an advice to the Hoge Raad’s case of HR 23 March 2004, ECLI:NL:HR:2004:AO6270, para 10. He refers in para. 5 to the case of HR 26 May 1998, ECLI:NL:HR:1998:ZD1048, *NJ* 1998, 677 and under para. 6 to Spronken (2001) at 447-449 and 463-469.

²⁶¹ Spronken (2001) at 464.

²⁶² Prakken and Spronken, in: Prakken and Spronken (2009) at 15.

²⁶³ Spronken (2001) at 629-636 and Prakken and Spronken, in: Prakken and Spronken (2009) at 8-9.

²⁶⁴ E.g. AG Knigge, ECLI:NL:PHR:2008:BC6813, as an advice to the Hoge Raad’s case of HR 22 April 2008, ECLI:NL:HR:2008:BC6813, *NJ* 2008, 387 who finds the decision of the court to continue with the case without reasoning “not incomprehensible”, unlike the annotator Reijntjes who submitted that if the accused clearly indicates that he wants to defend himself, the judge should accept it. For a similar position as AG Knigge, see AG Silvis who advised the Hoge Raad in HR 20 December 2011, ECLI:NL:PHR:2011:BT6406 to quash the case on a similar ground of a lack of an intervention in the case in order to protect the right of the accused to an effective defence. The Hoge Raad followed the advice of AG Silvis, but without his references to the right to an effective defence (see r.o. 3.5.).

²⁶⁵ Their position can be distinguished from Reijntjes position not only in his annotation to the case in which Knigge was AG, but also in Reijntjes (2008a) at 404 and (2008b) at 547, and his annotation to the Hoge Raad’s case of HR 22 April 2008, ECLI:NL:HR:2008:BC6813, *NJ* 2008, 387.

²⁶⁶ HR 20 December 2011, ECLI:NL:PHR:2011:BT6406, *NJB* 2012, 201.

²⁶⁷ Equally, AG Silvis, Conclusion, HR 20 December 2011, ECLI:NL:PHR:2011:BT6406, para. 5 quoting *Hoogerheide*’s r.o. 3.4.

²⁶⁸ HR 20 December 2011, ECLI:NL:PHR:2011:BT6406, *NJB* 2012, 201.

Reasoned *in extremo*, there is a difficulty with this concept of “an effective defence”, if it is to be construed in an objectified manner, rather than in relation to the subjective position of the accused as manifested in his rights, interests and wishes. In other words, the “effectiveness” of the defence can possibly be measured only in terms of its contribution to an error-free process or accurate outcome. *If* it is indeed construed as “only” a defence that needs to be effective out of the guarantee for an accurate outcome – rather than seen as a right in its own terms – this intervention by the authorities in the case might then be viewed as adopting an approach to an ineffective defence that embraces a consequentialist perspective (see sub-section 2.2.3.3.). In other words, under such conditions, the effectiveness of the defence becomes dependent on its potential to have ensured what supposedly is the correct outcome of the proceedings.

However, there is an alternative to an anti-consequentialist perspective that seeks, as far as possible, to determine the notion of an effective defence independently from the accurate outcome of the proceedings, and as a fair trial right instead. Under such circumstances, even if the outcome of the proceedings seem to be reasonable, an issue with fair trial can still arise. Decoupled from its impact on the outcome of the proceedings, that notion of an effective defence is then seen in the light of its potential for the accused to be heard and followed – and effectively participate in the proceedings. That latter approach appears to be the one that AG Silvis brings forward when he hinted at the ineffectiveness of the lawyers who represented the accused who thereupon sought to represent himself.

Arguably, this notion of an effective defence can be applied to ineffective legal assistance and considered *in extremo*. However, where reasoned most extensively, at worst, an approach of intervention in the case based on protecting the right of the accused to an effective defence might justify an interference in the lawyer-client relationship, whenever the authorities deem it necessary for the aspired *outcome* of the procedure. After all, even if the accused does not wish his defence by counsel to be any different, the authorities might be allowed to guarantee “an effective defence” if argued in its most extreme form. This might entail the paternalism to which Reijntjes referred to above (see sub-section 2.4.2.1.).

This core value – an intervention in the case to guarantee “an effective defence”, whether or not it is instrumental to an error-free process or accurate outcome – will have to be returned to below (in sub-section 2.4.2.3.). However, at this point in the research it is important to stress the significance of it, because of its implications for ineffective legal assistance and its redress in Dutch criminal procedure. For the sake of easy reference, such an approach will be referred to as “social” – as opposed to “liberal”, which was used in the context of the core value of autonomy of the accused.

2.4.2.3. *Third way and definitional distinctions*

Some questions regarding the two core values underlying ineffective legal assistance and its redress within the criminal process in the Netherlands have already been emphasised or even been answered, but several other important questions remain. This sub-section seeks to point out such questions because they are relevant for this entire research.

With regard to the first core value of autonomy of the accused, it is hard to believe that the accused is afforded a fair trial if he is “only” offered protection by the authorities if the lawyer is absent or does practically nothing for the accused. That appears to be a very low standard expected of counsel – to be present and do more than practically nothing for his client. Moreover, such a low bar might also cause difficulties with the fairness of the proceedings and truth finding. The difficulties of fairness might be more apparent, but the influence on truth finding might be less self-evident. Therefore, to explain the impact on truth finding, it is important to make explicit again that truth finding will often benefit, depending of the specific facts and circumstances of the case of course, from dialectics so that both the perspective of the prosecution and the defence should be brought forward and weighed. Usually, it will be important for the court to not only hear the one perspective of the prosecution but to also hear the possibly quite different view from the defence. Returning to the aforementioned very low standard, it is important to realise that adversariality will not happen best if counsel can merely be present and only has to do more than practically nothing. If reasoned *in extremo*, it seems difficult to understand that the accused can fairly bear the consequences of any other conduct of counsel except his absence or almost full lack of legal assistance. While perhaps it is only fair to assume that counsel benefits the accused, there might be some instances of (negative) conduct

of counsel that do not amount to full absenteeism or unwillingness to act that nonetheless raise issues with a fair trial.

Turning to the second core value of an intervention out of protection of an effective defence, it appears inexplicable that authorities can ensure this “right” of the accused by, at worst, legitimately going against the subjective position of the accused, determined by his rights, interests and wishes. It is difficult to believe that the defence can only be measured in objective terms without taking into account that the core value of the autonomy of the accused might be important as well for a defence by counsel to be actually “effective”. While it is fair to assume that, in principle, the accused will agree with counsel as to what constitutes an effective defence, there could be situations in which counsel is not fully absent or inactive, but nonetheless the accused does not believe that his rights, wishes and interests have been respected in the best possible manner. Of course, not all the grievances of an accused, who in hindsight might have wanted his lawyer to have pursued another strategy, should require authorities to intervene in the case. However, there may be situations under which the lawyer could have reasonably been expected to bring forward the rights, wishes and interests and did not do so.

Therefore, it may be wondered whether an approach that adequately offers redress for ineffective assistance by counsel in Dutch criminal procedure will have to reconcile both core values of the autonomy of the accused and an intervention in the case out of a subjective effective defence. Perhaps such an approach can prevent the two extreme forms and the undesirable consequences of these liberal and social approaches. In other words, it might require more from counsel than “only” being present and doing more than practically nothing at all (sub-section 2.4.2.2.). It might also call on the authorities not to go against the rights, interests and wishes of the accused when they are to intervene in the case out of protection of an effective defence (sub-section 2.4.2.3.).²⁶⁹

This possible solution to the two extreme forms of the two core values, which can be found if they are being reconciled, will for the sake of easy reference be coined the “third” way. This “third” way will have to be revisited in the remainder of this book (particularly in Part VI: Conclusion and Recommendations). At this stage of the research, a clarification on some of the terminology used in that “third” way is needed.

This section has referred to the two aforementioned core values of the autonomy of the accused and an intervention in the case out of a subjective effective defence; but it has not yet mentioned State *interference* with counsel (see above in sub-section 2.3.2.). While it might be tempting to equate an intervention in the case with State interference with counsel, it is questionable whether these two notions are not distinct. For example, can an invasion by the authorities into the lawyer-client relationship in legal practice or by statute (interference) not be seen as separate from an activity by a court that intervenes in the case where it seeks to protect the accused from damage against his rights (intervention)? For example, while the first issue of interference might be related to the negative obligation of the authorities not to drive a wedge between counsel and the accused, a positive duty of the authorities to intervene in the case could be their positive obligation to assist the accused’s who receives ineffective legal assistance.

Before turning to Dutch criminal proceedings, it helps to demonstrate here that the Court does appear to make such a distinction between a negative (interference) and positive (intervention) obligation. For example, in the case of *Apostu v. Romania*, the Court concludes that it has “(...) already held that an *interference* with the lawyer-client privilege and, thus, with a detainee’s right to defence, does not necessarily require actual interception or eavesdropping to have taken place. A genuine belief, held on reasonable grounds, that their discussion was being listened to might be sufficient, in the Court’s view, to limit the effectiveness of the assistance which the lawyer could provide. Such a belief would inevitably inhibit a free discussion between lawyer and client and hamper the detained person’s right effectively to challenge the lawfulness of his detention [emphasis added by the author].”²⁷⁰ In the yet mentioned *Artico*-case, the Court explains an intervention as follows: “(...) within the ambit of criminal proceedings, the competent national authorities are required under Article 6 to *intervene* only if a failure by counsel to provide effective legal assistance is manifest or

²⁶⁹ See for an unassisted accused who conducted a defence that was “painful” and “unwielding” as described in Franken (2008) at 569-570.

²⁷⁰ *Apostu v. Romania*, Judgment of 3 February 2013, HUDOC no. 22765/12, para. 98

sufficiently brought to their attention in some other way [emphasis added by the author]”. Seeing the Court uses different terminology, this section will further address this distinction between the notions of State interference with counsel and an intervention by the authorities in the case which are confronted with a lack of “an effective defence”. The Court thus appears to relate an interference to the negative obligation of the authorities not to drive a wedge between counsel and the accused and an intervention to a positive obligation of the authorities to redress the harm of an assisted accused who receives ineffective legal assistance.

Possible examples of the negative obligation (interference) are that the authorities place an informant in a conference between the accused and his lawyer and thereby gain some advantage, such as confidential information. After such “meddling” in the privileged relationship between the accused and his lawyer by the authorities, it will be safe to assume its adverse impact on the ability of the lawyer to conduct the defence in full, as opposed to effectively or not. Given that such abuse of process almost inevitably *interferes* with the rights of the accused, it will here be labelled a State interference with counsel, rather than an intervention in the case by the authorities which are confronted with a lacking effective defence.

Potential examples of the positive obligation (intervention) might rely on the two aforementioned conditions noted by the Court: manifestly ineffective legal assistance or an accused who has brought his difficulties with his lawyer to the attention of the domestic courts. This choice of terminology, which on these distinct terms separates State interference with counsel from an intervention in the case by the authorities which are confronted with ineffective legal assistance, stems from the following idea. After such an invasion in the lawyer-client relationship, even the most competent counsel would not reasonably be able to provide the accused with an effective defence. In other words, under such circumstances an instance *per se* of ineffective legal assistance will usually have to be concluded. Meanwhile, an intervention in the case by authorities which are confronted with ineffective legal assistance seeks to remedy the difficulties with which the accused might be confronted due to a lacking effective defence. In summary, State interference is a negative obligation not to hinder the right of the accused to effective legal assistance while State intervention is a positive obligation to protect the right of the accused to effective legal assistance where counsel does not ensure the accused an effective defence.

This qualification of State interference with counsel goes to show that it will be unnecessary to assess counsel’s subsequent performance as to its effectiveness or lack thereof. State interference with counsel is a broad concept, which can encompass different types of restrictions upon counsel’s assistance, defective appointment and a State invasion in the lawyer-client relationship. Its relevance lies in the consequence of an instance of ineffective legal assistance *per se*. The same accounts for a State interference in the case that is caused by statute, rather than legal practice. For example, when the State enacts laws or other binding rules on criminal defence lawyers that institute a system for their supervision, State interference by statute, rather than a court ruling, can arise.²⁷¹ Of course, not all types of supervision of the court of counsel’s performance necessarily fall in the rubric of State interference. Arguably, the fact that there are State rules governing how counsel must behave in criminal cases already means that there is a certain degree of interference. Such statutes certainly have the potential to impact on the freedom of both the accused and the lawyer to jointly determine how the best possible defence is safeguarded within criminal proceedings. However, such a statute will only be found here to amount to State interference if it encroaches from control of the integrity of counsel into their quality of performance within criminal proceedings.

In this regard, a further point in relation to State interference per statute and ineffective legal assistance *per se* has to be made. Admittedly, it is often complex to separate supervision of criminal defence lawyers’ integrity from the quality of their services to the accused within criminal proceedings. Such a distinction can hardly be made because of the degree to which integrity determines the quality of a lawyer’s legal assistance to the accused. Therefore, because of the focus of this research on ineffective legal assistance and its redress *in Dutch* criminal proceedings, only contextual factors with a direct bearing on that phenomenon are taken into consideration in this study.

²⁷¹ E.g. Consultation document regarding amendments to several laws including a system of supervision for lawyers (in Dutch: Consultatiedocument July 2011, Aanpassing van de Advocatenwet, de Wet op de rechtsbijstand en de Wet tarieven in burgerlijke zaken in verband met de positie van de advocatuur in de rechtsorde and Toelichting algemeen). See further chapter 4.

As a final note on the distinction between State interference with counsel and intervention in the case, it is important to state at this stage of the research that it becomes more complex to separate the two aforementioned notions when interventions become more proactive. In other words, it will depend on the facts of the case whether a court's decision to stay the proceedings so that the accused and his lawyer can confer about the case – or a remark by the judge that the accused should consult his lawyer – is an intervention in the case rather than a State interference.²⁷² Nonetheless, the aforementioned examples indicate why it is important to separate, in the research's analysis, interferences from interventions in the case. This distinction helps to demonstrate, moreover, how important it is that the authorities intervene in the case without *harming* the independence of the Bar from the State and the freedom of the defence.²⁷³ After all, the latter amounts to State interference, rather than an intervention in the case.

Against this backdrop, a “third” way that reconciles the two core values of autonomy of the accused and an intervention in the case out of protection of an effective defence can be revisited (see sub-sections 2.4.2.1. and 2.4.2.2.). It is important to note that Jackson refers to both notions that have been identified as core values in Dutch criminal proceedings, which might have a bearing on possible redress for ineffective legal assistance in the context of a fair and Convention-conforming criminal procedure.²⁷⁴

Jackson argues that fair trial standards are commonly portrayed as a set of minimum coherent standards that are applicable across a range of different legal traditions. However, like domestic criminal law and case law regulations, they possess an inherent tension. This tension exists between standards that accentuate the importance of the autonomy of the accused on the one hand, and, on the other, an accurate outcome through an effective defence.

His thesis is that the Court has “managed” this tension by giving more weight to the right to legal assistance under Article 6 (3) (c). To explain further, he submits that the Court requires that Member States ensure the right to assistance by counsel at more – and earlier – stages of the criminal procedure. Thereby, he submits, the Court addresses the tension between autonomy of the accused and an intervention to ensure an effective defence.

Although the right to counsel has been given more prominence by this, Jackson also explains how more assistance by counsel does not necessarily amount to an effective defence being provided by that lawyer. Rather, he finds there to be numerous developments in criminal proceedings that lead him instead to believe that a growing number of cases are being decided without an effective defence in the United Kingdom, at least. Both his remarks about the Convention and the issues with this particular domestic criminal process provide inspiration for this research.

As a final remark on this issue, it will be important to determine in this research whether Jackson is correct to assert that the Court has “managed” this tension in this way because of the use of the two notions of autonomy of the accused and an intervention in the case out of protection of the right to a fair trial. Moreover, his observations will also inspire developments that are worth examining with regard to Dutch criminal proceedings, in order to determine whether there are comparable trends in the Netherlands that may lead to a growing number of cases being decided without an effective defence by counsel.²⁷⁵ Therefore, both issues will have to be revisited in the remainder of this study, but not before the last aspect of the relevant perspectives for this research has been elaborated upon.

2.4.3. Four perspectives that are relevant for ineffective legal assistance

The cited Dutch scholarly work of Spronken, which has mentioned ineffective legal assistance as an issue that arose when studying the positive norms regulating counsel's conduct in Dutch criminal proceedings, has studied the phenomenon from a perspective that highlights a potential obligation on the authorities to intervene in the case.²⁷⁶ Moreover, this research has connected the possible role of the authorities to the importance of the independence of the Bar from the State and the principle of the

²⁷² E.g. Spronken (2001) at 464 and Prakken and Spronken, in: Prakken and Spronken (2009) at 15.

²⁷³ Spronken (2001) at 464.

²⁷⁴ Jackson (2009) at 1-18.

²⁷⁵ Jackson (2009) at 1-18.

²⁷⁶ Spronken (2001) at 464; Prakken and Spronken, in: Prakken and Spronken (2009) at 15; and Franken, in: Jordaans (2005) at 161-169, particularly at 168.

freedom of the defence.²⁷⁷ However, it should be made explicit that, for an understanding of the scope and content of the potential obligations of the authorities to intervene in the case, four issues cannot be overlooked.

First, a study into ineffective legal assistance has to determine, before addressing a potential obligation of authorities when confronted with ineffective legal assistance, what preconditions have to be ensured so that the accused can, in principle, be guaranteed an effective defence by means of legal assistance. Although the conditions for self-representation are important for an effective defence as well, the focus of this research requires an emphasis on the right to counsel and, if found relevant, the right to *effective* legal assistance. This perspective explores in particular the obligations of the authorities because it is mostly the State that determines by statute or case law when a lawyer is permitted to play a role. Counsel cannot make all the preconditions for his performance, because the lawyer will, for instance, depend on State law or court rulings to be allowed to be present during investigative acts during the pre-trial phase. This particular research topic, therefore, requires an examination of the obligations of the authorities towards the accused regarding the preconditions for an effective defence and, in particular, the procedural moments at which the right to legal assistance can be effectuated, before the issue of ineffective legal assistance can be examined.

A second important topic is what responsibilities counsel has towards the accused, who he has to provide with an effective defence. This topic has to be addressed before this study can turn to whether the authorities, when confronted with ineffective legal assistance, have to intervene in the case. Although the lawyer relies to some extent on the preconditions for an effective defence set by the authorities, it is only reasonable that counsel has to live up to standards of reasonable performance under the accused's right to an effective defence. After all, counsel has the legal training, expertise and skills to assist the accused. For this issue to be studied in detail, the lawyer-client relationship has to be examined, which in the words of Spronken requires a horizontal perspective to the right to an effective defence by means of legal assistance.

Thirdly, as explained with the above distinction between State interference and intervention, it is also important to assess what actions or omissions of the authorities with counsel make it reasonably impossible to provide proper services so that it constitutes ineffective legal assistance *per se*. Under such circumstances, it does not even have to be assessed whether subsequent services by counsel were effective. After all, as its wording implies, ineffective legal assistance *per se* inevitably amounts to a violation of the right to a fair trial. This particular topic can be explored with what will then be a – second – vertical perspective because it focuses on the relationship between the authorities and the accused.

Fourth and finally – and only after these three aforementioned components of an effective defence have been studied by taking the three above-noted perspectives – it is alternately possible to determine whether the authorities, when confronted with ineffective legal assistance, have (further) obligations to intervene in the case. Ultimately, if the authorities have such obligations to begin with, then it can also be determined what means should be employed to protect the effective defence of the accused. This issue concerning potential obligations of the authorities to intervene in the case when confronted with ineffective legal assistance – which is the main topic of this book – requires a third vertical perspective because it focuses on the obligations owed by the authorities towards the accused.

The reason all these perspectives have been separated is because it appears very difficult to examine this multi-faceted topic of ineffective legal assistance if no analytical tool for the exploration of its distinct four components is being used. All four perspectives have to be taken into account in order to get to grips with these four different elements of the multi-layered research theme of ineffective legal assistance in Dutch criminal proceedings which, moreover, have to conform to the Convention.²⁷⁸ Therefore, four different perspectives will be taken in turn so as to intentionally examine these four components separately and structure the respective sets of substantive research chapters of this book accordingly.

²⁷⁷ Spronken (2001) at 464.

²⁷⁸ Wittgenstein (2009) at 205, para. 125. containing the original texts and an English translation. Although the image is commonly known as the duck-rabbit figure, Wittgenstein calls it the duck-hare figure.

2.4.3.1. A vertical perspective, right to counsel

With an emphasis on the vertical relationship between the State and the accused, the preconditions for an effective defence that the authorities have to guarantee to the accused will be studied. Given that this research does not focus on the right to adequate self-representation, most attention will be paid to the criminal procedural stages or junctions at which the accused is entitled to the right to counsel. Moreover, it will have to be determined when the authorities have to go one step further by appointing legal aid counsel rather than allowing the accused to retain a lawyer. Therefore, from a vertical perspective, the obligations of the authorities towards the accused will be described in order to establish preconditions for an effective defence so that, in principle, the accused can benefit from an effective defence by equally effective assistance by counsel. Whether or not the accused will indeed receive an effective defence through corresponding effective legal assistance is another matter, and a question which cannot be answered by this first vertical perspective. For this same reason it is important to shift the attention of this research to the second, relevant perspective, which will be explained in the following sub-section.

2.4.3.2. A horizontal perspective, lawyer-client relationship

A shift will have to be made from the first vertical perspective to the horizontal view that explores the relationship between the lawyer and the accused, so that possible responsibilities owed by counsel to the accused in the lawyer-client relationship can be explored. Seeing that this research tackles ineffective legal assistance, it is also important to examine what can reasonably be expected of counsel in the positive sense, knowing of course that counsel is bound by the law and deontological norms. Whether or not all of the responsibilities to ensure this right to the accused lie with the lawyer, or whether perhaps the authorities might also bear some of that onus (as submitted by Trechsel and Harris, O'Boyle and Warbrick) are matters that cannot be studied from this horizontal perspective regarding the obligations from counsel towards the accused. Therefore, this research will have to take yet another perspective to address the last two important facets of the multi-layered phenomenon of ineffective legal assistance, which will be described in the next two sub-sections.

2.4.3.3. A second vertical perspective, State interference with counsel

A shift will have to be made, again, from the horizontal perspective toward a second vertical perspective in order to determine what conduct by the authorities amount to State interference with counsel. This topic of State interference with counsel, a negative obligation resting on the authorities not to hinder an effective defence, is relevant for this research into ineffective legal assistance in Dutch criminal proceedings which have to abide by the Convention because they can amount to ineffective legal assistance *per se*. This means that it does not even have to be assessed whether subsequent services by counsel were effective, because, as its wording alludes to, ineffective legal assistance *per se* inevitably amounts to a violation of the right to a fair trial. This topic, however, does not yet explain the most important component of this research regarding redress for ineffective legal assistance in Dutch criminal proceedings that conform to the Convention. One last perspective therefore remains, as will be explained below in the last sub-section on the four relevant perspectives for this study.

2.4.3.4. A third vertical perspective, State intervention in the case

Finally, and after having taken all three aforementioned perspectives in turn, the last important aspect of this research will be dealt with: do the authorities, which are confronted with an alleged ineffective legal assistance, owe (another) obligation towards the accused to intervene in the case? If the authorities have such an obligation to intervene in the case, it will also be explored what means authorities can use in fair criminal proceedings. From what will then be a third vertical perspective to the accused's effective defence, it will be further studied whether these extra intervention obligations of the authorities towards the accused whose effective defence through corresponding legal assistance might perhaps be worth protecting by requiring such activity from the State under its responsibility to ensure a fair trial. Rather than a negative obligation not to hinder an effective defence, this last element might comprise a positive obligation to protect the right to an effective defence where counsel does not protect it. As shown above, all four perspectives (especially this last one that can build on the three earlier views) provide the requisite building blocks to ultimately answer the central research question. Given that this question can only be answered if all topics mentioned in this chapter on the conceptual

framework are taken into account, the next section will compose a structure for the following in-depth study on the basis of the aforementioned relevant rights (section 2.2.), context (2.3.) and cross-cutting notions and perspectives (section 2.4.) of which this sub-section was the last (sub-section 2.4.3.).

2.5. Concluding remarks

This chapter has indicated three non-exhaustive themes that help to determine how best to proceed with this research into ineffective legal assistance and its redress in Dutch criminal proceedings. In this final section on concluding remarks, these preceding sub-sections will be combined in order to create a conceptual framework that will help guide the entire research.

A first building block for the conceptual framework is the theme of relevant *rights*. The reason for this emphasis on relevant rights is that, even if Dutch criminal proceedings do not require that the accused has been afforded a right to *effective* legal assistance, if the Convention does entail this right, it is directly binding. The overview presented above indicated how Spronken argues that Article 6 (3) (c) does not entail such a right and gave an impression of the impact of her thinking on Dutch practitioners and other scholars (see sub-section 2.2.3.). However, it has also been demonstrated how other scholars such as Trechsel and other Convention handbook authors do find a right to *effective* legal assistance under Article 6 (3) (c). Consequently, the conceptual framework for this research will need to have a particular focus on what the *Court* determines about this Convention right.

A second component for the conceptual framework is the relevant *context*. This context can be explored thanks to the contrast between more inquisitorial and adversarial criminal proceedings. That contrast is not just significant for the description and analysis of current Dutch criminal proceedings, because of the inherent connection between the position of the defence and the overall criminal procedural design. It is also helpful for the analysis of the impact of the case law of the Court on Dutch criminal proceedings, because of the case law that regards cases from both contexts. This contrast should not be misunderstood as if this study *assumes* that ineffective legal assistance can have more consequences for the rights of the accused in more adversarial, rather than more inquisitorial, criminal proceedings. Rather, the contrast provides a means to explore *what* impact ineffective legal assistance has for the accused and, by extension, the criminal proceedings in their entirety. This last point is also relevant for the second aspect of the conceptual framework.

The two building blocks of relevant rights and context are mutually reinforcing. This research will have to pay attention to the relevant rights with a view to the contrast between more inquisitorial and adversarial criminal proceedings. The Convention outlines benchmarks that assist in the evaluation of compliance of Dutch criminal procedure with the minimum guarantees regarding, if it exists, the right to effective legal assistance. Several scholars allege that, under the influence of the Convention, Dutch criminal proceedings have at least partly become more adversarial and thereby somewhat altered from their more inquisitorial origins. This last aspect will also have to be examined in this study.

A third and final set of building blocks for the conceptual framework consists of the relevant *cross-cutting notions and perspectives* for ineffective legal assistance and its redress in Dutch criminal proceedings. In summary, this last category encompasses relevant universal elements, core values and perspectives. Accordingly, the conceptual framework will have to take into consideration the three identified universal elements of conduct of counsel, the assumption that counsel's services benefit the accused and the potential harm of ineffective assistance by counsel to the accused's rights. Additionally, the framework can benefit from the as yet presented insights into the two core values: the autonomy of the accused and an intervention in the case out of protection of an effective defence. Third and finally, this research can only be done optimally by taking four separate perspectives that distinguish between the different aspects of this multi-faceted research theme of ineffective legal assistance and its possible redress in Dutch criminal proceedings.

All themes of the relevant rights and context as well as the cross-cutting notions and perspectives, are relevant for the conceptual framework of this entire research. In summary, the conceptual framework is based on the insights from this chapter, which have been translated into four sub-questions. Each substantive research chapter sets out to answer one such sub-question. The questions are the same for the Convention and Dutch criminal proceedings and guide the separate four parts under which the substantive research chapters will be grouped. The reason for this structure is

that it will allow for comparisons between the benchmarks of the Convention in relation to the findings about Dutch criminal proceedings. The four leading sub-questions per chapter are:

Under the Convention or in Dutch criminal proceedings respectively:

- (i) What obligations do the authorities owe to the accused regarding his right to counsel? (Vertical perspective 1; Part III)?
- (ii) What, if any, responsibilities does counsel owe to the accused? (Horizontal perspective; Part IV)?
- (iii) What obligations do the authorities owe to the accused so that they do not hinder an effective defence by interfering with counsel (Vertical perspective 2; Part V)?
- (iv) What obligations do the authorities owe to the accused when confronted with ineffective legal assistance so that they protect his right to an effective defence and by what means of redress within criminal proceedings (Vertical perspective 3; Part VI)?

In accordance with this conceptual framework, answers will be sought to these leading questions per substantive research chapter in relation to the Convention and Dutch criminal proceedings respectively. In each substantive research Part, the chapters on the Convention and Dutch criminal procedure will be mirrored in as far as possible because that will facilitate a comparison between them. Thanks to that comparison – which will follow in the final chapter – an answer can and will be ultimately provided to the evaluative central research question (chapter 13). That chapter seeks to explore normatively whether the current approach to ineffective assistance by counsel in Dutch criminal procedure complies with the minimum guarantees set by the Court for the right of the accused to an effective defence in a fair trial.

Before the substantive research chapters will be presented, Part II will follow with introductions into both Dutch criminal proceedings and the Convention. These chapters are most useful for readers who are unfamiliar with Dutch criminal proceedings and/or with methodological factors that impact the extent to which the Court's case law can be used as a framework for assessing compliance on minimum guarantees.

The subsequent substantive research chapters have been written as stand-alone sections of the research to the extent possible (Parts III to VI). However, seeing that some readers might be interested in the Court's case law while others rather might want to be informed about Dutch criminal proceedings, Part VII: Conclusion, Recommendations and a Summary is deliberately kept short. This final chapter can best be read, therefore, in conjunction with Parts I to VI.

PART II

INTRODUCTIONS TO THE CONVENTION AND DUTCH CRIMINAL PROCEDURE

CHAPTER 3. INTRODUCTION TO THE CONVENTION

3.1. Introduction

This chapter builds on the two previous chapters and provides the background to the analysis of the Court's case law, which will follow in the four following substantive research chapters on the Convention (chapters 5, 7, 9 and 11).²⁷⁹ Before the in-depth exploration of case law can be commenced, it has to be pointed out, as will be done here, what case law has been selected and for what reason. Moreover, this chapter will have to determine how six factors impact on the conclusions that can be drawn, on the basis of what will often be casuistic analyses.

Per chapter regarding the Convention, an answer will be sought to one of the four aforementioned leading questions which were presented at the end of the previous chapter that presented the conceptual framework. These questions take into consideration the relevant rights, context and cross-cutting notions and perspectives. A similar approach will be taken in the chapters regarding Dutch criminal proceedings. This "mirroring approach" will ultimately facilitate a comparison between the findings regarding the Convention and Dutch criminal proceedings. At the end of this book, all four comparisons will assist answering the central research question. That answer will seek to evaluate the current approach to ineffective assistance by counsel in Dutch criminal procedure on compliance with the minimum guarantees set by the Court for the right of the accused to an effective defence in a fair trial. As explained above, the minimum guarantees of the Convention are important benchmarks for this exploration. Therefore, this Chapter will provide an introduction as to how these minimum guarantees will be inferred from the case law of the Court.

Before the case law of the Court can be used as benchmarks for the approach to ineffective legal assistance and its redress in Dutch criminal proceedings, this chapter will set out some of the factors that impact on conclusions about relevant minimum guarantees under the Convention. These factors are therefore essential for, and will often be revisited in, the subsequent four substantive research chapters (chapters 5, 7, 9 and 11). Another brief section will concern the relationship between the Convention and a pertinent EU Directive regarding the right to counsel.

Outline

This chapter is divided in four more sections. The following sub-section will focus on how relevant case law was selected for the research topic of ineffective legal assistance under Article 6 (3) (c), under another minimum defence right under Article 6 or under other related Convention rights (section 3.2.).²⁸⁰ Thereafter, factors will be described that impact on this study, which moreover constitutes a warning concerning the types of conclusions that can be drawn on the basis of this part of the research (section 3.3.). The penultimate section will deal with the relationship between the Convention and EU law in so far as the right to counsel is concerned (section 3.4.). Finally, concluding remarks will be made (section 3.5.).

3.2. Relevant case law

This research will predominantly examine case law under Article 6 (3) (c) of the Convention in particular and under Article 6 in general,²⁸¹ as well as under Article 5 because of their applicability to

²⁷⁹ In this study, the emphasis is on the Court which, since its new mandate, adjudicates all complaints; specific mention is made when the Commission has adjudicated. Under Protocol 11 of the Convention, which entered into force on 1 November 1998, after which the single Court replaced the jurisdiction of the Commission and the Court.

²⁸⁰ The claim that additional obligations can follow from one right is also suggested by Mahoney who considers the Court's case law concerning criminal matters under Article 6 of the Convention to be "exceptionally rich" so that a code of criminal procedure could almost be drafted on the basis of all case law, P. Mahoney, Right To A Fair Trial In Criminal Matters Under Article 6 E.C.H.R., *Journal of International Studies*, Vol. 4, Iss. 2, 2004.

²⁸¹ E.g. J. McBride, *Human Rights and Criminal procedure, the case law of the European Court of Human Rights* (2009), Counsel of Europe Publishing, 2009, available at: http://www.coe.int/t/dghl/publications/ECHR_crimproc_en.pdf.

criminal proceedings.²⁸² Other Convention rights will also be considered to the extent that the Court uses them in the context of criminal proceedings²⁸³, such as Article 8²⁸⁴ regarding the privileged contact and communication between the accused and his lawyer and Article 10²⁸⁵ for counsel's freedom of speech in so far as the accused's right to an effective defence by counsel is concerned.

These Convention rights will be studied by evaluating several cases from different Member States. This method prevents the problem whereby only cases from one country or from one – more inquisitorial or adversarial – criminal procedure will be adopted.²⁸⁶ After several cases have been examined in this manner, this should facilitate the drawing of some general conclusions concerning minimum guarantees for every relevant Convention right which are binding to all Member States including the Netherlands.

In the remainder of this study, use will often be made of general principles, which the Court intends to extend beyond one particular case. However, even those general principles will frequently have to be seen in the context of their applications to the specific facts and circumstances of the case. For the more specific scope and content of the general principles to be understood, a balance will be sought to be struck between, on the one hand, case law – which is inevitably casuistic in nature – and on the other hand, a synopsis of several cases from different civil and common law traditions. Where possible, landmark cases of the Court will be highlighted.

3.3. Factors impacting on the conclusions to be drawn from the Court's case law

As is the case with almost all research that draws upon Article 6, this study is influenced by several factors. Henceforth, this overview addresses six factors that have an impact on the types of conclusions that can be drawn on the basis of this part of the research.

Factor 1: Limited role of the Court

A first factor stems from the Court's "limited role", which it explains itself by referring to its duty under Article 19:

“(…) to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. In particular, it is not its [the Court's] function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention [added by the author]”²⁸⁷.

This limited role of the Court corresponds with the wide discretion that Member States enjoy as regards the choice of means calculated to ensure that their legal systems comply with the requirements of the Convention.²⁸⁸ Accordingly, the Court's task is informed by the primary obligation for Member States in so far as Article 6 is concerned. Its task is to ensure a fair trial, under the subsidiary system of justice that the Convention system aims to be. The Court itself considers that its task is not to outline

²⁸² E.g. the case law in sub-section 6.2.1. including the principle of confidentiality of information exchanged between counsel and client in the context of Article 5 (4), e.g. *Khodorkovskiy v. Russia*, Judgment of 25 November 2007, HUDOC no. 5829/04. See also Harris et al (2014), at 361.

²⁸³ E.g. the right to life and a fair trial *Ireland v. the United Kingdom*, Judgment of 18 January 1978, HUDOC no. 5310/71, in which making someone stand in a prone position against a wall, while being hooded, being subjected to noise, deprivation of sleep and deprivation of food and drink was examined as an 'interrogation techniques'.

²⁸⁴ E.g. the right to privacy and a fair trial *Niemietz v. Germany*, Judgment of 16 December 1992, HUDOC no. 13710/88 a law firm's office being subjected to a search. See also Harris et al (2014), at 525.

²⁸⁵ E.g. the right to freedom of expression and a fair trial *Kyprianou v. Cyprus* [GC], Judgment of 15 December 2005, HUDOC no. 73797/01, contempt of court proceedings as a result of counsel's comments to the judges about their alleged inattention during his cross-examination. *Kyprianou* was counsel of *Panovits* whose case resulted in *Panovits v. Cyprus*, Judgment of 11 December 2008, HUDOC no. 4268/04. See also Harris et al (2014), at 525 and . See also J. McBride (2009) at 268-269.

²⁸⁶ Thanks to its system neutrality also not in favour of either common law or civil law countries, see Cape et al (2010) at 25ff.

²⁸⁷ E.g. *Garcia Ruiz v. Spain* [GC], Judgment of 21 January 1999, HUDOC no. 30544/96, para 28. See also Harris et al (2014), at 430-431.

²⁸⁸ E.g. *Colozza v. Italy*, Judgment of 12 February 1985, HUDOC no. 9024/80, para. 30, regarding the requirements of Article 6 of the Convention.

those means to the Member States in order to ensure that their legal systems are in compliance with the requirements of Article 6, but rather to determine whether the result which is required by the Convention has in fact been achieved in the cases before it. The Court can “only” examine in the specific case whether the Member State has complied with its Convention obligation by achieving an end-result of a domestic criminal procedure that is fair in terms of the Convention.²⁸⁹ This way, the Court seeks to avoid becoming a so-called “fourth instance” court, i.e. an extra court of appeal on points of law and fact.²⁹⁰ Therefore, the Court declares complaints relating to the inaccuracy of the outcome of such proceedings inadmissible and thus concern errors on the national level *ratione materiae*.²⁹¹ Moreover, in adjudicating the case, the Court will take into account the evidence used for the applicant’s conviction “only” to the extent that such evidence can interfere with the Convention – so that it prevents becoming a court of fourth instance.

Factor 2: Complaint-driven cases before the Court

A second factor that has an impact is that the Court’s case law is complaint-driven and that conclusions in this research are thus very case-specific because of the facts and circumstances of the underlying case and the country from which the case arises. With regard to the complaint-driven nature, it is important to note that, at present, the Court cannot select cases on its own initiative or determine more generally what is important for fair criminal proceedings.²⁹² Instead, the Court can only respond to complaints which moreover have to be brought by applicants who claim to have been directly harmed by the alleged violation of the Convention right. Applicants must be capable of bringing the complaint themselves – possibly with the assistance by counsel – or on behalf of their deceased relatives (Article 34). Consequently, it will hardly be possible to study applications brought by a lawyer who, for instance, complains that he has been unable to provide the accused with effective legal assistance and is thus not a direct victim of a human rights violation.²⁹³ The Court’s case law is selective in quantity. The Court only hears a mere 10% of all admissible complaints (if not less) so not all complaints are adjudicated on their merits.²⁹⁴ This also indicates the limited role (quantitatively speaking) of the Court. Moreover, the Court’s case law is selective in quality. Most cases concern Article 6, while the majority of its violations regard the fairness and the length of proceedings.²⁹⁵ There is only a limited majority of Court cases that regards Article 6, next to only some inadmissibility decisions, which can be explored on the issue of minimum guarantees that are relevant for the main research themes of ineffective legal assistance and its redress in fair criminal proceedings.²⁹⁶ For these reasons, the basis for any comparison between the diverse cases is often marginal. Although there are such restrictions, thanks to a relatively large number of complaints regarding Article 6, this research will still be able to examine relevant case law for main research themes of ineffective legal assistance

²⁸⁹ E.g. *Tsonyo Tsonev v. Bulgaria*, Judgment of 10 January 2010, HUDOC no. 33726/03, para. 42 and *P.G. and J.H. v. the United Kingdom*, Judgment of 25 September 2001, HUDOC no. 44787/98, para. 76.

²⁹⁰ See Sir Maxwell-Fyfe drafting for the United Kingdom in the *Travaux préparatoires* concerning Article 6 of the Convention, DH(56)11, available at: www.echr.coe.int/Documents/Library_TravPrep..

²⁹¹ E.g. *Granger v. the United Kingdom*, Judgment of 28 March 1990, HUDOC no. 11932/86, para. 44. See also Harris et al (2014), at 479 regarding legal aid ‘where the interests of justice so require’; *Belgian Linguistic* case, Judgment of 23 July 1968, HUDOC nos 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, para. 10 in fine; and *Handyside v. the United Kingdom*, Judgment of 7 December 1976, HUDOC no. 5493/72, para. 48. See also Harris et al (2014), at 14 and 15 regarding the principle of proportionality doctrine.

²⁹² For a discussion on such an *ex officio* mandate of the Court that would allow it to judge more than the mere 5 percent of the applications now received, see S. Greer, What’s Wrong with the European Convention on Human Rights?, *Human Rights Quarterly*, Vol. 30, Iss. 3, 2008.

²⁹³ See for instance *X. and Y. v. Austria* (dec.), 12 October 1978, HUDOC no. 2854/66, Appl. N° 7909/74, including as dictum that Article 3 (b) of the Convention can only be invoked by the accused, not by his counsel.

²⁹⁴ According to the President of the Court’s memorandum of 3 July 2009 for the preparation of the Interlaken Conference: since 1 November 1998 alone (when Protocol No. 11 entered into force), the Court has pronounced no fewer than 188,000 inadmissibility decisions and some 10,000 judgments on the merits. In 2008 it disposed of a total of over 32,000 applications, nearly 1,900 by judgment delivered and approximately 30,000 by inadmissibility decisions, available at www.echr.coe.int/NR/.../03072009_Memo_Interlaken_anglais1.pdf.

²⁹⁵ In fact, 64% of violations found by the Court concern either Article 6 (the right to a fair hearing) or Article 1 of Protocol No. 1 (protection of property), in *The ECHR in 50 questions*, available at <http://www.echr.coe.int/NR/rdonlyres/5C53ADA4-80F8-42CB-B8BD-CBBB781F42C8/0/FAQenglish.pdf>.

²⁹⁶ E.g. *Cornelis v. the Netherlands* (dec.) 25 March 2004, no. 994/03 and for no disclosure of any failure of the court-appointed lawyer to provide ‘effective representation’, *Raicevic v. Germany* (dec.), 29 September 2009, no. 28154/05.

and its redress in fair criminal proceedings. For example, cases can range from complaints from an accused who alleges to have had many lawyers who, in essence, did not provide the accused with effective legal assistance, to an accused who complains about not having had a lawyer at all. As further examples, there can be complaints that the accused did not get access to a lawyer or had the assistance of a lawyer whom the accused found to have worked without diligence. As far as possible, judgments will be scrutinised that entail general principles that exceed the particulars of the case. As a final tool, recourse will be made to (dissenting or concurring) opinions that indicate the debates amongst the Court judges. These interpretational tools help to somewhat overcome the inevitable limitations of the cases available.

Factor 3: The Convention as a living instrument

A third factor that has an impact is linked to the very nature of human rights law, to which the drafters admitted through their desire to create a living instrument. In the wake of World War II, the Convention drafters had already considered that for a human rights treaty to be effective it would have to be able to adapt to modern times. Under the living instrument doctrine the Court lives up to that promise and ensures, as far as possible, a modern protection of human rights with an adaptation of the terms of the Convention to current human rights standards.

The best known example in the context of criminal procedure is certainly the decision in *Selmouni v. France* in which treatment of an accused who was previously characterised as being “only” inhuman or degrading was considered by the Court to amount to torture.²⁹⁷ The Court has also used the living instrument doctrine more recently to oblige the authorities to co-operate transnationally in investigations into human trafficking under Article 4 regarding a prohibition of slavery and forced labour; the Article not listing this contemporary crime (*Rantsev v. Russia and Cyprus*).²⁹⁸

These two rather different examples indicate the important application of the living instrument doctrine to specific complaints that the Court deploys next to the general rules of treaty interpretation contained in Articles 31 and 32 of the Vienna Law on Treaties (literal, systematic and teleological interpretation). The Court thereby intends to be responsive to the present-day needs of human rights protection and to make sure that it discerns current conditions on the basis of national law and practice. For that latter purpose the Court usually makes use of a comparative overview that concentrates on States to the Council of Europe, but it may also consider legal developments in other parts of the world.²⁹⁹ Generally, when the analysis shows “(...) considerable differences and disparities among the Member States, the Court recognises a national margin of appreciation”.³⁰⁰ When different Member States protect human rights in the same way, the Court can choose this as a common standard.

Also under the living instrument doctrine the Court interprets defence rights that have to be practical and effective³⁰¹ according to their context and in the light of the object and purpose of the Convention.³⁰² Defence rights, including the right to a defence by either self-representation or assistance by counsel, can in that way be interpreted according to present-day standards.³⁰³ To conclude, such adaptation as circumstances change may ensure more legal protection for the accused in criminal proceedings against him over time, although critics might add that it may also have the opposite result.

Factor 4: The “as a whole” approach to criminal proceedings

The Court examines complaints that have exhausted all domestic legal remedies. Given that the Court under Article 35 only declares a complaint to be admissible when it has already been heard at all instances at the national level, the Court can examine the fairness of the criminal procedure “as a

²⁹⁷ *Selmouni v. France* [GC], Judgment of 28 July 1999, HUDOC no. 25803/94, para. 101. Cf., for impartiality under Article 6 *Borgers v. Belgium*, Judgment of 30 October 1991, HUDOC no. 12005/86 12005/86.

²⁹⁸ *Rantsev v. Russia and Cyprus*, Judgment of 7 January 2010, HUDOC nos. 25965/04 25965/04.

²⁹⁹ E.g. *Christine Goodwin v. United Kingdom*, Judgment of 11 July 2002, HUDOC no. 28957/95, paras. 84-85.

³⁰⁰ Bernhardt, in: Matscher and Petzold (1988) at 65-71 and Ovey et al (2006) at 55. Also see the following two citations.

³⁰¹ *Artico v. Italy*, Judgment of 13 May 1980, HUDOC no. 6694/74, para. 33.

³⁰² *T. v. United Kingdom* [GC], Judgment of 16 December 1999, HUDOC no. 24724/94, para. 70.

³⁰³ *Salduz v. Turkey* [GC], Judgment of 27 November 2008, HUDOC no. 36391/02, para. 55. Earlier e.g. *Brennan v. the United Kingdom*, Judgment of 16 October 2001, HUDOC no. 39846/98 and *Dougan v. the United Kingdom* (dec.), HUDOC no.44738/98, 14 December 1999.

whole”. The Court examines the case “as a whole” by taking into account that the fairness of domestic criminal proceedings should not be interpreted “restrictively”.³⁰⁴ Without ever having provided a definition of a fair trial – or of effective assistance by counsel for that matter – criminal proceedings are examined in their entirety because:

“(…) the compliance with the requirements of fair trial must be examined in each case having regard to the development of the proceedings as a whole and not on the basis of an isolated consideration of one particular aspect or one particular incident (...), although it cannot be excluded that a specific factor may be so decisive as to enable the fairness of the trial to be assessed at an earlier stage in the proceedings (...). This principle holds true not only for the application of the concept of fair trial as such, as laid down in Art 6 (1), but also for the application of the specific guarantees laid down in Art 6 (3). They exemplify the notion of fair trial in respect of typical procedural situations which arise in criminal cases, but their intrinsic aim is always to ensure, or contribute to ensuring, the fairness of the criminal proceedings as a whole. The guarantees enshrined in Art 6 (3) are therefore not an aim in themselves, and they must accordingly be interpreted in the light of the function which they have in the overall context of the proceedings”.³⁰⁵

By and large, the “as a whole” approach has three strands. Although, strictly speaking, the term of fair hearing in Article 6 of the Convention could only allow for an interpretation limited to the trial phase, the Court takes into account all aspects of the pre-trial stage of the domestic criminal procedure³⁰⁶, while attaching importance to both the special features of the procedural stage and the circumstances of the case.³⁰⁷ Article 6 can thus cast its “fairness”-shadow over the pre-trial phase. Consequently, for instance, the Court can accept witness examination pre-trial that is not repeated at the trial stage while still considering the proceedings as a whole to be fair.³⁰⁸ However, it then requires “counterbalancing procedures” that sufficiently compensate for the handicaps under which the defence laboured pre-trial during the subsequent phases.³⁰⁹

Moreover, the Court takes into account the appeal phases when examining the fairness of the criminal procedure “as a whole” especially in so far as the so-called “curing” of earlier deficiencies is concerned. Despite the separate Protocol No. 7 on the right to appeal (which the Netherlands has not ratified)³¹⁰, the Court examines in its regular Article 6 cases whether later stages such as appeal have affected the fairness of the hearing.³¹¹ As with the pre-trial phase, the appeal is examined as to the special features of the proceedings involved and the circumstances of the case. In fact, the Court first adopted these criteria for the appeal stage (on points of law and fact, the latter being non-existent in common law criminal proceedings) and the cassation appeal stage (for points of law only) and subsequently applied them to the pre-trial stage.³¹² The special appreciation of phases following the trial implies for the Court that a “cure” can be provided in the form of a *de novo* examination of the case on points of law and fact that redressed or compensated for an earlier human rights violation.³¹³ An earlier deficiency of law can moreover be “cured” by a domestic court which for that purpose has

³⁰⁴ Literally: “the right to a fair trial holds so prominent a place in a democratic society that there can be no justification for interpreting Article 6 para. 1 restrictively”, e.g. *Artico v. Italy*, Judgment of 13 May 1980, HUDOC no. 6694/74, para. 33 and *Delcourt v. Belgium*, Judgment of 17 January 1970, HUDOC no. 2689/65, para. 25.

³⁰⁵ *Can v. Austria*, Commission report of 12 July 1984, no. 9300/81, para. 48.

³⁰⁶ E.g. *Balliu v. Albania*, Judgement of 16 June 2005, HUDOC no. 74727/01, para. 25; *Imbrioscia v. Switzerland*, Judgement of 24 November 1993, HUDOC no. 13972/88, para. 38; *S.N. v. Sweden*, Judgment of 2 July 2002, HUDOC no. 34209/96, para. 4; and *Vanyan v. Russia*, Judgement of 15 December 2005, HUDOC no. 53203/99, para. 63-68.

³⁰⁷ E.g. a *Granger v. the United Kingdom*, Judgment of 28 March 1990, HUDOC no. 11932/86, para 44nd *Berliński v. Poland*, Judgment of 20 June 2002, HUDOC nos. 27715/95 30209/96, para. 75.

³⁰⁸ *Doorson v. Netherlands*, Judgment of 26 March 1996, HUDOC no. 20524/92.

³⁰⁹ *Doorson v. Netherlands*, Judgment of 26 March 1996, HUDOC no. 20524/92, para. 76.

³¹⁰ Protocol No. 7, entry into force 1 November 1988, which has been ratified by all Member States except Belgium, Germany, the Netherlands, Turkey, and the United Kingdom.

³¹¹ E.g. *Lalmahomed v. the Netherlands*, Judgment of 22 February 2011, HUDOC nos. 26036/08 26036/08, para. 36.

³¹² *Granger v. the United Kingdom*, Judgment of 28 March 1990, HUDOC no. 11932/86, para 44.

³¹³ E.g. *mutatis mutandis*, *Salduz v. Turkey* [GC], Judgment of 27 November 2008, HUDOC no. 36391/02, para. 58.

to have the full jurisdiction which is necessary to remedy the procedural defects at earlier stages.³¹⁴ Although no legal basis for such later “curing” may be found in Article 6 itself, it can be construed in the corollary of both the exhaustion of all domestic remedies requirement under Article 35³¹⁵ and the “subsidiary nature” of the Convention. The Court can conclude that earlier deficiencies have been redressed in such a way that the criminal procedure “as a whole” was fair.

Lastly, under its “as a whole” approach the Court sometimes features a “cumulative effect” of several aspects of the criminal procedure in conjunction with each other, without particular weight being attached to their separate probative values. This approach of the Court that comes to an overall determination concerning the fairness of the criminal procedure without explaining how it values its constitutive parts, is more problematic for this research than the two earlier mentioned examples. It is not always easy to draw inferences from such a cumulative effect, especially when the judgments do not explicitly refer to the weight of the separate aspects.

To give an example, in the case of *Barberà, Messegué and Jabardo v. Spain* the Court concluded that “(...) the proceedings considered as a whole including the way in which prosecution and defence evidence was taken” were not fair “(...) as required by Article 6 para. 1”.³¹⁶ To reach this conclusion, the Court considered the following aspects to be significant: “(...) the belated transfer of the applicants from” the city in which they were imprisoned to the city in which they were tried, “(...) the unexpected change in the court’s membership immediately before the hearing opened”, “the brevity of the trial” and, “above all”, “the fact that very important pieces of evidence were not adequately adduced and discussed at the trial in the applicants’ presence” and “under the watchful eye of the public”.³¹⁷ It is difficult to conclude how important all separate elements were in the Court coming to the conclusion that Article 6 was violated, thereby making it hard to draw inferences about the degree to which one of the aforementioned elements made the Court come to this verdict.³¹⁸ If there are some cases regarding ineffective legal assistance in which the Court takes a comparable approach, those will be highlighted in the substantive research chapters regarding the Convention.³¹⁹

Factor 5: Equality of arms and an adversarial hearing

As a fifth factor that has an impact, the Court considers equality of arms and an adversarial hearing as governing principles for a fair criminal procedure.³²⁰ Accordingly, the Court uses these two principles as a minimum guide to decide whether the domestic criminal procedure “as a whole” was fair in terms of the Convention.

Equality of arms is commonly explained in the following terms: “(...) each party must be afforded a reasonable opportunity to present his case under conditions which do not place him at a substantial disadvantage vis-à-vis his opponents”.³²¹ Under a strict reading of this definition³²² this

³¹⁴ *M.S. v. Finland*, Judgment of 22 March 2005, HUDOC no. 46601/99, paras. 35 and 36, particularly “What is particularly at stake here is the confidence of the parties of criminal proceedings in the working of justice, which is based on, inter alia, the knowledge that they have had the opportunity to express their views on every document in the file.”

³¹⁵ *T. v. United Kingdom* [GC], Judgment of 16 December 1999, HUDOC no. 24724/94, Article 35 is explained as placing the burden of proof on the Government claiming non-exhaustion to satisfy the Court that an effective remedy was available in theory and in practice at the relevant time.

³¹⁶ *Barberà, Messegué and Jabardo v. Spain*, Judgment of 6 December 1988, HUDOC no. 10590/83, para. 68.

³¹⁷ *Barberà, Messegué and Jabardo v. Spain*, Judgment of 6 December 1988, HUDOC no. 10590/83, para. 89.

³¹⁸ *Asch v. Austria*, Judgment of 26 April 1991, HUDOC no. 12398/86 para. 28 for a comparable ‘cumulative effect’ in view of another issue of the degree to which the domestic court was held responsible for not having ensured the minimum defence right to witness confrontation.

³¹⁹ E.g. *E.g. Sakhnovskiy v. Russia*, Judgment of 2 November 2010, HUDOC no. 21272/03.

³²⁰ See for the importance of these concepts in relation to fair criminal proceedings, e.g. Jackson (2005) at 737-764 and Field (2009) at 365-387.

³²¹ *Dombo Beheer B.V. v. the Netherlands*, Judgment of 27 October 1993, HUDOC no. 14448/88, para. 31. For criminal proceedings, see e.g. *Barberà, Messegué and Jabardo v. Spain*, Judgment of 6 December 1988, HUDOC no. 10590/83. The principle is sometimes held to be an expression of the old natural law principle of *audi alteram partem* first formulated by St Augustine, see e.g. Jackson (2005) at 737-764.

³²² *Dombo Beheer B.V. v. the Netherlands*, Judgment of 27 October 1993, HUDOC no. 14448/88, para. 32. Equality of arms was first developed by the Court with reference to the disadvantage of the evaluation of *civil proceedings*, although recognising the fact that Member States “have greater latitude when dealing with cases concerning civil rights and *obligation* than they have when dealing with criminal cases”. Whereas the Court transposed this governing principle of equality of arms into the evaluation of criminal procedures without defining it any differently, its real meaning only becomes apparent in further case law.

principle would appear to entail only that the defence cannot be treated less advantageously than the prosecution. This would mean that as long as both the defence and the prosecution are treated completely equally, the principle of equality of arms would be guaranteed. However, the Court construes the principle of equality of arms in a broader sense by requiring that the authorities ensure that the defence, which is necessarily in a weaker position, is actively put, as far as possible, on an equal footing with the prosecution, as follows for instance from the following citation:

“(…) in any criminal proceedings brought by a State authority, the prosecution has at its disposal, to back the accusation, facilities deriving from its powers of investigation supported by judicial and police machinery with considerable technical resources and means of coercion. It is in order to establish equality, as far as possible, between the prosecution and the defence that national legislation in most countries entrusts the preliminary investigation to a member of the judiciary or, if it entrusts the investigation to the Public Prosecutor’s Department, instructs the latter to gather evidence in favour of the accused as well as evidence against him. It is also, and above all, to establish that same equality that the “rights of the defence” (….) have been instituted”.³²³

For this very reason of compensating the defence for its inherently usually weaker position than the prosecution, minimum defence rights must be guaranteed:

“The Court recalls that the “rights of defence”, of which Article 6 § 3 gives a non-exhaustive list, have been instituted, above all, to establish equality, as far as possible, between the prosecution and the defence”.³²⁴

Under this reading of equality of arms, the Court can require that the accused in a criminal procedure does not have to be left without “a qualified lawyer” as there is also a lawyer representing the prosecution. A lawyer rather than a lay person could “(…) clarify the grounds adduced by the applicant in his appeal and effectively counter the pleadings of the public prosecutor at the hearing (….) thus ensuring respect for the principle of equality of arms”, the Court holds.³²⁵ However, the Court does not mean that a defence lawyer can in principle replace the accused in such situations. It stipulates that the lawyer has his own role to play together with the accused. Only then is the principle met, thereby ensuring that the two contending parties are heard, preferably before an independent tribunal as a principal guarantee of a fair judicial procedure (*le principe du contradictoire, audi et alteram partem*).³²⁶ For criminal procedures this principle further requires that the defendant has had an opportunity to comment on evidence obtained with regard to disputed facts.³²⁷

The right to an adversarial hearing “(…) means, in a criminal case, that both the prosecution and the defence must be given the opportunity to have knowledge of and comment on the observations filed and evidence adduced by the other party”.³²⁸ It can be described as ensuring the hearing of the two parties. This is the leading principle in trial hearings at first instance, but is not restricted to them. During the trial stage the defendant has to be able to “effectively participate” in a criminal procedure before an independent and impartial tribunal. The Court defines effective participation as being not only in principle a right to be present oneself and to “hear and follow” the proceedings, but also “(…) *inter alia*, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence”.³²⁹ At the trial phase, therefore, the Court requires in principle that lawyer and client launch a joint defence in

³²³ *Jespers v. Belgium* (dec.), 15/10/1980, No. 8403/78, para. 87.

³²⁴ *Bodrožić v. Serbia*, Judgment of 23 June 2009, HUDOC no. 32550/05 para. 63.

³²⁵ *Tsonyo Tsonev v. Bulgaria* (2), Judgment of 14 January 2010, HUDOC no. 2376/03 para. 40.

³²⁶ *Kamasinski v. Austria*, Judgment of 19 December 1989, HUDOC no. 9783/82, para. 102, but, *mutatis mutandis*, *Feldbrugge v. the Netherlands*, Judgment of 29 May 1986, HUDOC no. 8562/79, para. 44.

³²⁷ *Ibid.*

³²⁸ *Laukkanen and Manninen v. Finland*, Judgment of 3 February 2004, HUDOC no. 50230/99, para. 34.

³²⁹ *E.g. S.C. v. the United Kingdom*, Judgment of 15 June 2004, HUDOC no. 60958/00, para. 28, and *Timergaliyev v. Russia*, Judgment of 24 September 2009, HUDOC no. 40631/02, para. 51.

unity; the lawyer cannot “replace” the accused by doing this for him.³³⁰ This is not to say that the Court cannot allow a lawyer to represent the accused in his absence.³³¹ This does mean, however, that the Court prefers that a defendant during an adversarial hearing makes decisions between the existing options and selects, with advice from his criminal defence lawyer, the defence which the defendant wishes to put before the court.³³²

Moreover, an adversarial trial hearing implies that the defence and the prosecution have an equal position with regards to information during the trial stage. Therefore, prior to the trial phase and with sufficient time before the hearing, the defence should be able to prepare with enough time and facilities. The authorities are required to actively provide information to the defence in order to ensure an adversarial hearing before the “tribunal”³³³ in the first place.³³⁴ Such pre-trial activity and involvement are required because “(...) each party must in principle have the opportunity not only to make known any evidence needed for his claims to succeed, but also to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court’s decision”.³³⁵

As a final issue, the authorities may already have to guarantee adversariality for evidence testing pre-trial if the defence would in effect not have a proper opportunity to do so at the trial stage. Some evidence cannot be obtained without giving the defence during the pre-trial stage “(...) a real opportunity to comment effectively on (...) the main piece of evidence”, for instance to discuss an expert report when it is produced by the authorities and later used as evidence.³³⁶

The governing principles of equality of arms and adversariality seen in conjunction, can be explained as being interrelated and mutually reinforcing. Equality of arms is a guarantee for an adversarial trial hearing. Adversariality appears impossible when equality of arms is violated. Equality of arms can be respected whilst adversariality is not³³⁷, thus making equality of arms a necessary but not sufficient condition for an adversarial hearing. The Court can conclude that an adversarial hearing was not guaranteed whilst equality of arms was.³³⁸ Equality of arms and an adversarial hearing together ensure that the tribunal can base its decision upon the presentation and refutation by the two sides of the prosecution and the defence.³³⁹ Sometimes the Court has its own role to play in order to guarantee adversariality. For that same reason, the Court will mostly examine whether both principles have been fulfilled when faced with a complaint under Article 6 of the Convention.

Factor 6: The primacy of domestic evidence rules

The final factor that has an impact is that as a rule the Court³⁴⁰ examines the fairness of the criminal procedure while leaving domestic rules of evidence primarily to the domestic legislators³⁴¹ and courts³⁴². The Court has held: “(t)he admissibility of evidence is primarily a matter for regulation by national law and, as a rule, it is for the national courts to assess the evidence before them”.³⁴³ The Court’s task is “(...) to ascertain whether the proceedings considered as a whole, including the way in

³³⁰ For Spronken this was the main question at the time when she wrote her Ph.D., see Spronken (2001), at 435-482.

³³¹ E.g. *Sejdovic v. Italy* [GC], Judgment of 1 March 2006, HUDOC no. 56581/00, para. 99.

³³² E.g. *Ebanks v. the United Kingdom*, Judgment of 26 January 2010, HUDOC no. 36822/06, para. 82.

³³³ *Mantovanelli v. France*, Judgment of 18 March 1997, HUDOC no. 21497/93, para. 33.

³³⁴ E.g. *Barberà, Messegué and Jabardo v. Spain*, Judgment of 6 December 1988, HUDOC no. 10590/83, para. 78 and *Stanford v. the United Kingdom*, 23 February 1994, HUDOC no. 16757/90, para. 26

³³⁵ *Mantovanelli v. France*, Judgment of 18 March 1997, HUDOC no. 21497/93, para. 33.

³³⁶ *Mantovanelli v. France*, Judgment of 18 March 1997, HUDOC no. 21497/93, para. 36.

³³⁷ Jackson exemplifies this with the civil case of *Feldbrugge v. Belgium* in Jackson (2005) at 737-764. An important example of a criminal case is *M.S. v. Finland*, Judgment of 22 March 2005, HUDOC no. 46601/99, para. 31 (see further below).

³³⁸ Prior to this reasoning Trechsel considered that the Commission and Court did not always sufficiently distinguish between equality of arms and adversariality. Trechsel (2005) at 90.

³³⁹ See e.g. *Borgers v. Belgium*, Judgment of 30 October 1991, HUDOC no. 12005/86 para. 27 and *PG and JH v. United Kingdom*, Judgment of 24 October 2000, HUDOC no. 44787/98, para. 73.

³⁴⁰ E.g. first established in *Schenk v. Switzerland*, Judgment of 12 July 1988, HUDOC no. 10862/84, paras. 45-46, and *Garcia Ruiz v. Spain* [GC], Judgment of 21 January 1999, HUDOC no. 30544/96, para. 28. See also *Sharkunov and Mezentsev v. Russia*, Judgment of 10 June 2010, HUDOC no. 75330/01, para. 94.

³⁴¹ E.g. *Vanjak v. Croatia*, Judgment of 10 January 2010, HUDOC no. 29889/04, para. 47.

³⁴² E.g. *Aleksandr Zaichenko v. Russia*, Judgment of 18 February 2010, HUDOC no. 39660/02, para. 58.

³⁴³ *Asch v. Austria*, Judgment of 26 April 1991, HUDOC no. 12398/86, para. 26.

which evidence was taken, were fair”.³⁴⁴ This also means that “(...) it is not the Court’s role to examine whether the evidence in the present case was correctly assessed by the national courts”.³⁴⁵ The Court accordingly does not “(...) as a matter of principle [determine] whether particular types of evidence – for example evidence obtained unlawfully in terms of domestic law – may be admissible or indeed whether the applicant was guilty or not”. “The question which must be answered is whether the proceedings as a whole including the way in which the evidence was obtained were fair”. “This involves an examination of the “unlawfulness” in question and, where a violation of another Convention right is concerned, the nature of the violation found”.³⁴⁶

However, there can be exceptions to this rule. The Court can consider that the procedure for gathering and selecting evidence that domestic authorities followed infringed a Convention right or freedom to such an extent that the criminal procedure can no longer be – or indeed become – fair. For instance, the authorities can incite the accused who consequently commits a crime he would otherwise not have committed at all.³⁴⁷ Under such circumstances, instigating offences can impede the fairness of the procedure as a whole. For instance, a police informer can start a conversation with a suspect who thereafter makes statements that he would not otherwise have made, or at least not have made freely and/or on an informed basis.³⁴⁸ The police can also gather “real” evidence in a way that is contrary to the Convention.³⁴⁹ Finally, the police can obtain statements by witnesses whom the defence have not been able to hear throughout the procedure so that the Convention right to confront witnesses is infringed.³⁵⁰ Therefore, these cases indicate an exception to the aforementioned rule because the Court does consider the effect that the use of evidence obtained in this way by the authorities has on the fairness of the criminal procedure as a whole.

3.4. The right to counsel under the Convention and EU Directive 2013/48/EU

While this research focuses on the Convention minimum guarantees, it is helpful to also include EU Directive 2013/48/EU on minimum rules³⁴⁷ regarding *inter alia* “the right to access to a lawyer” in this book. For the purposes of this study, this EU Directive functions as an internal measure of quality control because it is largely based on codification of the Court’s case law. Therefore, this study will explicitly check whether the findings presented as Convention minimum guarantees correspond with the rights included in this EU Directive, which will be directly applicable in the Netherlands when implemented (sub-section 5.3.1.4.).

From a legal perspective, this study has also included EU Directive 2013/48/EU for three other important reasons. First, the Court has made EU Directive 2013/48/EU a point of reference for its own case law (e.g. *A.L. v. Luxembourg*; sub-section 5.4.3.1.). Second, when implemented, EU Directive 2013/48/EU will be binding on the Netherlands and will be justiciable before the Court of Justice of the European Union (hereafter the ECJ). This further avenue of adjudication before the ECJ will arise in addition to the yet existing individual complaint regarding a violation of these minimum guarantees under the Convention by the Court. As explained, that Convention complaint is open to individuals and is integral to the central research question that this chapter seeks to answer. Separately, the ECJ has competence, among other things, to render a preliminary ruling, which is a decision of the ECJ on the interpretation of EU law, made at the request of a court or tribunal of a Member State of the EU. Finally, if the European Union will accede to the Convention, the Court’s reference to EU Directive 2013/48/EU in its case law might also be relevant in relation to the harmonisation of both EU law and the Convention on the issue of access to counsel (e.g. *A.L. v. Luxembourg*; sub-section 5.4.3.1.). Third and finally, this Directive has also been included in this book because of its relevance for yet to be adopted implementation legislation in the Netherlands. The latter point, certainly, calls for a further

³⁴⁴ *Ibid.*

³⁴⁵ E.g. *Aleksandr Zaichenko v. Russia*, Judgment of 18 February 2010, HUDOC no. 39660/02, para. 58.

³⁴⁶ E.g. *Sharkunov and Mezentsev v. Russia*, Judgment of 10 June 2010, HUDOC no. 75330/01, paras. 95-96 and *Jalloh v. Germany*, Judgment of 11 July 2006m HUDOC no. 54810/00, para. 95.

³⁴⁷ E.g. *Ramanauskas v. Lithuania* [GC], Judgment of 5 February 2008, HUDOC no. 74420/01; *Teixeira de Castro v. Portugal*, Judgment of 9 June 1998, HUDOC no. 25829/94; *Vanyan v. Russia*, Judgement of 15 December 2005, HUDOC no. 53203/99; and *Khudobin v. Russia*, Judgment of 26 October 2006, HUDOC no. 59696/00.

³⁴⁸ *Allan v. the United Kingdom*, Judgment of 5 November 2002, HUDOC no. 48539/99.

³⁴⁹ E.g. *Funke v. France* Judgment of 25 February 1993, HUDOC no. 10828/84; *J.B. v. Switzerland*, Judgment of 3 May 2005, HUDOC no. 31827/96; *Jalloh v. Germany*, Judgment of 11 July 2006, HUDOC no. 54810/00.

³⁵⁰ E.g. *Kostovski v. the Netherlands*, Judgment of 20 November 1989, HUDOC no. 11454/85.

examination of the current approach to ineffective assistance by counsel and its redress in Dutch criminal procedure, as will be done in final chapter (section 13.4.).

3.5. Concluding remarks

Member States seek specific guidance in the numerous cases of the Court's case law regarding a fair trial. Although the Court's case law covers a wide range of fair trial issues including defence rights, it also has its limitations. As explained above, such restrictions essentially arise because the Court's cases are based on individual applications and thus are usually restricted to specific problems raised by applicants. This section on concluding remarks will therefore set out how all aforementioned six factors influence possible conclusions drawn regarding Article 6 (3) (c) in all substantive research chapters (chapters 5, 7, 9 and 11).

This chapter on the introduction to the Convention and particularly the sections that addressed the six aforementioned factors has sought to explain what influences the benchmarks sought in this study have on the approach to ineffective legal assistance in Dutch criminal proceedings under the relevant minimum guarantees under the Convention. These benchmarks are significant for the relevant rights, context and cross-cutting notions and perspectives that were explained in chapter 2 on the conceptual framework. In particular, the case law analysis that will follow in the substantive research chapters will be affected by the six aforementioned factors that have an impact on the conclusions that can be drawn in this study.

The manner in which the six aforementioned factors influence how the Convention can serve as a framework for compliance of Dutch criminal procedure to the minimum guarantees about the right of the accused to an effective defence, is twofold. First, these six factors, separately and combined, impact the utility of the Convention as a framework that uses the Court's case law as benchmarks. It will be complex to generalize minimum guarantees about the right of the accused to an effective defence from casuistic decisions. This is because the Court plays a limited role, only responds to complaints, and interprets the Convention as a living instrument. Sometimes the Court does not specify individual elements of a criminal case but rather takes into account the case in its entirety, it refers to guiding principles such as equality of arms and an adversarial hearing or adversariality and domestic rules of evidence take primacy in its rulings. Second, these factors will have to be taken into consideration in the case law analysis in the following manner. Per case, it will have to be assessed whether and, if so in what manner, the Court refers to the aforementioned factors when addressing cases that are relevant for this research into ineffective legal assistance and its redress in Dutch criminal proceedings. Generally speaking, these factors explained above have an effect on the scope and content of decisions by the Court, and in individual cases the specific impact of these factors shall have to be addressed. For example, if the Court considers that the State violated the right of the accused to an effective defence under the "as a whole" approach, attempts will be made to determine the individual elements that led the Court to that decision. Mostly, resort will be had to general principles and landmark decisions that were followed by similar cases that upheld such principles. This will prevent specific instances being over-generalised.

More specifically, given that the subsequent chapter will pay particular attention to the related issues of ineffective legal assistance and its redress in their relevant context of Dutch criminal proceedings, here the relevance of the factors for that contextual examination will also be highlighted. The case law of the Court is significant for this study into ineffective legal assistance and its redress in Dutch criminal procedure, because of the claims that its problems are supposedly caused, at least partly, by the Court's case law (see sub-section 2.3.1).³⁵¹ According to some scholars at least, the changes that have prompted Dutch criminal procedure to become more adversarial have been justified, or perhaps even created, by the Court's case law (see also further in chapter 4).³⁵² For instance, scholars have designed a more contradictory criminal procedure while referring to how the Court requires that contradiction between the defence and the prosecution is focused upon in court.³⁵³

³⁵¹ Prakken (1999) at 27-28.

³⁵² E.g. Meijers (1993). Groenhuijsen (2001) at 254. Also Groenhuijsen and Knigge (2001). See Prakken and Spronken, in: Prakken and Spronken (2009) at 12.

³⁵³ See Prakken and Spronken, in: Prakken and Spronken (2009) at 12. See for the claim that on the basis of the "exceptionally rich" case law about criminal matters under Article 6 of the Convention almost a whole code of criminal procedure could be drafted, Mahoney (2004). Aside from the use for this study, the Convention norms are often seen as

Moreover, by resorting to the Court's case law, some academics argue that the judge in Dutch criminal procedure should exercise the role that best suits a criminal procedure that is governed by this so-called principle of contradiction.³⁵⁴ In addition, some of these scholars contend that the Court's case law prompts the defence in general and counsel in particular into increased responsibilities within criminal proceedings.³⁵⁵ Separately these two trends do not necessarily pose difficulties for the accused with regard to ineffective legal assistance and its redress in Dutch criminal procedure. However, when the concept of a passive judge – who can have his role depend on the defence – is combined with increased responsibilities for the defence and *de facto* counsel, ineffective legal assistance can have a real impact on the rights of the accused.³⁵⁶ Perhaps, under such circumstances, it can even come at the expense of the accused.

In this respect, it is important to note that the legislator in the Netherlands has already changed the appeal phase along the lines of this more contradictory design, so as to allegedly prevent wasting of time, repetition, and lengthy proceedings.³⁵⁷ Arguably, the benefit of such an emphasis on the so-called contradictory principle governing the trial phase is that the two sides are best heard in court.

Therefore, if the Court does *not* require that the role of the trial judge depends more on the two sides of the defence and prosecution, it also has relevance for this study into ineffective legal assistance and its redress within the criminal process in the Netherlands. Under such circumstances, the judge in Dutch criminal procedure might no longer allege ineffective legal assistance if counsel supposedly was passive in relation to defence activities such as, for instance, witness requests or substantive defences. Also, the judge can then no longer claim that he could not intervene in the case out of respect for freedom of the defence where the defence has not lived up to the requirement of a more contradictory position in court.³⁵⁸ Potentially, the judge can under such circumstances no longer submit that he can only intervene in the case where counsel was passive or did practically nothing, seeing that there might be some independent responsibility of the bench to actively intervene in the case when confronted with ineffective legal assistance.

Hence, the subsequent substantive research questions regarding the Court's case law will also have to explore whether or not the Convention prompts such a development towards a more contradictory criminal procedure in the Netherlands. If the Court's case law sets as a minimum requirement on the trial judge that he has to decide to have his role depend on the defence – and the prosecution for that matter – whilst he can be passive when confronted with ineffective legal assistance that is permitted to come at the procedural risk of the accused, it therefore has a direct bearing on this research. After all, this study emphasises the consequences for the *accused* of ineffective legal assistance and its redress in Dutch criminal proceedings.

As a general concluding remark, by scrutinising human rights law, the importance of an efficient and effective Dutch criminal procedure will not be overlooked. Two other requirements of efficiency in time and expenditure have to be made explicit here because an emphasis on human rights law is often wrongfully found to neglect these other important aspects. For criminal procedure to comply with international human rights law, the criminal process also has to take place within a reasonable period of time. A criminal procedure will only be democratically legitimised when the accused's rights are protected and crime control as well as prevention is, as far as possible, guaranteed. Human rights protection and an efficient criminal procedure can conflict with one another and, when they do, a balance will inevitably have to be struck. However, this tension should not be exaggerated, because these interests are not always found to be complete opposites in all situations.

Regarding such a tendency to separate different types of interests of efficiency and fairness in criminal proceedings, the intricate relationship between fair trial rights and truth finding has already been highlighted in Chapter 2. From the outset of this research, it has been stressed that fair trial rights

an authoritative reference outside of that – jurisdictional – scope and can accordingly also be important for other (future) studies.

³⁵⁴ Groenhuijsen and Knigge (2001) at 1-52, particularly on p. 31.

³⁵⁵ E.g. Groenhuijsen (2001) at 254. Also Groenhuijsen and Knigge (2001).

³⁵⁶ See also Coster van Voorhout (2008b).

³⁵⁷ Statute streamlining the appeal phase (in Dutch: *Wet stroomlijnen hoger beroep*, *Stb.* 2006, 470, entry into force 1 March 2007), one of the first laws to follow the general framework for changes to the criminal procedure, 'Algemeen kader herziening Wetboek van Strafvordering', TK 29.271, nr. 1.

³⁵⁸ See further in Part VI Intervention due to ineffective legal assistance.

and truth finding cannot easily be separated by arguing that truth finding is in the public interest, while supposedly the right to legal assistance is “merely” an individual right of the accused. The second chapter on the conceptual framework already mentioned how an effective defence is both a procedural guarantee and a personal right of the accused. The interdependent relationship between truth finding and a fair trial is thus far too complex to justify a simplistic separation between these two important aims of equitable criminal proceedings.³⁵⁹

³⁵⁹ See section 2.3.

CHAPTER 4. INTRODUCTION TO DUTCH CRIMINAL PROCEDURE

4.1. Introduction

This chapter builds on the previous chapters and intends to lay the foundations for the description and analysis of the context of Dutch criminal proceedings, which will also be important as background information for the subsequent original case law research regarding ineffective legal assistance and its redress in the substantive research chapters (chapters 6, 8, 10 and 12). This introductory chapter on Dutch criminal proceedings will pay particular attention to contextual factors that impact on ineffective legal assistance and its redress in Dutch criminal proceedings as well as the right of the accused, under Article 28 Sv and Article 6 (3) (c), to legal assistance and perhaps an effective defence by assistance by counsel. This chapter will follow the methodology as described in chapter 1 which has been structured in the conceptual framework as laid down in chapter 2. It will build on the information presented in the previous chapter in so far as factors that impact possible inferences that can be drawn in this research are concerned. Moreover, this chapter will establish the foundation for further study into the two aforementioned possible trends of more responsibilities of the defence – and *de facto* counsel – and a judge who can decide to have his position depend on the two sides of defence and prosecution in Dutch criminal procedure (chapters 1 and 2). As explained in the introduction to this book, this chapter will focus on ineffective legal assistance, rather than assistance by a lawyer outside of Dutch criminal procedure, norms as to how counsel should offer a positive contribution to these proceedings, or ineffective self-representation by a necessarily unassisted accused.

To explain the aforementioned limitations of this study further, tradition is an important aspect of the context of Dutch criminal proceedings which will also impact this description and analysis of ineffective legal assistance and its redress in the present-day criminal process. The overview in this chapter will explore the influence of tradition mostly on the right to counsel and related (defence) rights in codified law and case law. Equally significant are actual and possible changes to the criminal procedural code and case law that most affect the protection of the rights of the accused in the Netherlands. Certainly, such occurred or foreseen alterations can sometimes affect the accused who opts for self-representation as much as the assisted accused. However, due to the focus of this study, the factors that impact on the effectiveness of assistance by counsel will feature more prominently here than the ones that influence self-representation. In keeping with the focus of this research on ineffective assistance by counsel and its redress in Dutch criminal procedure, most attention will inevitably be paid to an effective defence of the assisted accused, rather than unassisted accused. This means that this chapter will highlight factors that impact situations in which counsel is or can be involved, as opposed to situations in which the self-representing unassisted accused is not or cannot actively participate, in the criminal process.

Similarly, this research will focus on situations in which that same assisted accused is harmed, rather than helped, by the assistance provided by his lawyer. Consequently, a particular outlook is expressed by the following overview of the foundations for the description and analysis of the context of Dutch criminal proceedings in which the phenomenons of ineffective legal assistance and its redress can occur. The *negative* issue of how counsel ought not to perform in Dutch criminal proceedings will be highlighted instead of the *positive* contribution of counsel to the accused's effective defence.

The most relevant right for this description and analysis of ineffective legal assistance and its redress in Dutch criminal proceedings is Article 28 Sv, which affords the accused the option of either self-representation or legal assistance – which in turn can be provided by privately hired (retained) or legal aid (appointed) counsel in the presence or absence of the accused.³⁶⁰ The details of this right will be given in the remainder of this chapter, in order to determine how this right can be examined contextually in the substantive research chapters regarding the criminal process in the Netherlands (chapters 6, 8, 10 and 12).

³⁶⁰ Under Article 28 Sv, respectively Article 28 in conjunction with Articles 40-43 Sv, see further in subsection 3.3.1.

Outline

This chapter consists of four more sections. First, general characteristics of Dutch criminal procedure will be described to give an impression of its functioning (section 4.2.).³⁶¹ Thereafter, factors will be addressed that enable or limit the effectiveness of the assistance provided by counsel in Dutch criminal procedure (section 4.3.). The penultimate section will turn to an overview of what in the Netherlands is often referred to as cassation technique (section 4.4.). Finally, concluding remarks will be made (section 4.5.).

4.2. An overview of Dutch criminal procedure

The overview presented in this section will describe and analyse the general characteristics of Dutch criminal procedure. The main objective of this overview is to explain, in its context, the right to counsel under Dutch law.³⁶²

As explained in chapter 2 when discussing the conceptual framework, this right is also granted under the Constitution³⁶³ and the Convention (see sub-section 2.3.1.).³⁶⁴ These other headings will be referred to, where relevant. Especially the Convention will be emphasised because this research focuses on the Convention minimum guarantees.

The outline of this overview is as follows. First, characteristics of Dutch criminal proceedings that have hardly changed, which indicate the lasting impact of tradition on the current process, will be highlighted (sub-section 4.2.1.). Subsequently, a description will follow of changes to Dutch criminal proceedings, in order to determine to what extent the proceedings can be found to have shifted away from the civil law tradition and the correspondingly more inquisitorial criminal procedural design (sub-section 4.2.2.). Finally, both aforementioned aspects form an important context for the significant analysis of the right to legal assistance under Article 28 Sv, which will be provided in the last sub-section (sub-section 4.2.3.).

4.2.1. Largely unchanged general characteristics since 1926

The main source of Dutch criminal procedure is the Code of 1926. This Code, which has faced some 300 changes³⁶⁵, is still applicable today.

This arrangement complies with the Constitution of 1814³⁶⁶ – last amended in 1984 – which requires that the main body of substantive and procedural criminal law is codified. Although there have been significant changes to the procedure since 1926³⁶⁷, this sub-section will highlight characteristics that still more or less remain. This analysis is important when examining whether the civil law tradition continues to exert influence over today's procedure and, if so, in what way. After all, if unaltered characteristics can be pointed out, this can also explain how present-day criminal proceedings have not departed from elements that were already devised with the original intention of the drafters.

This intention of the drafters of the Code of 1926 can be found in their desire to change the criminal procedure of their time³⁶⁸, which they considered to be "(...) more inquisitorial in nature".³⁶⁹

³⁶¹ The claim that additional obligations can follow from one right is also suggested by Mahoney who considers the Court's case law concerning criminal matters under Article 6 of the Convention to be "exceptionally rich" so that a code of criminal procedure could almost be drafted on the basis of all case law, P. Mahoney, *Right To A Fair Trial In Criminal Matters Under Article 6 E.C.H.R.*, *Journal of International Studies*, Vol. 4, Iss. 2, 2004.

³⁶² For the context see sections 4.2.1. and 4.2.2., for the right to legal assistance see section 4.2.3.

³⁶³ Article 18 (1), respectively Article 18 (2) Gw.

³⁶⁴ Article 6 (3) (c) of the Convention and Article 14 (3) (d) ICCPR.

³⁶⁵ The government admits that the Code of 1926 has been changed 300 times already, but aspires to change the code significantly through "modernization", available at: <http://www.rijksoverheid.nl/onderwerpen/wetgeving-en-rechtsgebieden/strafrecht-en-sanctierecht/modernisering-wetboek-van-strafvordering>.

³⁶⁶ See also: www.government.nl/issues/constitution-and-democracy/constitution-and-charter (website last accessed on 27 April 2015)

³⁶⁷ See sub-section 4.2.2.

³⁶⁸ The French Code d'Instruction Criminelle of 1808 entered into force in the Dutch regions, along with the Code pénal of 1 January 1811, on 1 March 1811.

³⁶⁹ E.g. Minutes of the Ort Commission (named after its chairman), 46th meeting at 5-6, in: Lindenberg (2002) at 347-348.

Their aim was to design “(...) a pre-trial stage of a more inquisitorial nature that would end up in an improved accusatorial trial stage” and thereby shift away from the more inquisitorial design.³⁷⁰

Under that design, on the one hand, the investigating and prosecuting authorities had to be given all the powers required to perform their task.³⁷¹ On the other hand, out of fairness, the defence had to be “levelled” by compensating the accused with several participatory rights during the entire procedure.³⁷²

As defence rights, the drafters gave the accused a right to be heard, or to request to be heard, especially when investigative or detention measures were undertaken against him during the pre-trial stage.³⁷³ Moreover, the accused was afforded a right to request witnesses to be heard, as well as to utter the last word at the trial phase. The accused also became entitled to retain, or to be appointed, a lawyer during the entire criminal investigation – from pre-trial up to the *de novo* appeal stage.³⁷⁴ Therefore, the drafters appeared to want the authorities to hear what the accused had to declare with accompanying procedural rights, so that he could actively make use of his rights and could express his interests and wishes. For that latter issue, the accused could benefit from counsel if he so wanted, but not at earlier stages such as police interrogations.

The relationship between the accused and counsel was so regulated that they could, in principle, jointly examine the evidence in the dossier before the trial commenced. Moreover, the drafters gave counsel a pre-trial right to request to be present during the hearing of witnesses or the examination of a crime scene by the judge of instruction. Additionally, counsel was afforded a right to ask this judge to hear witnesses and experts. From this perspective of defence rights, it is noticeable that such rights were more limited during the pre-trial phase but were more extensive at the trial stage. The drafters gave rights to the defence at the pre-trial stage in order to adequately prepare for the more accusatorial phase in court.

However, these pre-trial rights were not unconditional. The code regulated that the accused could make use of these rights provided that their exercise would not hamper the “aim”³⁷⁵ of the criminal investigation.³⁷⁶ The criminal investigation by the authorities was considered to be a crucial aim, at all stages of the criminal procedure.

This latter arrangement demonstrates how important the drafters found truth finding and a fair trial. This is also shown in their desired result for the entire Dutch criminal procedure, which they explained as follows: “To promote as far as possible the imposition of criminal law on persons who are actually guilty and to prevent the conviction of the innocent and, to the extent possible, their prosecution”.³⁷⁷

The importance attached to the investigation by the authorities as a means to ensure truth finding in fair proceedings is also demonstrated by the prominent roles given to the authorities during the different stages of the criminal procedure. The Code ensured that the police or other authorities with a comparable mandate would carry out a criminal investigation that almost automatically resulted in a judicial investigation. During that judicial investigation, the main participant was a judge of instruction who was described as an “impartial delegated official from the district court”.³⁷⁸ This judge of instruction had to examine whether pre-trial evidence was gathered and selected in such a way that both truth finding and fairness were guaranteed. Under such conditions, the prosecution would indict the accused, so that the case would continue to trial. After the case had been investigated, mostly at first instance, both the prosecution and the defence could appeal on points of law as well as on facts.

³⁷⁰ *Memorie van Toelichting Wetboek van Strafvordering 1926*, TK 1913-1914, 258, nr. 3. See also on their description of Dutch criminal procedure, Corstens/ Borgers (2014) at 10-11.

³⁷¹ Melai (1992) at 1-244, particularly at 67-68 and Corstens/ Borgers (2014) at 11.

³⁷² Also ultimately adopted in *Memorie van Toelichting Wetboek van Strafvordering 1926*, TK 1913-1914, 258, nr. 3. Corstens/ Borgers (2014) at 10-11.

³⁷³ E.g. Minutes of the Ort Commission, 46th meeting at 5-6, in: Lindenberg (2002) at 347-348.

³⁷⁴ Minutes of the Ort Commission, 11th meeting at 4-5, in: Lindenberg (2002) at 189.

³⁷⁵ See for instance the emphasis on interrogations in order to discover both the offence and the reasons why the accused has committed that offence, Groenhuijsen (2012: 5-Art 29 Sv, suppl. 15), in: Melai/Groenhuijsen (2012).

³⁷⁶ E.g. explanatory memorandum regarding the criminal procedural code of 1926 (in Dutch: *Memorie van Toelichting Wetboek van Strafvordering 1926*, TK 1913-1914, 258, nr. 3, at 4; Kruseman (1907) at 368-407 and 419-460; and Sleutelaar, (1918) at 297.

³⁷⁷ TK 1913/14, 286, nr. 3, at 55.

³⁷⁸ TK 1913/14, 286, nr. 3, at 55.

After the appeal court had examined the case *de novo*, the prosecution and the defence had an opportunity to appeal on points of law only. The appeal in cassation was then adjudicated by the Hoge Raad. Therefore, rather than making the proceedings party-led, the Code gave, during the aforementioned stages, prominent roles to the authorities for truth finding and the guarantees for a fair trial.

Given the emphasis on the roles of the authorities for truth finding and the fairness of the criminal procedure pre-trial, it is important to note that at present the prosecutor remains to lead the criminal investigation executed by the police (Article 148 Sv). Moreover, although the prosecution service under the Judiciary (Organisation) Act has been given the task of maintaining the criminal legal order³⁷⁹, it is often stressed that the prosecutor should take a “magisterial” stance. Such a stance is commonly understood to include taking into account both the interests of the accused and the interests of the procedure as a whole, including its fairness and truth finding. It has relevance from the pre-trial stage. Consequently, already pre-trial, the prosecutor *inter alia* should attempt to take into account the rights of the accused. Such rights include the right to know that one has been “stopped” for investigation, the right to be presumed innocent, the right to have adequate time and means to prepare for the trial and the right to a fair criminal procedure in its entirety.³⁸⁰

The emphasis on the “magisterial” prosecutor as a leader of the investigation has been “reinforced” under a new statute.³⁸¹ On 1 January 2013, a statute “strengthened” the role of the pre-trial judge by giving him a more supervisory function.³⁸² Under this new supervisory role, the pre-trial judge who finds that it is necessary out of fairness or for truth finding, can, for example, hear a witness or expert or request a psychiatric examination (Articles 180-184 Sv). In summary, this new role means that the pre-trial judge no longer has to examine all the prosecutor’s use of procedural means (as explicitly mentioned under Article 170 (2) (new) Sv).³⁸³ Consequently, the interrelationship between the pre-trial judge and the prosecutor has also changed somewhat. Currently, the prosecutor is almost wholly responsible for the pre-trial investigation.³⁸⁴ Moreover, the pre-trial judge no longer combines investigating and general judicial tasks. However, in particular situations, the pre-trial judge can still conduct his own investigation if he considers this necessary (*ex officio*). For example, if he considers this necessary for the case, the pre-trial judge can hear witnesses or appoint an expert. However, under what conditions the pre-trial judge will do so appears to have become (more) dependent on the individual discretion of the individual judge.³⁸⁵ While case law will further determine what functions will or will not be acceptable under the new role of the pre-trial judge, the new statute appears to give considerable discretion to the pre-trial judge as to how active his foreseen *ex officio* investigative role will be.

³⁷⁹ Judiciary (Organisation) Act (in Dutch: *Wet op de rechterlijke organisatie*, *Stb.* 1998, 630, entry into force 16 April 1998), lastly amended in 2013, *Stb.* 2013, 382, entry into force 1 April 2013.

³⁸⁰ E.g. Articles 53 and 54 Sv as well as Article 28 Sv in relation to Article 359a Sv, e.g. HR 31 August 2004, ECLI:NL:HR:2004:AP1213, *NJ* 2004, 590. See also HR 24 May 1988, ECLI:NL:HR:1988:ZC3835, *NJ* 1988, 918. The first case has also been adopted in the legislative proposal regarding counsel’s role particularly pre-trial interrogations and investigative measures 34195 *Wijziging van het Wetboek van Strafvordering en enige andere wetten in verband met aanvulling van bepalingen over de verdachte, de raadsman en enkele dwangmiddelen* so as to explain that the timing of “stopping for the investigation”, which starts after the accused has reached the location at which he will be interrogated and the relevant authority – the assistant prosecutor, who usually is a police officer with additional training, has given the order for investigation when brought before him by the arresting officers (*voorgeleiding* under Articles 53 and 54 Sv). For a newer right that will become important for the prosecutor, see HR 10 December 2013., ECLI:NL:HR:2013:1752. Also annotated in *NJ* 2014, 196 m.nt. Reijntjes regarding the right to consultation in relation to police interrogations (*Salduz*). This case has also been adopted in 34195 *Wijziging van het Wetboek van Strafvordering en enige andere wetten in verband met aanvulling van bepalingen over de verdachte, de raadsman en enkele dwangmiddelen* so as to explain the requirements on the right to consultation by a lawyer at the stage of police interrogations.

³⁸¹ Act on reinforcing the position of the judge of instruction (in Dutch: *Wet versterking positie rechter-commissaris*, *Stb.* 2012, 408, entry into force 1 January 2013).

³⁸² Act on reinforcing the position of the judge of instruction (in Dutch: *Wet versterking positie rechter-commissaris*, *Stb.* 2012, 408, entry into force 1 January 2013) and Statute regarding experts in criminal cases (in Dutch: *Wet deskundigen in strafzaken*, *Stb.* 2009, 33, entry into force 1 January 2013).

³⁸³ Kwakman (2012) at 228-233.

³⁸⁴ The Statute has also annulled the earlier judicial pre-trial investigation (*gerechtelijk vooronderzoek*, *GVO*) and the corresponding notice of further prosecution (*kennisgeving van verdere vervolging*) and the accused’s appeal in writing against it (*het bezwaarschrift tegen de kennisgeving van verdere vervolging*).

³⁸⁵ Van der Meij (2010), particularly at 238-242 and 566-573. See also Verrest (2011) particularly at 203-215 and Kooijmans (2012) at 805-813.

With regard to the relationship between the prosecutor and the pre-trial judge, it is relevant to note that the statute has not changed the requirement of the pre-trial judge to check the legitimacy of the prosecutor-ordered pre-trial detention of the accused (e.g. Article 57 Sv).³⁸⁶ Likewise, the prosecutor, not the pre-trial judge, remains obliged to guarantee that the results of both the police investigation and the judicial pre-trial investigation are passed on to trial. For that purpose, the pre-trial judge has to guarantee that a thorough and complete dossier will go to the trial judge and to the defence before the accused is summoned. Thus., the pre-trial judge's role still consists of a check on the (fundamental) liberties of the accused in relation to pre-trial detention and the guarantee of the equal level of information of both sides of the defence and prosecution on the basis of the dossier.

Turning to the trial stage, the unchanged exclusive right of the prosecutor to initiate a prosecution by selecting what case to prosecute – on the basis of public interest – has an important impact on the interrelationship between the prosecutor and the trial judge (Article 167 Sv and 242 Sv). The nature of this right also means that the prosecutor is *not* obliged under the law to prosecute each known crime. The procedural consequence of this prosecutor's right is that the courts can only convict a person of the indicted offence as produced by the prosecutor. Although the judge has significant freedom to determine issues of fact and law, interference with this domain of the prosecutor is prohibited. The prosecutor is the only one who decides for which offence the accused has to stand trial. At the trial stage, the prosecutor is often referred to as a standing magistrate as opposed to the sitting magistrate – the judge.

As the description in the Code of 1926 indicates, judges are still always career professionals. They either act alone or in a panel of three, depending on the offence (Article 268 Sv).³⁸⁷ Both trial and appeal judges continue to have the authority to "(...) lead the investigation" in court (e.g. Article 272).³⁸⁸ During this trial investigation, the judge should take an active role in truth finding and in guaranteeing the fairness of the criminal procedure.³⁸⁹ That active role follows from his many investigative competencies at, or for the purpose of, the court hearings.³⁹⁰ For example, the judge can hear the defendant as well as witnesses and experts in criminal cases. Under such circumstances, the law affords the judge the first right to pose questions to the accused, while he can also open the hearing of prosecution witnesses. Additionally, the judge can examine, and put to the defence and prosecution, items assembled in the dossier. He can then read out parts of the dossier and ask the prosecution and defence to respond to what he has drawn attention to. Moreover, the judge can personally conduct a visit to the crime scene or another location (*descente*). Finally, the judge can use his own observations in court as evidence (Article 338 Sv). All these aforementioned measures can subsequently be used as evidence at the first instance and appeal stages for the conviction or acquittal of the accused (Article 338 Sv, respectively 415, 417 and 442 (2) Sv). In addition, the judge can use the fruits of these measures as legal evidence to prove the offence as a basis to convict the accused (Article 350 Sv). Dutch law not only requires that the indicted facts have been legally proven, but also that the judge is (personally) convinced on the basis of the content of lawful evidence resulting from the investigation in court (Article 338 Sv).

The structure of that latter requirement upon the judge is as follows. To render a verdict, the judge has an independent duty to answer four formal questions under Article 348 Sv. In summary, the judge has to ensure the validity of the indictment and the competence of the court to try the case. Moreover, the judge has to guarantee the admissibility of the prosecution and he must determine that there are no reasons to suspend the prosecution. Consequently, the court has to guarantee that procedural law, which has to be strictly followed, has indeed been complied with in practice in all

³⁸⁶ Sleutelaar (1918) at 297ff.

³⁸⁷ E.g. De Jongste and Decae (2010) at 5-31.

³⁸⁸ This leadership can also be demonstrated during a non-codified hearing of directions. At such a hearing, the defence and prosecutor can submit requests for investigation (in Dutch: *regie* or *pro forma zitting*). See e.g. HR 20 December 2013, ECLI:NL:HR:2013:2056 in which the appeal court corrected an earlier wrongly refused request to hear a witness on the basis of the wrong standard by the first instance court.

³⁸⁹ E.g. Cleiren (2001) at 9-31, particularly at p. 30-31; Melai (1992), particularly at 63-66 (para. 6) and with regard to the relationship with the defence and also especially counsel 67-84; and Silvis (2004: 4- Art 272 Sv, suppl. 119, in: Melai/Groenhuijsen (2000).

³⁹⁰ E.g. Cleiren (2001) at 9-31, particularly at p. 30-31; Melai (1992), particularly at 63-66 (para. 6) and with regard to the relationship with the defence and also especially counsel 67-84; and Silvis (2004: 4- Art 272 Sv, suppl. 119, in: Melai/Groenhuijsen (2000).

criminal procedural instances. When these formal questions cannot be answered positively, the judge ought not to start with the examination of the indicted offence at trial.

After having checked and answered in the affirmative the questions under Article 348 Sv, the court has an independent duty to answer four material questions under Article 350 Sv. The trial judge has to ensure that the act that has been committed can be legally proven and that this act amounts to a criminal offence for which the accused is liable. Moreover, the judge has to decide – if he does not conclude an acquittal – which sanction has to be imposed on the accused.

Often, these two sets of questions are summarised as the judicial decision scheme. They should ensure that the judge finds the “substantive truth” – which in summary means that the court tries to discover what has happened in reality.³⁹¹ Thus., the judge is also a trier of fact, a function that in some traditions is given to a jury. In the Netherlands, the jury system was abolished in 1813 and was never reintroduced.³⁹² Therefore, the interrelationship between the prosecutor and the trial judge appears to be fundamentally unchanged since the original structure underlying the Code.

At present, the authorities still appear to play a prominent role for truth finding and the guarantees for a fair trial during the aforementioned stages³⁹³, despite many statutory changes.³⁹⁴ Whilst the extent to which current procedure in its entirety is still largely akin to the original design of 1926 is being debated³⁹⁵, most scholars agree that the role expected of the trial judge³⁹⁶ – also in relation to the defence – should remain mostly (pro-)active.³⁹⁷ For example, Corstens and Borgers explain that the investigation in court is not dominated by the “parties” – i.e. the defence and prosecution – but by the trial judge.³⁹⁸ Fokkens also advocates the principle that the trial judge is the one who investigates.³⁹⁹ Nijboer considers that the position chosen by the two sides for the course of the proceedings can never be decisive; he concludes that fact-finding at the trial phase can be explained only partly in terms of requests and substantive defences, thereby putting the judge’s role at the centre.⁴⁰⁰ Brants, Mevis, Prakken and Reijntjes conclude that the active role of the trial judge means that he has *ex officio* to carry out investigative acts in order to ensure the necessary complementary investigation, even if the defence or prosecution do not explicitly consider that to be necessary.⁴⁰¹ Therefore, at present, there appears to be common agreement that the trial judge still maintains a key position and should play an active role in the criminal procedure, which resembles rather more inquisitorial than adversarial criminal proceedings.⁴⁰² Although not all scholars would use that latter terminology⁴⁰³, the trial judge has played, and should continue to play, an active role in both truth finding and in ensuring the fairness of the procedure. That inference is also present in the inherent law of evidence in the Code under which the judge has the freedom to select and evaluate the evidence as he sees fit.⁴⁰⁴ He can actively examine the evidence⁴⁰⁵ and has a great deal of discretion to decide whether, and if so when, the prosecution has provided sufficient evidence in a concrete case.⁴⁰⁶

³⁹¹ E.g. Cleiren (2001) at 9-31, particularly at 27-28.

³⁹² Corstens/ Borgers (2014) at 42.

³⁹³ Kruseman (1907) at 368-407 and 419-460. See also Van Zijl (2013) at 239.

³⁹⁴ E.g. Judicial Investigations (Review) Act following the criminal investigation but preceding trial (in Dutch: *Wet herziening gerechtelijk vooronderzoek*, *Stb.* 1999, 243, entry into force 1 February 2000); Act on reinforcing the position of the judge of instruction (in Dutch: *Wet versterking positie rechter-commissaris*, *Stb.* 2012, 408, entry into force 1 January 2013) and Experts in criminal cases Act (in Dutch: *Wet deskundigen in strafzaken*, *Stb.* 2009, 33, entry into force 1 January 2010). *Wet herziening regels voor procesdossier in strafzaken*, *Stb.* 2011, 601, entry into force 1 January 2013.

³⁹⁵ E.g. Groenhuijsen, in: Groenhuijsen and Knigge (2001) at 67-72, including a reference to Rozemond’s different interpretation of the *de auditu*’s case law effect on the relation between the pre-trial and trial stage at 69-72.

³⁹⁶ Groenhuijsen and Knigge (2001), at 72-78.

³⁹⁷ Ort Commission member Simons (1926) at 19 and Groenhuijsen and Knigge (2004) at 89-90.

³⁹⁸ Corstens/ Borgers (2014) at 10-11 and 122.

³⁹⁹ Fokkens, in: Harteveld et al (2005) at 139-149.

⁴⁰⁰ Nijboer (2004) at 492-503.

⁴⁰¹ Brants et al, in: Brants et al (2003), particularly at 3 and 5.

⁴⁰² E.g. Cleiren (2001) at 9-31, particularly at 30.

⁴⁰³ Groenhuijsen, in: Klip et al (2004) at 147-158, particularly at 151.

⁴⁰⁴ Buruma (2010b) at 689-706.

⁴⁰⁵ See for the more general explanation of the judge’s freedom with regard to the free selection and evaluation of evidence, e.g. HR 4 May 2004, ECLI:NL:HR:2004:AO5061, *NJ* 2004, 480. See also Duijst, in: De Groot-van Leeuwen (2009), at 98-99. See in relation to a specific type of evidence, here statistical calculations, for this freedom of the judge, e.g. HR 26 October 2004, *NJ* 2004, 69, ECLI:NL:HR:2004:AR2190.

⁴⁰⁶ Bronkhorst, in: Schoordijk (1970) at 35-47.

Thus,, the judge is supposed to be active and it will have to be explored in the remainder of this section how that idea about the active trial judge corresponds with proposals for change of the proceedings.

4.2.3. *The mainly unaltered right to legal assistance since 1926*

The previous sub-sections have indicated several changes, actual and possible, to the criminal procedure. Interestingly, since 1926 the right to legal assistance has remained largely unchanged (Article 28 Sv). To appreciate the importance of this lack of change to the most important right for this study, it is important to explore how it got codified.

Interestingly, at the time of its codification, the drafters *broke with legal tradition*.⁴⁰⁷ They did not follow the historic trend when they codified Article 28 Sv. Before 1926 each accused person was entitled to legal assistance during the trial phase for all criminal offences.⁴⁰⁸ The trial judge, when confronted with an unassisted accused, had to appoint counsel to assist him or the case would be null and void (Article 294 of the then applicable French *Code d’Instruction Criminelle* of 1811). No such obligation was required for the pre-trial stage, so that in the case of a detained suspect with the requisite financial means the authorities could even refuse to allow him access to a lawyer. The rationale put forward by the legislator was that during the pre-trial phase the accused did not require access to a lawyer because the accused had the most knowledge concerning the criminal offence.⁴⁰⁹ The authorities, who conducted the criminal investigation under professional obligations, were allowed to “use” the accused as a source of information.⁴¹⁰ A second codification under the then applicable Dutch *Code of Criminal Procedure* of 1836 brought two significant changes to the then existing right to legal assistance. The accused who was not detained became entitled to legal assistance five days before the trial phase for each criminal offence.⁴¹¹ Additionally, from detention during the pre-trial stage onwards, an accused – who was under threat of being charged with criminal offences punishable by more than one year of imprisonment – had a right to legal assistance.⁴¹² At the time, there was already disagreement with this expansion of the right to legal assistance at the expense of the nullity of the case. The then acting Minister of Justice, Olivier, sought to dispense with mandatory legal assistance at the trial phase in all criminal cases altogether.⁴¹³ He thought that legal assistance was not required, since professional judges ensured both truth finding and the fairness of the trial stage.

The drafters of the Code of 1926, who felt that the earlier criminal procedure was “too inquisitorial”, were apparently close to the Minister’s point of view as far as the right to legal assistance was concerned. They gave the accused the right to opt for self-representation or for assistance by a retained or appointed lawyer at all stages of the criminal procedure.⁴¹⁴ They also included legal assistance during the pre-trial phase. However, they lifted the obligation in all the aforementioned examples for the authorities to *appoint* counsel at the cost of the nullity of the case.⁴¹⁵ Mandatory legal assistance, which at the time existed in Germany⁴¹⁶, was dismissed as an option for Dutch criminal proceedings. Rather, the drafters argued that mandatory legal assistance would result in

⁴⁰⁷ Spronken (2001) at 9 and the Statute introducing the new criminal procedure code of 15 January 1921, *Stb.* 1921, 14, entry into force 1 January 1926.

⁴⁰⁸ The French Code d’Instrucion Criminelle, dating from 1808, entered into force in the Dutch regions, along with the Code pénal of 1 January 1811, on 1 March 1811.

⁴⁰⁹ Bosch (2005) at 127.

⁴¹⁰ Spronken (2001) at 9.

⁴¹¹ Statute of 24 April 1836, *Stb.* 18-40, entry into force on 1 October 1838.

⁴¹² Rethaan Macaré (1889-I) at 96. Mackay proposed and defended the system, leading to Article 132 Sv. The government decided on this by 41 votes in favour and 16 votes against.

⁴¹³ Rethaan Macaré (1889-I) at 90-92.

⁴¹⁴ Statute of 15 January 1921, *Stb.* 14, entry into force 1 January 1926.

⁴¹⁵ Bosch (2005) at 141.

⁴¹⁶ The design of the criminal procedural code (in Dutch: *Ontwerp tot vaststelling van een Wetboek van Strafvordering, Der Koningin aangeboden door de Staats-Commissie voor de herziening van het Wetboek van Strafvordering, ingesteld bij koninklijk besluit van 8 april 1910, no. 17, deel II: Toelichting, p. 66, 67*); Bosch (2005) at 137; Hingst (1874) at 94-144; Simons (1897) particularly at 19; Vonkenberg (1918), particularly at 61 and at 93; Van der Vries (1899), particularly at 88.

coercing the accused to have assistance by a lawyer against his will.⁴¹⁷ Since 1926, the position of counsel under criminal procedural law is thus dependent upon, or deriving from, the accused's will and procedural position.⁴¹⁸ The accused has a right to opt for the best possible defence at all stages of the criminal procedure, with or without counsel. He is free, in most circumstances, to choose whether to have assistance of counsel, whether retained or appointed.⁴¹⁹ This is not to say that the choice for a certain legal aid lawyer is binding on the authorities, although they are free to follow the preference of the accused who qualifies for legal aid under the current scheme.⁴²⁰ The legal aid system has expanded so that, for instance, an accused who would be deprived of his liberty during the pre-trial stage or thereafter can obtain legal assistance free of charge.⁴²¹ Around 1960, the government decided to meet the costs of legal aid under this scheme since this, allegedly, provided an impetus for legal assistance of a better quality, at least according to some scholars.⁴²² Consequently, indigent or non-detained accused also have an opportunity to defend themselves with the assistance of counsel.

Nowadays, despite the manifold (recent) changes to Dutch criminal procedure⁴²³, the codified right to legal assistance has not altered since 1926 (Article 28 Sv). However, law and case law has modified its application. A first example, which has already been given, is the introduction of mandatory assistance by counsel for the two phases of appeal in cassation and revision (for the benefit of the accused; see sub-section 2.3.3.3.).⁴²⁴ As one important aspect of the right to an effective defence and a fair trial, the impact of obligatory assistance by counsel on the free choice of the accused whether or not to opt for legal assistance calls for further examination in the substantive research chapters. A second set of changes, which will have to be explored in the remainder of this research, are alterations that follow from the Court's case law. The case of *Salduz v. Turkey* from 2009⁴²⁵ readily comes to mind. This case required that the Hoge Raad had to make Article 28 Sv applicable earlier on in the criminal procedure by advancing the right to be assisted by a lawyer to the stage of police interrogations.⁴²⁶ Therefore, these are at least two examples that indicate the importance not just of a further examination of both Dutch law and case law, but also of case law from the Court in relation to the right of the accused to an effective defence in criminal proceedings in the Netherlands.

4.2.2. Actual and possible changes to criminal procedure since 1926

This sub-section will explore actual and possible changes to Dutch criminal proceedings whether by statute or case law since 1926. With regard to legislation, it appears to be that 2014, 2015 and 2016 are peak years for Dutch criminal procedural reforms.⁴²⁷ In 2014, the former Minister of Security and Justice announced the desire to modernise the criminal procedural code, for which 19 legislative proposals are being prepared. The yet known proposals and their consequent impact through actual and potential changes of Dutch criminal proceedings will be examined here, with a view to exploring the extent to which tradition still exerts influence over the current process.

⁴¹⁷ TK 1913/14, 286, no. 3, at 39 (Explanatory Memorandum, in Dutch abbreviated as MvT, of Article 29 ORO). See Spronken (2001) at 13, section 2.4.1. and sub-section 2.11.6.

⁴¹⁸ Röttgering (2005: 3.6 - Art 28 Sv, suppl. 150), in: Melai/Groenhuijsen (2005).

⁴¹⁹ See also Mevis in his annotation to HR 9 October 2007, ECLI:NL:HR:2007:BA5025, *NJ* 2008, 43 m.nt. P.A.M. Mevis, in which he labels the Hoge Raad's verdict "surprising", particularly because of its legal ground of Article 6 of the Convention and the activity required from the court who had ordered the accused to leave the room. According to Mevis, this decision goes against the trend of the legislator to limit this responsibility of the court.

⁴²⁰ See sub-section 1.1.

⁴²¹ Reijntjes/Minkenhof (2009) at 10.

⁴²² Bosch (2005) at 128.

⁴²³ See sub-sections 4.2.1. and 4.2.2.

⁴²⁴ See sub-section 4.2.2.

⁴²⁵ E.g. This right will be introduced into Dutch criminal proceedings as of 1 March 2016 because of HR 22 December 2015, ECLI:NL:HR:2015:3608 more than six years after the Court's case (see section 6.3.1.). HR 30 June 2009, ECLI:NL:HR:2009:BH3079 (HR about *Salduz*). See also its annotation in *NJ* 2009, 349 m.nt. T.M. Schalken. See also Franken and Röttgering, in: Prakken and Spronken (2009) at 215 anticipating the interpretation of the Court's case of *Salduz v. Turkey* in the context of the experiment into counsel at police interrogations which was ongoing at the time in the Netherlands. See also Coster van Voorhout (2009a).

⁴²⁶ See sub-section 4.3.1.

⁴²⁷ The government admits that the Code of 1926 has been changed 300 times already, but aspires to change it significantly through "modernization", available at: <http://www.rijksoverheid.nl/onderwerpen/wetgeving-en-rechtsgebieden/strafrecht-en-sanctierecht/modernisering-wetboek-van-strafvordering>.

4.2.2.1. Changes pre-trial and to the flow from pre-trial to trial

Often, scholars note that a first change to the criminal proceedings as laid down in the Code of 1926 already took place in that same year when the Hoge Raad delivered its first *de auditu* decision. This case concerned testimonies of witnesses before the police⁴²⁸, which was thereafter expanded to other types of evidence.⁴²⁹ In this *de auditu* case law, the Hoge Raad accepted pre-trial hearsay witness evidence without requiring the trial judge to hear that same witness in open court. The Hoge Raad attracted criticism with that verdict, because it would have allegedly ruptured the drafters' design.⁴³⁰ The Hoge Raad, with its *de auditu* case law⁴³¹, would have hindered the flow "(...) from a more inquisitorial pre-trial to a more accusatorial trial phase".⁴³² By allowing materials gathered and selected during the pre-trial stage without restriction, the court supposedly no longer had to check the evidence against the accused in full and in "immediacy" in the courtroom. Therefore, the Hoge Raad would, allegedly, have made the pre-trial phase more important at the expense of the trial stage contrary to the proceedings as foreseen in the Code.

With regard to the rights of the defence, the aforementioned issue of immediacy may be important. The principle of immediacy entails the direct hearing of witnesses and the examination of other evidence at the trial phase, during which the defence, the prosecution, and the judge are present and are able to directly comment on all evidence. A trial session in immediacy may, possibly, justify a more inquisitorial position of the accused during the pre-trial stage thanks to an examination in full in court of the earlier criminal investigation. A full examination would encompass both with regard to fairness and the protection of certain rights as ensured under codified law. According to these scholars, with emphasis on the pre-trial phase, such a legitimisation of restrictions at the pre-trial stage is no longer available.

Therefore, this *de auditu* case law of the Hoge Raad has often been criticised because of its supposed negative effect for the defence.⁴³³ The case law would have resulted in a disadvantage for the accused and counsel, who, as explained above, would be largely absent at the gathering and selection of materials pre-trial.⁴³⁴ For example, given that the accused was not afforded a right to counsel during police interrogations, this apparent rupture in the design would make it very difficult for the defence to test in depth the relevance and reliability of evidence. Also, pre-trial, the defence can hardly test the credibility of the witness in the entire criminal procedure, which could be used as hearsay evidence in court.⁴³⁵ Therefore, defence activities would, allegedly, end up being limited to only "verifying" evidence that has been presented by the authorities at the trial phase. Critics would state that such a position of the defence goes against the desire for full examination of all the evidence, as is required for a fair procedure in which the truth can be found.⁴³⁶

Not all scholars agree that the Code did not foresee the exception to the rule that the Hoge Raad ensured with its *de auditu* case law. For example, Rozemond contends that the Code of 1926 itself made the pre-trial phase central to the criminal procedure.⁴³⁷ He argues therefore that the Hoge Raad did not cause any rupture in the natural flow of the proceedings. Rather, the drafters had compensated the accused at the pre-trial stage by providing him with a right to counsel and other rights for him to be heard.⁴³⁸ Consequently, in his opinion, the drafters had themselves intended the trial stage to verify the materials gathered and selected during the pre-trial phase, rather than all evidence being taken in immediacy.

Rozemond appears to make an adequately supported case for his argument that, rather than what is often assumed in the Netherlands, the drafters had foreseen criminal proceedings that would allow, as they called it, for *de auditu* evidence as an exception to the rule of an accusatorial trial.

⁴²⁸ HR 20 December 1926, ECLI:NL:HR:1926:BG9435 (*De auditu*), NJ 1927, 85. See also Pompe (1946) at 6-13.

⁴²⁹ See Borgers (2009a) at 838-841.

⁴³⁰ E.g. Pompe (1946) at 6-13.

⁴³¹ HR 20 December 1926, ECLI:NL:HR:1926:BG9435 (*De auditu*), NJ 1927, 85. See also Pompe (1946) at 6-13.

⁴³² HR 20 December 1926, ECLI:NL:HR:1926:BG9435 (*De auditu*), NJ 1927, 85.

⁴³³ E.g. Franken (2010) at 403-418.

⁴³⁴ E.g. Franken (2010: 4.1), in: Mevis et al (2010).

⁴³⁵ E.g. Pompe (1959) at 141-151 and Baauw, in: Brants et al (1996) at 135-143.

⁴³⁶ See sub-section 4.3.2.

⁴³⁷ Rozemond (1999) at 144-150.

⁴³⁸ Sleutelaar (1918) at 297ff.

Whether or not Rozemond is correct does not have a significant effect on this research, though it is important to also note his minority view because it is well argued and goes against this often encountered idea that was mentioned above at the beginning of this section. In both scenarios, the pre-trial stage is significant for the proceedings in their entirety, whether by design or because of the *de auditu* case law.⁴³⁹ This indicates the importance of the question as to whether or not the defence – and *de facto* counsel – can reasonably play the pre-trial role expected of him.

Statutory changes⁴⁴⁰ do seem to stress pre-trial assertiveness and activity from the defence, such as the statute that “reinforces” the role of the judge of instruction,⁴⁴¹ who can now conduct examination on the requests of the defence. Moreover, pre-trial activity appears to be expected of the defence in relation to the composition of the dossier for which the defence has to play an “increased”⁴⁴² role.⁴⁴³ Another expected change is the proposed Statute that will implement Directive 2013/48/EU into Dutch criminal proceedings (see more regarding the Directive above in section 3.4.; the Directive has to be implemented before 27 November 2016). This Statute will introduce a right of access to a lawyer at the stage of police interrogations in the criminal process in the Netherlands (see also section 6.3.1.). A report presented by the former Minister of Security and Justice of the Netherlands about this Statute stresses that Dutch law and policy already comply to an important extent on the right to legal assistance in criminal proceedings and in European arrest warrant proceedings with the Directive. However, more importantly for this book, this report also notes that this Statute will “further develop and extend” this right on “several points”.⁴⁴⁴ The most important point of *existing* non-compliance of current Dutch criminal law and policy with this Directive is, according to this report, the “general right of accused to be assisted by counsel during police interrogations” (para. 3 of this report). Additionally, the report stresses that the Statute will *introduce* complementary measures regarding the right to access to counsel in relation to certain investigative acts; the right of the accused to inform third persons when he is deprived of his freedom; and – though less important for this research – access to a lawyer in European arrest warrant proceedings. The report adds that the provisions of the Directive, especially those regarding the right to access to counsel in criminal proceedings, originate to an important extent from Article 6 regarding a fair trial. Consideration 53 of the Directive is highlighted because it settles that EU Member States have to ensure that the provisions of the Directive abide by the rights guaranteed under the Convention and have to be implemented as explained in the case law of the Court. Therefore, this report also discusses in detail the *Salduz* case (para. 3.2. of this report), as well as important conditions relating to the waiver of the right to counsel; the exercise of this right by vulnerable accused and the legal consequences when the authorities have not ensured this right (para. 3 of this report). As explained in the introduction to this book, this study will conduct original research into both the *Salduz* case and the other cases that give an indication of the other aforementioned guarantees (see especially sub-section 5.3.1.). Therefore, this research can also help to assess to what extent the aforementioned Statute conforms with the minimum guarantees set by the Court in relation to the right to counsel and the other cited guarantees (see also section 6.3.1.).

Given the aforementioned description of the balance between pre-trial and trial stage, such relatively recent changes that might require a more (pro-)active pre-trial role of the defence – and *de*

⁴³⁹ E.g. Vellinga-Schootstra (2010) at 439-456; Van Kempen (2011) at 8-24, Van der Kruijs (2011) at 3-6; and Van Kampen (2011) at 29-35.

⁴⁴⁰ E.g. General framework for the revision of the criminal procedural code of 1926 (in Dutch: *Algemeen kader herziening Wetboek van Strafvordering*, TK 2003/04, 29 271, nr. 1).

⁴⁴¹ Statute on reinforcing the position of the judge of instruction (in Dutch: *Wet versterking positie rechter-commissaris*, Stb. 2012, 408, entry into force 1 January 2013).

⁴⁴² Statute changing the rules regarding items in the dossier (in Dutch: *Wijziging van het Wetboek van Strafvordering in verband met de herziening van de regels inzake de processtukken, de verslaglegging door de opsporingsambtenaar en enkele andere onderwerpen (herziening regels betreffende de processtukken in strafzaken*, TK 32 468, entry into force 1 January 2013).

⁴⁴³ See particularly sub-section 3.5.2.

⁴⁴⁴ Minister Opstelten to the King, in his report entitled *Nader rapport wetsvoorstel implementatie richtlijn 2013/48/EU recht op toegang tot een advocaat*, dated 13 February 2015, to be found on: <https://www.rijksoverheid.nl/documenten/kamerstukken/2015/02/21/tk-nader-rapport-inzake-eu-recht-op-toegang-tot-een-advocaat>.

facto counsel – are also relevant for the possible alterations to the trial stage. This subject will be explored in the next sub-section (sub-section 4.2.2.2.).

4.2.2.2. Changes to the trial stage as “more adversarial”

Some scholars point out that the trial stage has become more adversarial.⁴⁴⁵ They contend that the role of the trial judge has come to depend (more) on the positions of the defence and the prosecution, rather than on his active investigation of the case. This potential change is particularly relevant for this research into ineffective legal assistance because of the role expected of the trial judge in relation to the defence and *de facto* counsel.

That is, if the trial stage has indeed become more adversarial, it could be the case that the trial judge, who is confronted with ineffective assistance by counsel that harms the accused’s rights, has become more passive.⁴⁴⁶ However, without an active role of the judge – who intervenes in the case where confronted with ineffective legal assistance – the accused almost automatically bears the consequences. The question that arises in this research is, of course, whether or not this would come at the expense of the accused who is entitled to a fair trial under Dutch law and the Convention. Even if Dutch law does not require that a fair trial encompasses a right of the accused to *effective* legal assistance, rather than only a more formal right to counsel, the directly binding Convention might set this obligation.

The aforementioned question about the fairness of foreseeable consequences for the accused is that other bodies of law such as civil law and disciplinary proceedings have *no* effect on the course or outcome of criminal proceedings, as explained in the introduction to this research. Moreover, the accused cannot (directly) complain of ineffective assistance by counsel under a separate procedure after the facts in the Netherlands. Therefore, unless the “damage” will be restored *during* the criminal proceedings, later during the *de novo* appeal or ultimately during the appeal in cassation on points of law only, the accused will normally fail to get redress for ineffective legal assistance *in* Dutch criminal proceedings. Again, even if Dutch law does not require that a fair trial encompasses redress for the accused who is being harmed by ineffective legal assistance, the Convention might set this obligation *if* the Court explains the rights of the accused to a fair trial to include a right to *effective* legal assistance, rather than “only” a formal right to have a lawyer on one’s side.

Certainly, the accused who assumes a wrongful action or omission by his counsel at first instance can choose another retained counsel for the appeal stage. Moreover, the appellant can ask his lawyer to deal with his appeal stage differently than his predecessor at first instance proceedings. However, ineffective assistance by counsel is not a *separate* ground to which the appeal court has to respond with reasons in its verdict. Moreover, it does not open a direct route to the Hoge Raad. Therefore, the two aforementioned risks make it important to explore the effects of changes, especially to the trial stage, on the central research theme of ineffective legal assistance *in* Dutch criminal proceedings.

In order for this analysis regarding the claim that the trial stage has become more adversarial to be contextualized, it is important to refer to three scholarly works regarding the Dutch trial phase.

First, a research group of scholars found the issue of verification⁴⁴⁷ at the original, more inquisitorial, trial stage one of the reasons for demanding its reform (*Criminal Procedure 2001*).⁴⁴⁸ Consequently, this group designed a new procedure that they find more “contradictory” than the existing criminal proceedings.⁴⁴⁹ With this term of “contradictory”, they mean that “(...) the issues about which the defence and the prosecution hold particularly different views” should be focussed on.⁴⁵⁰ According to these scholars, such a change to the trial is being prompted, in part, by the case law of the Court. They argue that the Convention requires that the accused is both heard and allowed to request the presentation of further evidence at the trial phase so that he can launch the best possible defence. These scholars thus conclude that truth finding has to be ensured accordingly by *audi et alteram parte*. For the procedure to live up to its potential, they advocate that counsel has to meet

⁴⁴⁵ E.g. Röttgering (2005: 3.3 - Art 28 Sv) in Melai/Groenhuijsen (2005).

⁴⁴⁶ Franken (2011) at 1109-1117.

⁴⁴⁷ Groenhuijsen and Knigge (2001) at 67-78.

⁴⁴⁸ Groenhuijsen and Knigge (1999) at 1-52, particularly at 31.

⁴⁴⁹ Groenhuijsen and Knigge (1999) at 1-52, particularly at 31.

⁴⁵⁰ Blom and Hartmann, in: Groenhuijsen and Knigge (2001), at 195-231.

higher standards than a lay accused.⁴⁵¹ They argue that it is fair to require “more” from counsel because he is legally trained. These suggestions of the research group appear to have been translated into new legislation, although for a rather more contradictory appeal than trial stage.⁴⁵²

A second helpful comparative description of a change of Dutch criminal procedure into a more adversarial, rather than inquisitorial trial phase, can be given on the basis of work by the American scholar Anderson.⁴⁵³ Anderson has stressed how, in Dutch criminal proceedings, mainly written materials are being checked, on the basis of contested information available to all participants in the usually public court session. Therefore, at the trial phase, the verification has to include two tests. The first test encompasses the question whether investigative measures were legally deployed. The second test probes whether there is sufficient information that can indeed serve to inform the tribunal of fact that there is sufficient legal and convincing evidence for the underlying assumption that the person charged has committed the indicted offence. For this reason, he concluded that the trial phase and, by extension, Dutch criminal proceedings in their entirety, can best be seen as an “audit model”.⁴⁵⁴

Third and finally, the Dutch scholar Cleiren also comes to this conclusion regarding these two aforementioned tests under both written and unwritten principles of good criminal procedural order, which aim to prevent, as far as possible, the wrong person being arrested, indicted, and convicted.⁴⁵⁵ These guarantees are meant to ensure both that the truth is eventually found and that the procedure is fair. In summary, truth finding must take place in a lawful and legitimate way as well as in a reliable and a fair manner.⁴⁵⁶ Therefore, Dutch law entitles the accused to his right to remain silent and the presumption of innocence.⁴⁵⁷ Likewise, the professional oath of police officers and the oath sworn by witnesses and by experts in criminal cases are intended to serve that aim. Ultimately, the principle of *audi et alteram parte* and the reasoned verdict are part and parcel of Dutch law.

However, substantive guarantees for the reliability of the process of truth finding can hardly be laid down in law, as the drafters of the Code of 1926 already seem to have realised. They have adopted an evidence system with minimum requirements for legal evidence and a strictly limited list of admissible evidence which only partly provides for the aforementioned guarantees (Article 338 Sv, respectively Article 339 (1) Sv).

As foreseen, truth finding itself remains by and large the result of an inductive process – the outcome of which may, in fact, be nothing more than a judgment based on a degree of probability. The drafters therefore appear to have included the personal conviction of the judge in the Code before the provision on the list of evidence.

Under Article 338 Sv, after the judge has reviewed the available legal evidence at the trial phase, he can find that the accused has committed the indicted offence. Moreover, fairness does not only consist of procedural requirements of law and legitimacy, but also includes demands of professionalism by the authorities. From the point of view of professionalism, the trial judge has to be informed by other authorities, notably the prosecutor, of any incomplete elements in the investigation. These authorities also have to point out shortcomings, inconsistencies, exonerating evidence and other facts emerging from the criminal investigation. As a consequence, the investigating and prosecuting authorities have to anticipate the trial phase to fulfill the aforementioned professional requirements. Moreover, the requirements for a fair criminal procedure in its entirety, in which the truth can be found, foreshadows normative consequences for the pre-trial stage.

Given these considerations about the proposed reforms and the general description of truth finding and fair trial guarantees for the trial stage, it is important to point out the essential elements of the scholarly criticism of a more contradictory or adversarial trial stage. As explained above, the research group of *Strafvordering 2001* finds that this notion of a contradictory trial stage derives in

⁴⁵¹ Groenhuijsen and Knigge (1999), referred to as common part/algemeen deel, at 1-55, particularly at 29ff.

⁴⁵² E.g. General framework for the revision of the criminal procedural code of 1926 (in Dutch: *Algemeen kader herziening Wetboek van Strafvordering*, TK 2003/04, 29 271, nr. 1).

⁴⁵³ Anderson, in: Malsch and Nijboer (1999) at 47-68.

⁴⁵⁴ *Ibid.*

⁴⁵⁵ Cleiren (2008) at 272-285.

⁴⁵⁶ E.g. Mevis (2009) at 35-862, particularly at 205-619.

⁴⁵⁷ Article 29 Sv; Article 6 (2) of the Convention; Article 141 Sv with regard to the police record; Article 290 Sv, respectively Article 51m Sv; and general unwritten norms of Dutch criminal procedure as well as Article 6 of the Convention. See also Buruma, in: Hartevelde (2005) at 71-87.

part from the Court's case law, which usually adopts the term of an adversarial hearing for that guiding principle (see chapter 3).

Scholars point out that a more contradictory or adversarial trial stage requires the accused to become a "full procedural party".⁴⁵⁸ Accordingly, the defence would have to perform a far greater activity than "only" verifying, and thus commenting on, materials that the authorities present in court. Once the trial stage becomes more contradictory or adversarial, the accused can no longer wait to account for what he had allegedly done when confronted with the prosecutor's case. That case would entail presenting incriminating and exculpatory evidence gathered and selected by investigative and prosecuting authorities. Rather, the defence would have to anticipate and become voluntarily active pre-trial⁴⁵⁹, without fully knowing what evidence the prosecutor holds on the accused perhaps. Consequently, thanks to a potential change towards a more (pro-)active pre-trial role of the defence⁴⁶⁰, scholars indicate that there might be two risks. These risks are of further relevance for this research into ineffective legal assistance and its possible redress in Dutch criminal proceedings.⁴⁶¹

A first risk relates to the role of the trial judge, who may legitimately step back from his original task as a more active guarantor of fair truth finding. The trial judge may, for instance, allege that counsel, who is a professional, did not bring relevant defence issues to the court's attention. Or the trial judge could see his role depend on what the defence – and counsel in particular – submits.⁴⁶² Consequently, as far as the defence is concerned, the court could potentially assert ineffective assistance by counsel, while it supposedly cannot interfere in the freedom of the defence. Freedom of the defence supposedly prohibits the court from actively going against the express or apparent will of the accused. Therefore, the court has to assume that the will of the accused has been expressed in the unity of the defence, consisting of both the accused and his counsel. This also means that the court has to interpret the absence of a request to hear a witness, or to lodge a substantive defence, as a demonstration of that will of the accused. Accordingly, passivity by counsel will, in principle, come at the procedural risk of the accused. The accused would bear the consequences of defence passivity, even if it was an instance of counsel who provides the accused with ineffective legal assistance by failing to be active.

A second risk relates to the role of the defence. According to some scholars, the defence lacks the requisite rights and resources, particularly during the pre-trial phase, to satisfy the required "more contradictory" role that the defence would have to perform at trial.⁴⁶³ For instance, counsel will often be absent during police interrogations and cannot attend several other investigative measures during which the accused will usually have to determine to remain silent, answer some questions or make a full statement (e.g. a witness confrontation procedure and a search of a vehicle). These answers and statements have, due to the *de auditu* jurisprudence, an impact on the defence during the entire criminal procedure. In other words, if the accused takes a position pre-trial, the defence can hardly change it as a later stage when counsel can assist the accused.

Scholars often stress how these two aforementioned risks are being increased under specialized legislation, which curtails in particular defence rights pre-trial and/or require the defence to be more active pre-trial at a loss of using such rights during the subsequent trial phase.⁴⁶⁴ Often, it is alleged, such specialized legislation has a "spill over" effect into other more generic criminal procedural legislation, because of its assumed effectiveness.⁴⁶⁵ For example, Van der Woude and Sliedregt ask for attention for the call for a right to safety in times when the Netherlands is noticeably less impacted by crime than before⁴⁶⁶, while anti-terrorism measures such as the shielded hearing of intelligence officers also find their way to "normal" criminal proceedings.⁴⁶⁷

⁴⁵⁸ E.g. Schalken, in: Schalken and Hofstee (1989) at 13; Cleiren (1990) at 162; Spronken (2001) at 146; and Franken (2011) at 1109-1117.

⁴⁵⁹ E.g. Schalken, in: Schalken and Hofstee (1989) at 13.

⁴⁶⁰ E.g. Groenhuijsen and Knigge (2004), particularly concerning counsel at 86, 87, 89, 91 and for the defence consisting of the accused and his lawyer, at 173.

⁴⁶¹ E.g. Röttgering (2005: 3.3 - Art 28 Sv) in Melai/Groenhuijsen (2005).

⁴⁶² Cleiren (1990) at 151; Spronken (2001) at 633; Verstraeten (2002) at 997; and Franken (2012) at 361-368.

⁴⁶³ Franken and Röttgering, in: Prakken and Spronken (2009) at 201-296.

⁴⁶⁴ Prakken (1999) at 8 and Bosch (2005) at 128.

⁴⁶⁵ Van der Woude and Van Sliedregt (2007) at 216-226.

⁴⁶⁶ Van der Woude and Van Sliedregt (2007) at 226.

⁴⁶⁷ Coster van Voorhout (2006) at 199-144.

The aforementioned changes to the trial stage are also relevant for the possible alterations to the stages that follow, which will be explored in the next sub-section. As mentioned above, there are some means of redress to ineffective legal assistance that can be found during the subsequent *de novo* appeal stage and those will have to be explored because of their possible impact on the relationship with the trial stage.

4.2.2.3. Changes to the stages of appeal, appeal in cassation, and revision

Under the Code of 1926 the importance of truth finding and the role of the judge was demonstrated by the fact that the criminal procedure had a further factual instance during the appeal phase, which was fully *de novo*.⁴⁶⁸ There were two court instances to discover what actually happened, in so far as this was relevant for the indicted offence and for the imposition of the correct sentence. Over the last few years, the appeal stage has changed twice.

A first change is that a person convicted of minor offences, which mainly entail offences punishable with a maximum of four years' imprisonment, has to seek leave to appeal (Article 410a Sv). The additional requirement is that, for the approval of the president of the court, the combined imposed sanctions cannot be higher than 500 euros and there has to be proper administration of justice. In more serious cases, the accused can still appeal without such a request for leave to appeal (Article 404 Sv⁴⁶⁹).

Since 22 February 2007, a second alteration has meant that the appeal procedure's structure has been transformed. The appeal judge still has discretion to examine the case in full, but he is now also allowed to focus the examination only on issues of fact or law about which the defence and the prosecution hold different views (Article 415 (2) Sv).⁴⁷⁰ To explain this further, on the one hand the appeal court can choose to carry out a *de novo* examination, ensuring that, for instance, both the accused and the prosecutor can submit new evidence that requires a full examination (Article 414 Sv). On the other hand, the appeal court can also opt for a "streamlined" stage, as it is called in the statute's title.⁴⁷¹ This means that "(...) an efficient use of resources is combined with the goal to prevent trial work being done twice" and that the appeal judge can focus the examination on points of contention between the defence and the prosecution.⁴⁷² The focus of the appeal judge in that case does not have to conflict with the rights of the accused, for instance where the accused only contests the imposed sentence which the appeal court accordingly addresses.⁴⁷³ However, difficulties can arise, when the appeal judge feels pressured into focussing on efficiency.⁴⁷⁴ Under such circumstances, a problem for the accused may arise because the appeal court can allege that counsel did not alert it to certain issues, *so that* it could not examine points of contention between the defence and the prosecution.⁴⁷⁵ As another example, an appeal court might be allowed to infer that counsel did not provide effective legal assistance, as a consequence of which it does not have to refute, with reasons, a supposedly wrongly formulated defence.⁴⁷⁶ Consequently, if there are no norms that regulate how counsel should act during the appeal stage, there might be a real risk that appellants with passive or incompetent lawyers, for instance, have to bear the consequences of their lawyers' conduct.⁴⁷⁷ This will be particularly problematic when the appeal court assumes that it cannot examine the (negative) conduct of the

⁴⁶⁸ For the discussion that preempted this choice, see Krabbe (1983) at 13-233, particularly at 23; Groenhuijsen and De Hullu (1994) at 17; *Bijl. Hand. II* 1913-1914, 286, nr. 3, at 148.

⁴⁶⁹ E.g. Haentjes, in: Wiewel and De Winter (2007) at 31-59, particularly at 48-49; Blom et al (2007) at 61-71, particularly at 67; for the dominance of efficiency see Valkenburg et al (2002) at 68.

⁴⁷⁰ Groenhuijsen and Knigge (2004) at 88.

⁴⁷¹ One of the first laws to follow the general framework for changes to the criminal procedure (in Dutch: *Algemeen kader herziening Wetboek van Strafvordering*, TK 2003/04, 29 271, nr. 1): Appeal Procedures (Streamlining) Act (in Dutch: *Wet stroomlijnen hoger beroep*, *Stb.* 2006, 470, entry into force 1 March 2007).

⁴⁷² Explanatory memorandum concerning the Act changing the appeal phase (in Dutch: *Memorie van Toelichting for 30.320. Wijziging van het Wetboek van strafvordering met betrekking tot het hoger beroep in strafzaken, het aanwenden van gewone rechtsmiddelen en het wijzigen van de telastlegging (stroomlijnen hoger beroep)*, nr. 3.

⁴⁷³ TK 2005/06, 30320, nr. 3, at 11 and 13 and Mevis (2006) at 1-16.

⁴⁷⁴ HR 5 January 2010, ECLI:NL:HR: 2010:BK2145. See also its annotation in *NJ* 2010, 176 m.nt. Schalken who refers to an appeal that "rumbles" through instead of runs through.

⁴⁷⁵ Not seen as problematic by Groenhuijsen and Knigge (2004) at 180-184.

⁴⁷⁶ See also Buruma, in: Harteveld et al (2005) at 71-87.

⁴⁷⁷ E.g. Groenhuijsen and Knigge (1999) at 23-27.

defence lawyer out of respect for the freedom of the defence.⁴⁷⁸ Certainly, the changed appeal structure results in dependence on the appeal judge's discretion to examine the case in full or on the basis of the points of contention between the defence and prosecution. This has the potential to negatively affect legal certainty and legality in each case, because the contents and scope of every appeal now rest on the individual choice of the particular appeal judge in itself. Moreover, it raises important issues for this research into ineffective legal assistance, as explained.

After the appeal proceedings have been finalised, both the accused and the prosecutor can appeal in cassation before the Hoge Raad on points of law only. Also, this cassation phase has changed. As of 1 October 2000, accused persons cannot submit a legal brief without counsel. The Hoge Raad shall deem submissions made by accused persons on their own to be null and void (Article 437 (2) Sv).⁴⁷⁹ The memorandum explains that the legislator introduced such mandatory legal assistance for appeals in cassation in order to improve both the quality and effectiveness of the cassation proceedings.⁴⁸⁰ Given that the procedure is usually wholly in writing and only addresses points of law, counsel is assumed to have greater knowledge and skills to help them live up to these requirements than the accused. From a rights perspective this means that a convicted person will not receive a substantive judgment from the Hoge Raad unless he has legal assistance.⁴⁸¹ However, the authorities are not under a legal obligation to appoint counsel. Consequently, the convicted person who wants to invoke his right to make use of this legal remedy is not entitled to legal aid, unless he is detained – and for that reason deserves to be appointed a legal aid lawyer (Article 43 (2) Sv). Nonetheless, it is common practice that the Legal Aid Council appoints counsel to represent non-detained accused persons who want to appeal in cassation.⁴⁸²

Finally, there is another avenue to request a judgment from the Hoge Raad. Once the verdict is irrevocable, a convicted person can request a special type of retrial before the Hoge Raad, provided that he has legal assistance and introduces a *novum* (revision for the benefit of the accused).⁴⁸³ A *novum* can be a fact such as a new expert insight, depending on how it will be defined in the case law (Article 457 Sv).⁴⁸⁴ This new fact should have been unknown to the lower courts when they came to their decision and that fact, had it been known at the time, should have possibly led to an acquittal, for example. The current view regarding this retrial is that the court's ability to find the truth is not infallible and that, even after two (*de novo*) examinations, a last instance needs to be open for specific cases. As mentioned under appeals in cassation, the same issue with legal aid is relevant here. In addition to this type of revision, a new statute was introduced even more recently which aims to provide for a retrial for acquittals, in order to ensure, supposedly, that criminal law is actually applied against guilty persons (revision to the detriment of the accused).⁴⁸⁵ The 'nova' for this type of revision with a detrimental effect for the acquitted person will be, *inter alia*, new technical evidence, 'falsa', such as factually wrong exculpatory evidence and perjury and a credible confession. From a rights perspective, scholars pose the question concerning *ne bis in idem* and the reasonable expectation of an accused person that the case is final after the aforementioned stages.⁴⁸⁶

Before turning to preliminary conclusions, it is important to note how these actual and possible changes can also be seen in conjunction. For example, Mevis argues that the Hoge Raad places increased demands on the defence both at the factual level and at the level of cassation for it to take into consideration the requests made at this level of cassation (in Dutch: *piepsysteem*).⁴⁸⁷ To use a

⁴⁷⁸ See sections 2.3. and 2.4.2.1.

⁴⁷⁹ Statute of 28 October 1999, *Stb.* 467, entry into force 1 October 2000.

⁴⁸⁰ Spronken, in: Happé et al (2003) 179-183, particularly at 181. See also: *TK* 1998, 26027, no. 3; Explanatory memorandum regarding Article 437 Sv. See also Haak (1996) at 43 especially.

⁴⁸¹ Brouwer (2012) at 276-277.

⁴⁸² Spronken (2001) at 210 and Klifman, in: Hendriks et al (1999) at 389-397.

⁴⁸³ Act on revision for the benefit of the accused (in Dutch: *Wet van 18 juni 2012 tot wijziging van het Wetboek van Strafvordering in verband met een hervorming van de regeling betreffende herziening ten voordele van de gewezen verdachte (Wet hervorming herziening ten voordele)*, 32 045, *Stb.* 2013, 25, entry into force on 1 October 2012).

⁴⁸⁴ E.g. Duker (2010) at 1657 and Broeders (2005) at 11-26.

⁴⁸⁵ Legislative proposal regarding revision to the detriment of the accused (in Dutch: *Wijziging van het Wetboek van Strafvordering in verband met de invoering van een regeling betreffende herziening ten nadele van de gewezen verdachte (Wet herziening ten nadele)*, 32 044, dated 11 April 2013, entry into force is still unknown).

⁴⁸⁶ Kooijmans and Mevis (2008) at 1935-1936.

⁴⁸⁷ Mevis (2013) at 1201-1205.

further example, Borgers and Kristen submit that the defence has to act more vigorously for the court to take up its responsibility regarding substantive defences and requests (in Dutch: *verwerpen en verzoeken*).⁴⁸⁸ To provide one more illustration, Sikkema and Kristen suggest that Dutch criminal proceedings are influenced by measures that ensure that criminal cases are brought before the court quicker and quicker (in Dutch: *ZSM-aanpak* and (*super*)*snelrecht*).⁴⁸⁹ The aforementioned scholars argue that the aforementioned actual changes might have resulted in an altered criminal procedural “landscape”. If the criminal procedural “landscape” has indeed changed, it becomes even more important to explore the question whether purportedly increased responsibilities of the defence have not been based on a “false”, or at least too much, trust in the criminal defence lawyer – and the judge for that matter.⁴⁹⁰ Franken argues that it does.⁴⁹¹ This research will explore on its own terms whether more conduct of counsel qualifies as ineffective legal assistance and whether the court actively offers redress to its most serious manifestations at least. For this purpose, an original case law analysis will follow in the substantive research chapters (chapters 6, 8, 10 and 12). After all, if indeed the criminal procedural “landscape” has been changed so that more trust is placed in counsel and the bench, then it is worth exploring what effects this will have for the accused who receives ineffective legal assistance in Dutch criminal proceedings.

4.2.2.4. Preliminary conclusions about all changes seen in conjunction

When all three aforementioned changes to the different stages of Dutch criminal proceedings are taken together, there appears to be more emphasis on the pre-trial stages in relation to the trial stage. Moreover, the more contradictory or adversarial criminal trial stage can have effects for the defence, which appears to be required to be more active if it is to get a response from the court. Finally, the changes to the post-trial phases also affect the accused who now appears to be required to ensure that issues of fact and law do not, as far as possible, wait until appeal and has to lodge an appeal in cassation together with a lawyer. Therefore, this is relevant for pursuing further study into ineffective legal assistance and its possible redress in Dutch criminal proceedings, for which the right to legal assistance under Article 28 Sv will be vital – as will be further explained in the next sub-section.

4.3. Factors impacting the effectiveness of legal assistance within criminal proceedings

Given the focus in this research on ineffective legal assistance in Dutch criminal proceedings and its redress for the accused for its most serious manifestations at least, this section elaborates upon systems in the Netherlands that are intended to ensure that lawyers provide adequate services to the accused (sub-section 4.3.1.). Thereafter, an examination will follow of (future) legislation that either risks enabling or restraining the effectiveness of legal assistance in Dutch criminal proceedings (sub-section 4.3.2.). Finally, the last section is devoted to trends which, according to scholars, impact the effectiveness of assistance by counsel in Dutch criminal procedure (sub-section 4.3.3.).

4.3.1. Quality control systems for lawyers

A first system that allegedly encourages the good quality of counsel’s services to the accused is the free market of all lawyers.⁴⁹² Based on the conception of a liberal State and with emphasis on competition between lawyers, the assumption is that all lawyers working in the Netherlands supposedly begin at a similar level and compete as to the quality of their services. Thanks to this alleged qualitative impulse with regard to lawyers, it is claimed that the accused usually benefits from the best possible counsel he can afford.

However, there are effects that distort the market of lawyers in the Netherlands, such as the legal aid system, which may prevent appointed lawyers from having to compete as to the quality of their services. For instance, lawyers can make sure that the Council for Legal Aid appoints them

⁴⁸⁸ Borgers and Kristen (2005) at 568-588 and, for example, HR 6 September 2005, ECLI:NL:HR:2005:AT7553, NJ 2006, 85, particularly the conclusion by AG Jörg ECLI:NL:PHR:2005:AT7553, which the Hoge Raad followed.

⁴⁸⁹ E.g. Sikkema and Kristen, *Strafbeschikking en ZSM: verschuivingen binnen de strafrechtshandhaving*, in: De Jong and Kool (2012) at 185-189.

⁴⁹⁰ Franken (2004), especially at 45.

⁴⁹¹ *Ibid.*

⁴⁹² *Een maatschappelijke orde*, Rapport van de Commissie Van Wijnen d.d. 24-4-2006, available at: <www.justitie.nl/images/Advocatuur_tcm74-115174_tcm34-20054.pdf>.

sufficiently often so that their earnings are guaranteed. Although a maximum number of appointments is set⁴⁹³, nevertheless some lawyers can ensure a good standard of living through the many appointments they receive. Adding to this distorting market effect is the recent expansion of the appointment system for police interrogations.⁴⁹⁴ Also, the Council can appoint any counsel who has a licence to practice law and has obtained the rather low-key additional educational requirements of training accreditation points, that are attained on a yearly basis. The Council does not have to make a distinction between counsel, whether or not they are a general lawyer or a specialist in criminal law. The Council is also not obliged to “reward” criminal defence lawyers who have undergone more training than the required minimum. However, according to Spronken, in practice some of the bureaus to which the Council delegates appointments do, she argues, give precedence to lawyers who have acquired more educational points than the bare minimum.⁴⁹⁵ However, there is no legal requirement to prioritise legal aid lawyers with further credentials of (relevant criminal law) education or experience or means to counter the effects of an appointment to the free market of criminal defence lawyers in the Netherlands.

The aforementioned aspect of market distortion has been established empirically – albeit in foreign studies – by showing that appointed counsel usually provide a lesser quality of work than retained lawyers.⁴⁹⁶ In summary, the rationale put forward is that legal aid lawyers who will be paid anyway have less incentive to provide good quality services to the accused than privately hired lawyers who are usually better paid.⁴⁹⁷

This study refrains from drawing any conclusions regarding the specific situation in the Netherlands due to the lack of comparable domestic empirical studies. Nonetheless, it has encountered no reasons that would suppose that legal aid lawyers in foreign countries would be any different than appointed lawyers in Dutch criminal proceedings in this respect.

To make this point explicit, this lack of empirical data poses no particular problem for this normative study. The present research presupposes that an accused, who is assisted by an appointed lawyer, should not be worse off than one who has retained counsel on normative grounds.⁴⁹⁸ For this same reason it is relevant that, although the best possible defence is often assumed to be conducted by counsel who has been chosen by the accused, this same accused has no right to select the legal aid lawyer of his preference.⁴⁹⁹

In addition to this more structural issue with the market for lawyers, the accused can be faced with further difficulties in obtaining the best possible defence by counsel in his case. Surely an accused will, mostly, refrain from retaining a lawyer with a poor reputation, but it is questionable whether the accused as a lay person will always know which counsel will deliver good quality services.⁵⁰⁰ Sometimes the other participants in the criminal procedure will notice ineffective legal assistance whilst the accused might not doubt the services provided by his lawyer. There are also reasons to believe that an accused might sometimes, for instance, be tempted to assume that a particular lawyer is the most appropriate for his case, by virtue of being well known in the media or being recommended by another lawyer who works for the same law firm.⁵⁰¹ Although some accused

⁴⁹³ A maximum of 250 appointments per year, see also Hof van Discipline, 5 August 2011, *LJN*: YA 1922 No. 5983. In 2010, appointments in criminal cases constituted 35% of the total.

⁴⁹⁴ Besluit vergoedingen rechtsbijstand 2000, *Stb.* 1999, 580, latest amendment 1 June 2008, *Stb.* 170. See Spronken (2008) at 164-169 and Van Dijk (2008) at 120-123. See also Combrink-Kuiters et al (2011) at 15, 19-29 and 62-63 in particular.

⁴⁹⁵ Spronken (2001) at 213-220.

⁴⁹⁶ Houseman (1995) at 1670-72; Bright (1997) at 783-836; and Cape et al (2007b) at 109-128.

⁴⁹⁷ See McConville et al (1994) at 1-298, particularly at 270-298; Auld Report (1993), available at: <http://www.criminal-courts-review.org.uk>. The Commission was appointed in the wake of a number of infamous miscarriage of justice cases in the United Kingdom, including the cases of the Birmingham Six, *R. v. McIlkenny*, [1992] 2 All E.R. 417 (C.A.1991); the Guildford Four, *R. v. Richardson* (C.A. Oct. 19, 1989), Enggen Library, Cases File; *R. v. Maguire*, [1992] 1 Q.B. 936 (C.A.1991) (involving other defendants convicted of the Guildford bombing); *Judith Ward, R. v. Ward*, [1993] 2 All E.R. 577 (C.A.1992); and *Stefan Kiszko, R. v. Kiszko* (C.A. Feb. 18, 1992); Stewart Tandler, World Library, Times File. See Clive Walker & Keir Starmer, *Justice in Error* (1993); Margaret Driscoll, *Queue Forming at the Appeal Court's Door*, *The Times* (London), May 17, 1992.

⁴⁹⁸ Under Rule 9 (2) Rules of Conduct for instance the same rules apply for recusing oneself as a legal aid and privately retained lawyer.

⁴⁹⁹ Spronken (2001) at 213-220.

⁵⁰⁰ Franken (2011) at 1109-1117.

⁵⁰¹ Knapen (2010) at 62.

persons might want a specialised criminal defence lawyer, they will often have to turn to the more readily available general lawyers.⁵⁰² Finally, neither upon a complaint by the accused nor on his own initiative can the trial judge exclude from the case counsel who apparently provides ineffective legal assistance to the accused.⁵⁰³ Dutch law does not equip the courts with the legal means to make the lawyer withdraw from the case, although they can seek to remove the lawyer from the courtroom where order in the court is disturbed.

As a result, the market may not always be a conclusive and definite means of ensuring good quality services by each counsel for every accused.⁵⁰⁴ Certainly, the free market for criminal defence lawyers who act in Dutch criminal proceedings will contribute to competition between them as to the quality of their legal services and will ensure for many accused persons that they can select the best counsel for their case.⁵⁰⁵ However, the market has its flaws and also the other aforementioned reasons in some cases leads to the situation where not every accused person obtains the best possible defence by the right lawyer in his case.

In addition to the market, there are further quality control systems for defence counsel under three different legal systems. First, under Dutch disciplinary law, criminal defence lawyers can receive cautions, warnings, conditional suspensions, unconditional suspensions and a full deletion from the list of lawyers, which are published on the website for disciplinary cases.⁵⁰⁶ In this way, disciplinary law can ensure some control over the activities of criminal defence lawyers, as well as when the accused assumes he has not been provided with an effective defence. In the near future, the association of lawyers may also be required to publish the list of lawyers who are unconditionally and irrefutably suspended, or whose names have been deleted from the tableau.⁵⁰⁷ Consequently, the scope and potentially the effectiveness of the decisions of the disciplinary courts might be increased. In other words, these might become known to the general public.

However, disciplinary law, which can contribute to ensuring that many accused persons will normally obtain an effective defence by counsel, comes with one difficulty for the accused. It is the accused or another person on his behalf – who will often be a lay person too – who must first discover that counsel has not given effective legal assistance to the accused.⁵⁰⁸ Either the accused or that third person will namely have to present a complaint to the disciplinary court.

A solution to this problem might lie in Rule 11 of the Rules of Conduct 1992. This rule obliges counsel to inform the accused when he has been unable to completely serve his interests and, if necessary, to recommend him to ask for independent advice. However, not every defence lawyer might consider either that he has failed this duty or find it necessary to inform the accused about the way in which he has failed the accused. It is possible that a lawyer who has provided the accused with an ineffective defence will often be uninclined to inform the accused under this Rule.

Moreover, a disciplinary complaint about a lawyer by third persons, such as a judge, prosecutor or another counsel, normally needs to be followed up by the Bar representative.⁵⁰⁹ An accused who has third persons take action against his advocate is similarly dependent on the actions of the Bar representative. Additionally, although the outcomes of the cases tried by the disciplinary courts are made public, often many persons other than the complainant will be ignorant of the disciplinary complaint against specific counsel and its result.⁵¹⁰ Consequently, the deterrent effect of disciplinary law is not usually general in nature.

A second legal route that is open to the accused is a claim for civil damages against counsel, which might also contribute to the quality of services by lawyers. Civil law helps the accused –

⁵⁰² Spronken (2001) at 203-204.

⁵⁰³ Prakken and Wöretshofer, in: Prakken and Spronken (2009) at 531-533.

⁵⁰⁴ For civil law predominantly Barendrecht and Kamminga (2005) at 1-89, particularly at 14; Worst (1907) at 280; and Duyvendak et al (2001); and Bannier, in: Bekkers et al (2007) at 263-272.

⁵⁰⁵ E.g. Mols, in: Adriaans (1993) at 11-24.

⁵⁰⁶ <http://tuchtrecht.overheid.nl/nieuw/advocaten>.

⁵⁰⁷ Proposed Article 8 of the Lawyers Act, Memorandum of Change d.d. 16-2-2011 for the Legislative Proposal ‘Van Wijmen’, Alteration of the Lawyers Act, TK 2010-2011, 32 382, nr. 8. Adopted in the other legislative proposal regarding supervision of lawyers TK 2010-2011, 32 500 VI, nr. 81 and TK 2010-2011, 32 382, nr. 9.

⁵⁰⁸ Fanoy and Bannier, in: Bannier et al (2008) at 47-89.

⁵⁰⁹ For a duty to cooperate see Hof van Discipline 17 January 1966, *Advocatenblad* 1967, at 519. See also Van Heloma Lugt (1998) at 47-50.

⁵¹⁰ Fanoy and Bannier, in: Bannier et al (2008) at 47-89.

although usually in a more limited manner than under disciplinary law – by way of compensating for any damage suffered. Usually, these cases are published on the website containing all the case law and are thus informative for (other) accused persons.⁵¹¹ Consequently, the civil law courts might, although more indirectly than the disciplinary courts, stimulate counsel to do his utmost. However, the deterrent effect of civil law will often be limited because persons other than the accused who brought the civil action against his lawyer will not usually know about the case or its outcome.

Third and finally, criminal law – just like for all citizens – is binding on counsel. For instance, criminal law is not just relevant for a violation of the prohibition of disclosing confidential information contrary to this legal obligation (Article 272 Sr)⁵¹², but also for all other relevant offences that a criminal defence lawyer can commit.

To conclude with all three aforementioned legal proceedings, they have an interesting common feature: disciplinary law actions, civil damages suits and criminal law as a last resort have a downside for the accused because of a lack of any effect on the criminal procedural course and/or its outcome. They will often be more generally pre-emptive in nature than helpful in guaranteeing that the accused does not have to bear the consequences of the (mis)conduct of his lawyer in the specific case. The latter direct effect is absent because all three bodies of law have an impact neither on the course nor on the outcome of the criminal proceedings against the accused.

Having seen all the aforementioned quality control systems for lawyers, there are important reasons to believe that they fall short in solving all the difficulties for the accused caused by ineffective assistance by counsel in Dutch criminal proceedings. Thus, the question arises whether there should be other means to ensure that the accused does not have to suffer the consequences of ineffective legal assistance, such as the possibility for the authorities to intervene in the case by means of a separate procedure or to inquire into the conduct of counsel at trial when possible negative effects to the course and/or outcome of the process can still be remedied.⁵¹³

4.3.2. Factors under (future) law potentially complicating legal assistance's effectiveness

For legal assistance to be effective, usually counsel and the accused must be able to work in a close unity so that the accused can provide his advocate with (immediate) instructions and the accused can get informed and expert advice from his lawyer. However, both current and future law and case law can affect this unity of the defence. The following examples mainly focus on procedural rights gained by counsel that the accused does not have⁵¹⁴ or situations where the advocate represents the accused in his absence so that the unity is not present, at least during the proceedings.⁵¹⁵

Six factors under (future) law will be explored that potentially complicate the effectiveness of the assistance given by counsel in Dutch criminal procedure in the aforementioned ways. The context in which these factors occur is one of increasing recognition for the importance of the right to legal assistance at both pre-trial and trial stages of Dutch criminal procedure. In other words, it will be explored here whether (future) law results in an increasing amount of cases being decided without an effective defence for the accused, in particular by counsel as opposed to self-representation.⁵¹⁶

In 1993, a right has been afforded exclusively to counsel: the lawyer can – but the accused cannot – attend hearings of threatened witnesses pre-trial by the judge of instruction (e.g. Article 226d Sv). Difficulties for the defence under such circumstances can be caused by the consequent complications on the lawyer's ability to provide the accused with adequate services. This means that the accused might not be able to give the lawyer sufficient information about the case in general and/or about the threatened witness in particular. Also, the lawyer certainly cannot get immediate instructions from the accused when the threatened witness is being heard. Prior to the hearing of witnesses, it will be difficult for the accused to provide his lawyer with sufficiently detailed information, precisely because he does not know the identity of the witness. During the questioning of witnesses, the accused will, because of his absence, not know what emerges in the testimony of the witness. Consequently,

⁵¹¹ www.rechtspraak.nl.

⁵¹² See also sub-section 4.4.1.

⁵¹³ See chapters 2 and 4.

⁵¹⁴ Prakken and Spronken, in: Prakken and Spronken (2009) at 12-13.

⁵¹⁵ Spronken (2001) at 290; Prakken (2012: 7-Art. 37 Sv), in: Melai/Groenhuijsen (2012.).

⁵¹⁶ See Franken (2010: 1.5), in: Mevis et al (2010); Prakken and Spronken, in: Prakken and Spronken (2009) at 1-27; and Franken (2007) at 369.

the accused will be unable to raise issues concerning the credibility of the witness if immediate responses are required. Although the defence lawyer can duly inform the accused after the hearing of the witness, the absence of the accused during the witness examination cannot be fully compensated by information *ex post*. Moreover, this right that is exclusively provided to counsel acting for the accused may also result in a wedge being driven between the accused and his lawyer. That might come at the expense of constructing and executing a proper defence strategy, at least in so far as the hearing of these anonymous witnesses is concerned. For an effective defence, it is important that the evidence can be tested by the unity of counsel and the accused, but this right that has been exclusively provided to counsel makes it more complicated to ensure that aim.

In 1996, the Hoge Raad accepted in a case that is known as *Dev Sol* that a lawyer can be provided with items in the dossier that cannot be shared with the accused. Provided that those are police materials, instead of evidence subjected under the law to disclosure to both the accused and counsel, the items can be given to counsel but not to the accused (Articles 30 to 34 Sv in conjunction with Article 51 Sv).⁵¹⁷ The materials in this case were photographs that were used to identify the accused who was believed to have committed a terrorist offence.⁵¹⁸ The Hoge Raad concluded that there was no right for either the accused or his lawyer to have these photographs disclosed to them because it did not constitute evidence. Rather, it was information upon which the accused had been identified. It was held that the situation where the authorities had shown counsel the police photographs did not irreparably damage the rights of the accused.⁵¹⁹ The Hoge Raad accepted this type of disclosure only to counsel in this specific situation: a potential terrorist wanting to know on the basis of which photographs (supposedly of him) the witness had identified him. This decision can possibly result in difficulties in the relationship between the accused and his lawyer, in particular because the distinction between police materials and other items in the dossier appears to be a difficult one to make. The dividing line between a photo for identification that is used as police material or has to be included in the dossier because of its value for the case has not been explained.

With regard to that distinction, scholars argue that Dutch law does not, as the Hoge Raad did in this case, lay down a category of police materials on the one hand and evidence on the other.⁵²⁰ They find that the Hoge Raad only sought this solution in order to prevent this case from being quashed because the lower courts had given access to counsel to the photos but not to the accused. The “way out” was unfit in their view because counsel has no autonomous right to take cognizance of items in the dossier; rather that right “derives” from the personal right of the accused. This will be explained further in this research (see chapter 6).⁵²¹

These difficulties for an effective defence by counsel, who cannot share all documents with the accused, seem to continue under a new statute that, according to its memorandum, was intended to solve such problems.⁵²² Since 1 January 2013, the accused has been granted more possibilities to exert an influence over the composition of the dossier.⁵²³ However, these new rules regarding the composition of the dossier do not appear to offer the accused an option to contradict the prosecutor, which might cause problems in relation to Article 6 of the Convention.⁵²⁴ Moreover, the Statute does not define what police materials are (a term borrowed from the aforementioned *Dev Sol*), so that it remains unknown whether such items can still be provided to the lawyer only, who cannot thereupon share these materials with the accused. Therefore, under this new statute, some items can be shared with counsel exclusively and this observation has been made at this stage of the research because it

⁵¹⁷ See sub-section 4.2.2.1. See also HR 7 May 1996, ECLI:NL:HR:1996:AB9820, particularly in para. 5.11. See also its note in *NJ* 1996, 687 m.nt. Schalken.

⁵¹⁸ HR 7 May 1996, ECLI:NL:HR:1996:AB9820, *NJ* 1996, 687 m.nt. Schalken.

⁵¹⁹ Jebbink (2010: 24.6), in: Mevis et al (2010).

⁵²⁰ The lawyer in the *Dev Sol* case, Prakken, HR 7 May 1996, ECLI:NL:HR:1996:AB9820, *NJ* 1996, 687 m.nt. Schalken. See also Franken (2012: 6.3), in: Melai/Groenhuijsen (2012).

⁵²¹ E.g. Franken (2012: 6.3), in: Melai/Groenhuijsen (2012).

⁵²² E.g. Van Kampen and Hein (2013) at 72-78.

⁵²³ See sub-section 4.2.2.1. Statute changing the rules regarding items in the dossier (in Dutch: *Wijziging van het Wetboek van Strafvordering in verband met de herziening van de regels inzake de processtukken, de verslaglegging door de opsporingsambtenaar en enkele andere onderwerpen (herziening regels betreffende de processtukken in strafzaken, TK 32 468, Stb. 2011, 601, entry into force on 1 January 2013, Stb. 2012, 408.*

⁵²⁴ E.g. Van Kampen and Hein (2013) at 72-78.

can potentially hinder the effectiveness of the assistance provided to the accused, who has no such access.

A third factor relates to Dutch law which affords counsel the right to represent the accused who is tried in his absence (see also chapter 8).⁵²⁵ This issue will only be explained here as pertaining to possible complications caused to the effectiveness of the assistance provided by counsel in Dutch criminal procedure.⁵²⁶ If counsel considers himself authorised, the legal fiction applies that the hearing is being conducted as a contradictory procedure, as if the accused were present in court (Article 279 Sv).⁵²⁷ Consequently, counsel will have to act on behalf of the accused, but may be uncertain about how the accused would want his defence to be conducted in the light of developments in the case in court.⁵²⁸ Such difficulties are particularly germane if counsel has not had contact with the accused for a long time.⁵²⁹

Additionally, there is a risk that counsel exceeds his authorisation in court, given that the judge is not obliged to stay the proceedings even after an amendment to the indictment.⁵³⁰ Moreover, the authorised lawyer cannot confer with the accused about, for instance, the nature and length of the sentence, which are issues that emerge during the court session. Additionally, the defence will have to deploy the legal remedy of an appeal within fourteen days after the final verdict, which is further problematic if counsel cannot contact the accused after the proceedings.⁵³¹ The same *in absentia* regime applies to the appeal stage. The work of counsel, who is unauthorised under Article 279 Sv, is regulated by case law instead of the procedural law explained here. This factor has been highlighted because, since 1994, the legislator has had to reconcile the Court's case law with the system that allows for trials at which the accused is absent by introducing authorisation for counsel.⁵³² Evidently, at that time, the legislator already persisted in continuing with legal representation in the absence of the accused, notwithstanding the apparent difficulties with the effectiveness of the legal assistance provided. Finally, this authorisation system also raises problems with the right of the accused to attend the court session where the judge is not required to adequately check whether the accused has personally waived his right to be present at the hearing.⁵³³ This issue will have to be returned to in the case law analysis (see chapters 6, 8, 10 and 12).

Another factor relates to access to court, which is a right that is also a constitutional guarantee (Article 17 Gw).⁵³⁴ Dutch law has increasingly adopted out-of-court "settlements", thus resulting in cases that never go to trial.⁵³⁵ One of the specific statutes has been built on a system of transactions by the prosecutor regarding offences that are usually only punishable by a fine⁵³⁶, and has been disposed of. This statute, which has been included in a general framework that also covers more statutes⁵³⁷, regulates a pre-trial out-of-court "settlement" which is a "prosecutor's decision".⁵³⁸

⁵²⁵ E.g. Lensing and Balkema (1985) at 499-501.

⁵²⁶ See also De Hullu and Plaisier (1996) at 614-633; Ingelse (2002) at 2183-2188; and Jordaans-Lindeman (1995) at 208-210.

⁵²⁷ HR 23 April 2002, ECLI:NL:HR:2002:AD8860, *NJ* 2002, 338 m.nt. Schalken and HR 19 December 2006, ECLI:NL:HR:2006:AZ2176 *NJ* 2007, 30. See also Prakken and Wöretshofer, in: Prakken and Spronken (2009) at 483.

⁵²⁸ See also Prakken and Wöretshofer, in: Prakken and Spronken (2009) at 483.

⁵²⁹ See also Prakken and Wöretshofer, in: Prakken and Spronken (2009) at 483.

⁵³⁰ Article 314 Sv.

⁵³¹ HR 23 April 2002, ECLI:NL:HR:2002:AD8860, *NJ* 2002, 338 m.nt. Schalken.

⁵³² Court, Judgment of 22 September 1999, *Lala and Pelladoah v. the Netherlands*, *NJ* 1994, 733, m.nt Knigge. See also Myjer (2000) at 137-158.

⁵³³ See further chapter 6.

⁵³⁴ Boksem (2007) particularly at 7-8.

⁵³⁵ For example, regarding the Public Prosecution Service (Settlement) Act (in Dutch: *Wet OM-afdoening*, Statute of 26 April 2007, *Staatsblad* 2007, 160, entry into force 1 April 2013), Boksem (2007) at 15-17.

⁵³⁶ E.g. Article 74 Sr.

⁵³⁷ E.g. the ongoing legislative process under the general framework for the revision of the criminal procedural code of 1926 (in Dutch: *Algemeen kader herziening Wetboek van Strafvordering*, *TK* 2003/04, 29 271, nr. 5); Procedural Rules (Breach) Act (in Dutch: *Wet vormverzuimen*, *Stb.* 1995, 441, entry into force 14 September 1995); Act on the revision of the investigation in court (in Dutch: *Wet herziening onderzoek ter terechtzitting*, *Stb.* 1998, 33, entry into force 1 February 1998); Special Investigative Powers Act (in Dutch: *Wet bijzondere opsporingsbevoegdheden*, *Stb.* 1999, 245, entry into force 27 May 1999); Act on the revision of the judicial investigation by the pre-trial judge prior to the court proceedings (in Dutch: *Wet herziening gerechtelijk vooronderzoek*, *Stb.* 1999, 243, entry into force 1 February 2000); Confessing Accused Act (in Dutch: *Wet bekende verdachte*, *Stb.* 2004, 580, entry into force 1 January 2005); Act on streamlining the appeal phase (in Dutch: *Wet stroomlijnen hoger beroep*, *Stb.* 2006, 470, entry into force 1 March 2007); Position of Victims in Criminal Proceedings (Further Measures) Act (in Dutch: *Wet versterking positie slachtoffer in het*

As of 1 February 2008 the prosecutor⁵³⁹, certain specially-appointed police officers and even public officials⁵⁴⁰ can impose, entirely of their own motion,⁵⁴¹ a sanction or measure on the accused without an automatic judicial review.⁵⁴² Unless the sanction is a fine, the accused has to accept the settlement or resist it⁵⁴³ in order to have the case go to “normal” court.⁵⁴⁴

The prosecutor can use this “decision” for offences punishable with a maximum sentence of six years imprisonment and can deal with one or more offences in conjunction.⁵⁴⁵ To this end, the prosecutor has complete discretion to decide on unconditional punishments or measures with a wide range. It can be a community service order or a fine, the confiscation of criminal objects, monetary compensation having to be paid to the victim (up to € 2000) or a driving ban; or alternatively a combination of such punishments. However, the “prosecution decision”, which settles the case out of court, does result in a criminal record.

The accused who is subject to this out of court “prosecution decision” has some procedural rights. For instance, the suspect has a right to be heard if the public prosecutor seeks to impose a community service order, a behaviour order or a driving ban. For the purpose of being heard by the prosecutor, the accused can retain a lawyer or can request an appointed legal aid counsel when he lacks the financial means to pay for counsel himself. However, the accused does not have a *right* to be appointed legal aid counsel under this statute.

Mandatory legal assistance is present when the monetary fine or compensation measure for a victim is more than € 2000. The absence of a lawyer in such circumstances results in the criminal case being referred to a “normal” criminal court.

In all other situations, accused persons do not have such procedural rights.

This statute has attracted criticism. No longer is a trial judge required to be able to answer the questions under Articles 348 and 350 Sv as the only legitimate basis for criminal punishment. These out-of-court settlements require no automatic judicial check, so that it will be almost impossible to know whether *prima facie* the prosecution has met its burden of proof. The “prosecution decision” can permit that cases are being settled out of court without any real examination of the strength of the prosecution case. Moreover, it allows such out-of-court settlement without the automatic guarantee that the accused would not have resisted the prosecution sanction if he had possessed sufficient information about his rights. Therefore, the statute would allegedly have caused a fundamental change to criminal procedure, allowing the prosecution to take decisions that belong to the role of the judge.⁵⁴⁶ No longer is there a judicial check in place, whilst a prosecutor’s decision results in a criminal record and a sanction imposed on the accused by the State. This statute therefore appears to have set aside the principle that only the material truth, as established by the trial judge, can legitimize the imposition of such sanctions. As a consequence of this statute, the criminal procedure has fundamentally changed the basis for legitimate criminal punishment in the form of sanctions or measures. Moreover, some scholars point out that it requires that the prosecutor, rather than the judge, determines the *guilt* of the accused prior to imposing a pre-trial sanction or measure.⁵⁴⁷ Scholars accuse the legislator of having

strafproces, Stb. 2010, 1, entry into force 1 January 2011); Experts in Criminal Cases Act (in Dutch: *Wet deskundigen in strafzaken*, Stb. 2009, 33, entry into force 1 January 2013); Public Prosecution Service (Settlement) Act (in Dutch: *Wet OM-afdoening*, Statute of 26 April 2007, *Staatsblad* 2007, 160, entry into force 1 April 2013).

⁵³⁸ Public Prosecution Service (Settlement) Act (in Dutch: *Wet OM-afdoening*, Statute of 26 April 2007, *Staatsblad* 2007, 160, entry into force 1 April 2013).

⁵³⁹ Article 257a Sv.

⁵⁴⁰ Article 257ba Sv.

⁵⁴¹ Public Prosecution Service (Settlement) Act (in Dutch: *Wet OM-afdoening*, Statute of 26 April 2007, *Staatsblad* 2007, 160, entry into force 1 April 2013). Also *Aanwijzing OM-afdoening*, 2013A008, *Staatscourant* 2013, 11374, entry into force 1 May 2013. See Sikkema and Kristen, in: De Jong and Kool (2012) at 185-189.

⁵⁴² See for comparable criticism about the pre-trial out-of-court settlement: De Graaf (2003) at 820-823. See more positively: Groenhuijsen and Simmelink, in: Jordaans et al (2005) at 178-180.

⁵⁴³ Article 257e Sv.

⁵⁴⁴ Article 257a-h Sv.

⁵⁴⁵ TK 2004-2005, 29 849, nr. 3, at 84. With the normal rules for concurrence (in Dutch: *samenloop*) under Article 57 Sr, i.e. when several acts amount to one continued criminal offence, except when the punishment itself would exceed the limit such as the maximum of 180 hours of community service.

⁵⁴⁶ E.g. Brants and Stapert, in: Boone et al (2004) at 249-266; Groenhuijsen and Simmelink, in: Jordaans et al (2005) at 178-180; and De Graaf (2003) at 820-823.

⁵⁴⁷ E.g. Hartmann, in: Groenhuijsen and Knigge (1999) at 59-90 and Groenhuijsen and Simmelink, in: Jordaans et al (2005) at 178-180.

cherry picked this particular prosecutor's decision from their numerous suggestions for reform⁵⁴⁸ (that aim to make criminal procedure more contradictory⁵⁴⁹) without incorporating the other statutes.⁵⁵⁰

In so far as an effective defence is concerned, it is relevant that the accused might not be able to make a proper decision as to whether he should resist the prosecutor's decision in the absence of counsel. No judge can *ex officio* see possible issues with the case that a lay person, particularly without legal assistance, might not notice. There is no judge who can scrutinise whether the accused should have had assistance by counsel. The judge cannot assess whether the accused has decided voluntarily to not "resist".⁵⁵¹

It also has an effect on the issue of ineffective legal assistance. Without prejudging whether the court is allowed to do so at trial (as remains to be seen in this study), if the accused did have legal assistance, no judge can assess whether the services provided by the lawyer were proficient at all. In other words, out-of-court settlements including the "prosecution decision" certainly give the judge no possibility to intervene in the case if confronted with possible ineffective assistance by counsel, which can potentially damage the accused in terms of his rights. After all, the judge is not involved entirely, unless, for instance, the accused resists the prosecutor's decision. Consequently, the accused will usually have to bear the consequences of ineffective legal assistance if it arises in the context of out-of-court settlements, such as the prosecutor's decision. Moreover, this out-of-court settlement hinders the accused's right to access to court. Unless he resists, the case will not go to normal court.

As a penultimate, fifth factor, a matter of policy rather than law will be mentioned because of its impact on the law. The funding for legal aid by appointed counsel, which is financed under the statute on legal assistance⁵⁵², will be lowered under the "system renewal regarding legal assistance".⁵⁵³ Most legal aid funding is spent on criminal cases and the austerity measures can therefore have an important impact on the effectiveness of assistance provided by an appointed lawyer to the accused. Spronken has argued the danger of this development for access to justice.⁵⁵⁴ Criminal defence lawyers have also protested against these changes to the Dutch system of legal aid.⁵⁵⁵ By comparison, the funding available for legal aid in the Netherlands is relatively low, particularly in contrast to, for example, England and Wales.⁵⁵⁶ As a consequence of the lowered funding, criminal defence lawyers may not (or no longer) have a financial incentive to provide the best possible assistance to the – often indigent – accused persons, who are often vulnerable as well.⁵⁵⁷

As a sixth and final factor under future law, the legislator has recently drafted a legislative proposal for the enhanced supervision of lawyers in general, including in particular criminal defence lawyers.⁵⁵⁸

This draft statute does not follow the advice given by a research group presided over by the former highest officer of the prosecution service Docters van Leeuwen, which has recently examined its own ideas about a supervisory scheme for lawyers.⁵⁵⁹ Given that this research team has considered

⁵⁴⁸ The general framework for the revision of the criminal procedural code of 1926 (in Dutch: *Algemeen kader herziening Wetboek van Strafvordering, Kammerstukken II 2003/04, 29 271, nr. 1*). See also Cleiren, in: Cleiren et al (2006) at 13-37, particularly at 24-25.

⁵⁴⁹ See subsection 4.2.2.2.

⁵⁵⁰ E.g. Knigge (2002) at 221-236, in particular at 234; Prakken (2003) at 725-742, in particular at 741; legislative advice 365 of 11 March 2003 by the Dutch Bar Association regarding the legislative concepts concerning pre-trial out-of-court settlements (available at www.advocatenorde.nl).

⁵⁵¹ See for a similar description as consensual: Corstens/ Borgers (2014) at 5-6.

⁵⁵² E.g. Westerveld (2014) at 246-321, who explains that in 1994, under the *Wet op de rechtsbijstand (WRB)*, 1994, legal aid was referred to as "funded" legal assistance, which changed when the section on subsidy of the Statute on General Administration was made applicable (Article 4:29-31), and ever since has been called "subsidized" legal assistance.

⁵⁵³ 'Stelselvernieuwing rechtsbijstand', Letter of the Secretary of State of Security and Justice, dated 12 July 2013, *Kamerstukken II 2013/14, 31 753, nr. 64*.

⁵⁵⁴ Spronken (2013) at 1955.

⁵⁵⁵ Westerveld (2014) at 246-321, who cites on p. 316 data that demonstrate that the largest percentage of legal aid, 33%, is provided in criminal proceedings.

⁵⁵⁶ Cape et al, in: Cape et al (2007a) at 59-78.

⁵⁵⁷ See also Böhler, in: Bauw et al (2013) at 175 in particular.

⁵⁵⁸ See e.g. s 58 PACE '(...) A person arrested and held in custody in a police station or other premises shall be entitled, if he so requests, to consult a solicitor privately at any time'. A solicitor can decide to give telephone advice only or to be present during the police interrogations. Presence during interrogations is estimated to occur in 37 percent of all cases, see Bucke and Brown (1997) at 19 and Bucke et al (2001) at 21, as cited in Ashworth and Redmayne (2010) at 92.

⁵⁵⁹ Docters van Leeuwen (2010) at 36.

that the market failure of lawyers is almost inevitable⁵⁶⁰, it has advised that a system of supervision for both competition and quality should be set up. This supervisory system would have to consist of, literally, “a wise man” who can supervise lawyers’ conduct. This independent research, that was initiated by the Bar, concluded that the supervision of counsel by the State is unconstitutional and unnecessary. The group emphasised the importance of the independence of the Bar from the State as a constitutional reason for not providing the government with any type of supervision over lawyers.⁵⁶¹

Evidently dismissing this advice⁵⁶², the legislator seeks to introduce an auxiliary supervisory system so that the State can oversee lawyers under the responsibility of the Minister of Security and Justice.⁵⁶³ The legislative proposal seeks to create a new and independent supervisory council consisting of three non-lawyers, chosen by persons who are not members of the Bar.⁵⁶⁴ The aim of this council is rather broadly formulated: “to ensure that lawyers abide by the rules and that they do not abuse their privileges”. The council, which will not be directly dependent on the government and lawyers themselves, will report in public about its activities on an annual basis. Regional Bar representatives will be the primary supervisors of lawyers, but, as stated in the introduction to the statute, the council will have the final responsibility.

Such final responsibility lies in the fact that the council can give binding indications to the regional Bar representatives and an independent disciplinary court to have these members suspended or dismissed if they fail to exercise proper supervision. In the exercise of their supervisory tasks, the regional Bar representatives can dispense with the right of counsel to not disclose confidential information (in Dutch: *verschoningsrecht*): the members of the council can lift that right of counsel to not disclose confidential information and access the dossiers protected by legal privilege.

Evidently, the legislator finds the supervision system drafted by the group headed by Docters van Leeuwen to be insufficient because of the assumed lack of independence of the supervisory body. The supposed benefit of the draft statute is that local disciplinary bodies composed of lawyers continue to have the leading role in lawyers’ supervision and in ensuring uniformity in different districts. Claims of its unconstitutional nature were apparently dismissed. This could give rise to problems because lawyers’ constitutional right to independence entails that counsel must be able to act zealously against the State and therefore should not be confronted with the authorities supervising competition between, and the quality of, criminal defence lawyers. Even the prospect of the State supervision of counsel could prevent a lawyer from feeling free to use all possible means to vigorously defend an accused in the criminal proceedings instigated against him by the authorities.

Such a system of supervision of the lawyer might constitute a State interference⁵⁶⁵, because of its impact on the independence of the Bar from the State and the freedom of the defence.⁵⁶⁶ Arguably, restrictions might be placed upon counsel’s assistance, by statute rather than court ruling, which make it impossible for the lawyer to make full use of the trial procedures. For example, Spong refers to the plans regarding the supervisory council on the Bar that “(...) might be the beginning of the end of an independent Bar which despite risks will not be restricted in their freedom of speech”.⁵⁶⁷ He foresees that an inadequate procedure of contempt of court will be initiated, which he ties to the risks – under the Convention and both disciplinary and criminal law – that lawyers currently run if they speak critically about judicial bodies (both within and outside of the courtroom). He points out that lawyers (not politicians and civilians) are the only ones in the Netherlands who take an oath in which they

⁵⁶⁰ See also above in section 4.3.1.

⁵⁶¹ The more recently drafted legislative proposal for a new council to supervise all lawyers, thus including criminal defence lawyers, is also examined, but below under section 7.4. (in Dutch: Consultatiedocument July 2011, Aanpassing van de Advocatenwet, de Wet op de rechtsbijstand en de Wet tarieven in burgerlijke zaken in verband met de positie van de advocatuur in de rechtsorde, attached to the letter of 7 February 2011).

⁵⁶² Docters van Leeuwen (2010) at 36.

⁵⁶³ Consultation document relating to the supervisory system for lawyers (in Dutch: Consultatiedocument July 2011, Aanpassing van de Advocatenwet, de Wet op de rechtsbijstand en de Wet tarieven in burgerlijke zaken in verband met de positie van de advocatuur in de rechtsorde and Toelichting algemeen).

⁵⁶⁴ See also 32.382, Wet positie en toezicht advocatuur, Amendement by Member of Parliament lid Van der Steur who wanted to include a possibility that convicted lawyers will have pay for the costs of the legal proceedings in which they were convicted, dated 13 September 2013.

⁵⁶⁵ See for this terminology, sub-section 2.4.1.

⁵⁶⁶ Spronken (2001) at 464.

⁵⁶⁷ Spong (2013) at 460-462.

swear respect for the judiciary. He fears that the new legislative plans can significantly impact on the freedom of expression of the lawyer, which is already bound by the aforementioned bodies of law.

This last factor only has a limited bearing on this research. The supervisory system is more concerned with the integrity of counsel, in general, whilst this study explores especially the quality of the performance by counsel in Dutch criminal proceedings, in particular. Integrity of counsel and the quality of his services to the accused are certainly connected issues. However, the emphasis here is more on the possible intervention in the case required by the authorities in order to protect the right of the accused to an effective defence who suffers from ineffective legal assistance, rather than exploring the prohibited more structural State interferences that supervision of lawyers by a State organ might constitute. Therefore, this particular topic had to be mentioned at this early stage of the study but will not be examined in detail in this research.

4.3.3. Trends according to scholars potentially complicating legal assistance's effectiveness

This sub-section will discuss trends that according to scholars can have a negative effect on counsel's ability to provide the accused with effective legal assistance, with a further risk of damaging the accused in terms of his rights rather than the strategy of the defence. These trends are very much interconnected⁵⁶⁸, but they will be addressed separately. Emphasis will be put on developments in criminal proceedings that cause – a possibly growing – number of cases that are being decided without an effective defence in the Netherlands, as Jackson would put it (sub-section 2.4.2.).

Boksem refers to two aspects of a trend that results in an imbalance in Dutch criminal proceedings.⁵⁶⁹ First, Boksem submits that the competences of investigating officers have been increased. The legislator has removed formal rules. Moreover, the Hoge Raad has held in its case law that their legal consequences are lifted, so that breaches can no longer result in advantages for the accused. Second, Boksem argues, the defence has gained too few procedural rights, for instance to order investigative measures that can be beneficial to the accused. In this light, other scholars in agreement contend that the legislator and the judge tend to lean towards the “needs” of the investigation and prosecution, rather than of the defence.⁵⁷⁰ Therefore, the lack of a proper role of counsel pre-trial would supposedly give too much power to the authorities, particularly during the pre-trial stage.

Additionally, scholars point out two trends that they see mostly in conjunction. One trend is that, supposedly, counsel is expected to play an increasingly active role in Dutch criminal proceedings.⁵⁷¹ As a first example, scholars point out a (new) activity required from counsel: they point out his “duty” to do a mid-term check of pre-trial detention.⁵⁷² Its duration has increased, so that one order can result in up to 90 days of deprivation of liberty. As a second example, they argue that at trial, counsel has to present a *prima facie* reasonable case that there were illegitimacies in the criminal investigation. However, it is believed that counsel is not being granted the necessary access to the relevant materials to support any such contentions.⁵⁷³ Counsel might therefore have to act more vigorously so that the court will act regarding substantive defences⁵⁷⁴ including contentions of abuse of process under Article 359a Sv.⁵⁷⁵ As a third example, they list more responsibilities of counsel, which would mean he has to constantly repeat in court requests or substantive defences.⁵⁷⁶ When such requests or substantive defences have already been rejected by the first instance court, the lawyer can do two things because he cannot just reiterate them on appeal. Counsel can present new arguments if he wants the court to respond with reasons in their verdicts to his submissions or explain to the first

⁵⁶⁸ Franken (2010: 1.4), in: Mevis et al (2010); Franken and Spronken (2001) at 1-18; and Docters van Leeuwen (2010) at 1-18. See also 't Hart and Simmelink, in: Enschedé et al (1987), at 165-179.

⁵⁶⁹ Boksem (2010) at 233-244.

⁵⁷⁰ Gutwirth and De Hert (2001) at 1048-1087.

⁵⁷¹ See Franken (2007) at 360-369; Boksem (2009) at 1-19; Prakken and Spronken, in: Prakken and Spronken (2009) at 1-27; and Franken (2010:1.5), in: Mevis et al (2010).

⁵⁷² Röttgering (2005: 3.3), in: Melai/Groenhuijsen (2005).

⁵⁷³ Franken (2007) at 360-369. See also Boksem (2009) at 1-19; Prakken and Spronken, in: Prakken and Spronken (2009) at 1-27; and Franken (2010:1.5), in: Mevis et al (2010).

⁵⁷⁴ See Borgers and Kristen (2005) at 568-588 and, for example, HR 6 September 2005, ECLI:NL:HR:2005:AT7553, *NJ* 2006, 85, particularly the conclusion by AG Jörg ECLI:NL:PHR:2005:AT7553, which the Hoge Raad followed.

⁵⁷⁵ HR 30 March 2004, ECLI:NL:HR:2004:AM2533, *NJ* 2004, 376, m.nt. Buruma. See also Borgers (2012) at 257-273.

⁵⁷⁶ See also in sub-section 4.3.2. Act of 28 October 1999, *Stb.* 1999, 467, entry into force 1 October 2000. Wet van 15 maart 2012 tot wijziging van de Advocatenwet, de Wet op de rechterlijke organisatie en enige andere wetten ter versterking van de cassatierechtspraak (versterking cassatierechtspraak), *Stb.* 116, 2012. E.g. Article 9j (3) of this Statute.

instance court why it rejected the requests or substantive defences on wrong grounds. Also, if the defence makes a request to hear a witness at a late stage in the proceedings such as during the first trial session, counsel will have to ensure that the time limit will not be exceeded and that the witness request has been formulated in such a manner that the court cannot reject it without having to give reasons in its verdict as to why it did not hear the witness. Furthermore, post-trial counsel will have to make sure he abides by supposedly stricter requirements regarding briefs concerning appeals in cassation. If counsel does not meet the applicable standards for briefs for appeals in cassation, the accused will lose his right to appeal in cassation to the Hoge Raad.

The second trend is that Dutch criminal procedure has *less* expectations of the autonomous initiative required from the court. For example, a scholar argues that the appeal judge is required “only” to *respond* to defences if they have been made both at first instance and explicitly at the second instance stage.⁵⁷⁷ For instance, Röttgering mentions that potentially efficient and quick case management has limited the court to doing what is “strictly necessary”.⁵⁷⁸ Consequently, counsel has to take a supposedly more active role and is thus being held by the court to be more responsible than before if he is inactive.

In this research into ineffective legal assistance, it is important to separate these *two* separate trends of “more” required from counsel and “less”⁵⁷⁹ required from the court. After all, in principle, the two trends can happen in tandem. However, if they are both present, the impact on the rights of the accused can be significant. If Dutch criminal procedure places *more* expectations on counsel *whilst* the court can be *less* active, it is almost inevitable that ineffective legal assistance will harm the accused (more). If ineffective legal assistance comes at the procedural risk of the accused⁵⁸⁰, the court can *allege* that counsel “failed” to submit a substantive defence or request to hear a witness. If the Hoge Raad does not overturn such cases, the accused runs the risk of having to bear the consequences of counsel’s supposed inactivity.⁵⁸¹ The risk that counsel does not live up to the expectations is higher if *more* is being required from him in terms of arguments, substantive defences, and requests. If the court no longer has an *ex officio* obligation to explore such issues that can benefit the accused, the accused can end up paying the price at the expense of having the case against him examined. Consequently, the accused risks bearing the consequences of both *actual* and *alleged* ineffective legal assistance, even if that harms his personal rights.⁵⁸² These consequences for the accused might raise difficulties from a perspective of a fair trial. It is believed that truth finding supposedly benefits from an effective defence because the case against the accused will be tested rigorously. If counsel and the court do not put the evidence against the accused to the test, both objectives of truth finding and a fair trial might not be met. It has already been noted in the introductory chapter to this study that ineffective legal assistance, that had not been corrected by an active judge, can result in miscarriages of justice. Therefore, the substantive research chapters regarding Dutch criminal proceedings will inquire into the existence of the aforementioned trends, especially the last two which are often seen in conjunction.⁵⁸³

4.4. Cassation technique

The following substantive research chapters regarding Dutch criminal proceedings will draw heavily on a description and analysis of the most relevant cases of the Hoge Raad.⁵⁸⁴ That case law will be presented in this book by way of a sample. This sample deals with alleged and actual ineffective legal assistance, as submitted at least by scholars and legal practitioners.⁵⁸⁵ In this sample, attention will be

⁵⁷⁷ See also Mevis (2013) at 1201-1205.

⁵⁷⁸ E.g. Röttgering (2013) at 111-126.

⁵⁷⁹ See also De Weerd (2013a) at 156-160; Van Vreeswijk (2013) at 244; Van der Goot (2013) at 244; Bueno (2013) at 245; Van den Heuvel (2013) at 246.; Denie (2013) at 246; Verloop (2013) at 246-247; and De Weerd (2013b) at 243 and 247-248.

⁵⁸⁰ See for an exception to this rule where only the lawyer can be faulted for having submitted the appeal brief to late, and thus not the accused, HR 25 February 1986, ECLI:NL:HR:1986:AC9244, *NJ* 1986, 648.

⁵⁸¹ These questions call for a case-by-case examination, which will be done in chapters 6, 8, 10 and 12.

⁵⁸² See for instance for the accused’s personal right to lodge an appeal, HR 12 June 2001, ECLI:NL:HR:2001:AB2060, *NJ* 2001, 695.

⁵⁸³ See chapters 1 and 2.

⁵⁸⁴ See similarly Röttgering (2013) at 175-370.

⁵⁸⁵ See for important case law overviews on the defence in Dutch criminal procedure e.g. De Roos (1991) at 5-48; Spronken (2001) at 435-489 especially; Franken (2004) at 5-47; and Prakken (2005) at 1-136.

paid to a range of defence activities that can be performed by either unassisted or assisted accused, from witness requests to substantive defences and appeal and cassation. From these cassation cases, inferences will be drawn as to how much more is expected of counsel than of a lay accused who acts alone. To that end, comparisons will be made between an assisted or unassisted accused who has performed such a defence activity. Ultimately, the objective of that exploration is to determine how such expectations placed on the defence – and *de facto* on counsel – risk harming the rights of the accused rather than the strategy of the defence, on the one hand. As a second goal this research will seek to determine whether or not the court actively intervenes in the case when confronted with ineffective legal assistance, on the other hand.

Cassation case law is relatively specific. The Hoge Raad has the authority to overturn cases by appeal courts (a procedure known as cassation) and thereby establishes case law, but only if the lower court applied the law incorrectly or the ruling lacks sufficient reasoning. As a rule, the facts determined in the lower court are not reviewed and are accepted as correct.

In the Netherlands, a case is first heard by one of the ten district courts (*rechtbanken*). Afterwards, either side may appeal to one of the four courts of appeal (*gerechtshoven*). Finally, either side of prosecution or defence may file a cassation complaint to the Hoge Raad.

Cassation is possible in relation to a breach of the law or an abuse of a procedure. In summary, the first issue arises if the Hoge Raad deems that the lower court made a mistake as to the interpretation of the law and the second situation occurs when the lower court has not complied with a (written or unwritten) criminal procedural prescription by not reasoning in its verdicts its decision in relation to an explicitly formulated standpoint, a procedural omission of abuse of process (Article 359a Sv) or not calling a witness to testify.⁵⁸⁶

After cassation, the Hoge Raad can give its own decision in relation to the case (this is different in France).⁵⁸⁷ The tasks of the Hoge Raad are to ensure legal uniformity and certainty, which constitute a public interest which also comprises legal protection. Law development and shaping is also part of the Hoge Raad's task.

The role of the criminal defence lawyer has become important due to the requirement of the written cassation appeal brief since 1 October 2000. The Hoge Raad focuses on the complaint in cassation, unless there is an interest of the accused that it would deal with *ex officio* (which scholars claim happens scarcely, see below in this section). Supposedly, this reliance of the cassation court on the conduct of counsel is also part of the trend of Dutch criminal proceedings become more contradictory.⁵⁸⁸ The absence of cassation *ex officio* when resulting in possible harm to the accused has also made it to the newspaper.⁵⁸⁹ Therefore, for counsel, it is also important to anticipate the cassation phase already during the lower, factual instances. During the factual instances, and in particular during appeal, the foundation is laid for the appeal in cassation. If that foundation is not proper, this limits the opportunities in cassation. For example, a substantive defence has to meet certain criteria, if the court is to be obliged to respond with reasons in its verdict.

A cassation lawyer has two months to submit the cassation appeal grounds (Article 437 (2) Sv). The Hoge Raad has explained that such grounds have to be a certain and clear complaint about a breach of a rule of law and/or an abuse of a procedural prescription by the judge who has ruled in the case.⁵⁹⁰

If the public prosecution appeals in cassation, then the accused can get an incidental appeal in cassation (Article 433 (1) Sv). That is the regular cassation procedure. The accused can also opt to contradict the public prosecution (Article 438 (2) Sv). That can be done orally or in writing.

The Procureur-General, and usually in practice this will be an AG, will give a conclusion, a non-binding advice, to the Hoge Raad.⁵⁹¹ Scholars claim that usually the Hoge Raad follows this

⁵⁸⁶ See further chapter 12.

⁵⁸⁷ Boksem et al (2015) at 1-5.

⁵⁸⁸ Also Fokkens, in: Hartevelde et al (2005) at 139-149.

⁵⁸⁹ The case (HR 9 October 2012, ECLI:NL:HR:2012:BX5513, *NJ* 2013, 53, m.nt. Mevis); the journal article and newspaper article Jebbink (2013) at 1201-1205 and W. Jebbink, 'Hoge Raad handhaaft rechtsmissers', *NRC Handelsblad* 3 May 2013, at 20; and a response in that same newspaper: P.C. Kop, Hoge Raad kent de twee kanten van ieder oordeel, *NRC Handelsblad*, p. 10, 13 May 2013. See further section 12.4.2.

⁵⁹⁰ HR 29 January 2008, ECLI:NL:HR:2009:BC2338.

⁵⁹¹ Connected to the Hoge Raad is a "parket", of which Advocates-General and the (replacement) Procureur-General are

advice, and can even conclude its case by referring to the conclusion.⁵⁹² The defence or prosecution can respond to that conclusion. Academics submit that there are few cassations *ex officio* and that therefore both the defence and prosecution have to adequately formulate the grounds for cassation.⁵⁹³ According to empirical research from 2007, one out of eight lodged cassation complaints are examined on their merits, with the most successful cassation cases being those that concern the reasonable time of the proceedings.⁵⁹⁴

Seeing the nature of cassation as described above, it is almost inevitable that in this research the selection of case law presented in the subsequent chapters regarding Dutch criminal procedure often “only” deals with the appeal stage rather than also with the lower factual examination of first instance. Consequently, the appeal phase will feature more prominently in the substantive research chapters than the proceedings at first instance. Both at first instance and on appeal, the accused is entitled to legal assistance, which is important for this research into ineffective legal assistance. It might be understandable that the accused does not have a basis for complaining in cassation about even the most ostentatiously deficient performance of counsel, if he has no underlying right to assistance by counsel in a fair trial under Dutch law, after all. However, as explained in this chapter, both at first instance and on appeal, the accused has a right to legal assistance by retained or appointed counsel so that no such issues with a lacking legal ground can arise (under Article 28 Sv and the related rights such as Article 41 Sv mentioned above in chapter 1 and as will be explained further in chapters 6, 8, 10 and 12).

Also, more generally speaking, all cassation cases cited in the subsequent chapters regarding Dutch criminal proceedings necessarily have their own rather specific intricacies. Cases have been selected on their explanatory strength for the interactions between the defence and the lower courts or the Hoge Raad. The cited case law is thus selective, chosen for the specific aim of a description and analysis of the rather negative topic of ineffective legal assistance and its redress in Dutch criminal procedure. Accordingly, the presented case law has not been chosen in order to understand criminal proceedings in the Netherlands in a broader sense than is relevant for this specific research or to identify the positive contribution that a lawyer ought to give to the process. In addition to the choices made in the development of the sample, another reason for the selectivity of the case law is the self-selecting process of cases that do not even come before the Hoge Raad. Mostly, issues of ineffective legal assistance will have to be solved by the judge who can try both the facts and the law, it is hoped, of course. A cassation by the Hoge Raad is, and will always be, only an ultimate resort. A third limitation regarding this case law analysis is that not all case law of the Hoge Raad is being published and does not include the cassation appeal briefs of the lawyers.⁵⁹⁵ Consequently, these factors make it difficult to determine whether or not there are instances of ineffective legal assistance on the previous levels of first instance and appeal. The selective nature of the cases will be accounted for when more general conclusions regarding Dutch criminal proceedings will be drawn (chapter 13).

4.5. Concluding remarks

This chapter has demonstrated that, despite the lack of changes to the procedural right to legal assistance under Article 28 Sv, important alterations are noticeable in relation to earlier and greater participation of the defence and especially defence counsel.⁵⁹⁶ For example, legal assistance is now required for more stages than before, such as on appeal in cassation and revision (for the benefit of the accused).⁵⁹⁷ Thus,, Dutch authorities have to ensure that the accused has access to a lawyer, or even have to go one step further by appointing a legal aid lawyer to represent the accused during more criminal procedural stages than originally were foreseen under the design of the code in 1926.

members. The main task of this “parket” is to give non-binding advice, so-called conclusions, to the Hoge Raad. The parket is independent and is being led by the Procureur-General. The conclusions are being taken by three Advocates-General (AG’s) on behalf of the Procureur -General (PG). This book contains some cases in which the case law refers to the conclusion by the PG.

⁵⁹² Boksem et al (2014) at 59-60.

⁵⁹³ *Ibid* at 68-69.

⁵⁹⁴ *Ibid* at 73-74 and Couzijn (2007) at 244.

⁵⁹⁵ See also Doornbos (2014) at 416.

⁵⁹⁶ See sub-sections 4.2.1. and 4.2.2.

⁵⁹⁷ See sub-section 4.2.2.3.

This overall observation regarding more defence participation is of particular relevance for this research because the more value attached to the assistance by counsel for the accused's effective defence, the more impact ineffective legal assistance may have on the accused's rights. That is, if the authorities afford no redress within criminal proceedings for an accused who is confronted with ineffective legal assistance, the accused will potentially end up bearing the consequences (more often). The latter can result in difficulties with a fair trial. It is hard to maintain that a fair trial has been guaranteed if the accused's rights end up being damaged by counsel, whilst the authorities remain passive when confronted with ineffective legal assistance by that lawyer.⁵⁹⁸

In relation to that issue of fairness, it is important to draw inferences from the aforementioned factors that seem to limit, rather than enable, the effectiveness of assistance by counsel in criminal cases.⁵⁹⁹ These factors that impact the effectiveness of legal assistance in Dutch criminal proceedings are relevant for all three components of the conceptual framework of the relevant rights, context and cross-cutting notions and perspectives, as explained in chapter 2. To reiterate one of the aforementioned exemplary factors, the rights that are being exclusively provided to counsel, as opposed to the lawyer and his client in their unity of the defence, make counsel unable to share all the information with the accused. Moreover, the free market, disciplinary law, civil damages and criminal law provide norms that should regulate the effectiveness of the conduct of counsel within criminal proceedings. However, as explained above, the aforementioned bodies of disciplinary and tort law have no effect on the criminal procedure in terms of its course and outcome. Consequently, the lack of redress for ineffective legal assistance, causes, as a rule, it to come at the procedural risk of the accused in the Netherlands. This study will, therefore, have to pay particular attention to redress for ineffective legal assistance *in* Dutch criminal procedure.

For the subsequent exploration of the relevant rights, context and cross-cutting notions and perspectives mostly on the basis of Dutch case law, whose analysis will follow in the next substantive research chapters, the contrast between more inquisitorial and adversarial criminal proceedings must be reiterated (see chapters 6, 8, 10 and 12). This chapter has demonstrated that the origin of Dutch criminal procedure, at least by way of legal tradition, can still be influential by means of a more inquisitorial pre-trial phase in which the accused is not granted all rights required to be a full procedural party. This conception of the role of the defence pre-trial might be "ruptured" if the trial stage and, accordingly, the role of the judge has to become more adversarial rather than more inquisitorial. If the trial judge no longer has the responsibility to compensate the accused for this disadvantaged position during the pre-trial stage by actively having to guarantee the fairness of the entire procedure and truth finding in court, it may have the aforementioned impact on ineffective legal assistance. Therefore, it is essential to study in the following substantive research chapters whether the trial judge still plays, and has his cases overturned by the Hoge Raad when he does *not* play, this original role of an active truth-seeker and guarantor of a fair trial (see chapters 6, 8, 10 and 12).

⁵⁹⁸ See for a suggestion of a *desaveu* procedure that nullifies specific activities by the defence when proven to have been ineffective, e.g. Spronken (2001) at 308-310 and 644-645; as well as Prakken (2005) at 69-71.

⁵⁹⁹ See particularly section 4.3.

PART III RIGHT TO COUNSEL

CHAPTER 5. RIGHT TO COUNSEL UNDER THE CONVENTION

5.1. Introduction

This chapter builds on the previous chapters and pays particular attention to the question of how the Court interprets the right to counsel under Article 6 (3) (c). This topic is particularly relevant for this research into ineffective legal assistance and its redress in Dutch criminal proceedings, for two reasons at least. First, there has to be a legal basis in an applicable right to counsel for there to be a complaint about lacking *effectiveness* of such assistance by counsel that the Court will have to adjudicate in the first place. Therefore, it will be important to explore at what stages, according to the Court, the Convention right to counsel applies within criminal proceedings. As a second and related reason, it will have to be determined that at these procedural moments or junctions the Court requires that the accused has been afforded legal assistance *per se* (formal interpretation) or that *effective* legal assistance should have been provided for the Convention to have been respected (substantive interpretation). The latter issue is relevant because chapter 2 on the conceptual framework has already explained that some Dutch scholars argue that the Court does not require such a substantive interpretation. On the basis of that assumption, it is being argued that I more in the Court would supposedly hold that the authorities within criminal proceedings are required to intervene “only” in the case when “(...) the lawyer is absent or otherwise does practically nothing at all for the accused” contend that.⁶⁰⁰ Consequently, it is important to assess whether that reading of the Court’s case law conforms with what is being found in the context of this study into ineffective legal assistance and its redress in Dutch criminal proceedings.

In order to examine both the legal ground for a Convention complaint of ineffective legal assistance and the Court’s interpretation of the right to counsel, this chapter will take a first vertical perspective. That perspective is necessary in order to explore the relationship between the authorities and the accused whose right to an effective defence has to be guaranteed. The emphasis here will be on this effective defence for an assisted accused, rather than an unassisted accused. This is also the reason why the leading question for this chapter is, as explained in chapter 2: What obligations do the authorities owe to the accused regarding his right to counsel under the Convention?

This chapter will mostly refer to case law regarding Article 6, but will also include a limited amount of case law on other Convention rights. For example, cases will be included regarding the protection by the lawyer against ill-treatment and related conduct committed against the accused (Article 3) and the procedural guarantees in relation to pre-trial detention if counsel can play a role (Article 5). Also covered are cases regarding the right to privacy and privileged contact and communication between defence counsel and the accused (Article 8) and – to a lesser extent – the right to freedom of expression as to how counsel can defend the accused within criminal proceedings (Article 10; more so in chapter 7).⁶⁰¹

Therefore, this chapter will give a first indication of the important aspects of the conceptual framework of relevant rights, context and cross-cutting notions and perspectives. Most attention will be paid to the relevant rights under the first vertical perspective to the accused’s right to an effective defence. The other aspects will be focused on more in the next substantive research chapters regarding the Convention (chapters 7, 9 and 11).

Several of the relevant topics that will be presented in this chapter – and the following three substantive research chapters on the Convention for that matter – have resulted in scholarly debates in the Netherlands.⁶⁰² In keeping with the methodology which aims at providing descriptive answers to the leading research questions for each chapter or section, the findings of an original case-by-case

⁶⁰⁰ Spronken (2001) at 447 and 464. See also this same view reiterated in Prakken and Spronken, in: Prakken and Spronken (2009) at 15.

⁶⁰¹ See chapter 7 for responsibilities of counsel under the Convention from the horizontal perspective; chapter 9 for State interference (negative obligation); and chapter 11 for State interventions in the case (positive obligation), from the second and third vertical perspectives.

⁶⁰² See chapter 4.

analysis will be presented in the following sections.⁶⁰³ Although the relevant literature will be taken into consideration, other questions that have not been raised therein will also be brought up here. This literature will be referred to in the next chapter (chapter 6) and all other remaining chapters that will explore, in turn, the Convention and Dutch criminal procedure (in Part IV: Lawyer-client relationship, Part V: State interference with counsel and Part VI: Ineffective legal assistance).

Intentionally, this chapter mirrors the topics that will be discussed under the first vertical perspective towards Dutch criminal procedure (see chapter 6). Ultimately, this structure will enable a comparison between these two descriptive chapters (section 6.6.), so that an evaluation can follow in the final chapter of this book when all research Parts can be seen in conjunction (chapter 13).

Outline

This chapter is divided into four more sections. First, an exploration will follow of the right to counsel under the Convention in more general terms (section 5.2.).⁶⁰⁴ Thereafter, the examination will turn to the question of whether the Court requires the authorities to ensure the right to counsel by means of access to counsel at procedural stages at which this right is “critical” for the fairness of the criminal procedure as a whole (section 5.3.). The penultimate section will deal with the question of whether or not the Court construes a right to substantive *effective* assistance by counsel in fair criminal proceedings that comply with the Convention (section 5.4.). Finally, a conclusion will be drawn on the basis of the findings presented in the preceding sections (section 5.5.).

5.2. Right to counsel

This section will explore during which criminal procedural moments or junctures the authorities have to ensure the accused’s right to counsel under the Convention.⁶⁰⁵ This right consists of two components. First, the authorities can be required to afford the accused so-called “access to a lawyer”, so that the accused can invoke this right to counsel by retaining a lawyer. Second, the authorities might have to go one step further and actually ensure that the accused has legal assistance from counsel by appointing a legal aid lawyer who provides such services. Usually, the accused can waive this first right to access to a lawyer if he, for example, wants to proceed on his own. Also the renouncement of the right to an appointed lawyer will be explored, amongst other issues, in the remainder of this chapter (section 5.4.).⁶⁰⁶

5.2.1. Right to retained counsel

Article 6 (3) provides that “(e)veryone charged with a criminal offence has the following minimum rights: “(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.” This Convention right clearly affords a right to the accused to retain counsel when he is “(...) charged with a criminal offence”.⁶⁰⁷ The Court has held that the starting point of the criminal charge is an autonomous notion. It entails “(...) the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence”, a definition that also corresponds to the test whether “(...) the situation of the [suspect] has been substantially affected”. The Court determines autonomously whether or not an accused is charged with a criminal offence (see further section 5.3.). Once started, that charge with a criminal offence continues through to the end of the proceedings, including the appeal in cassation stage. This does not mean that the right to counsel has to be provided continuously until the end of the proceedings, but rather at critical stages of the proceedings, which will be discussed in the remainder of this chapter (sub-section 5.2.3. and section

⁶⁰³ See sub-section 1.3.

⁶⁰⁴ See *John Murray v. the United Kingdom* [GC], Judgment of 8 February 1996, HUDOC no. 18731/91, para. 59. *I.I. v. Bulgaria*, Judgment of 9 June 2005, HUDOC no. 44082/98, paras. 72-73 and *Moiseyev v. Russia*, Judgment of 9 October 2008, HUDOC no. 62936/00, para. 135.

⁶⁰⁵ E.g. *Barberà, Messegué and Jabardo v. Spain*, Judgment of 6 December 1988, HUDOC no. 10590/83, para. 78

⁶⁰⁶ E.g. *Croissant v. Germany*, Judgment of 25 September 1992, HUDOC no. 13611.

⁶⁰⁷ E.g. *Deweert v. Belgium*, Judgment of 27 February 1980, HUDOC no. 6903/75, paras. 42 and 46, and *Eckle v. Germany*, Judgment of 15 July 1982, HUDOC no. 8130/78, para. 73. The Court has also held that a person in police custody who was required to swear an oath before being questioned as a witness was already the subject of a “criminal charge” and had the right to remain silent. See *Brusco v. France*, Judgment of 14 October 2010, HUDOC no. 1466/07, paras. 46-50. See sub-section 5.3.1.2.

5.3.). Given that most of the Court's case law deals with the right to *appointed* counsel, rather than with the right to *retained* counsel, this section will point out those findings (for mostly *restrictions* on the right of the accused to retain counsel of "his own choosing", sub-section 7.2.1.).

5.2.2. Right to appointed counsel

Article 6 (3) (c) also affords the accused a right to appointed counsel, which has been explained by the Court in the case of *Artico v. Italy*, as follows:

"(...) sub-paragraph (c) (art. 6-3-c) guarantees the right to an adequate defence either in person or through a lawyer, this right being reinforced by an obligation of the State to provide free legal assistance in certain cases".⁶⁰⁸

The phrase "in the interests of justice" included in Article 6 (3) (c) has a potentially broad scope, because in the context of the right to a fair trial the length of the case, its size and complexity need to be taken into account.⁶⁰⁹

This does not mean that an accused cannot be held responsible for lacking legal aid. Where the accused had been appointed a legal aid lawyer but hired a private advocate, so that the appeal court dismissed the appointed counsel, the Commission determined that "(t)he fact that in the proceedings before the Court of Appeal the first applicant did not have the services of a lawyer could therefore to a considerable degree be attributed to his own action".⁶¹⁰ The Commission therefore held to be manifestly ill-founded the applicant's complaint about the lack of free legal aid because the appeal court followed the law after the accused appointed a private defence counsel by revoking the appointment of the appointed legal aid counsel.

The right to appointed counsel applies in "certain cases", when the Court requires the authorities to go one step further than merely providing access to a lawyer to the accused. Those "certain cases" can be distinguished into three categories. First, some accused are vulnerable on their own, so that the authorities have to protect them by appointing a legal lawyer (vulnerable suspects). Second, some accused who are not vulnerable *per se*, can find themselves in situations that make them vulnerable so that they should be compensated by having a legal aid lawyer present (situations that induce vulnerability). Third and final, both types of reasons for appointing counsel can also be present in one case (see sub-sections 5.2.2.1. to 5.2.2.4).

5.2.2.1. Vulnerable suspects

"Normally" the authorities have to appoint a legal aid lawyer to a minor because of his vulnerability in the proceedings without counsel (sub-section 5.2.3. and section 5.3.).⁶¹¹ For instance, during police custody and interrogations, the authorities have to appoint a legal aid lawyer who can help to ensure that the minor can understand the police officers who arrest or question him.⁶¹² Before or during remand proceedings⁶¹³ – and prior to and during the trial stage⁶¹⁴ – the authorities also have to appoint legal aid counsel to a minor. This is because he can, in principle, only effectively participate with a lawyer during the adversarial trial hearing, as follows:

"(...) In the case of a child, it is essential that he be dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and

⁶⁰⁸ *Artico v. Italy*, Judgment of 13 May 1980, HUDOC no. 6694/74, para. 33.

⁶⁰⁹ *Quaranta v. Switzerland*, Judgment of 24 May 1991, HUDOC no. 12744/87, paras. 32 and 33. See also E.g. *Pakelli v. Germany*, Judgment of 25 April 1983, HUDOC no. 8398/78, para. 38-40 and *Croissant v. Germany*, Judgment of 25 September 1992, HUDOC no. 13611/88, paras. 32-33.

⁶¹⁰ Commission admissibility decision of 1 March 1991, *Tage Ostergren and Others v. Sweden*, HUDOC no. 13572/88, (inadmissible).

⁶¹¹ See *Panovits v. Cyprus*, Judgment of 11 December 2008, HUDOC no. 4268/04, para. 67.

⁶¹² E.g. *Salduz v. Turkey* [GC], Judgment of 27 November 2008, HUDOC no. 36391/02, para. 59.

⁶¹³ E.g. *Bouamar v. Belgium*, Judgment of 29 February 1988, HUDOC no. 9106/80, paras. 55, 58 and 59 and *Waite v. the United Kingdom*, Judgment of 10 December 2002, HUDOC no. 53236/99, para. 59.

⁶¹⁴ E.g. *S.C. v. the United Kingdom*, Judgment of 15 June 2004, HUDOC no. 60958/00, para. 27 with reference to *T. v. the United Kingdom* [GC], Judgment of 16 December 1999, HUDOC no. 24724/94, paras. 72 and 84 and *V. v. the United Kingdom* [GC], 16 December 1999, HUDOC no. 24888/94.

that steps are taken to promote his ability to understand and participate in the proceedings (...), including conducting the hearing in such a way as to reduce as far as possible his feelings of intimidation and inhibition (...). The Court accepts the Government's argument that Article 6 § 1 does not require that a child on trial for a criminal offence should understand or be capable of understanding every point of law or evidential detail. Given the sophistication of modern legal systems, many adults of normal intelligence are unable fully to comprehend all the intricacies and all the exchanges which take place in the courtroom: this is why the Convention, in Article 6 § 3 (c), emphasises the importance of the right to legal representation. (...) The defendant should be able to follow what is said by the prosecution witnesses and, if represented, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence (...)"⁶¹⁵.

The Court can also accept that, in addition to having a lawyer, the authorities afford the minor "representation" by "(...) for example, an interpreter, lawyer, social worker or friend".⁶¹⁶ Representation ensures that the minor understands "(...) the general thrust of what is said" by the authorities⁶¹⁷, while the lawyer acting on the minor accused's behalf within criminal proceedings has to assist in helping him understand the factual and legal issues of the case against him.⁶¹⁸

Normally the authorities also have to appoint a legal aid lawyer to an accused with a mental illness, for example before and during remand hearings.⁶¹⁹ The Court will, by the way, not accept appointment of counsel being dependent on a *request* for legal aid by that mentally-ill person.⁶²⁰ For example, in the case of *Megyeri v. Germany*, the Government contended before the Court that *Megyeri* himself was responsible for neglecting to ask for legal aid. On the contrary, the Court concluded that the authorities were accountable for not having appointed a legal aid lawyer to this mentally ill person on their own initiative, as Article 6 (3) (c) requires. This is the general rule, but the Court also finds that authorities do not have an obligation to appoint a legal aid lawyer to a potentially mentally ill person whom the domestic court had adequately *examined* on his fitness to plead.⁶²¹ For example, in the case of *Liebreich v. Germany*, the Court considered that *Liebreich* took part without a lawyer in an appeal hearing while taking anti-depressant medication.⁶²² The domestic appeal court investigated *Liebreich's* capacity to defend himself in person prior to the hearing. For that purpose, the appeal court had obtained information from the doctor treating *Liebreich* on the issue of whether he was fit to plead. The domestic court, on the basis of this information, concluded that *Liebreich* was fit to plead and thus to effectively participate in the appeal proceedings without a lawyer, while he did take medication for a mental illness. The Court also considered that *Liebreich* had been adequately represented by his lawyers prior to the appeal hearing and held that the domestic court had checked his mental capacity for the purpose of the appeal stage. Thus,, the Court declared that complaint inadmissible under Article 6 (1). Nonetheless, in principle, persons with a mental illness will have to be protected by means of an appointed legal aid lawyer because of their vulnerability in the proceedings against them without counsel.

Equally vulnerable and thus deserving of appointment of a legal aid lawyer is an intoxicated person, as follows, for instance, from the case of *Plonka v. Poland* in which there were reasons to assume that the accused was under influence when being questioned at police interrogations.⁶²³ It has to be added that this case was quite specific. On the one hand, the domestic court had deployed the pre-trial statements of the accused who was allegedly under influence but, on the other, determined

⁶¹⁵ *S.C. v. the United Kingdom*, Judgment of 15 June 2004, HUDOC no. 60958/00, paras. 28 and 29.

⁶¹⁶ E.g. *Panovits v. Cyprus*, Judgment of 11 December 2008, HUDOC no. 4268/04, para. 67.

⁶¹⁷ *Güveç v. Turkey*, Judgment of 20 January 2009, HUDOC no. 70337/01, para. 124.

⁶¹⁸ *S.C. v. the United Kingdom*, Judgment of 15 June 2004, HUDOC no. 60958/00, para. 33.

⁶¹⁹ E.g. *Magalhães Pereira v. Portugal*, Judgment of 26 February 2002, HUDOC no. 44872/98, para. 56 and *Megyeri v. Germany*, Judgment of 12 May 1992, HUDOC no. 13770/88, paras. 23-25.

⁶²⁰ *Megyeri v. Germany*, Judgment of 12 May 1992, HUDOC no. 13770/88, para. 26.

⁶²¹ *Liebreich v. Germany*, (dec.), Commission decision of 8 January 2008, no. 30443/03.

⁶²² *Liebreich v. Germany*, (dec.), Commission decision of 8 January 2008, no. 30443/03, under b. Application of those principles to the present case.

⁶²³ *Liebreich v. Germany*, (dec.), Commission decision of 8 January 2008, no. 30443/03, para. 37.

that her trial statements were incredible because she had been under influence. The Court considered two rights to be important for its assessment as to whether the domestic authorities had dealt with the right to counsel fairly: the right to remain silent and the right to legal assistance. Given these two rights, the Court held that a domestic court that determines the addicted accused incapable of giving reliable statements in court due to being under influence cannot assume the following: first, that the accused during pre-trial freely waived her right to remain silent and, second, that she voluntarily waived her right to legal assistance so as to proceed to questioning in the absence of counsel.⁶²⁴ If those are the circumstances, the Court holds that the right to counsel has been violated because the domestic authorities had not appointed a legal aid lawyer during the police interrogations.

Furthermore, for a foreign national who is, for instance, subjected to an extradition procedure, the authorities must appoint a legal aid lawyer.⁶²⁵ The Court considers the assistance of a lawyer to be critical for the fairness of the criminal procedure “as a whole” because a foreigner will often be unfamiliar with the legal system and thus unable to defend himself in person without assistance by counsel.⁶²⁶ When the authorities have no evidence that the foreign accused’s legal knowledge is sufficient to enable him to adequately present his requests in relation to the extradition procedure on his own, they have to appoint him a legal aid lawyer.⁶²⁷

A final example of a vulnerable accused who should be appointed legal aid counsel to compensate for the difficulties arising in a fair trial, is a person with a hearing problem.⁶²⁸ The Court considered that the authorities should appoint a legal aid lawyer to an accused like *Timergaliyev* and guarantee that this lawyer is indeed in court to provide legal assistance and advice.⁶²⁹ The relevant fair trial right in this context is that an accused should be able to hear and follow the procedure, and would need to be legally assisted by an appointed legal aid lawyer if he cannot do so on his own.

5.2.2.2. Situations that induce vulnerability

Before the *Salduz*-case regarding the right to counsel at the stage police interrogations had been rendered (sub-section 5.3.1.1.)⁶³⁰, the Court held that, when police custody makes the accused vulnerable, the authorities have to appoint a legal aid lawyer to the accused who is vulnerable in that situation.⁶³¹ For instance, the Court came to that conclusion in a case in which the interrogations in custody were qualified as “intense” and put the accused in an anxious and emotional state, i.e. where permissible pressure resulted in illegitimate coercion.⁶³² Moreover, in another case, the Court held that authorities have to appoint legal aid counsel to an accused who reasonably risks being ill-treated during police interrogations on account of the duration of that custody⁶³³ or because the nature of the detention made the accused “incommunicado”.⁶³⁴

Moreover, when the accused risks a severe penalty such as two years imprisonment⁶³⁵, life imprisonment⁶³⁶ or the death penalty, the authorities also have to appoint a legal aid lawyer to the accused (section 5.3.).⁶³⁷ To make this obligation practical, the authorities have to inform the accused – who risks such a long sentence – how to be appointed a lawyer when they themselves do not directly appoint a legal aid lawyer to him (e.g. about an application procedure under which the accused has to apply to the council to obtain such an appointed legal aid counsel in the first place).⁶³⁸ To give an example, in the case of *Yaremenko v. Ukraine* the accused was believed to have murdered several taxi

⁶²⁴ *Liebreich v. Germany*, (dec.), Commission decision of 8 January 2008, no. 30443/03, para. 39.

⁶²⁵ *Sanchez-Reisse v. Switzerland*, Judgment of 21 October 1986, HUDOC no. 9862/82, paras. 45-46.

⁶²⁶ *Sanchez-Reisse v. Switzerland*, Judgment of 21 October 1986, HUDOC no. 9862/82, para. 47.

⁶²⁷ See *mutatis mutandi* for a suspect who could speak the court’s language at “street level”, e.g. *Lagerblom v. Sweden*, Judgment of 14 January 2003, HUDOC no. 26891/95, para. 62.

⁶²⁸ E.g. *Timergaliyev v. Russia*, Judgment of 14 October 2008, HUDOC no. 40631/02. See *Grigoryevskikh v. Russia*, Judgment of 9 April 2009, HUDOC no. 22/03 (participating via a video link, see below under combined reasons).

⁶²⁹ See chapter 8, section 8.3.1.3.

⁶³⁰ *Salduz v. Turkey* [GC], Judgment of 27 November 2008, HUDOC no. 36391/02, para. 55.

⁶³¹ See also *Coster van Voorhout* (2009b).

⁶³² E.g. *Pishchalnikov v. Russia*, Judgment of 24 September 2009, HUDOC no. 7025/04.

⁶³³ E.g. *Özcan Çolak v. Turkey*, Judgment of 6 October 2009, HUDOC no. 30235/03.

⁶³⁴ E.g. *Öcalan v. Turkey* [GC], Judgment of 12 May 2005, HUDOC no. 46221/99, para. 70

⁶³⁵ *Padalov v. Bulgaria*, Judgment of 10 August 2006, HUDOC no. 54784/00, paras. 53-54.

⁶³⁶ *Yaremenko v. Ukraine*, Judgment of 12 June 2008, HUDOC no. 32092/02, para. 86.

⁶³⁷ *Talat Tunç v. Turkey*, Judgment of 27 March 2007, HUDOC no. 32432/96, para. 57.

⁶³⁸ *Padalov v. Bulgaria*, Judgment of 10 August 2006, HUDOC no. 54784/00, paras. 54 and 55.

drivers.⁶³⁹ For the first offence of the murder of a taxi driver, *Yaremenko* obtained a lawyer and was thereafter questioned in custody. For the second offence – yet another murder of a taxi driver – *Yaremenko* supposedly freely requested that he be interrogated by the police in the absence of his lawyer. Before questioning the accused, the authorities had characterised the offence regarding this taxi driver not as murder, but as manslaughter. Consequently, the mandatory legal aid system, which would otherwise be applicable to accused persons who are suspected of murder and thus risking severe punishment, did not apply to *Yaremenko*. The Government contended before the Court that *Yaremenko* had himself chosen not to exercise his right to legal assistance. The Court, which did not agree with the Government’s position, held the domestic authorities responsible for neglecting to appoint the accused *ex officio* a legal aid lawyer, for two reasons. First, the authorities cannot initially start questioning under a less serious offence (manslaughter) for which legal aid is not required and then immediately re-characterise the offence as a more serious crime (murder) that would automatically entitle the accused to an appointed lawyer. Second, the authorities cannot rely on the accused’s request, allegedly of his own free will, to be questioned without any lawyer being present when risking a severe penalty in the form of life imprisonment. The Court thus considers legal aid to be essential when the accused risks being imposed a severe sentence, which moreover has to culminate in an effective defence at the adversarial hearing.

The authorities also have to appoint a legal aid lawyer to an accused who is subjected to a procedure in which complex questions of law are being examined.⁶⁴⁰ For instance, in the case of *Quaranta v. Switzerland*, the Court held that there was a violation of Article 6 (3) (c) because the interests of justice required that the applicant be given free legal assistance before the investigating judge and the trial court did not enable him to present his case in an adequate manner due to his appearance in person without the assistance of a lawyer.⁶⁴¹ The Court found that the “interests of justice”-test requires consideration of the seriousness of the offense, the complexity of the case, and the ability of the accused to provide his or her own representation. Here, the accused was suspected to have committed an offence of drug use and trafficking and was liable to imprisonment, not exceeding three years, or a fine. The Court found that legal aid should have been afforded by reason of the mere fact that “(...) so much was at stake”. Shifting from pre-trial and trial to the later phase of an appeal in cassation, the Court comparably requires the authorities *ex officio* to ensure that the convicted person receives legal aid if the legal issues addressed in court are complex. The Court sums up the obligation of the authorities to appoint legal aid counsel as follows:

“The factors relevant to the determination of the scope of this obligation include: (a) the scope of the jurisdiction of the appeal court in question (whether it extended to both legal and factual issues, whether the court was empowered to fully review the case and to consider additional arguments which had not been examined in the first-instance proceedings); (b) the seriousness of the charges against the applicant; and (c) the severity of the sentence which the applicant faced (...).”⁶⁴²

An accused who participates in the hearing through a video link from outside of the courtroom also deserves to be afforded legal aid by the authorities, for example at the first instance hearing and appeal stages.⁶⁴³ To this end, the authorities have to make arrangements for conducting proceedings that respect the rights of the defence for an accused who has to take part in court by means of a video link.⁶⁴⁴ Therefore, the accused should have a lawyer present in the courtroom with whom he can communicate out of earshot of third parties.⁶⁴⁵ Moreover, that accused must have an opportunity to

⁶³⁹ *Yaremenko v. Ukraine*, Judgment of 12 June 2008, HUDOC no. 32092/02, para. 86. See *Shabelnik v. Ukraine*, Judgment of 19 February 2009, HUDOC no. 16404/03, para. 58.

⁶⁴⁰ E.g. *Woukam Moudefo v. France* (dec.), Commission decision of 8 July 1987, HUDOC no. 10868/84.

⁶⁴¹ *Quaranta v. Switzerland*, Judgment of 24 May 1991, HUDOC no. 12744/87, paras. 32 and 33.

⁶⁴² *Iglin v. Ukraine*, Judgment of 12 January 2012, HUDOC no. 39908/05, para. 69.

⁶⁴³ *Marcello Viola v. Italy*, Judgment of 5 October 2006, HUDOC no. 45106/04, para. 72.

⁶⁴⁴ *Marcello Viola v. Italy*, Judgment of 5 October 2006, HUDOC no. 45106/04, para. 73.

⁶⁴⁵ *Marcello Viola v. Italy*, Judgment of 5 October 2006, HUDOC no. 45106/04, para. 74.

bring forward the defence case from outside of the courtroom, without any substantial disadvantage when compared with the prosecution.⁶⁴⁶

As a final example, the authorities also have to appoint a legal aid lawyer in order to provide an accused with an opportunity to appeal.⁶⁴⁷ In the case of *Boner and Maxwell v. the United Kingdom*, the convicted person *Boner* sought to appeal. The lawyer already retained by the accused did not want to lodge an appeal on *Boner's* behalf without giving sufficient reasons why not. Therefore, *Boner* requested to be appointed a legal aid lawyer. However, the Legal Aid Board declined his application for legal aid, since it was not satisfied that *Boner* had substantial grounds for appeal. The Court held that, where declined legal aid, *Boner* was unable to find his own lawyer who would be willing to assist him in lodging an appeal. Although no particularly complex legal issues were addressed during this appeal stage, *Boner* – in the Court's view – did require legal skill and experience to lodge an appeal as his last opportunity, before the judgment would become final. Therefore, a situation in which the accused cannot appeal without counsel can make an accused vulnerable, making him entitled to be appointed a legal aid lawyer.

5.2.2.3. Both reasons for appointment seen in conjunction

There are also cases in which both personal and contextual reasons are present for the appointment of a lawyer.⁶⁴⁸ For example, in the case of *Elawa v. Turkey* the Court held the authorities responsible for failing to appoint, from the first police interrogation, a legal aid lawyer to a foreign national who faced serious accusations.⁶⁴⁹ In addition, the Court concluded that a violation of Article 6 (3) (c) had occurred in the case of *Vaudelle v. France* in which the authorities did not appoint a legal aid lawyer to an adult, who was under supervision because of a civil case resulting from mental disabilities, and risked a serious penalty in a criminal case against him.⁶⁵⁰ Moreover, in the case of *Twalib v. Greece* the authorities were held responsible for neglecting to appoint legal aid counsel to a foreign national facing a cassation procedure concerning complex legal issues.⁶⁵¹ And, finally, two further examples are: *Grigoryevskikh v. Russia*, in which the hearing impaired accused had to participate via a video link from outside of the courtroom⁶⁵² and *Güveç v. Turkey* in which a minor faced the death penalty.⁶⁵³ The Court found that in all these cases the authorities did not live up to their Convention obligations to appoint a legal aid lawyer to a vulnerable accused who, moreover, found himself in a situation that induced vulnerability.

5.2.2.4. Rationales

The rationales for the obligation of the authorities to appoint a legal aid lawyer for persons who are vulnerable, or who are confronted with situations that make them vulnerable (or both), lie in the Court's rather general consideration that "(...) even adults of normal intelligence are unable fully to comprehend all the intricacies and all the exchanges which take place in the courtroom"⁶⁵⁴ as much as pre- and post-trial.⁶⁵⁵ Therefore, the Court considers that legal assistance must be provided to persons who are, due to personal or situational circumstances or a combination of such reasons, unable to go through the proceedings without a lawyer. An appointed legal aid lawyer can respect, and have respected by the authorities, the accused's rights, wishes and interests. Moreover, assistance by counsel helps to ensure the procedural guarantees of equality of arms and adversariality. An appointed legal aid lawyer can be important for equality of arms, because there is often also a lawyer on the side

⁶⁴⁶ *Marcello Viola v. Italy*, Judgment of 5 October 2006, HUDOC no. 45106/04, para. 75.

⁶⁴⁷ *Boner and Maxwell v. the United Kingdom*, Judgment of 28 October 1994, HUDOC no. 18711/91, para. 41.

⁶⁴⁸ See also *Coster van Voorhout* (2009c).

⁶⁴⁹ E.g. *Elawa v. Turkey*, Judgment of 25 January 2011, HUDOC no. 36772/02, para. 40.

⁶⁵⁰ *Vaudelle v. France*, Judgment of 30 January 2001, HUDOC no. 35683/97, para. 59.

⁶⁵¹ *Twalib v. Greece*, Judgment of 9 June 1989, HUDOC no. 24294/94, para. 53.

⁶⁵² *Grigoryevskikh v. Russia*, Judgment of 9 April 2009, HUDOC no. 22/03, para. 78.

⁶⁵³ *Güveç v. Turkey*, Judgment of 20 January 2009, HUDOC no. 70337/01, para. 119.

⁶⁵⁴ E.g. *S.C. v. the United Kingdom*, Judgment of 15 June 2004, HUDOC no. 60958/00, para. 27 with reference to *T. v. the United Kingdom* [GC], Judgment of 16 December 1999, HUDOC no. 24724/94, paras. 72 and 84 and *V. v. the United Kingdom* [GC], 16 December 1999, HUDOC no. 24888/94.

⁶⁵⁵ E.g. *Pishchalnikov v. Russia*, Judgment of 24 September 2009, HUDOC no. 7025/04, para. 78. See also *Coster van Voorhout* (2009c).

of the prosecution.⁶⁵⁶ An appointed legal aid lawyer can also play a significant role for adversariality, because of counsel's ability to put the case against the accused to the test, to ensure that the prosecution meets its burden of proof, and to bring the case in court so that the bench can hear both sides on the basis of their factual and legal arguments.⁶⁵⁷ The burden of proof is also important in relation to the presumption of innocence. Because the accused is presumed innocent until proven guilty, this is a specific guarantee under the Convention (Article 6 (2)). The presumption of innocence is also closely connected to the defence rights (Article 6 (3)) and the rights that the Court "reads into" the right to a fair trial "as a whole" such as the right to remain silent and the right not to incriminate oneself (Article 6 (1)). These additional rights are also intimately connected with the presumption of innocence because they help to ensure that also that presumption is guaranteed.

5.2.3. Right to counsel at "critical" stages of the procedure

In 1996, the Court established that assistance by counsel, whether retained or appointed, is required at "(...) a critical stage of the criminal procedure", which, for example, the Grand Chamber held to be "(...) the first 48 hours of his police detention"⁶⁵⁸ (*John Murray v. the United Kingdom*).⁶⁵⁹ Under the Convention, the right to counsel at "critical" stages of the criminal proceedings are important for the fairness of the criminal proceedings "as a whole", because⁶⁶⁰:

"The right to counsel [is] a fundamental right among those which constitute the notion of fair trial and [ensures] the effectiveness of the rest of the foreseen guarantees of Article 6 of the Convention [added by the author]".⁶⁶¹

This general principle cited indicates how the Court holds that the right to assistance by a criminal defence lawyer or, in summary, the right to counsel, is not only important for the specific Convention right as laid down in Article 6 (3) (c) but also for other, related defence rights and fair trial guarantees. Given that the right to counsel pre-trial or post-trial is particularly seen in relation to the adversarial hearing at trial or on a *de novo* appeal when both facts and legal issues are at stake⁶⁶², the Court takes into consideration how earlier and later stages support an effective defence for the accused during the adversarial hearing. In other words, the Court deems the right to counsel important *per se* and supportive of the protection of other rights of the accused. Given this significant conclusion about the centrality of the right to counsel at "critical" stages of the criminal proceedings for a fair trial "as a whole", the next sub-section will deal with the particular "as a whole" approach that the Court sometimes takes in its case law (see also section 3.3. Factor 4: The "as a whole" approach to criminal proceedings).

5.2.3.1. The centrality of the adversarial hearing for the accused's right to an effective defence

The Court assesses the pre- and post-trial involvement of a lawyer – especially from being placed in police custody – in light of the right of the accused to an effective defence primarily at the "adversarial hearing".⁶⁶³ The Court thus examines whether legal assistance pre-trial culminates in an effective defence during what will normally be the first instance adversarial trial hearing or hearings. Equally, the Court explores whether appeal phases should have corrected an absence of an effective defence at trial, by exploring whether issues of law have been dealt with fairly. In other words, the Court holds the right to counsel at the *trial* and/or *de novo* appeal stage⁶⁶⁴ to be "critical" for the fairness of the

⁶⁵⁶ E.g. *Shulepov v. Russia*, Judgment of 26 June 2008, HUDOC no. 15435/03, para. 38 and *Timergaliyev v. Russia*, Judgment of 14 October 2008, HUDOC no. 40631/02, para. 59.

⁶⁵⁷ E.g. *Shulepov v. Russia*, Judgment of 26 June 2008, HUDOC no. 15435/03, para. 38 and *Timergaliyev v. Russia*, Judgment of 14 October 2008, HUDOC no. 40631/02, para. 59.

⁶⁵⁸ *John Murray v. the United Kingdom* [GC], Judgment of 8 February 1996, HUDOC no. 18731/91, para. 59.

⁶⁵⁹ *John Murray v. the United Kingdom* [GC], Judgment of 8 February 1996, HUDOC no. 18731/91, para. 70.

⁶⁶⁰ E.g. *Engel and others v. the Netherlands*, Judgment of 8 June 1976, HUDOC nos 5100/71 5101/71 5102/71 5354/72 5370/72, para. 81.

⁶⁶¹ *Pishchalnikov v. Russia*, Judgment of 24 September 2009, HUDOC no. 7025/04, para. 78.

⁶⁶² E.g. *Ebanks v. the United Kingdom*, Judgment of 26 January 2010, HUDOC no. 36822/06.

⁶⁶³ E.g. *Dayanan v. Turkey*, Judgment of 13 October 2009, HUDOC no. 7377/03, paras. 30-34.

⁶⁶⁴ See separately for details of appeals that differ from the requirements set for first-instance trials in sub-section 6.2.3.

criminal procedure “as a whole”.⁶⁶⁵ Accordingly, this research will refer to an adversarial hearing when referring to the first instance trial session or sessions and the phases of rehearing of the case on both points of fact and law (*de novo*). At the adversarial hearing, the authorities have the following obligations towards an assisted accused:

“(…) read as a whole, Article 6 of the Convention guarantees the right of an accused to participate effectively in a criminal trial. In general this includes not only the right to be present, but also the right to receive legal assistance, if necessary, and to follow the proceedings effectively. Such rights are implicit in the very notion of an adversarial procedure (…).”⁶⁶⁶

Under Article 6 (3) (c), the authorities have to guarantee that the assisted accused and his lawyer can play their own separate roles in court, as follows:

“(…) in the context of any criminal proceedings, decisions must be made as to how best to present an accused’s defence at trial. In many cases several options will be available and it is the responsibility of the accused to select, with the advice of counsel, the defence which he wishes to put before the court”.⁶⁶⁷

This consideration is significant for the obligations of the authorities regarding the right to counsel owed to the accused, because they will have to allow the assisted accused to be such a decision-maker. For instance, the authorities are required to afford both the assisted accused and his lawyer sufficient time and facilities for preparation for the trial hearing.⁶⁶⁸ Moreover, the authorities have to ensure, that the assisted accused can “(…) freely consult during the proceedings”⁶⁶⁹ with his lawyer. Effective assistance by counsel at an adversarial trial hearing which is “key” for the fairness of the criminal procedure “as a whole” implies the following division of roles between counsel and the accused in court:⁶⁷⁰ while counsel is an advisor, the accused should be the decision-maker about the decisions in his own case.

The first two connected cases that can help explore what rights fall within the realm of decision-making by the accused, rather than by counsel, are *Panovits and Kyprianou v. Cyprus*.⁶⁷¹

During the trial, a lawyer named *Kyprianou* assisted the accused called *Panovits*. *Panovits* was accused of a murder and robbery. During the first instance proceedings, when *Kyprianou* complained about the way his cross-examination of witnesses was received by the bench, he was accused of contempt of court. He was sentenced to five days imprisonment in separate, disciplinary proceedings. *Kyprianou* thereafter requested for leave to withdraw from the criminal case against *Panovits*. The court denied that request. Ultimately, the court convicted *Panovits*.

Before the Court *Panovits* complained, amongst other issues, that his right to effective assistance by counsel had been violated. He submitted that *Kyprianou*’s conviction and imprisonment for contempt of court had inhibited his ability to defend himself.

The Court concluded the following about the effect of the sentence imposed in the *separate* disciplinary proceedings on counsel *Kyprianou* in the criminal case against the accused *Panovits*⁶⁷²:

“(…) the sentence imposed on the applicant’s lawyer had been capable of having a “chilling effect” on the performance of the duties attached to lawyers when acting as defence counsel. (...) the refusal of Mr *Kyprianou*’s request for leave to withdraw from

⁶⁶⁵ E.g. *Pishchalnikov v. Russia*, Judgment of 24 September 2009, HUDOC no. 7025/04, para. 78.

⁶⁶⁶ E.g. *I.H. and others v. Austria*, Judgment of 20 July 2006, HUDOC no. 42780/98, paras. 33.

⁶⁶⁷ *Ebanks v. the United Kingdom*, Judgment of 26 January 2010, HUDOC no. 36822/06, para.82.

⁶⁶⁸ *Tsonyo Tsonev v. Bulgaria (2)*, Judgment of 14 January 2010, HUDOC no. 2376/03, para. 34. See Maffei (2006) at 3-241, particularly at 71-73.

⁶⁶⁹ *Roos v. Sweden (dec.)*, Commission 6 April 1994, no. 19598/92.

⁶⁷⁰ *Ebanks v. the United Kingdom*, Judgment of 26 January 2010, HUDOC no. 36822/06, para.82.

⁶⁷¹ *Kyprianou v. Cyprus*, Judgment of 15 December 2005, HUDOC no. 73797/01.

⁶⁷² For the contempt of court proceedings, see *Kyprianou v. Cyprus*, Judgment of 15 December 2005, HUDOC no. 73797/01, para. 182. For the effect of these contempt of court proceedings and the refusal to allow the lawyer’s *Kyprianou*’s withdrawal on the accused’s trial, see *Panovits v. Cyprus*, Judgment of 11 December 2008, HUDOC no. 4268/04.

the proceedings due to the fact that he felt unable to continue defending the applicant in an effective manner exceeded, in the present circumstances, the limits of a proportionate response given the impact on the applicant's rights of defence. (...)”⁶⁷³

The Court concluded in *Panovits* two issues that are relevant for the role of counsel in the lawyer-client relationship at trial.⁶⁷⁴ First, the Court concluded there was a violation of Article 6 (1), because the applicant's defence was undermined by the sentencing of his lawyer for contempt of court. Second, the Court, which dealt with contempt proceedings against *Kyprianou* which were separate from *Panovits*'s trial, nonetheless held that they affected the accused's proceedings. The judges were offended by *Panovits*'s lawyer *Kyprianou* when he complained about the manner in which his cross-examination was received by the bench. That situation undermined the conduct of *Panovits*'s defence and thus the right to a fair trial.

For this chapter, this conclusion is relevant because the Court considered the *effect* of the insult on the judge by the lawyer (*Kyprianou*) on the rights of the accused (*Panovits*). Thus, the Court did not want the accused to bear the consequences of the lawyer's conduct, which it deemed harmful to the accused in terms of his personal right to an effective defence. The Court even explained that the authorities prohibited what counsel should be able to do in court: assist the accused, advise him and present the accused' case in court while protecting the accused's rights, interests and wishes with zeal. This explains the role expected of counsel at trial: the lawyer should advise and assist the accused zealously, so that the best possible defence of the accused is being presented at the adversarial trial hearing (see for the lawyer-client relationship also chapter 7).

5.2.4. Right to counsel as a “derived” right for a fair trial “as a whole”

The Court often considers the right to counsel not “only” in relation to Article 6 (3) (c) but also as “derived” from the broader right of the accused to a fair trial “as a whole”.⁶⁷⁵ Equality of arms and adversariality are important in order for the criminal procedure “as a whole” to be fair (section 3.3.).⁶⁷⁶ Accordingly, the Court explores whether, without legal assistance, an adversarial hearing has been guaranteed, primarily at the first instance trial and *de novo* appeal but also, as the example of *Artico* already indicated, when only points of law are being adjudicated (sub-section 5.2.2.).⁶⁷⁷ The Court sometimes also holds that the accused should have been entitled to the right to counsel as “derived” from other rights such as the right to remain silent with regard to legal assistance at interrogations⁶⁷⁸ and the right to confrontation of witnesses or “real” evidence such as in relation to identification parades.⁶⁷⁹ To list examples of other such rights, the Court also holds the right to counsel to be supportive of other Convention rights such as Articles 3⁶⁸⁰ and 5⁶⁸¹. Out of equal protection, the Court sometimes extends an obligation – with regard to access to a retained lawyer – to also include appointment of legal aid counsel. By doing so, the Court ensures there is no discrimination between an accused who is “only” entitled to hiring counsel and an accused who would be appointed a legal aid lawyer by the State.⁶⁸² These are all illustrations as to how, under the Court's “as a whole” approach, an accused has sometimes to be afforded assistance by counsel – if need be appointed, as the Court argues in *Artico* – so that the criminal proceedings in their entirety can be deemed to conform with the Convention (sub-section 5.2.2.).⁶⁸³

5.2.4.1. Example of a “derived” right to counsel from the right to a fair trial under Article 3

“(A)ccess to legal advice” is “(...) a fundamental safeguard” against ill-treatment of the accused under Article 3, which according to the Court can apply to a separate procedure about allegations thereof as a

⁶⁷³ *Panovits v. Cyprus*, Judgment of 11 December 2008, HUDOC no. 4268/04, para. 100.

⁶⁷⁴ *Mutatis mutandi Rybacki v. Poland*, Judgment of 13 January 2009, HUDOC no. 52479/99, para. 59.

⁶⁷⁵ E.g. *Barberà, Messegué and Jabardo v. Spain*, Judgment of 6 December 1988, HUDOC no. 10590/83.

⁶⁷⁶ E.g. *Barberà, Messegué and Jabardo v. Spain*, Judgment of 6 December 1988, HUDOC no. 10590/83.

⁶⁷⁷ E.g. *Laukkanen and Manninen v. Finland*, Judgment of 3 February 2004, HUDOC no. 50230/99.

⁶⁷⁸ E.g. *Salduz v. Turkey* [GC], Judgment of 27 November 2008, HUDOC no. 36391/02.

⁶⁷⁹ E.g. *Yunus Aktas and others v. Turkey*, Judgment of 20 October 2009, HUDOC no. 24744/03.

⁶⁸⁰ E.g. *Salduz v. Turkey* [GC], Judgment of 27 November 2008, HUDOC no. 36391/02.

⁶⁸¹ E.g. *Ilijkov v. Bulgaria*, Judgment of 26 July 2001, HUDOC no. 33977/96.

⁶⁸² E.g. *Artico v. Italy*, Judgment of 13 May 1980, HUDOC no. 6694/74, para. 33.

⁶⁸³ E.g. *Laska and Lika v. Albania*, Judgment of 20 April 2010, HUDOC nos 12315/04 17605/04.

“derived” right to counsel from the right to a fair trial.⁶⁸⁴ The authorities have to ensure the accused’s right to counsel in order to protect – and to have protected by the authorities – the accused’s right not to be ill-treated.

This right to counsel entails that counsel should normally be able to attend, if the domestic system allows for pre-trial proceedings in which a court or other authority examines allegations by the accused that he has been ill-treated by the authorities.⁶⁸⁵ The authorities have to ensure the accused that he can invoke his right to counsel because of his “particular vulnerability” during such proceedings⁶⁸⁶, which the Court likens to an adversarial trial hearing at which the issue of ill-treatment would arise.⁶⁸⁷

The accused will be assumed vulnerable because of both “(...) the stressful situation” and “(...) the increasingly complex criminal legislation involved”.⁶⁸⁸ Apparently, the right to counsel is important not only for a more humanitarian function of stress relief but also for the more technical issue about what constitutes ill-treatment under the law. Therefore, the authorities normally have to allow counsel to play “a” role in proceedings in which allegations of ill-treatment of the accused are examined.⁶⁸⁹

The accused’s own role in such proceedings should afford him not only the “right to be heard” but also to “effectively participate” during such hearings.⁶⁹⁰ Therefore the authorities, who are responsible for an adequate examination of allegations of ill-treatment in proceedings governed by equality of arms and adversariality, have to guarantee that the accused is afforded both rights. The right to counsel can be a means to ensure the end of the protection of both rights, because the accused can also waive his right to attend.⁶⁹¹

If the proceedings regarding the examination of allegations of ill-treatment are conducted *in absentia*, the authorities have to ensure not only that the accused freely waived his right to attend the proceedings, but also that the accused was afforded *effective* legal representation (assistance by counsel in the accused’s absence).⁶⁹² What *effective* legal representation entails can only be examined after the three other perspectives have been taken in the three subsequent chapters (chapter 13; and chapters 7, 9 and 11 respectively). At this stage of the research, it should however be noted that the Court finds the right to counsel “critical” for the protection of the right of the accused not to be ill-treated. Like with the procedural guarantees for pre-trial detention proceedings (Article 5), the Court finds “a” role of counsel important for the procedural safeguards of equality of arms and the adversariality of such proceedings regarding the examination of allegations of ill-treatment. As will be explained for such pre-trial detention proceedings (Article 5), the Court may relax procedural guarantees other than the right to counsel, but does not seem to do so for this right which is held to be “critical” for the fairness of the criminal procedure “as a whole” (sub-sections 5.3.2.1. and 5.3.2.2.).

5.2.5. Waiver of the right to counsel and the right to proceed pro se

The accused has a *right* to counsel at “critical” stages of the criminal procedure, which can be renounced because it is no obligation, for example so that the accused can proceed on his own. Therefore, the accused can normally freely waive this right, for instance, in order to proceed *pro se* at a “critical” stage such as custodial police interrogations.⁶⁹³ For the waiver of the right to counsel, the Court appears usually to set a “higher” standard than for ordinary waivers of Convention rights, which

⁶⁸⁴ *Salduz v. Turkey* [GC], Judgment of 27 November 2008, HUDOC no. 36391/02, para. 54. See *Artyomov v. Russia*, Judgment of 27 May 2010, HUDOC no. 14146/02, para. 204. Grand Chamber request pending.

⁶⁸⁵ E.g. *Nechiporuk and Nikolayevna Yonkalo v. Ukraine*, Judgment of 21 April 2011, HUDOC no. 42310/04, para. 263 and *Aleksandr Leonidovich Lazarenko v. Ukraine*, Judgment of 28 October 2010, HUDOC no. 33929/03, para. 50.

⁶⁸⁶ *Ibid.*

⁶⁸⁷ E.g. *Öcalan v. Turkey* [GC], Judgment of 12 May 2005, HUDOC no. 46221/99, para. 169 concerning the implementation of the death penalty.

⁶⁸⁸ E.g. *Nechiporuk and Nikolayevna Yonkalo v. Ukraine*, Judgment of 21 April 2011, HUDOC no. 42310/04, para. 263 and *Aleksandr Leonidovich Lazarenko v. Ukraine*, Judgment of 28 October 2010, HUDOC no. 33929/03, para. 50.

⁶⁸⁹ E.g. *Nechiporuk and Nikolayevna Yonkalo v. Ukraine*, Judgment of 21 April 2011, HUDOC no. 42310/04, para. 263 and *Aleksandr Leonidovich Lazarenko v. Ukraine*, Judgment of 28 October 2010, HUDOC no. 33929/03, para. 50.

⁶⁹⁰ *Kapanadze v. Russia*, Judgment of 11 February 2011, HUDOC no. 19120/05, para. 50.

⁶⁹¹ *Denis Vasilyev v. Russia*, Judgment of 17 December 2009, HUDOC no. 32704/04, para. 157.

⁶⁹² *Denis Vasilyev v. Russia*, Judgment of 17 December 2009, HUDOC no. 32704/04, para. 157.

⁶⁹³ *Salduz v. Turkey* [GC], Judgment of 27 November 2008, HUDOC no. 36391/02 and *Boz v. Turkey*, Judgment of 9 February 2010, HUDOC no. 2039/04.

is the “freely and unequivocally”⁶⁹⁴-threshold for renouncing other Convention rights such as the entitlement to attend the hearing.⁶⁹⁵ The Court requires namely the following standard for the right to counsel to be waived in a manner that conforms to the Convention:

“(…) the right to counsel, being a fundamental right among those which constitute the notion of fair trial and ensuring the effectiveness of the rest of the foreseen guarantees of Article 6 of the Convention, is a prime example of those rights which require the special protection of the knowing and intelligent waiver standard”.⁶⁹⁶

Consequently, the accused cannot implicitly – as opposed to explicitly – renounce his right to assistance by a lawyer, as he can with other Convention rights such as the right to attend a hearing.⁶⁹⁷ Different to the right to attend a hearing, the Court, for example, does not allow the authorities to “read into” the accused’s conduct of answering questions during police interrogations in the absence of counsel, the conclusion that he had thereby waived his right to assistance by a lawyer up to the “knowingly and intelligently”-standard.⁶⁹⁸ Rather, the Court requires that the accused has waived his right to counsel at custodial police interrogations “knowingly and intelligently”. Particularly important to understand this higher standard for the waiver of the right to counsel – than for other Convention rights – is that the right to counsel is seen as “(…) a fundamental right among those which constitute the notion of fair trial” and is found to ensure “the effectiveness of the rest of the foreseen guarantees of Article 6 of the Convention” (see also sub-section 5.2.3.). Not only does the Court find it important that the accused has renounced his right to counsel at custodial police interrogations because of the importance of this fair trial guarantee *per se*, but assistance by counsel at this “critical” stage is also deemed to protect the three other Convention rights: the right to remain silent, the right not to incriminate oneself and the right to effective defence by a lawyer in particular at trial. Hence, the Court requires a waiver that would ensure that the accused renounces all three rights. That is, while answering questions in the absence of counsel might at best indicate that the accused freely waived his right to remain silent, the Court appears to hold consistently that this does not equate to having renounced the right to an effective defence by counsel during and after custodial police interrogations.⁶⁹⁹ As a rule, the waiver cannot be negatively construed either. Hence, the Court will not accept that, by holding that the accused did *not* request a lawyer, the authorities can claim that the accused must therefore have waived his right to legal assistance at a critical stage such as custodial police interrogations.⁷⁰⁰

For example, the Court held that the accused had renounced his right to legal assistance “knowingly and intelligently” in the case of *Sharkunov and Mezentsev v. Russia*.⁷⁰¹ The accused *Mezentsev* wrote a note by hand, which he moreover signed, that indicated he did not want a lawyer for the purpose of the police interrogation for reasons unrelated to his financial situation. In the ensuing criminal procedure *Mezentsev* argued that he was indigent and therefore requested legal aid for the remainder of the criminal procedure against him. The authorities did not grant him legal aid. *Mezentsev* argued before the Court that his right to legal aid had not been respected. The Court held in so far as police interrogations were concerned that he had freely waived his right to the assistance of a lawyer in the aforementioned note. Moreover, there was no (potential) evidential difficulty in this case, because *Mezentsev* had not made any incriminating statements when interrogated by the police while

⁶⁹⁴ Cf., for the right to remain silent, *Pishchalnikov v. Russia*, Judgment of 24 September 2009, HUDOC no. 7025/04, para. 77 and *Aleksandr Zaichenko v. Russia*, Judgment of 18 February 2010, HUDOC no. 39660/02, para. 54. See also *Coster van Voorhout* (2010a).

⁶⁹⁵ E.g. *Hermi v. Italy* [GC], Judgment of 18 October 2006, HUDOC no. 18114/02.

⁶⁹⁶ *Pishchalnikov v. Russia*, Judgment of 24 September 2009, HUDOC no. 7025/04, para. 78.

⁶⁹⁷ E.g. *Hermi v. Italy* [GC], Judgment of 18 October 2006, HUDOC no. 18114/02.

⁶⁹⁸ E.g. *Pishchalnikov v. Russia*, Judgment of 24 September 2009, HUDOC no. 7025/04.

⁶⁹⁹ E.g. *Pishchalnikov v. Russia*, Judgment of 24 September 2009, HUDOC no. 7025/04. See also for the same “knowing and intelligent” standard, *Hakan Duman v. Turkey*, Judgment of 23 March 2010, HUDOC no. 28439/03, para. 49. See *Salduz v. Turkey* [GC], Judgment of 27 November 2008, HUDOC no. 36391/02 and *Boz v. Turkey*, Judgment of 9 February 2010, HUDOC no. 2039/04.

⁷⁰⁰ *Panovits v. Cyprus*, Judgment of 11 December 2008, HUDOC no. 4268/04 and *Plonka v. Poland*, Judgment of 31 March 2009, HUDOC no. 20310/02.

⁷⁰¹ *Sharkunov and Mezentsev v. Russia*, Judgment of 10 June 2010, HUDOC no. 75330/01.

in custody in the absence of a lawyer. Also, the domestic court had itself checked the aforementioned note by *Mezentsev*. This case indicates that the accused in principle has an autonomous choice to freely renounce the right to legal assistance at critical stages. In this way, the Court protects the right of the accused to choose self-representation or legal assistance, unless the interests of justice require that a legal aid lawyer assists the accused.

A waiver of the right to assistance by counsel appears to have to meet three conditions.⁷⁰² The accused accordingly appears only to be able to renounce his right to legal assistance under the Convention when he has received all relevant information about what the right to assistance by counsel actually entails (information-based conditions). Second, the accused appears to have to be able to make a choice as to whether or not to exercise his right to legal assistance, which also means that he should not be forced into renouncing the right by way of either a unilateral decision made on his behalf or because of conventional practice (material conditions). Lastly, apparently the accused has to know about the effect that a waiver of the right may have in terms of both this right and other related defence rights in the ensuing procedure (procedural conditions).

Although this rule of the “higher” standard of a “knowing and intelligent” waiver appears to arise from all the cited cases, an exception has been encountered in the context of the case of *Yoldaş v. Turkey* (by four votes to three on the issue of the waiver). The facts of the case are that *Yoldaş* was an adult who had been arrested as well as questioned in custody in the absence of a lawyer for being a member of the PKK. The Court in that case held that the accused had waived his right to legal assistance “libre et équivoque”. Therefore, a waiver against the “normal” standard – such as for the right to attend⁷⁰³ or the right to a public hearing⁷⁰⁴ – was held to be sufficient for the protection of the accused’s right to legal assistance at the “critical” stage of custodial police interrogations⁷⁰⁵, considering:

“Il ressort d’ailleurs clairement de ses dépositions obtenues lors de la garde à vue que le choix de l’intéressé de renoncer à son droit d’être assisté par un avocat doit être considéré comme libre et volontaire. Partant, la renonciation du requérant à ce droit était non équivoque et entourée d’un minimum de garantie (...). Par ailleurs, force est de constater que requérant a déposé dans le même sens sans contester les faits qui lui étaient reprochés ni le contenu de ses dépositions devant le juge et le procureur de la République. Il est vrai que, devant la cour d’assises, le requérant a nié certaines infractions qui lui étaient reprochées. Cela étant, dans son arrêt du 27 avril 2006, la cour d’assises a tenu compte de ce changement d’attitude du requérant. Après avoir fait sa propre appréciation des faits et à la lumière des éléments de preuve contenus dans le dossier, elle a exclu six infractions du dossier de l’affaire au motif qu’elles n’étaient fondées que sur la déposition du requérant et n’étaient étayées par aucun autre élément de preuve (...). En conséquence, la cour d’assises a condamné le requérant en se fondant sur les autres chefs d’accusation, corroborés et étayés par des éléments de preuve (...). Partant, la Cour considère que les juges du fond ont sauvegardé scrupuleusement les droits de défense du requérant et aucun élément de la procédure ne permet de suspecter que la renonciation du requérant à l’assistance d’un avocat pendant sa garde à vue n’était pas libre et sans équivoque (...).”⁷⁰⁶

However, the three dissenting judges in this case did explain that the higher standard ought to have applied:

⁷⁰² See O. De Schutter and J. Ringelheim, *La renonciation aux droits fondamentaux. La libre disposition du soi et le règne de l’échange*, CRIDHO working paper series 1/2005.

⁷⁰³ E.g. *Poitrinol v. France*, Judgment of 23 November 1993, HUDOC no. 14032/88 (the right to waive the right to be present at the trial).

⁷⁰⁴ *Håkansson and Stureson v. Sweden*, Judgment of 21 February 1990, HUDOC no. 11855/85, para. 66 (implied waiver), *Deweer v. Belgium*, Judgment of 27 February 1980, HUDOC no. 6903/75, paras. 51-54 (a specific waiver resulted in a violation due to the fact that the applicant had to choose between paying a fine or the closure of his business pending criminal proceedings).

⁷⁰⁵ *Yoldaş v. Turkey*, Judgment of 24 September 2009, HUDOC no. 27503/04, paras. 52-53.

⁷⁰⁶ *Yoldaş v. Turkey*, Judgment of 24 September 2009, HUDOC no. 27503/04, paras. 52-53.

“A nos yeux ce serait aller trop loin que de tirer de la décision Kwiatkowska ou de l’arrêt Salduz la possibilité de renoncer à toutes les garanties prévues par l’article 6 dans tous les cas et en toutes circonstances. L’assistance de l’avocat est nécessaire pour permette à l’accusé détenu d’obtenir l’assistance découlant de la vaste gamme d’activités qui sont propres au conseil: la discussion de l’affaire, l’organisation de la défense, la recherche des preuves favorables à l’accusé, la préparation des interrogatoires, le soutien de l’accusé en détresse, le contrôle des conditions de détention, etc. Tout choix procédural que l’accusé détenu peut faire sans que son avocat puisse l’informer et le conseiller ne peut pas être libre et éclairé”.

Nonetheless, as this exception to the rule of the waiver of the right to counsel up to the higher “knowingly and intelligently”-standard indicates, under exceptional circumstances the accused can be held to have waived his right to assistance by counsel to the normal standard of a waiver of a Convention right.⁷⁰⁷

An exception of the “higher” standard for the waiver, but not the waiver itself has also been encountered in the Court’s case law regarding an accused who has been placed in police custody without being questioned. In the case of *Savaş v. Turkey*, the Court held the following regarding the highest domestic court, which had to check whether the accused had renounced his right to assistance by counsel during police custody – which took place independently from the subsequent interrogation which the accused had to undergo:

“(…) Enfin, il convient de relever que, devant le juge du tribunal correctionnel de Balıkesir, l’avocat du requérant a déclaré que la déposition de l’intéressé n’avait pas été obtenue conformément aux dispositions du code de procédure pénale. L’avocat précisa en outre que le frère du requérant s’était rendu, la nuit de la garde à vue, au commissariat de police afin de lui fournir l’assistance d’un avocat (...). Or, les juridictions du fond n’en ont tiré aucune conséquence. Quant à la Cour de cassation, elle n’a pas remédié à cette lacune. (...) Or toute renonciation au bénéfice des garanties de l’article 6 doit se trouver établie de manière non équivoque. A la lumière de ces considérations, la Cour estime qu’elle ne peut en l’espèce se fier à l’exactitude de la mention figurant sur le formulaire type de la déposition du requérant (...). Il n’est donc pas établi que le requérant ait renoncé de manière non équivoque à son droit d’être assisté par un avocat lors de la garde à vue. Partant, il a été personnellement touché par cette impossibilité, dans la mesure où les actes établis pendant sa garde à vue, en l’absence d’un avocat, ont servi à fonder sa condamnation. En conclusion, même si le requérant a eu l’occasion de contester les preuves à charge à son procès devant les juridictions nationales, l’impossibilité de se faire assister par un avocat alors qu’il se trouvait en garde à vue a irrémédiablement nui à ses droits de la défense (...)”⁷⁰⁸.

This leads to the final relevant observation regarding the waiver of the right of the accused to assistance by counsel that, under the Convention, the authorities also have their own obligations regarding the right to assistance by counsel and related minimum defence rights. They have to ensure that the accused has been informed of his right to legal assistance and, when he chooses to renounce it, has indeed personally waived the right with his prior and free consent. Therefore, the domestic court has a subsidiary duty to *check* whether the accused has indeed waived his right to legal assistance and, last but not least, to establish that renouncing the right did not conflict with a public interest. Normally, such a check of the waiver also has to be met with reasons in the domestic court’s verdict. This particular topic will be revisited in sections 5.3. and 5.4. but not before one remaining other relevant subject has been elaborated upon. The next sub-section will turn to the issue of standby counsel, due to its relevance for this research into ineffective legal assistance. The reason for the inclusion of this aspect of the right to counsel is as follows: it is foreseeable that if the accused wants

⁷⁰⁷ See also Coster van Voorhout (2009a).

⁷⁰⁸ *Savaş v. Turkey*, Judgment of 8 December 2009, HUDOC no. 9762/03, para. 68.

no legal assistance because he alleges that he cannot be afforded a fair trial with counsel, the authorities may appoint a standby counsel who is available to the accused.

5.2.6. Standby counsel

The Court has stated in the context of a case that concerned the right to be defended by counsel of “one’s own choosing”, that this right is not absolute.⁷⁰⁹ It is for the domestic courts to decide whether the interests of justice require that the accused be defended by counsel appointed by them. As a corollary of this responsibility, the authorities therefore seem to be allowed to ensure the accused a standby counsel, if an accused did not elect to represent himself, but rather chose to present his case through counsel of his choice. Under such circumstances, the Court deals with the right of the accused to opt for the defence of his choosing. The aim of preserving a fair trial can be a valid reason for the authorities to appoint counsel who assists the accused on a standby basis. The particular subject of the choice of retained counsel and the selection of appointed counsel will be explored further in the next substantive research question regarding the Convention (chapter 7, sub-sections 7.2.1. and 7.2.2.). This chapter will proceed with explaining in more detail at what stages of the criminal proceedings the Court requires that the accused can resort to the right to counsel.

5.3. Right to counsel: Stages of the procedure

This section explores the obligations owed by the authorities to the accused to ensure the preconditions for an effective defence under the Convention by ensuring that the accused can have (retained), or actually has (appointed), counsel’s legal assistance at what “critical” stages. In accordance with the structure under Article 6 (3) (c), this sub-section will start with the obligation of the authorities to ensure that the accused has access to a retained lawyer and only thereafter, determine when the authorities have to go one step further by guaranteeing that the accused has legal assistance by appointing legal aid counsel. Moreover, the description will follow the usual chronology of criminal proceedings following the identification of the accused. Consequently, the description will start with police interrogations and end with the appeal in cassation stage (on points of law only, known as appeal stage in common law countries, but as appeal in cassation, or simply cassation, stage in civil law countries).

5.3.1. The right to counsel at police interrogations (*Salduz*)

In the normal chronology of a criminal investigation, police interrogations in or outside of custody usually represent the first procedural moment at which an accused will have been identified. Therefore this sub-section will start with an exploration of the Convention obligations of the authorities regarding the right to counsel at this “critical” stage at police interrogations. Highlighted in particular will be access to counsel and, in “certain cases”, appointment of counsel by the authorities at (i) police custody; (ii) police interrogations of an accused who is at liberty; and (iii) custodial police interrogations. Because of the Court’s “as a whole”-approach, the case law regarding these three procedural moments will be discussed in full, from police custody and/or interrogations to the final exhausted domestic remedy (sub-sections 5.3.1.1.-5.3.1.3.). In addition to the Court’s case law, the EU Directive 2013/48/EU on minimum rules regarding *inter alia* “the right to access to a lawyer”⁷¹⁰ will also be introduced (sub-section 5.3.1.4.). After its implementation this Directive will be binding law for the Netherlands and, because it is based on the Court’s case law, it serves as an external quality check on the original case law analysis conducted in this book. Concluding remarks will ultimately be made on the basis of all aforementioned sub-sections (sub-section 5.3.1.5.).

5.3.1.1. The right to counsel at police interrogations (*Salduz v. Turkey*)

This sub-section concerning the right to counsel at the “critical” stage of police interrogations begins with a description of the Grand Chamber’s case of *Salduz v. Turkey*.⁷¹¹ This case stands as part of a

⁷⁰⁹ E.g. *Croissant v. Germany*, Judgment of 25 September 1992, HUDOC no. 13611/88, para. 29.

⁷¹⁰ Preamble para. 8 of the Directive 2013/48/EU.

⁷¹¹ *Salduz v. Turkey* [GC], Judgment of 27 November 2008, HUDOC no. 36391/02.

tradition of an earlier identified need about the right to counsel during the “(...) pre-trial phase”⁷¹² that thanks to *Salduz v. Turkey*⁷¹³ became more specified to the stage of police interrogations.⁷¹⁴

- *Salduz v. Turkey*

The relevant facts of the case of *Salduz v. Turkey* are that the police informed *Salduz*, a minor, of his right to remain silent by a written form before conducting custodial police interrogations without a lawyer being present.⁷¹⁵ *Salduz* then made statements to the police and an investigative judge which he subsequently retracted. Ultimately *Salduz* got convicted for acts of terrorism based upon the statements *inter alia* which he had given to the police (and other pre-trial authorities such as a prosecutor).

Before the Court *Salduz* complained that he had not received a fair criminal procedure “as a whole”. At the police interrogations, the authorities had neglected to guarantee him his right to counsel.

The Grand Chamber held five general principles to be applicable in the case:⁷¹⁶

- (i) The protection under Article 6 of the Convention must be guaranteed as of the earliest moment, the “criminal charge”;
- (ii) The person charged with a criminal offence has the right, (though not absolute) as a fundamental feature of a fair trial, to be defended effectively by a lawyer; assigned officially if need be;
- (iii) Legal assistance by a defence lawyer is normally called for where there is a situation in which consequences can be attached in domestic law to an accused person’s attitude adopted early in the process, such as during police interrogations;
- (iv) The protection of the right to silence and the privilege against self-incrimination;
- (v) The importance of the investigating stage, during which not only the evidential framework for the trial is made but an accused is also “often” in a “particularly vulnerable position”.

Moreover, the Court concluded what will henceforth be called, in summary, the *Salduz*-rule:

“(...) that in order for the right to a fair trial to remain sufficiently “practical and effective” (...) Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police (...)”.⁷¹⁷

The Court took into consideration the fact that the authorities had not provided access to a lawyer at the first police interrogation to *Salduz*, who was following the proceedings convicted *inter alia* upon the statements made to the police without a lawyer being present. Therefore, the Court concluded that the authorities had violated Article 6 (3) (c) in conjunction with Article 6 (1).

The Court appears to indicate in the *Salduz*-case that the authorities owe an obligation at least regarding the right to counsel towards the accused at this stage of the first interrogation. The Court deems legal assistance at that phase to be “critical”⁷¹⁸ for the fairness of the criminal procedure “as a whole”. This *Salduz*-rule does call for a further examination of several of the terms used by the Grand Chamber such as “a suspect”, “as from” and “the first interrogation by the police”.

⁷¹² E.g. *Imbrioscia v. Switzerland*, Judgement of 24 November 1993, HUDOC no. 13972/88. Interestingly, the requirement for the right to legal assistance to be ‘practical and effective’ was firstly held in the civil case of *Airey v Ireland*, Judgement of 9 October 1979, HUDOC no. 6289/73, and only later in criminal cases in *Artico v. Italy*, Judgment of 13 May 1980, HUDOC no. 6694/74, as cited below.

⁷¹³ *Salduz v. Turkey* [GC], Judgment of 27 November 2008, HUDOC no. 36391/02.

⁷¹⁴ For the perspective of the Hoge Raad on *Salduz*, see sub-section 3.3.1.

⁷¹⁵ *Salduz v. Turkey* [GC], Judgment of 27 November 2008, HUDOC no. 36391/02.

⁷¹⁶ *Salduz v. Turkey* [GC], Judgment of 27 November 2008, HUDOC no. 36391/02, paras. 50-54.

⁷¹⁷ *Salduz v. Turkey* [GC], Judgment of 27 November 2008, HUDOC no. 36391/02, para. 55.

⁷¹⁸ See for the use of this term sub-section 5.2.3., in which a foundational case for this notion will also be cited: *John Murray v. the United Kingdom* [GC], Judgment of 8 February 1996, HUDOC no. 18731/91, para. 70.

Is a suspect under the *Salduz*-rule a person who is so qualified under domestic law or does the Court assess on its own terms who is a suspect under the Convention?⁷¹⁹ Does the suspect have to be a minor, like *Salduz*, or is an adult similarly entitled to access to a lawyer? Is a person who is “merely” placed in custody without a subsequent interrogation by the police under the *Salduz*-rule also entitled to at least retain a lawyer? To qualify for this *Salduz*-protection, should the suspect be officially arrested, placed in custody and interrogated? Or can a person who is at liberty also be a suspect in this *Salduz*-sense? Alternatively, does the Court require that the authorities afford an individual who is at liberty and also questioned by the police access to a lawyer? Does the Court consider a person, who voluntarily comes to the police station on his own initiative, possibly to confess to his involvement in the commission of a crime, to be a suspect under the *Salduz*-rule? Does the Court by the term “as from” mean that it is a continuing right or can the authorities provide the suspect with a once-only opportunity to obtain legal assistance at the “first” police interrogation?

Considering that the *Salduz*-case raises all these questions, an attempt will be made to answer these questions on the basis of subsequent cases of the Court that confirmed the *Salduz*-rule.

5.3.1.2. *The right to counsel at police interrogations (Salduz-rule)*

This sub-section will present *Salduz*-rule cases as far as possible in the order needed to answer the most pertinent, with most of these questions about the Court’s *Salduz*-case having been raised in the previous sub-section (sub-section 5.3.1.1.). The entire overview discusses seven cases, all of them in detail with references to their relevant facts because of their important “explanatory power” for the yet mentioned *Salduz*-rule.

- *To whom does the Salduz-rule apply?*

The case of *Brusco v. France* will be examined in order to give a first indication of persons to whom the *Salduz*-rule applies, including who determines this and on what basis.⁷²⁰

The relevant facts of this case are that, first, the police invited *Brusco* to the station for questions about an attempted murder. They then released him. Later, the police began to interrogate a second person. This person made a statement that *Brusco* was the mastermind behind that attempted murder. The police then placed *Brusco* in custody, not as an accused but instead as a witness. The police told him to tell the truth, did not caution him or otherwise inform him about his right to remain silent and did not give him an opportunity to retain counsel. The second person in the course of the proceedings became *Brusco*’s co-accused. Ultimately, *Brusco* got convicted for the attempted murder. The court used for his conviction his answers to the questions by the police supposedly given as a witness, rather than an accused.

Before the Court *Brusco* complained that he had not received a fair criminal procedure “as a whole”, because the authorities had not provided him with access to a lawyer at the police interrogations.

The Court, which dealt with this complaint, first considered that *Brusco* was a suspect⁷²¹ in terms of the Convention. Therefore, it held *Brusco* eligible for the rights under Article 6.⁷²² Because of a fair trial, the authorities should have guaranteed the right to counsel to *Brusco*, according to the Court, because:

“(…) le droit d’être assistée d’un avocat dès le début de cette mesure [de placement en garde à vue] ainsi que pendant les interrogatoires, et ce *a fortiori* lorsqu’elle n’a pas été informée par les autorités de son droit de se taire (...). [added by the author from the earlier sentence]”⁷²³

⁷¹⁹ See also *Coster van Voorhout* (2010b).

⁷²⁰ See also *Šebalj v. Croatia*, Judgment of 28 June 2011, HUDOC no. 4429/09; *Kraniotis et al* (2011) at 79ff.; *Navone and others v. Monaco*, Judgment of 24 October 2013, HUDOC nos. 62880/11 62892/11 62899/11; and AG Spronken, Conclusion, HR 26 November 2013, ECLI:NL:HR:2013:1424, *Recht op bijstand van advocaat tijdens politieverhoor (Salduz, Navone en Richtlijn 2013/48/EU)*.

⁷²¹ E.g. *Engel and others v. the Netherlands*, Judgment of 8 June 1976, HUDOC nos 5100/71 5101/71 5102/71 5354/72 5370/72, para. 81.

⁷²² *Brusco v. France*, Judgment of 14 October 2010, HUDOC no. 1466/07, para. 45. See also *Coster van Voorhout* (2010b).

⁷²³ *Brusco v. France*, Judgment of 14 October 2010, HUDOC no. 1466/07, para. 45 with reference to the general principles in *Salduz v. Turkey* [GC], Judgment of 27 November 2008, HUDOC no. 36391/02, paras. 50-62, *Dayanan v. Turkey*,

Because the authorities had neglected to guarantee to *Brusco* access to a lawyer from the stage that he was placed in custody after which he was questioned, the Court held that Article 6 (3) (c) in conjunction with Article 6 (1) had been violated.

This case appears to answer many questions about the *Salduz*-rule. First, the Court autonomously decides who is a suspect under the rule, so that the authorities are required to provide the accused with access to a lawyer under the Convention even if they allege he was not accused. Consequently, it holds the domestic qualification of a witness, rather than an accused, to be immaterial if it finds that the person was actually an accused under the *Salduz*-rule itself. Second, it appears that the authorities have to guarantee that the accused can retain a lawyer at least when he is being placed in custody, rather than “only” when he is being interrogated thereafter. Third and final, given that *Brusco* was an adult, the Court does not appear to distinguish between adult and underaged accused. Given that the second point might have related to the fact that *Brusco* had incriminated himself during the police interrogations in the absence of a lawyer, it is important to resort to another case in which that situation did not occur.

- *Has the Salduz-rule been devised “only” to protect the accused’s right to remain silent?*

Another case, *Dayanan v. Turkey*, will be analysed because of its potential relevance for questions about the right of the accused to remain silent (a right that the Court mostly mentions together with the right, or principle, not to incriminate himself) as connected to the applicability of the *Salduz*-rule at police interrogations.⁷²⁴

The authorities placed *Dayanan*, upon arrest, in police custody without recourse to a lawyer. During his custodial police interrogations, *Dayanan* remained silent. Later, the domestic court convicted *Dayanan*, essentially for the offence of belonging to Hezbollah.

Before the Court *Dayanan* complained that he had not received a fair criminal procedure “as a whole”.

The Court, which confirmed the earlier observation made about the applicability of the *Salduz*-rule regarding placement in custody before any interrogations, made another important consideration of the Court for this study:

“En ce qui concerne l’absence d’avocat lors de la garde à vue (...). Elle estime que l’équité d’une procédure pénale requiert d’une manière générale, aux fins de l’article 6 de la Convention, que le suspect jouisse de la possibilité de se faire assister par un avocat dès le moment de son placement en garde à vue ou en détention provisoire”.⁷²⁵

While *Dayanan* was evidently not coerced into giving answers or a full statement to the authorities which could potentially have been used to convict him, the Court still held that Article 6 (3) (c) in conjunction with Article 6 (1) had been violated. Therefore, this research can infer that this case appears to suggest that the authorities are obliged to ensure that the accused can invoke his right to legal assistance, at least from the time he is placed in custody – regardless of whether he had been interrogated subsequently. Thus., the *Salduz*-rule does not seem to apply “only” to interrogations out of protection of the right to remain silent – read here in conjunction with the right of the accused not to incriminate oneself. Rather, the Court connects placement of the accused in police custody to the right of the accused to an effective defence. This particular topic will be revisited, because it already points more towards a substantive reading of Article 6 (3) (c) as requiring *effective* legal assistance, rather than a formal interpretation (section 5.1.). However, before that point can be addressed further, a short explanation of the right to remain silent and the right of the accused not to incriminate oneself is important (sub-section 5.3.1.4. on *effective* legal assistance at the stage of police interrogations).

The Court’s reasoning that the right to counsel is not only important in its own right but also supportive of the protection of other rights – more specifically, the right to remain silent and the right

Judgment of 13 October 2009, HUDOC no. 7377/03, paras. 30-34, *Boz c. Turkey*, Judgment of 9 February 2010, HUDOC no. 2039/04, paras. 33-37 and *Adamkiewicz v. Poland*, Judgment of 2 March 2010, HUDOC no. 54729/00, paras. 82-92.

⁷²⁴ *Dayanan v. Turkey*, Judgment of 13 October 2009, HUDOC no. 7377/03, para. 6.

⁷²⁵ *Dayanan v. Turkey*, Judgment of 13 October 2009, HUDOC no. 7377/03, paras. 30 and 31.

not to incriminate oneself – can be explained further by reiterating the *Salduz*-rule.⁷²⁶ The Court appears to find it essential that, under the *Salduz*-rule, the authorities must ensure that counsel can play “a” role for the accused, in order to protect his rights when placed in custody independently from subsequent custodial⁷²⁷ interrogations by the investigating authorities.⁷²⁸ At least, the Court appears to relate this *Salduz*-rule to a right about which scholars have been shown to disagree: the right to effective legal assistance, as in the following dictum:

“En ce qui concerne l’absence d’avocat lors de la garde à vue, la Cour rappelle que le droit de tout accusé à être effectivement défendu par un avocat, au besoin commis d’office, figure parmi les éléments fondamentaux du procès équitable (...)”⁷²⁹

The obligation of the authorities owed to the accused regarding the right to counsel at the stage of police interrogations is, in other words, important for the accused’s right to effective legal assistance which is usually interpreted to apply in particular at the adversarial trial hearing.⁷³⁰ This connection between the *Salduz*-rule at police interrogations and an effective defence by counsel at trial requires further analysis.

This sub-section, which has taken a first vertical perspective only, will be important for a further examination as to what conduct counsel ought to perform for the lawyer to ensure *effective* legal assistance to the accused, which will follow in the next Convention chapter (chapter 7).⁷³¹ This observation rests on the reading of this *Dayanan*-case, which – particularly when seen in conjunction with the above-cited *Brusco*-case – does appear to provide answers to questions raised about the “starting point” of the *Salduz*-rule. That point is placement in custody. The right to counsel is “critical” at that stage for the fairness of the criminal procedure “as a whole”, which in principle also appears to require that the legal assistance at this early stage culminates in *effective* legal assistance at trial.⁷³² The Court requires legal assistance from placement in police custody and before (consultation) and during (presence) custodial police interrogations, as follows from the dictum in *Navone et al. v. Monaco*:

“La Cour souligne à ce titre qu’elle a plusieurs fois précisé que l’assistance d’un avocat durant la garde à vue doit notamment s’entendre, au sens de l’article 6 de la Convention, comme l’assistance « pendant les interrogatoires » (...), et ce dès le premier interrogatoire (...) [Emphasis added by the author].”⁷³³

Therefore an important remaining question, as examined immediately below, is whether the authorities are also required to guarantee the accused access to a lawyer if interrogations take place *without* placing the accused in custody.

- *Does the Salduz-rule “only” apply to interrogations of accused who has been placed in police custody?*

Having seen the applicability of the *Salduz*-rule from placement in police custody and for subsequent interrogations, it is also worth exploring the obligations regarding the right to counsel of the authorities towards an accused who is interrogated whilst at liberty. A first case that will be analysed for this purpose is *Aleksandr Zaichenko v. Russia*.

The relevant facts of this case include the following: *Zaichenko* was an employee of a company which had requested the authorities to set up road checks. Its employees were purportedly stealing fuel and the company hoped that they would be caught in this way. When *Zaichenko* was

⁷²⁶ *Dayanan v. Turkey*, Judgment of 13 October 2009, HUDOC no. 7377/03, para. 34.

⁷²⁷ *Dayanan v. Turkey*, Judgment of 13 October 2009, HUDOC no. 7377/03, paras. 31 and 32.

⁷²⁸ See custody by the gendarmes, e.g. *Amutgan v. Turkey*, Judgment of 3 February 2009, HUDOC no. 5138/04.

⁷²⁹ *Dayanan v. Turkey*, Judgment of 13 October 2009, HUDOC no. 7377/03, para. 30.

⁷³⁰ E.g. *Ebanks v. the United Kingdom*, Judgment of 26 January 2010, HUDOC no. 36822/06, para. 82.

⁷³¹ See chapter 8 including e.g. *Condron v. the United Kingdom*, Judgment of 2 May 2000, HUDOC no. 35718/97 and *Beckles v. the United Kingdom*, Judgment of 8 October 2002, HUDOC no. 44652/98.

⁷³² *Dayanan v. Turkey*, Judgment of 31 October 2009 HUDOC no. 35718/97, paras. 35-43. See also *Mader v. Croatia*, Judgment of 21 June 2011, HUDOC no. 56185/07, para. 153.

⁷³³ *Navone et al v. Monaco*, Judgment of 24 oktober 2013, HUDOC no. 62880/11, 62892/11 en 62899/11, para. 79.

stopped during such a road check, the police neither arrested *Zaichenko* nor formally placed him in custody. They also did not inform him of his right to remain silent and there was no lawyer present during the subsequent round of questions. Those questions were posed to him during this road check, which was, moreover, held both in public and in the presence of two witnesses. The questions of the police touched upon the two jerry cans that they had found in *Zaichenko*'s back of his car, and in particular how he had obtained the fuel therein. *Zaichenko* answered that he had taken the fuel from his service vehicle. After these initial questions during the road check, the police brought *Zaichenko* to the station. There, a police officer informed *Zaichenko* of his right to remain silent. Subsequently, *Zaichenko* stated that he had poured fuel from the company's premises into the cans "(...) for his own use" and thus may have made an incriminating statement, which was laid down in a signed official document. The police officers drew up the file containing the two statements of *Zaichenko* and then allowed him to leave the police station. After a week, a higher-ranking officer summoned *Zaichenko* and opened an official case against him for the theft of fuel. The officer asked *Zaichenko* whether he wanted a lawyer to assist him. *Zaichenko* explained that he did not want to be assisted by counsel and answered all questions of this higher-ranking officer. After trial, the domestic court convicted *Zaichenko* of the crime of fuel theft, using all three sets of answers to police questions: at the road check as well as at the first and second round at the police station.

Before the Court *Zaichenko* complained that his right to remain silent had been violated. It is important to stress that he did not claim that his right to legal assistance had been contravened. In a letter to the Court, he explained that he had waived his right to legal assistance during the entire pre-trial phase.

Nonetheless, the Court examined on its own motion whether the authorities ought *ex officio* to have provided *Zaichenko* with access to a lawyer when he was questioned in public during this road check. A first important consideration in this respect is, that the Court held that:

"Although the applicant in the present case was not free to leave, the Court considers that the circumstances of the case as presented by the parties, and established by the Court, disclose no significant curtailment of the applicant's freedom of action, which *could be sufficient* for activating a requirement for legal assistance already at this stage of the proceedings. [Emphasis added]"⁷³⁴.

The Court found that both at the road check and shortly thereafter at the station, the police did nothing but simply "receive" *Zaichenko*'s statements. Moreover, the police had transported *Zaichenko* to the station in "(...) a direct sequence of events" where he was not placed in custody for the purpose of police interrogations.⁷³⁵ The higher-ranking officer, who instigated an official criminal case against *Zaichenko*, had informed him of both his right to remain silent and his right to legal assistance.⁷³⁶ Thereupon, *Zaichenko* freely waived both rights. First, he answered more questions, thereby waiving his right to remain silent, implied by his conduct of breaking the silence. Second, he renounced his right to assistance by a lawyer outrightly by stating that he did not want to invoke his right to counsel. Consequently the Court established in the *Zaichenko*-case, that the authorities had not significantly curtailed *Zaichenko*'s freedom of action. *Zaichenko* had specifically chosen to participate without a lawyer in the hope that he would receive a fair trial in court.⁷³⁷ Hence, the Court decided by majority (six votes to one) that the applicant's right to legal assistance under Article 6 (1) together with 6 (3) (c) had not been violated.⁷³⁸

This *Zaichenko*-case is important for the question raised above regarding the applicability of the *Salduz*-rule during police interrogations outside of custody, which appears to hold if the

⁷³⁴ *Aleksandr Zaichenko v. Russia*, Judgment of 18 February 2010, HUDOC no. 39660/02, para. 48. See also *Coster van Voorhout* (2010a).

⁷³⁵ *Aleksandr Zaichenko v. Russia*, Judgment of 18 February 2010, HUDOC no. 39660/02, para. 47.

⁷³⁶ *Aleksandr Zaichenko v. Russia*, Judgment of 18 February 2010, HUDOC no. 39660/02. See the Court in *Begu v. Romania*, Judgment of 15 March 2011, HUDOC no. 20448/02, paras. 140-141.

⁷³⁷ *Aleksandr Zaichenko v. Russia*, Judgment of 18 February 2010, HUDOC no. 39660/02, para. 46 "confirmed by the applicant's representative in his letter to the European Court dated 26 July 2002".

⁷³⁸ See the dissenting Judge Spielmann considered that *Zaichenko* should have been brought to the police station for official questioning with a lawyer already being present when he was bound to incriminate himself when asked about the 'origin of the fuel'.

individual's freedom of action has been significantly curtailed by another reason than placement in custody. Therefore, another case has to be explored in order to determine what could equate with police custody as a "significant curtailment" of the accused's "freedom of action" (see sub-section 5.3.2.4.).

The Court appears to hold three grounds for the *Salduz*-rule to apply: placement in police custody, custodial police interrogations and interrogations outside of custody where the individuals's "freedom of action" has been significantly curtailed. In turn, the Court appears thus to exclude from the *Salduz*-rule a person who voluntarily comes to the police station on his own initiative to confess to his involvement in the commission of a crime without being placed in police custody and who can therefore leave the station. Moreover, a person who answers questions freely in the public arena like *Zaichenko* appears to be excluded from this *Salduz*-rule. An important additional observation regarding the *Zaichenko*-case is that the Court does not seem to take into account the *nature* of the questions posed by the police. Perhaps the Court will do so in a subsequent case. However, until now the Court "only" examines whether a significant curtailment of the individuals's "freedom of action" occurred. Nonetheless, interrogations outside of police custody can be a "critical" stage at which the authorities have to provide *Salduz*-protection to a person who might not (yet) be arrested.

- *Does the Salduz-rule "only" apply to police interrogations?*

So far this examination has not explored possible investigative or evidence-gatherings acts that can follow the interrogations. A penultimate case that is helpful for that analysis is *Karadağ v. Turkey*.⁷³⁹

The relevant facts of this *Karadağ*-case are that the authorities arrested this adult, who was in the military but on leave, for murder. Upon his arrest, a defence lawyer visited *Karadağ*. At that moment, *Karadağ* gave his first statement, confessing to having committed the murder in the presence of counsel. Immediately upon that confession, the authorities took *Karadağ* into police custody. He was questioned again in the presence of counsel. Also on that occasion, he confessed to the murder. On two subsequent occasions, while being driven to a reconstruction of the events and while being heard by military authorities, *Karadağ* again confessed to the murder. However, at these two subsequent moments, he had given these confessions in the *absence* of a lawyer.⁷⁴⁰ *Karadağ* was ultimately convicted for the murder based on, amongst other evidence, the statements he had given during the police interrogations in the presence of legal assistance, as well as the reconstruction of events in the absence of it.

Before the Court *Karadağ* complained that his right to legal assistance had not been respected.

The Government contended that it had complied with its Convention obligations by providing the accused with assistance from a lawyer as of his arrest.

The Court came to the conclusion that:

"Dans les circonstances d'espèce, la Cour constate que le requérant a pu s'entretenir et bénéficier de l'assistance d'un avocat *durant une partie* de sa garde à vue. Cela étant, au vu des pièces du dossier, il apparaît n'avoir pas bénéficié d'une telle assistance à l'occasion de certains actes de procédure accomplis durant sa garde à vue, tel que le transport sur les lieux avec reconstitution des faits, circonstance dénoncée par son avocat (...) et sa déposition faite au commandement militaire (...) [Emphasis added by the author]".⁷⁴¹

The Court thus held that the authorities had not complied with Article 6 (1) in conjunction with Article 6 (3) (c).⁷⁴²

This case helps to explain the term "as from the first police interrogations" in the *Salduz*-rule. Apparently, the obligation regarding the right to counsel owed by the authorities will not be met if they "only" provide the accused assistance by a lawyer at the initial interrogations rather than also at subsequent further investigative or evidence-gathering acts. Thus,, the *Salduz*-rule does not offer once-only protection.

⁷³⁹ *Karadağ v. Turkey*, Judgment of 29 June 2010, HUDOC no. 24036/05.

⁷⁴⁰ *Karadağ v. Turkey*, Judgment of 29 June 2010, HUDOC no. 24036/05, para. 7.

⁷⁴¹ *Karadağ v. Turkey*, Judgment of 29 June 2010, HUDOC no. 24036/05, para. 47.

⁷⁴² *Karadağ v. Turkey*, Judgment of 29 June 2010, HUDOC no. 24036/05, para. 48.

At the very least, the authorities have to guarantee that the accused is being protected under the *Salduz*-rule during other such pre-trial investigative measures when the authorities pose questions, rather than collect “real” evidence, it seems. The right to remain silent and not to incriminate himself need to be protected by counsel, in principle. This *Karadağ*-case also appears to imply that, where the investigation continues outside of the interrogation room, the authorities should still live up to their obligation regarding the right to counsel owed to the accused.⁷⁴³

While it was important to come to this conclusion at this stage of the research about the *Salduz*-rule, a separate subsequent sub-section will deal further with these other investigative or evidence-gathering acts following the – usually earlier – police interrogations (sub-section 5.3.2.).

- *Does the Salduz-rule “only” apply out of protection of the right to counsel?*

One penultimate remaining question about the terms in the *Salduz*-rule (and particularly in relation to other Convention rights aside from the aforementioned right to remain silent and right not incriminate oneself) can be explored on the basis of a final interesting case, *Şaman v. Turkey*.⁷⁴⁴

The relevant facts of this case are that the police interrogated *Şaman*, who was believed to have been a member of an illegal organisation, without either an interpreter or a lawyer being present. The suspect was illiterate and Kurdish and not a fluent Turkish speaker. At the trial stage, *Şaman*'s lawyer brought to the court's attention that the accused had limited knowledge of Turkish and that during her police custody she had not had the assistance of either an interpreter or a lawyer. The court allowed *Şaman* to have the assistance of an interpreter in court. However, it found that *Şaman* was capable of expressing herself in Turkish. The domestic court convicted *Şaman* based, *inter alia*, upon her pre-trial statements given in the absence of both legal assistance and interpretation.

Before the Court *Şaman* complained that her right to legal assistance and her right to interpretation had been violated.

The Government contended that the authorities did not hinder *Şaman*'s access to a lawyer at any stage of the criminal proceedings. They submitted that, before each interrogation, the police and other authorities had reminded *Şaman* of her right to be assisted by a lawyer which she had waived voluntarily and on the basis of informed consent.

The Court first determined, as a general principle, that the authorities are required to ensure the individual the right to an interpreter pre-trial especially where being “(...) of crucial importance for the preparation of criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered”.⁷⁴⁵ Thereupon, it did not only take into consideration the absence of an interpreter in the light of Article 6 (3) (e) but also its effect for Article 6 (3) (c). Without the assistance of an interpreter during police interrogations, the Court concluded that *Şaman* could not “(...) reasonably have appreciated the consequences of accepting to be questioned without the assistance of a lawyer”.⁷⁴⁶ Without an interpreter, *Şaman* could not be held to have voluntarily waived her right to legal assistance pre-trial, in other words. Neither the in-court assistance of both an interpreter and a lawyer at first instance and subsequently on appeal “cured” the damage done to *Şaman*'s defence rights pre-trial.⁷⁴⁷ Therefore, the Court concluded that both Article 6 (3) (e) and Article 6 (3) (c) had been violated. Hence, the authorities owe the accused obligations regarding the right to counsel under the *Salduz*-rule because of the rights that are directly related to police custody, interrogations and an effective defence at trial only. Additionally, they sometimes owe that obligation when “a” role of counsel is supportive of other relevant minimum defence rights under Article 6 (3).

While it was important to draw this conclusion at this stage of the study because of the *Salduz*-rule, a separate subsequent sub-section will deal further with the right to counsel as “derived” from other Convention rights (sub-section 5.3.2.).

- *What rights underlie the Salduz-rule?*

⁷⁴³ See *Pishchalnikov v. Russia*, Judgment of 24 September 2009, HUDOC no. 7025/04, para. 78.

⁷⁴⁴ *Şaman v. Turkey*, Judgment of 5 April 2011, HUDOC no. 35292/05, para. 30.

⁷⁴⁵ *Şaman v. Turkey*, Judgment of 5 April 2011, HUDOC no. 35292/05, para. 30.

⁷⁴⁶ *Şaman v. Turkey*, Judgment of 5 April 2011, HUDOC no. 35292/05, para. 35.

⁷⁴⁷ *Şaman v. Turkey*, Judgment of 5 April 2011, HUDOC no. 35292/05, para. 36.

The aforementioned case details indicate the following rights underlying the *Salduz*-rule: (i) the right to remain silent and the right not to incriminate oneself and (ii) the right to an effective defence. About the right to remain silent and the right not to incriminate himself, it is important to note that the Court has explained their intricate linkages as follows:

“(…) the right not to incriminate oneself cannot reasonably be confined to statements of admission of wrongdoing or to remarks which are directly incriminating (…). Testimony obtained under compulsion which appears on its face to be of a non-incriminating nature – such as exculpatory remarks or mere information on questions of fact – may later be deployed in criminal proceedings in support of the prosecution case, for example to contradict or cast doubt upon other statements of the accused or evidence given by him during the trial or to otherwise undermine his credibility (…)”⁷⁴⁸.

In summary, the Court explains that the right to remain silent entails the entitlement to choose whether or not to answer any questions. The right not to incriminate oneself is the right not to answer questions in a way that one provides evidence against oneself.⁷⁴⁹ Though both rights are intimately connected, they are thus different in nature and encompass different objectives. Nonetheless, the Court’s references to the right to remain silent “alone” often implies the right not to incriminate oneself should also be protected.

These rights play a role because of the different nature of police custody, on the one hand, and police interrogations, on the other.

First, for placement in police custody, the right that counsel can help to protect is the right to an *effective* defence by counsel as from the placement and in particular thereafter at trial.⁷⁵⁰

Second, for police interrogations, the Court appears to hold that assistance by counsel protects the following rights of the accused: the right to remain silent and the right not to incriminate oneself. The right to remain silent and the right not to incriminate oneself are rights that are both “(…) at the core of the concept of a fair trial” and “(…) their rationale relates in particular to the protection of the accused against abusive coercion of the authorities”.⁷⁵¹

Third, for *custodial* police interrogations, the Court rests the *Salduz*-rule on all three rights: the right to remain silent, the right not to incriminate oneself and the right to an effective defence by counsel, predominantly at trial. Given the importance of the protection of all three rights, the Court normally concludes that the authorities have to provide access to counsel to the accused when his freedom of action will be significantly curtailed by means of custodial police interrogations⁷⁵² or because of a risk to the right to remain silent in public.⁷⁵³ The additional right of an effective defence as of placement in custody and especially during the adversarial trial is important for both police custody *per se* and at *custodial* police interrogations.

While counsel cannot usually change the course of the interrogations conducted by the police, he can protect – and have protected by the authorities – the right to remain silent, the right not to incriminate oneself and the right to an effective defence as of deprivation of liberty of the accused. This idea of the protection of these rights in the *relationship* between the authorities and counsel also manifests itself in the obligations owed by the authorities regarding the aforementioned right to remain silent, right not to incriminate oneself and right to an effective defence.

⁷⁴⁸ *Begu v. Romania*, Judgment of 15 March 2011, HUDOC no. 20448/02, para. 54. See also the Concurring opinion of Judge Zagrebelsky, joined by Judges Casadevall and Türmen annexed to *Salduz v. Turkey* [GC], Judgment of 27 November 2008, HUDOC no. 36391/02.

⁷⁴⁹ E.g. *Ramanauskas v. Lithuania* [GC], Judgment of 5 February 2008, HUDOC no. 74420/01; *Teixeira de Castro v. Portugal*, Judgment of 9 June 1998, HUDOC no. 25829/94; *Vanyan v. Russi, a*, Judgement of 15 December 2005, HUDOC no. 53203/99; and *Khudobin v. Russia*, Judgment of 26 October 2006, HUDOC no. 59696/00.

⁷⁵⁰ *Salduz v. Turkey* [GC], Judgment of 27 November 2008, HUDOC no. 36391/02., para. 30.

⁷⁵¹ *Salduz v. Turkey* [GC], Judgment of 27 November 2008, HUDOC no. 36391/02, para. 53.

⁷⁵² *Brusco v. France*, Judgment of 14 October 2010, HUDOC no. 1466/07 in police custody and *Amutgan v. Turkey*, Judgment of 3 February 2009, HUDOC no. 5138/04 in gendarmes custody.

⁷⁵³ *Aleksandr Zaichenko v. Russia*, Judgment of 18 February 2010, HUDOC no. 39660/02, para. 48.

The authorities are required to inform the accused of his right to remain silent.⁷⁵⁴ Where done by means of a written form, the Court finds it “(...) a minimum recognition of the right of the suspect to silence”.⁷⁵⁵ With regard to the right not to incriminate oneself, the authorities shall not be allowed to use deception, force or any other such prohibited means to get an accused to waive his right to remain silent and provide evidence against him.

With regard to the right of the accused to an effective defence, it is only reasonable that the Court can expect more of counsel than of the authorities, particularly at the adversarial hearing. However, the authorities have their own roles to play with in regard to that right of the accused as well as, for example, protection for the procedural guarantee of equality of arms⁷⁵⁶ because:

“(...) the very fact of questioning a suspect without enabling him to consult a lawyer may shift the power balance between the parties in breach of the fair trial guarantees even absent any appearance of negative consequences for the outcome of the proceedings”.⁷⁵⁷

For the sake of the protection of the other procedural guarantee of adversariality, the authorities owe the *Salduz*-obligations regarding the right to counsel to the accused as well, because of the following three reasons at least:

“(...) the importance of the investigation stage for the preparation of the criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial (...). At the same time, an accused often finds himself in a particularly vulnerable position at that stage of the proceedings, the effect of which is amplified by the fact that legislation on criminal procedure tends to become increasingly complex, notably with respect to the rules governing the gathering and use of evidence. In most cases, this particular vulnerability can only be properly compensated for by the assistance of a lawyer whose task is, among other things, to help to ensure respect of the right of an accused not to incriminate himself”.⁷⁵⁸

Finally, the authorities will have to ensure a right to counsel to the accused because “a” role of counsel can be deemed to be supportive of the protection of minimum defence rights under Article 6 (3), as explained for the right to interpretation under Article 6 (3) (e) (e.g. *Şaman v. Turkey*).⁷⁵⁹

- *What exceptions to the Salduz-rule are allowed?*

When discussing the *Salduz*-rule of access to a lawyer⁷⁶⁰, the exceptions to it must not be overlooked. With regard to the exceptions to the *Salduz*-rule, the Court does allow for restrictions of the right to counsel, provided that:

“(...) it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6 (...). The rights of the defence will in principle be irretrievably prejudiced when

⁷⁵⁴ *Mutatis mutandi Brusco v. France*, Judgment of 14 October 2010, HUDOC no. 1466/07, para. 54.

⁷⁵⁵ *Pishchalnikov v. Russia*, Judgment of 24 September 2009, HUDOC no. 7025/04, para. 79.

⁷⁵⁶ See Chapter 5 for these procedural guarantees as factors impacting the Court’s case law and therefore also its analysis in studies such as the present one.

⁷⁵⁷ *Paskal v. Ukraine*, Judgment of 15 September 2011, HUDOC no. 24652/04 para. 79.

⁷⁵⁸ *Pishchalnikov v. Russia*, Judgment of 24 September 2009, HUDOC no. 7025/04, para. 69. See also *John Murray v. the United Kingdom* [GC], Judgment of 8 February 1996, HUDOC no. 18731/91, paras. 68 and 70.

⁷⁵⁹ *Şaman v. Turkey*, Judgment of 5 April 2011, HUDOC no.35292/05, para. 30.

⁷⁶⁰ For the examination of whether the *Salduz*-rule includes also a right to *effective* legal assistance, I refer to chapters 7 and 8 which will deal with the further issues than the right to access to a lawyer under the first vertical perspective taken at this stage of the research.

incriminating statements made during police interrogation without access to a lawyer are used for a conviction (...).⁷⁶¹

So far the Court has not yet established what would be a compelling reason to justify a restriction on the right of the accused to be granted access to a lawyer as from the first police interrogation. It is certain that a categorical restriction under domestic law is not permitted by the Court.⁷⁶² National law impedes Article 6 *per se*⁷⁶³ when it forms an “obstacle” to the provision of an opportunity for the accused to invoke his right to legal assistance.⁷⁶⁴ Thus, it remains to be seen how strict the Court will be in accepting restrictions to this obligation of the authorities to the accused regarding the right to counsel at the “critical” stage of police interrogations.

- *Can a breached Salduz-rule be “cured” by a subsequent adversarial trial?*

This chapter opened with a reference to the importance of an adversarial hearing for a fair trial “as a whole” (see sub-section 5.2.3.1.). That observation is also important at this stage of the research, because the Court considers whether or not pre-trial stages such as police interrogations culminate in such a first instance or *de novo* appeal governed by equality of arms and adversariality. One important element is that the *Salduz*-rule concerns the important pre-trial stage at which answers can be given to police questions or the accused can even give a full statement to the police which can later be used to convict him. Consequently, it will be explored further here how the Court deals with cases in which domestic courts can be said to have “repaired” the damage caused by the lack of legal assistance at the police custody stage and/or interrogation stage. Two cases will be examined in which domestic courts not only examined the impugned situation of the lack of any application of the *Salduz*-rule, but also remedied the harm caused by their actions at the adversarial trial hearing. They constitute two exceptions to the *Salduz*-rule that “(...) neither the assistance provided subsequently by a lawyer nor the adversarial nature of the proceedings could counteract the defects which had occurred during his initial questioning” in the absence of counsel.⁷⁶⁵

Before getting to these cases that demonstrate the exception to the rule, it is important to reiterate that the *Salduz*-rule – as interpreted on the basis of that one case and its successors – will here be interpreted to mean that the authorities have to ensure the accused can retain, or in “certain cases” be appointed, counsel as of police custody (*garde à vue*) and before and during police interrogations. Simply put, the reason for counsel to be in place before police interrogations is so counsel and the accused can exercise consultation, while having counsel during the interrogation guarantees not that they will change the course of the interrogation, but that their presence will protect the rights of the accused. The *Salduz*-rule entails that such access to counsel at police interrogations can “only” be limited for “compelling reasons”, as held by the Grand Chamber in *Salduz*.⁷⁶⁶ “Compelling reasons”, are needed because “(...) the evidential framework for the trial is made” during the pre-trial stage, according to the Court.⁷⁶⁷ Consequently, where answers to police questions – or a full statement by the accused obtained during an interrogation in custody without *Salduz*-protection – are used to convict the accused, the Court will, as a rule, hold that the authorities have violated the Convention.⁷⁶⁸ Moreover, the Court does not only examine whether such answers or full statements by the accused were used for his conviction, but also for the *prosecution*. The Court will especially explore what the

⁷⁶¹ *Salduz v. Turkey* [GC], Judgment of 27 November 2008, HUDOC no. 36391/02, para. 55.

⁷⁶² *Salduz v. Turkey* [GC], Judgment of 27 November 2008, HUDOC no. 36391/02, para. 56. See *Dayanan v. Turkey*, Judgment of 13 October 2009, HUDOC no. 7377/03, para. 33.

⁷⁶³ The law includes codified and case law, e.g. *Sharkunov and Mezentsev v. Russia*, Judgment of 10 June 2010, HUDOC no. 75330/01, para. 104.

⁷⁶⁴ E.g. *Salduz v. Turkey* [GC], Judgment of 27 November 2008, HUDOC no. 36391/02, para. 56. See *Yunus Aktaş and others v. Turkey*, Judgment of 20 October 2009, HUDOC no. 24744/03 para. 45 and *Bouglamé v. Belgium* (dec.), 2 March 2010, n° 16147/08.

⁷⁶⁵ *Mader v. Croatia*, Judgment of 21 June 2011, HUDOC no. 56185/07, para. 154.

⁷⁶⁶ *Salduz v. Turkey* [GC], Judgment of 27 November 2008, HUDOC no. 36391/02, para. 52.

⁷⁶⁷ *Salduz v. Turkey* [GC], Judgment of 27 November 2008, HUDOC no. 36391/02 and *Boz v. Turkey*, Judgment of 9 February 2010, HUDOC no. 2039/04.

⁷⁶⁸ E.g. *Aleksandr Zaichenko v. Russia*, Judgment of 18 February 2010, HUDOC no. 39660/02, para. 54.

effect is of answers or statements given by the accused in the absence of a lawyer on the rights of the suspect.⁷⁶⁹ For that purpose, the Court takes into account several forms of use of such pre-trial evidence by the domestic court: “attaching weight to”⁷⁷⁰, “giving weight to”⁷⁷¹ or “relying upon”⁷⁷². Thus, the Court does not require that the police statements given in the absence of a lawyer were the “decisive”⁷⁷³, “only”⁷⁷⁴ or “sole”⁷⁷⁵ evidence for the accused’s conviction, which is evidently the higher threshold deployed in the case of witness testimony. Therefore, only under exceptional circumstances can the exclusion of evidence relating to answers or full statements at police interrogations provided by the accused to the authorities “cure” *the absence of counsel* at this critical stage.

Two cases that represent this exception have been encountered in this research that explain how the exclusion of a police statement which was given by the accused in the absence of a lawyer at police interrogations from the evidence used against the accused, can “cure” the damage to the defence rights caused by a lack of legal assistance and thus *Salduz*-protection.⁷⁷⁶

First, the Court in the case of *Hovanesian v. Bulgaria* held that the authorities only used the statement in order to establish whether a case needed to be instigated against the accused.⁷⁷⁷ Subsequently, the domestic court excluded the police statement from the evidence because this statement had been obtained without a lawyer being present. Not only did the authorities, by so acting, follow national law but they also respected Article 6. Therefore, the Court found that the damage done to the accused who had been interrogated and given a statement without *Salduz*-protection had been “repaired” by the authorities who excluded the statement for building the case against the accused and/or convicting him. Thus, use at the investigative stage, but exclusion for prosecution and adjudication at the trial stage, can under such circumstances “cure” damage done to the accused who had been interrogated and had given a statement in the absence of counsel.

Second, in the case of *Kuralić v. Croatia*, the Court considered how the domestic court had excluded two out of four pre-trial statements that the accused had given in the absence of a lawyer and thus did not use those two statements for *Kuralić*’s conviction.⁷⁷⁸ *Kuralić* was suspected of having murdered his wife whom he had not reported as missing. To the police he had confessed to her murder in the absence of a lawyer. Before the pre-trial judge, while there was still no lawyer present, *Kuralić* had on three separate occasions “only” confessed to disposing of his wife’s body. The domestic court had excluded the police statement and the first statement before the pre-trial judge, which *Kuralić* alleged to have been obtained as a result of ill-treatment. The domestic court did use the accused’s two later statements before the pre-trial judge. In these two statements, the accused had “merely” confessed to disposing of his wife’s body for his conviction for murder.

The Court, which examined what the effect of the earlier absence of a lawyer during the pre-trial stage at all four instances was on the proficiency of the services of the lawyer at the trial hearing and the accused’s right to effective legal assistance in court, held the following about the effectiveness of the legal assistance provided to *Kuralić* during the trial hearing:

“While it is true that the lawyer representing the applicant at the initial stage of the proceedings was not the one of his own choosing, in which case a higher degree of

⁷⁶⁹ *John Murray v. the United Kingdom [GC]*, Judgment of 8 February 1996, HUDOC no. 18731/91, paras. 68 and 70 (police statements used for a conviction but not in violation of the right to remain silent). *Brennan v. the United Kingdom*, Judgment of 16 October 2001, HUDOC no. 39846/98, para. 48 (statements made after a denial was retracted). *Magee v. the United Kingdom*, Judgment of 6 June 2000, HUDOC no. 28135/95 paras. 45-46 (24-hour denial after which statements were used for the defendant’s conviction).

⁷⁷⁰ *Gök and Güler v. Turkey*, Judgment of 28 October 2009, HUDOC no. 74307/01, para. 57.

⁷⁷¹ *Hakan Duman v. Turkey*, Judgment of 23 March 2010, HUDOC no. 28439/03, paras. 51-52.

⁷⁷² *Laska and Lika v. Albania*, Judgment of 20 April 2010, HUDOC nos 12315/04 17605/04, para. 68.

⁷⁷³ E.g. *Kostovski v. the Netherlands*, Judgment of 20 November 1989, HUDOC no. 11454/85, para. 44.

⁷⁷⁴ E.g. *Asch v. Austria*, Judgment of 26 April 1991, HUDOC no. 12398/86, para. 30 and *Unterpertinger v. Austria*, Judgment of 24 November 1986, HUDOC no. 9120/80.

⁷⁷⁵ E.g. *Saidi v France*, Judgment of 20 September 1993, HUDOC no. 14647/89, para. 44.

⁷⁷⁶ See also, for the right to remain silent, *Musa Karataş v. Turkey*, Judgment of 5 January 2010, HUDOC no. 63315/00, para. 91, *Amutgan v. Turkey*, Judgment of 3 February 2009, HUDOC no. 5138/04, paras. 15-20 and *Vetrenko v. Moldova*, Judgment of 18 May 2010, HUDOC no. HUDOC no. 36552/02, para. 56.

⁷⁷⁷ *Hovanesian v. Bulgaria*, Judgment 21 December 2010, HUDOC no. 31814/03, para. 37.

⁷⁷⁸ *Kuralić v. Croatia*, Judgment of 15 October 2009, HUDOC no. 50700/07, paras. 45-49.

trust and confidence is usually to be expected, but was officially appointed, the Court notes that the applicant did not, at any stage of the proceedings before the national courts or before the Court put forward any complaints as regards his legal representation by the officially appointed defence lawyer, nor has he ever complained that he had in any way been hindered in consulting the officially appointed counsel. Also, the Court notes that the officially appointed counsel, acting on behalf of the applicant, lodged an appeal against a decision ordering investigation and also against a decision on extending the applicant's pre-trial detention. He also attended hearings held on 24 and 30 April 2004 before the Dubrovnik County Court investigating judge, at the latter of which three witnesses gave their evidence, and a hearing on 8 June 2004, thus showing that the officially appointed counsel actively defended the applicant's interests at the pre-trial stage of the proceedings and that his conduct gave no reason for the courts to doubt the quality of his representation of the applicant in any respect".

Therefore, the Court concluded that under these circumstances at least the two final statements, made by the applicant before the investigating judge during the second and third interview in the absence of counsel, were expressions of his free will. Accordingly, in establishing the facts of the case the domestic court could rely, without impeding the rights under the Convention, on *Kuralić's* statement that he had disposed of his wife's body as evidence of her murder. The corroborating evidence of murder was the testimony of a witness who had stated that *Kuralić* had told him that he had killed his wife and asked him to help him dispose of her dead body. There was also an expert's report establishing that bloodstains found in the accused's flat belonged to his wife. Moreover, these items of evidence were duly produced before the trial court when *Kuralić* was legally assisted by two defence lawyers of his choosing, where he had had the opportunity to challenge all the evidence against him as well as the prosecution's allegations. The fairness of the accused's trial hearing was thus not prejudiced on account of the use of two of *Kuralić's* statements made at the pre-trial stage in the absence of a lawyer. The Court accordingly held that Article 6 (1) in conjunction with 6 (3) (d) had been respected. Therefore, it seems that the Court holds that the deficiency concerning the right to remain silent as well as the right to effective legal assistance had been "cured" by the domestic court, which excluded two out of four statements. That last aspect of how effective legal assistance at the adversarial trial "cured" the absence of *Salduz*-protection will also be important for the Convention chapter regarding interventions in the case based on the opposite situation of *ineffective* legal assistance. Also significant is the separation made between the pre-trial and trial stage, rather than an "as a whole"-approach (see sub-section 3.3. and chapter 11).⁷⁷⁹ In other words, under an "as a whole"-approach as expressed in the *Salduz*-case, the Court should see the connection between pre-trial and trial stage as it had done by setting the general principle that "(...) neither the assistance provided subsequently by a lawyer nor the adversarial nature of the proceedings could counteract the defects which had occurred during his initial questioning" in the absence of counsel.⁷⁸⁰ In this respect, the *Kuralić*-case would have been more helpful if the Court would have used its relatively clearer rule that the right to legal assistance at the stage of police interrogations can "only" be limited for "compelling reasons".⁷⁸¹ Nonetheless, for this interim conclusion regarding possible remedies to a lack of *Salduz*-protection, the courts can "repair" earlier damage done by excluding police statements from the evidence for a conviction and/or only using voluntarily delivered statements for the accused's conviction.

- *What is the additional importance of the Salduz-rule for this research into ineffective legal assistance and its redress within Convention-conform Dutch criminal proceedings?*

The *Salduz*-rule is relevant for this research into ineffective assistance by counsel and its redress, because a legal basis for the right to counsel, reasonably speaking, has to exist for the Court to be able to adjudicate a complaint about alleged *ineffective* legal assistance in the first place. The two sub-

⁷⁷⁹ Ashworth and Redmayne (2005) at 330-331.

⁷⁸⁰ *Mader v. Croatia*, Judgment of 21 June 2011, HUDOC no. 56185/07, para. 154.

⁷⁸¹ *Salduz v. Turkey* [GC], Judgment of 27 November 2008, HUDOC no. 36391/02, para. 52.

sections regarding this *Salduz*-rule have explained how the Court holds as a rule that at the stage of police interrogations, the authorities should afford the accused a lawyer as of police custody and before (consultation) and during (presence) custodial police interrogations especially (sub-sections 5.3.1.1. and 5.3.1.2.). The last discussed case of *Kuralić v. Croatia* has already indicated that the Court might construe the right to counsel as a substantive entitlement to *effective* legal assistance *at trial*, moreover. Therefore, it also becomes important to explore whether the Court similarly construes Article 6 (3) (c) substantively at the “critical” stage of police interrogations, as will be done immediately below (sub-section 5.3.1.3.).

5.3.1.3. *The right to effective legal assistance at the stage of police interrogations?*

This sub-section on police interrogations will give a first indication as to whether or not the Court holds that an accused is entitled under the Convention to *effective* legal assistance at the stage of police interrogations. Only one case will be described, with references to its relevant facts because of their important “explanatory power” for the yet mentioned *Salduz*-rule.

- *Pavlenko v. Russia*

The facts of the case are that *Pavlenko* was believed to have committed several murders and rapes. He was placed in custody by the police for the purpose of being interrogated. Prior to questioning, the police asked *Pavlenko* whether he wanted a lawyer to be present during the custodial police interrogations. According to the Government, he responded that he wanted a particular retained lawyer, who purportedly could not assist him due to a conflict of interest. Therefore, the investigator appointed a legal aid lawyer to assist *Pavlenko*. This legal aid lawyer, D., was appointed despite the fact that *Pavlenko* had expressed a general distrust of legal aid lawyers.⁷⁸² During the official police interrogations, which were conducted in the presence of D., *Pavlenko* remained silent. During “visits” when the police put further questions to *Pavlenko*, D. was absent. During these visits by the police to the accused, *Pavlenko* had allegedly freely confessed to the murder and rape charges. After these visits between *Pavlenko* and the police were over, D. came to sign the confessions thereby becoming part of the official police records. Ultimately, on the basis *inter alia* of these records of the visits, the domestic court convicted *Pavlenko*.

Before the Court *Pavlenko* did not complain that the authorities had not ensured his right to assistance by a lawyer during the police interrogations. Rather, he submitted that his right to *effective* legal assistance at these stages and the “visits” had been violated.

The Government countered this complaint by contending that the authorities had guaranteed that *Pavlenko* had had a lawyer throughout the entire pre-trial phase. The Government argued that the authorities, which had appointed a lawyer to assist him, could have done no more, else they would have violated the independence of the Bar from the State and interfered with the freedom of the defence in the lawyer-client relationship. The Government added that the freedom of the defence prohibits the authorities from doing anything other than providing an accused and his lawyer with the opportunity to decide freely and without interference by any State organ the way in which to conduct the defence at the custodial police interrogations.

The Court examined whether *Pavlenko*, whose formal right to a lawyer as from the first police interrogations had evidently been respected, had indeed been guaranteed his substantive right to effective legal assistance. For that purpose, the Court explored the rights protection of the accused who found himself in a complex situation⁷⁸³ and considered:

“(…) Bearing in mind that the Convention is intended to guarantee rights which are practical and effective, the Court has to assess the *effectiveness* of counsel D.’s assistance. In other words, the Court has to determine whether the assistance by the legal-aid counsel appointed by the investigator was such as to secure the compliance with the guarantees of Article 6 in the circumstances of the case, in particular for

⁷⁸² *Pavlenko v. Russia*, Judgment of 1 April 2010, HUDOC no. 42371/02, paras. 107-111 including the following two citations.

⁷⁸³ *Pavlenko v. Russia*, Judgment of 1 April 2010, HUDOC no. 42371/02, para. 112.

preventing any breach of the privilege against self-incrimination and the effective exercise of the right to remain silent”⁷⁸⁴.

The Court concluded that *Pavlenko* had not been guaranteed *effective* legal assistance within the meaning of Article 6 (3) (c) during the custodial police interrogations⁷⁸⁵ and found that the authorities were to blame for this, as follows:

“The investigators’ interest in the advancement of the investigation and eventual disclosure of other offences through possible confessions from the applicant did not induce them to keep a close eye on the effectiveness of the defence”⁷⁸⁶.

The Court added that, in determining whether the proceedings as a whole were fair, consideration must be given to whether the rights of the defence had been respected at later stages. In particular, the Court assessed whether the accused was given the opportunity to challenge the authenticity of the evidence and to oppose its use during the trial phase, which had to be in compliance with equality of arms and adversarial in nature. In addition, the Court explored whether the circumstances in which the evidence had been obtained cast doubt on its reliability or accuracy. Where the reliability of the evidence is in dispute, the existence of fair procedures to examine the admissibility of the evidence takes on an even greater importance, according to the Court. In finding *Pavlenko* guilty, the Court found that the trial court had relied on his pre-trial admissions and certain other evidence, including various pieces of physical evidence obtained through the use of information provided by him in his statements made pre-trial. This evidence had been obtained, according to the Court, under circumstances that cast doubt on the reliability of the accused’s admissions. Both the trial and appeal courts dealt with the alleged violation of *Pavlenko*’s right to legal assistance during the preliminary investigation, as well as his allegations of ill-treatment and having made a confession under duress. However, the accused, who was by then assisted by counsel, made no specific allegations concerning the procedure by which the courts reached their decision concerning the admissibility of the evidence, including his own confessions. In other words, neither *Pavlenko* nor his lawyer put forward any specific arguments concerning the admissibility or sufficiency of the other evidence such as expert reports or witness statements. However, the Court did not consider it relevant to explore the basis for *Pavlenko*’s conviction further in the present case, because the restriction on *Pavlenko*’s right to assistance by counsel during the pre-trial phase had *no* justification. According to the Court, the authorities had not ensured that the accused’s right to *effective* legal assistance at the stage of custodial police interrogations. Even if at the trial stage the accused would have had an opportunity to challenge the evidence against him in adversarial proceedings with the benefit of legal advice, the Court would not have concluded that the said shortcomings in respect of the legal assistance provided at the pre-trial stage could be repaired. The absence of effective assistance during the custodial police interrogations had seriously undermined the position of the defence at the trial hearing. Accordingly, the Court found a violation of Article 6 (1) in conjunction with 6 (3) (c).

This *Pavlenko*-case is important at this early stage of the research, because the Court neither held counsel ultimately responsible for her conduct in the case nor did it conclude that the accused had to bear the consequences of his lawyer’s behaviour. The authorities failed to live up to its obligations regarding the right to *effective* legal assistance at the stage of custodial police interrogations. Consequently, the accused’s rights including the right to remain silent, the right not to incriminate oneself, and the right to an effective defence as of placement in custody were irreparably damaged.

It is only natural that this case description will already prompt questions about related subjects such as *what role* should counsel play at the stage of police interrogations for the Convention right to *effective* legal assistance to be guaranteed. Consequently, this *Pavlenko*-case, which has been approached from a vertical perspective, has laid some foundations for the next Convention chapter that will assess what conduct would be expected of counsel so that the accused will be provided with *effective* legal assistance at police interrogations (horizontal perspective; chapter 7). Moreover, this

⁷⁸⁴ *Pavlenko v. Russia*, Judgment of 1 April 2010, HUDOC no. 42371/02 para. 108.

⁷⁸⁵ *Pavlenko v. Russia*, Judgment of 1 April 2010, HUDOC no. 42371/02, para. 120.

⁷⁸⁶ *Pavlenko v. Russia*, Judgment of 1 April 2010, HUDOC no. 42371/02, para. 113.

case will certainly be germane for the third Convention chapter about authorities which interfere with counsel and hinder counsel from providing *effective* legal assistance to the accused (second vertical perspective; chapter 9 regarding the negative obligation). Finally, this case is also important for the topic of an intervention in the case at the trial stage when the authorities are confronted with ineffective legal assistance because in this *Pavlenko*-case the accused's rights had already been irreparably damaged at the "critical" stage of police interrogations (third vertical perspective; chapter 11 regarding the positive obligation). For all these subsequent Convention chapters, it is important that the Court holds that an accused is not merely entitled to have counsel be present at police interrogations, but that his assistance should be *effective* (chapters 7, 9 and 11). Thus,, the Court appears to construe the right to counsel at this "critical" stage of police interrogations substantively rather than formally by arguing legal assistance should be *effective* and there should not just be a lawyer on the accused's side. Keeping the later usefulness of this interim conclusion in mind, this sub-section has therefore explored and found that the Court holds there to be a Convention right to *effective* legal assistance at the "critical" stage of police interrogations. As explained in the introduction to this section on the right to counsel at police interrogations, the following sub-section will not just elaborate upon the case law of the Court but also on EU Directive 2013/48/EU because of its binding nature for the Netherlands when it will be implemented. Therefore, the next sub-section will discuss that Directive, also because it serves as a quality check on the aforementioned interim conclusion about the *Salduz*-rule. This side-step to the other body of law of EU Directive 2013/48/EU will be made immediately below (sub-section 5.3.1.4.; for a more general discussion of the interrelationship between defence rights under the Convention and EU law, see section 3.4.).

5.3.1.4. *The right to counsel at police interrogations under EU Directive 2013/48/EU*

Because of its future implementation in the Netherlands, but also because of its external check on the yet presented interpretation of the Court's *Salduz*-rule (sub-sections 5.3.1.1. to 5.3.1.3.), the EU Directive 2013/48/EU will be considered here in detail (sub-section 5.3.1.4.).⁷⁸⁷ This Directive concerns the "right to access to a lawyer in criminal proceedings", including provisions on access to a lawyer to the accused at the stage of police interrogations.⁷⁸⁸

EU Directive 2013/48/EU finds its basis in international human rights law including the Convention. More specifically, its basis is Article 47 of the Charter of Fundamental Rights of the European Union (the Charter), Article 48 (2) of this Charter which guarantees respect for the rights of the defence, Article 6 of the Convention and Article 14 of the ICCPR which enshrine the right to a fair trial.⁷⁸⁹ Therefore, because this research includes the interpretation of the right to counsel under the Convention, it is important that the Directive bases its minimum rules regarding *inter alia* "the right to access to a lawyer"⁷⁹⁰ on the Court's *Salduz* and subsequent confirmation cases, which has already been referred to as the *Salduz*-rule (sub-sections 5.3.1.1. to 5.3.1.3.).

This Directive has a wider application regarding the right to counsel than at "only" the stage of police interrogations. For example, the Directive also deals with what is being referred to as "investigative or other evidence-gathering acts" such as crime scene visits, identification procedures and witness examination proceedings (sub-section 5.3.2.). The Directive will be explained here in full, because some aspects of other stages aside from police interrogations have already been dealt with above in this section (section 5.3.1.). However, at this point of the research, the obligations regarding

⁷⁸⁷ 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, Official Journal of the European Union L 294/1, 6 November 2013. Hereafter Directive 2013/48/EU. The Directive also entails a right to access to a lawyer during criminal proceedings before a court, if they have not waived that right, Preamble para.19 of the EU Directive 2013/48/EU.

⁷⁸⁸ Article 2 of the Directive 2013/48/EU explains that this Directive applies to suspects or accused persons in criminal proceedings from the time when they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence, and irrespective of whether they are deprived of liberty. It applies until the conclusion of the proceedings, which is understood to mean the final determination of the question whether the suspect or accused person has committed the offence, including, where applicable, sentencing and the resolution of any appeal.

⁷⁸⁹ See preamble para. 1 of the Directive 2013/48/EU.

⁷⁹⁰ Preamble para. 8 of the Directive 2013/48/EU.

the right to counsel of the authorities towards the accused at police interrogations will be highlighted, rather than any other procedural stages or junctures (sub-section 5.3.1.4.).

The Directive⁷⁹¹ requires that Member States shall ensure that suspects and accused persons have the right of access to a lawyer⁷⁹² in such time and in such a manner that they can “exercise their rights of defence practically and effectively” (Article 3 (1)). Under the Directive, the accused is entitled to have access to a lawyer without undue delay (Article 3 (2)). This provision means that, “(i)n any event, suspects or accused persons shall have access to a lawyer from whichever of the following points in time is the earliest”, at the following four procedural stages. A first stage is before the accused is being questioned by the police or by another law enforcement or judicial authority (Article 3 (2) (a)). A second stage is upon the carrying out by investigating or other competent authorities of an investigative or other evidence-gathering act (Article 3 (3) (c) (Article 3 (2) (b)). Thirdly, without undue delay after deprivation of liberty, the accused is entitled to access to a lawyer (Article 3 (2) (c)). Fourth and finally, where the accused has been summoned to appear before a court having jurisdiction in criminal matters, this entitlement applies too in due time before they appear before that court. (Article 3 (2) (d)).

This right of access to a lawyer entails three guarantees for the accused. First, Member States shall ensure that suspects or accused persons have the right to meet in private and communicate with the lawyer representing them, including prior to questioning by the police or by another law enforcement or judicial authority (Article 3 (3) (a)). Second, Member States shall ensure that suspects or accused persons have the right for their lawyer to be present and participate effectively when questioned (Article 3 (3) (b)).⁷⁹³ The Directive explains that such participation “(...) shall be in accordance with procedures under national law, provided that such procedures do not prejudice the effective exercise and essence of the right concerned”. It also adds that “(w)here a lawyer participates during questioning, the fact that such participation has taken place shall be noted using the recording procedure in accordance with the law of the Member State concerned”. As a third guarantee, Member States shall ensure that suspects or accused persons shall have, as a minimum, the right for their lawyer to attend the following investigative or evidence-gathering acts where those acts are provided for under national law and if the suspect or accused person is required or permitted to attend the act concerned: (i) identity parades; (ii) confrontations; (iii) reconstructions of the scene of a crime (Article 3 (3) (c)).

As an additional guarantee, Article (3) (4) of the Directive stipulates that the Member States shall endeavour to make general information available to facilitate the obtaining of a lawyer by suspects or accused persons. Notwithstanding provisions of national law concerning the mandatory presence of a lawyer, Member States shall make the necessary arrangements to ensure that suspects or accused persons who are deprived of liberty are in a position to exercise effectively their right of access to a lawyer, unless they have waived that right (Article 9).

As a penultimate observation, this Directive permits two types of exceptions. First, as a penultimate important section, Article 3 (5) explains that, in exceptional circumstances and only at the pre-trial stage, Member States may temporarily derogate from the application of point (c) of paragraph 2 where the geographical remoteness of a suspect or accused person makes it impossible to ensure the

⁷⁹¹ Preamble para. 14 of the Directive 2013/48/EU stipulates that this Directive lays down minimum rules concerning the rights of suspects and accused persons in criminal proceedings and of persons subject to proceedings pursuant to Framework Decision 2002/584/JHA (“European arrest warrant proceedings”) to have access to a lawyer, to have a third party informed of the deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

⁷⁹² Preamble para. 15 of the Directive 2013/48/EU explains that the term “lawyer” in this Directive refers to any person who, in accordance with national law, is qualified and entitled, including by means of accreditation by an authorised body, to provide legal advice and assistance to suspects or accused persons.

⁷⁹³ Preamble para. 25 of the Directive stipulates: “Member States should ensure that suspects or accused persons have the right for their lawyer to be present and participate effectively when they are questioned by the police or by another law enforcement or judicial authority, including during court hearings. Such participation should be in accordance with any procedures under national law which may regulate the participation of a lawyer during questioning of the suspect or accused person by the police or by another law enforcement or judicial authority, including during court hearings, provided that such procedures do not prejudice the effective exercise and essence of the right concerned. During questioning by the police or by another law enforcement or judicial authority of the suspect or accused person or in a court hearing, the lawyer may, inter alia, in accordance with such procedures, ask questions, request clarification and make statements, which should be recorded in accordance with national law”.

right of access to a lawyer without undue delay after deprivation of liberty. Second, Article 3 (6) stipulates that, “(...) in exceptional circumstances and only at the pre-trial stage, Member States may temporarily derogate from the application of the rights provided for in paragraph 3 to the extent justified in the light of the particular circumstances of the case, on the basis of one of the following compelling reasons: (a) where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person and (b) where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings”.

Finally, it is worth emphasising that the Directive is one of more Roadmap Directives under European Union (EU) law, which in turn is based on mutual trust among EU Member States. For EU Member States to actually have confidence in each other’s justice systems and for those states to cooperate effectively, it is important that EU law is indeed being implemented in each Member State in the same manner.

For this same reason, it is worth examining one case of the Court, the *A.T. v. Luxembourg* case, in which this Directive has been taken into consideration for the first time.⁷⁹⁴ Although it might not yet be a final case, because *A.T. v. Luxembourg* can be submitted to the Grand Chamber, it will be explored here because of the interaction between the Court and the EU on this specific issue of the right to counsel at police interrogation and perhaps even their convergence.⁷⁹⁵

The relevant facts of the case are that *A.T.* was arrested on charges of rape and indecent assault against a minor under 16. *A.T.* had been questioned by the police following surrender under a European Arrest Warrant and requested a lawyer upon his arrival at the station. It is not fully clear how the police responded, but *A.T.* upon that information from the police accepted questioning without counsel. He denied the offences. *A.T.* was thereafter questioned again by the investigating judge, with a lawyer present. However, he had not had an opportunity to confer with counsel before the investigating judge questioned him and the lawyer had not been able to examine the case file prior to that questioning. *A.T.* denied the offences again. Within the domestic proceedings, *A.T.* argued that his defence rights had been breached because he had been denied access to a lawyer. However, both the appeal court and the court of cassation rejected his complaint, in essence because they held that *A.T.* had agreed to being questioned without a lawyer and that no obligation arose to remedy any prejudice caused.

Before the Court, *A.T.* complained that Article 6 had been violated.

The Government argued, for example, that no violation of Article 6 arose because *A.T.* had denied the offences.

The Court clarified that there has to be a legal basis for an accused to have an acceptable complaint under the Convention because of the supposed absence of a waiver of his right to counsel. Given that in Luxembourg no legal right to a lawyer at the initial questioning is provided for the special category of persons questioned following surrender under a European Arrest Warrant, the Court did not consider that the accused could complain about not having waived a right that he did not have.

Thereupon the Court did examine whether the authorities should not have denied the accused “access to a lawyer”, even though this accused had not confessed to any crime. The Court emphasised that the domestic courts violated Article 6 by relying on the statements *A.T.* made in the absence of a lawyer and had not given any redress that could have repaired the damage done to the rights of the accused who had faced these restrictions on his right to legal assistance. For example, the courts did not exclude his statements from the evidence used against the accused to convict him. The Government’s aforementioned claim that *A.T.*’s rights would not have been harmed because he did not confess in the absence of a lawyer was not accepted by the Court. In other words, it was most important for the Court that *A.T.* had “changed his story” during the proceedings and that his early statements, though denials of the allegations, were held against him in that way. This has already been highlighted but adds also to the explanation of the cases cited to explain the *Salduz*-rule (sub-sections 5.3.1.1. and 5.3.1.2.). This case therefore adds a new element to the cases yet discussed in which total silence, clear confessions and consistent denials were at stake (sub-sections 5.3.1.1. and 5.3.1.2.).

⁷⁹⁴ *A.T. v. Luxembourg*, Judgment of 9 April 2015, HUDOC no. 30460/13.

⁷⁹⁵ Tinsley (2015) available at <http://eulawanalysis.blogspot.nl/2015/05/at-v-luxembourg-start-of-eu-echr-story.html>.

As another relevant new issue presented by the *A.T.*-case, it is noteworthy how the Court explains the importance of access to a lawyer to include a right to consultation prior to questioning. The Court explains that, without consultation between lawyer and client prior to questioning, the legal assistance provided to *A.T.* during the questioning was not *effective* and therefore did not meet the requirements of Article 6. While the above-cited cases, including *Navone v. Monaco*, established the importance of legal assistance during questioning, the Court repeated not only that consideration but also the significance of consultation prior to such interrogations (sub-sections 5.3.1.1. and 5.3.1.2.).

With regard to access to the case file prior to police interrogations, the Court did not argue that legal assistance is not effective if the lawyer does not have access to the case file prior to questioning, in order to advise the client on an informed basis. This conclusion is important because Article 7(1) of Directive 2012/13/EU does require access to documents which are essential for challenging detention, which could be interpreted to include access to the police case file prior to interrogations. This latter point should also be seen in conjunction with the more general point of the proposed accession of the EU to the Convention and the possibility that the Court of Justice of the EU (hereafter referred to as the ECJ) could consider complaints that a Member State does not abide by the Convention.

For a better understanding of that latter observation, it is worth noting here that the Netherlands, as a Member State to the EU, is not only bound by this Directive but is also subjected to rulings on the rights it lays down that are being delivered by the ECJ. As Tinsley states, the EU treaties give the ECJ the power for consistent application of EU law across the EU as a whole.⁷⁹⁶ The ECJ is the highest court for matters of EU law. It is tasked with interpreting EU law and ensuring its equal application across all – currently 28 – EU Member States. Member States' national courts can refer questions of EU law to this ECJ, while it ultimately remains the task of the national court to apply these rulings and the resulting interpretation to the facts of any given case. Only courts of the last instance – which could be courts of appeal or appeal in cassation, depending on the common law or civil law system – are bound to refer a question of EU law when one is addressed. The ECJ has competence, among other things, to render a preliminary ruling, which is a decision made by them based on the interpretation of EU law, made at the request of a court or tribunal of a Member State of the EU.

Tinsley points to a first case before the ECJ on the Roadmap Directives that can serve as an illustration (Case C-216/14 Covaci).⁷⁹⁷ He explains how Advocate General Bot's Opinion of 7 May 2015 indicates how fundamental the "minimal rules" are and how they should be approached expansively, almost equal to how the Court considers the Convention under its living instrument doctrine.⁷⁹⁸ This means that, while the Roadmap Directives should respect national legal cultures, domestic procedures will have to ensure their useful effect, or else risk being overturned by higher national courts, with the ECJ's preliminary rulings as the final "sanction". If these rulings by the ECJ will indeed be expansive, the Netherlands might end up being subject to stricter rules under EU law than the Convention. Usually this will be so because the Court will be less quick and might formulate lower standards than those now adopted in the Roadmap Directives, while the Convention of course does have impact outside of the EU. It will remain to be seen how both the ECJ and the Court will lead changes to defence rights across Europe.

The future of how the EU Directive 2013/48/EU and the other Roadmap Directives will be implemented by Member States to the EU such as the Netherlands is not yet set. Most likely, the issue of consultation between counsel and the accused prior to police interrogations, the main point decided in *A.T. v Luxembourg*, will not cause difficulties for many EU Member States that seem to have already adopted it under the Convention. Nevertheless, this *A.T.*-case is one example of EU law setting a standard regarding the right to counsel, which the Court thereupon also found to exist under the Convention. This case represents the first time that one of the Roadmap Directives has been interpreted in the case law of the Court and it raises questions as to possible convergence and how the Court is going to react to rulings from the ECJ on the Roadmap Directives.⁷⁹⁹ In that light, it will be interesting to see how the ECJ will treat new questions that have not yet been answered in case law of

⁷⁹⁶ Tinsley (2015) available at <http://eulawanalysis.blogspot.nl/2015/05/at-v-luxembourg-start-of-eu-echr-story.html>.

⁷⁹⁷ Tinsley (2015) available at <http://eulawanalysis.blogspot.nl/2015/05/at-v-luxembourg-start-of-eu-echr-story.html>.

⁷⁹⁸ Conclusions de l'Avocat Général M. Yves Bot, 7 mai 2015, Affaire C-216/14, Procédure pénale contre Gavril Covaci, available at: <http://eur-lex.europa.eu/legal-content/FR/TXT/HTML/?uri=CELEX:62014CC0216&from=EN>.

⁷⁹⁹ Tinsley (2015) available at <http://eulawanalysis.blogspot.nl/2015/05/at-v-luxembourg-start-of-eu-echr-story.html>.

the Court, and how the Court will adjudicate EU Directive rights that are brought to it in complaints that it might not have laid down in case law yet.

Certainly, this *A.T.*-case might give an indication as to the possible future convergence of the two bodies of law of EU law and the Convention regarding the right to counsel. For the Netherlands and other Member States to the EU, this *A.T.*-case is significant because the Court repeated its *Salduz*-rule and considered the Directive's minimum standards on access to a lawyer. This EU Directive's standards are mostly based on a "codification" of the Court's case law but also include new ones and have anticipated some expected case law of the Court (see section 5.3.1.4.). The Court can and does have regard to such measures when developing its case-law, and this Directive does raise the significant possibility of cross-fertilisation and perhaps even convergence between EU law and the Convention.

5.3.1.5. Concluding remarks regarding legal assistance at the critical stage of police interrogations

To end with several concluding remarks about this entire sub-section 5.3.1., the Court considers the right to legal assistance to be "critical" for the fairness of the criminal procedure "as a whole" at the stage of police interrogations, which here has also made reference to police custody *per se* and custodial police interrogations as well as police interrogations of an accused who was at liberty. As a rule, the authorities have to ensure to the accused that he can retain a lawyer or in, "certain cases" is appointed counsel who can assist him at the stage of police custody and before (consultation) and during (presence) custodial police interrogations (sub-sections 5.3.1.1. and 5.3.1.2.). The Court scrutinises this *Salduz*-protection by viewing these pre-trial trial stages in conjunction with the ultimate culmination of a fair adversarial hearing, during which equality of arms and adversariality also have to be guaranteed. Ultimately, the trial stage is the moment at which the Court assesses the *effectiveness* of the legal assistance provided by counsel. This emphasis on the trial stage goes hand in hand with the Court's requirement that the accused is entitled to *effective* legal assistance at police interrogations (*Pavlenko v. Russia*; sub-sections 5.3.1.3). Consequently, the Court does not only require *Salduz*-protection at the "critical" stage of police interrogations out of fairness of the criminal procedure "as a whole". The Court also construes the right to counsel substantively as requiring *effective* legal assistance at the stage of police interrogations. These interim conclusions about the *Salduz*-rule are not just important because these minimum guarantees under the Convention are binding on the Netherlands *per se*, but also because these same requirements regarding access to counsel will become binding under EU Directive 2013/48/EU which sets the same *Salduz*-rule. Finally, this sub-section is also important for future Convention chapters. In particular, the aforementioned *Pavlenko*-case will be useful for related subjects such as the role that counsel should play at the stage of police interrogations, which will be described in the next Convention chapter (chapter 7). Similarly, this case description has laid the foundations for subsequent chapters that will deal with connected issues such as the possible interference by the authorities with counsel and potential interventions in the case due to a lack of effective legal assistance by that lawyer at police interrogations (chapters 9 and 11). As a final remark, the "critical" stage addressed in the next sub-section (sub-section 5.3.2.) will be what in the previous sub-section on EU Directive 2013/48/EU has been labelled "other" pre-trial investigative or evidence gathering-acts (sub-section 5.3.1.4.).

5.3.2. Pre-trial stages other than police interrogations

This sub-section will turn to phases that in the normal chronology of a criminal investigation will follow after police custody, police interrogations or custodial police interrogations. Examples of subsequent procedural moments at which an accused will also have been identified, are proceedings during which pre-trial detention will be decided upon and "other" pre-trial investigative or evidence gathering-acts as they are being called under EU Directive 2013/48/EU.⁸⁰⁰ This sub-section will explore all such other pre-trial moments, while taking into consideration the findings about the right to

⁸⁰⁰ See above in sub-section 3.1.1.4. 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, Official Journal of the European Union L 294/1, 6 November 2013. Hereafter Directive 2013/48/EU. The Directive also entails a right to access to a lawyer during criminal proceedings before a court, if they have not waived that right, Preamble para.19 of the EU Directive 2013/48/EU.

counsel at the stage of police interrogations (sub-section 5.3.1.). In summary, these findings appear to indicate that the Court holds that the authorities have to ensure to the accused “access to counsel” as of his placement in police custody and before and during subsequent police interrogations.⁸⁰¹ This sub-section will also turn to how the right to counsel is sometimes “derived” from other Convention rights as laid down in Articles 3, 5, 6 (3) (d) and 6 (1) (discussed in sub-section 5.2.4.). It will take into account that the Court considers the pre-trial stage particularly in light of the subsequent adversarial trial hearing under the Court’s “as a whole” approach.⁸⁰² In other words, it is important to the Court that the pre-trial phase culminates in an adversarial trial for the criminal procedure “as a whole” to be fair and thus to be Convention-conforming.

This overview will start with the pre-trial detention under Article 5 because it often comes after police custody, police interrogations or custodial police interrogations, but before trial. Although strictly speaking this right regarding pre-trial detention does not fall under Article 6, its intricate connection with the remainder of the criminal procedure is evident and therefore explored as a “critical” stage immediately below (sub-section 5.3.2.1.).

5.3.2.1. *The right to counsel in relation to Article 5*

In several cases, the Court has held that, “normally”, the authorities are required to provide an accused with access to a lawyer as a matter of equality of arms prior to proceedings for decisions about detention on remand of the accused as a “derived” right to counsel from the right to a fair trial.⁸⁰³ The authorities thereby guarantee that the accused can make use of legal assistance by a lawyer before or during the hearing when his (continuing) right to liberty is in the balance, given that there is also a lawyer on the side of the prosecution.⁸⁰⁴ Repeated case law also indicates that the authorities, moreover, have to give the assisted accused sufficient time and facilities for preparation with his lawyer to adequately prepare for such remand proceedings.⁸⁰⁵ For example, the accused and his lawyer have to have access to the (preliminary) file.⁸⁰⁶ In this way, the assisted accused can read the documents and share his own views with his lawyer, while he can also provide instructions to his lawyer on how to approach the remand proceedings. Moreover, the lawyer can offer the accused (further) advice as to his detention, the length and the basis upon which he can be or is being detained. Prior to the demand proceedings hearing, the authorities have to provide the accused with an opportunity to have privileged contact and communication with his lawyer.⁸⁰⁷ As a rule, both the defence lawyer and the accused must be provided with “any submissions” that the prosecuting authorities intend to enter into the proceedings at such a hearing.⁸⁰⁸ The disclosure of the prosecution’s submissions and underlying documents to the lawyer of the assisted accused are in the Court’s view especially important, as demonstrated with the following quotation taken from the case of *Lamy v. Belgium*:

“(…) during the first thirty days of custody the applicant’s counsel was, in accordance with law as judicially interpreted, unable to inspect anything in the file, and in particular the reports made by the investigating judge and the Verviers police. This applied especially on the occasion of the applicant’s first appearance before the chamber du conseil, which had to rule on the confirmation of the arrest warrant. The applicant’s counsel did not have the opportunity of effectively challenging the

⁸⁰¹ *Castravet v. Moldova*, Judgment of 13 March 2007, HUDOC no. 23393/05, para. 47.

⁸⁰² E.g. *Ebanks v. the United Kingdom*, Judgment of 26 January 2010, HUDOC no. 36822/06.

⁸⁰³ *Ilijkov v. Bulgaria*, Judgment of 26 July 2001, HUDOC no. 33977/96, para. 103.

⁸⁰⁴ *Svipsta v. Latvia*, Judgment of 6 March 2006, HUDOC no. 66820/01, para. 129.

⁸⁰⁵ On a lack of time and facilities, thereby depriving detainees of “une défense effective”, see e.g. *Samoila and Cionca v. Romania*, Judgment of 4 March 2008, HUDOC no. 33065/03.

⁸⁰⁶ E.g. *Mooren v. Germany* [GC], Judgment of 9 July 2009, HUDOC no. 11364/03, para. 124 with reference to *Lamy v. Belgium*, 30 March 1989, 10444/83; *Nikolova v. Bulgaria* [GC], Judgment of 25 March 1999, HUDOC no. 31195/96, para. 58; *Schöps v. Germany*, Judgment of 13 February 2001, HUDOC no. 25116/94 para. 44; *Shishkov v. Bulgaria*, Judgment of 9 January 2003, no. 38822/97, para. 77; and *Svipsta v. Latvia*, Judgment of 6 March 2006, HUDOC no. 66820/01, para. 129.

⁸⁰⁷ E.g. *Öcalan v. Turkey* [GC], Judgment of 12 May 2005, HUDOC no. 46221/99, para. 70.

⁸⁰⁸ For disclosure only to the lawyer, not to the suspect, see e.g. *Niedbala v. Poland*, Judgment of 4 July 2000, HUDOC no. 27915/95.

statements or views, which the prosecution based on these documents. Access to these documents was essential at this crucial stage in the proceedings, when the court had to decide whether to remand in custody or to release him. Such access would, in particular, have enabled counsel for Mr. Lamy to address the court on the matter of the co-defendants statement and attitude. In the court's view, it was therefore essential to inspect the documents in question in order to challenge the lawfulness of the arrest warrant effectively".⁸⁰⁹

During remand proceedings, "normally"⁸¹⁰ the authorities have to guarantee both equality of arms⁸¹¹ and adversariality by giving the accused an opportunity to obtain legal assistance by a lawyer when the prosecution is also represented by a lawyer at that stage.⁸¹² This means, first, that the authorities have to inform the assisted accused and his lawyer about the date and time of the hearing before the judge or other authority who decides on detention on remand.⁸¹³ In addition, a tribunal, which is faced with an accused who remains absent at the remand hearing despite having been summoned, has to investigate whether the accused has freely waived his right to attend that hearing.⁸¹⁴ For a hearing to be "effective", the tribunal has to guarantee that the accused is given an opportunity to be heard⁸¹⁵ and that his right to effectively participate in the hearing is respected.⁸¹⁶ Such respect requires that the authorities ensure circumstances that are conducive for the accused's and his lawyer's "unhampered concentration".⁸¹⁷ Moreover, the tribunal has to ensure that it considers the lawyer's submissions under its obligation to conduct an effective hearing.⁸¹⁸ In order to guarantee adversariality, the tribunal cannot reverse the burden of proof of the authorities by imposing an onerous burden on the accused.⁸¹⁹ For example, the authorities cannot demand proof from the defence of the absence of a risk of absconding, of reoffending or of obstructing justice.⁸²⁰ For that same purpose of adversariality, the tribunal has to guarantee conditions that permit an adequate dialogue between the defence and the prosecution.⁸²¹ Where necessary, the court itself has to interact with the two sides of the defence and the prosecution in order to ensure that the hearing is truly adversarial in nature.⁸²² The tribunal, which in principle must conduct an oral hearing instead of "only" a written procedure, should, for example, ensure possibilities for verbal responses and audiovisual exchanges.⁸²³ The latter have to take place in a courteous, dynamic and undisturbed manner between the defence, the prosecution and the tribunal.⁸²⁴ Before the remand hearing, equality of arms is important so that, for instance, the defence should be able to consult the investigation file.⁸²⁵ However, in its own initiative, the tribunal has to take into

⁸⁰⁹ *Lamy v. Belgium*, 30 March 1989, 10444/83; *Nikolova v. Bulgaria* [GC], Judgment of 25 March 1999, HUDOC no. 31195/96, para. 29.

⁸¹⁰ *Sanchez-Reisse v. Switzerland*, Judgment of 21 October 1986, HUDOC no. 9862/82; *Wloch v. Poland* Judgment of 19 October 2000, HUDOC no. 27785/95; and *Svipsta v. Latvia*, Judgment of 6 March 2006, HUDOC no. 66820/01, para. 129.

⁸¹¹ *Grauzinis v. Lithuania*, Judgment of 10 October 2000, HUDOC no. 37975/97 and *Trzaska v. Poland*, Judgment of 11 July 2000, HUDOC no. 25792/94.

⁸¹² *Svipsta v. Latvia*, Judgment of 6 March 2006, HUDOC no. 66820/01, para. 129.

⁸¹³ E.g. *Fodale v. Italy*, Judgment of 1 June 2006 HUDOC no. 70148/01, para. 43: neither the detainee nor counsel were informed.

⁸¹⁴ For the false reason of absence due to an in-patient psychiatric examination that in fact took place four days prior to the hearing, see e.g. *Shulenkov v. Russia*, Judgment of 17 June 2010, HUDOC no. 38031/04, para. 52.

⁸¹⁵ For representation by a lawyer in his absence, but where the court had to assess his personality, see e.g. *Grauzinis v. Lithuania*, Judgment of 10 October 2000, HUDOC no. 37975/97, para. 34.

⁸¹⁶ See *Dolenec v. Croatia*, Judgment of 26 November 2009, HUDOC no. 25282/06, para. 206.

⁸¹⁷ For an unaffected dialogue with a prosecutor who was centrally seated in the court whilst the detainees' advocates could hardly be heard and had their concentration disturbed by the camera flashes and halogen camera lights of the press, see e.g. *Ramishvili and Kokhreidze v. Georgia*, Judgment of 27 January 2009, HUDOC no.1704/06, para. 132.

⁸¹⁸ *Ramishvili and Kokhreidze v. Georgia*, Judgment of 27 January 2009, HUDOC no.1704/06, para. 129, including the two following citations.

⁸¹⁹ E.g. *Nikolova v. Bulgaria*, Judgment of 25 March 1999, HUDOC no. 31195/96, para. 59.

⁸²⁰ E.g. *Nikolova v. Bulgaria*, Judgment of 25 March 1999, HUDOC no. 31195/96, para. 59.

⁸²¹ *Nikolova v. Bulgaria*, Judgment of 25 March 1999, HUDOC no. 31195/96, para. 130.

⁸²² *Nikolova v. Bulgaria*, Judgment of 25 March 1999, HUDOC no. 31195/96, para. 130.

⁸²³ *Nikolova v. Bulgaria*, Judgment of 25 March 1999, HUDOC no. 31195/96, para. 131.

⁸²⁴ *Nikolova v. Bulgaria*, Judgment of 25 March 1999, HUDOC no. 31195/96, para. 131.

⁸²⁵ *Svipsta v. Latvia*, Judgment of 6 March 2006, HUDOC no. 66820/01, para. 129.

account *ex officio* the accused's arguments favouring his release⁸²⁶ and his personal situation.⁸²⁷ During the hearing, the tribunal has to address any important arguments that the defence submits and must actively protect the accused's right not to be presumed guilty.⁸²⁸ In its reasoning in the verdict the tribunal has to show⁸²⁹ that it has in fact examined the defence's arguments and has protected the accused's rights in the course of the proceedings.⁸³⁰ Additionally, the Court considers the right to legal assistance to be important in remand proceedings, which have to be both effective and fair.⁸³¹

This case law overview appears to indicate that the Court considers it important that an accused has assistance by a lawyer who can protect and have protected by the authorities the accused's personal right not to be unnecessarily detained, as well as the right to be heard and the right to participate effectively in the hearing or hearings. In other words, the right to counsel is fundamental for the requisite equality of arms and adversariality, at least in so far as the hearings are concerned.

To make some concluding remarks regarding Article 5, the Court has held that the authorities normally have to ensure that the accused can invoke his right to assistance by counsel when the accused is faced with proceedings concerning his detention on remand.⁸³² This obligation of the authorities regarding the right to counsel for the accused can be contextualized by a comparison that the Court often makes between Articles 5 and 6. When comparing certain procedural requirements under Article 5 with the ones under Article 6, the Court allows the authorities to be more flexible concerning some of those regarding pre-trial detention.⁸³³ For instance, the Court can accept that authorities, which are under stringent time constraints, can keep hearings regarding the accused's remand in a prison or another detention facility rather than as public trials. However, the Court does not seem to accept that other procedural fairness requirements such as the right to assistance by counsel under 6 (3) (c) are relaxed in proceedings under Article 5. The Court finds the right to counsel "critical" for the fairness of proceedings in which pre-trial detention is being determined as well as the actual execution thereof. The Court even goes so far as to require *effective* legal assistance at the remand hearing, as will be highlighted in the next sub-section and reserved for a more detailed exploration in the third and penultimate substantive Convention chapter (chapter 9).

5.3.2.2. *The right to effective assistance by counsel in relation to Article 5?*

The previous sub-section prompts the question as to whether the Court construes a Convention right to *effective* legal assistance at "critical" stages of criminal proceedings that concern pre-trial detention proceedings under Article 5. In order to explore that matter, two cases will be discussed here, because the line that emerges from the yet discussed Court's case law is that assistance by counsel for an accused who might be or has already been detained is, in summary, designed to help protect three

⁸²⁶ For a court that took a 'selective and inconsistent approach' by accepting the prosecution's arguments but not reasoning why it did not accept the defence arguments, see e.g. *Aleksandr Makarov v. Russia*, Judgment of 12 March 2009, HUDOC no. 15217/07, paras. 125-126.

⁸²⁷ For a person who was detained because his accomplice had gone into hiding, see e.g. *Mamedova v. Russia*, Judgment of 1 June 2006, HUDOC no. 7064/05, para. 80.

⁸²⁸ For a person who was detained because of his failure to plead guilty, see e.g. *Kauczor v. Poland*, Judgment of 3 February 2009, HUDOC no. 45219/06, para. 46.

⁸²⁹ E.g. *Boicenco v. Moldova*, Judgment of 11 July 2006, HUDOC no. 41088/05, paras. 143-145 (a ground under national law only cited); *Bykov v. Russia* [GC], Judgment of 10 March 2009, HUDOC no. 4378/02, para. 65 (not addressing *inter alia* the situation which had developed); *Mamedova v. Russia*, Judgment of 1 June 2006, HUDOC no. 7064/05, para. 74 (only from an abstract point of view); *Huseyin Esen v. Turkey*, Judgment of 8 August 2006, HUDOC no. 49048/99, paras. 77-78 (only cited '« l'état des preuves »' without individualised and personal reasons) but sufficiently 'reasoned' in *W. v. Switzerland*, Judgment of 26 January 1993, HUDOC no. 14379/88, para. 33 and 36; and *Punzelt v. the Czech Republic*, Judgment of 25 April 2000, HUDOC no. 31315/96, para. 76; *Letellier v. France*, Judgment of 26 June 1991, HUDOC no. 14379/88, para. 39.

⁸³⁰ For sketchy reasoning and omissions to state exactly why continued detention was necessary because of the risk of absconding at that time, see e.g. *I.A. v. France*, Judgment of 23 September 1998, HUDOC no. 28213/95, para. 105.

⁸³¹ For the independence and impartiality of the tribunal, *I.A. v. France*, Judgment of 23 September 1998, HUDOC no. 28213/95, paras. 133-134.

⁸³² E.g. *Svipsta v. Latvia*, Judgment of 6 March 2006, HUDOC no. 66820/01, para. 129 and *Magalhães Pereira v. Portugal*, Judgment of 26 February 2002, HUDOC no. 44872/98, para. 56.

⁸³³ For the determination that the remand hearing could be held in private where the arrangements for a public hearing would interfere with the expeditiousness of the proceedings see, e.g. *Reinprecht v. Austria*, Judgment of 15 November 2005, HUDOC no. 67175/01, para. 40.

personal rights of the accused: the right to effective legal assistance⁸³⁴, the right not to be ill-treated⁸³⁵ and the right not to be unnecessarily detained. The Court appears to hold that assistance by counsel helps to protect these rights because it is the authorities, rather than the lawyer, who determine the conditions, justification, and length of detention of the accused.⁸³⁶ The authorities are therefore required to abide by *their* own obligation to guarantee the detained accused's "human dignity", which will be particularly important in the criminal proceedings in which counsel can challenge both justification and length of the detention, as two example cases will allude to.⁸³⁷

First, with regard to the notion of the "human dignity" of the accused, it is helpful to turn to the case of *Slyusarev v. Russia*.⁸³⁸ In this case, the authorities did not return the accused's glasses, which got lost during his arrest, when he was placed in pre-trial detention. They also did not provide him with new glasses. The Government argued before the Court that the lawyer neglected to give advice to the assisted accused about how to appeal to the competent authorities in order to get his old glasses back or to obtain new glasses. The Court, which understood that counsel has some responsibility under domestic law for knowing how to complain to the competent authorities, did not hold the lawyer responsible for this supposed lack of proper advice to his client. Instead, the Court found that the authorities were required to protect the accused's "health and well-being" under Article 5 (4), even though the assisted accused did not ask for the return of his glasses to the correct authority.⁸³⁹ Consequently, the Court appears to hold the authorities responsible for respecting the accused's "human dignity", rather than going along with the Government's submission that counsel was responsible for failing to provide the proper advice. At least, the Court did not want the accused to bear the consequences of his lawyer's conduct, holding instead that the authorities violated Article 5 (4).

A second case that is important for the exploration as to whether or not the authorities are required to ensure the precondition of effective assistance by counsel with regard to the right under Article 5, is the case of *Lebedev v. Russia*.⁸⁴⁰ In this case, the tribunal conducting the first-instance hearing about detention on remand (the District Court) did not allow *Lebedev*'s lawyers, who arrived one hour and fifteen minutes late, to enter the courtroom. During the appeal hearing, the tribunal (the Moscow City Court) did allow the lawyers to assist *Lebedev* when the decision to detain him on remand was reconsidered. At first instance, *Lebedev* had already been ordered to pre-trial detention.

Before the Court, *Lebedev* complained about a violation to his right to effective legal assistance because his lawyers, who arrived more than an hour after the start of a remand hearing, were denied access to the courtroom by the authorities.

The Government found the lawyers responsible for their own belated arrival and argued that this blame could not be shifted towards them.

The Court compared the present case to *Istratii and Others v. Moldova*⁸⁴¹ and determined:

"The central issue in that case was not the positive duty of the State to secure legal assistance to a detainee, but the negative obligation of the State not to hinder effective assistance from lawyers in the context of detention proceedings (§ 88). In the Court's opinion, this problem is also at the heart of the complaint under examination in the present case."⁸⁴²

⁸³⁴ E.g. *Dayanan v. Turkey*, Judgment of 31 October 2009, HUDOC no. 7377/03, para. 32 and *Brusco v. France*, Judgment of 14 October 2010, HUDOC no. 1466/07, para. 5.

⁸³⁵ See also *Svipsta v. Latvia*, Judgment of 6 March 2006, HUDOC no. 66820/01, para. 129.

⁸³⁶ *Tagaç and others v. Turkey*, Judgment of 7 July 2009, HUDOC no. 71864/01. See also *Öcalan v. Turkey* [GC], Judgment of 12 May 2005, HUDOC no. 46221/99, para. 131.

⁸³⁷ For the term "human dignity", see e.g. *Van der Ven and Lorse v. the Netherlands*, Judgments of 4 February 2003, HUDOC no. 50901/99 and HUDoc no. 52750/99, with in *Van der Ven* in para. 62. See also regarding arrest *Kucera v. Slovakia*, Judgment of 17 July 2007, HUDOC no. 40072/98 and for treatment that starts outside of and continues until questioning in custody see e.g. *Menesheva v. Russia*, Judgment of 9 March 2006, HUDOC no. 59261/00.

⁸³⁸ *Slyusarev v. Russia*, Judgment of 20 April 2010, HUDOC no. 60333/00, para. 40.

⁸³⁹ *Slyusarev v. Russia*, Judgment of 20 April 2010, HUDOC no. 60333/00, paras. 43-44.

⁸⁴⁰ *Lebedev v. Russia*, Judgment of 25 October 2007, HUDOC no. 4493/04.

⁸⁴¹ *Istratii and others v. Moldova*, Judgment of 27 March 2007, HUDOC nos. 8721/05 8705/05 8742/05.

⁸⁴² *Istratii and others v. Moldova*, Judgment of 27 March 2007, HUDOC nos. 8721/05 8705/05 8742/05, para. 87.

In addition to this consideration about *effective* legal assistance, it is noteworthy that the damage done to this right of the accused was not repaired by the lawyers' subsequent performance during the second instance proceedings in which the assisted accused appealed the initial decision to detain him. The Court held that the first instance court "(...) showed excessive rigour in not allowing the applicant's lawyers to take part in the proceedings"⁸⁴³, and mentioned the following concerning the subsequent appeal court which did allow the lawyers to attend. According to the Court, assistance by counsel during the appeal proceedings did not "cure" the earlier damage done, reasoning the following:

"(...) the applicant's lawyers were present before the court of appeal [the Moscow City Court], where they were able, at least in principle, to develop legal arguments calling for the applicant's release. In the context of Article 6 the Court usually examines the proceedings as a whole; however, this rule is not without exceptions, especially when it comes to pre-trial detention. Turning to the present case, the Court notes that the detention order of 3 July 2003 became effective immediately. Therefore, even if the court of appeal ultimately heard the applicant's lawyers, by that time the applicant had already spent twenty days in detention. Given that lapse of time, the Court cannot accept such a retroactive validation of the procedurally flawed detention order issued by the District Court. The Court concludes that the presence of the defence lawyers before the Moscow City Court did not remedy the defects of the procedure before the District Court [added by the author]"⁸⁴⁴.

Therefore, the Court concluded that Article 5 (3) was violated.

As with a notice according to the law, it seems likely that a lawyer will normally be responsible for his belated arrival. However, the Court did not equate any such responsibility of the lawyers to a *wavier* from the accused of his personal right to effective legal assistance at the remand hearing. Accordingly, the Court does not conclude that the accused has to bear the consequences of the conduct of these lawyers who failed to arrive on time for the first instance proceedings. It follows from this case that the authorities cannot reasonably argue that the accused has renounced *his* right to have his lawyers participate in the remand hearing in order to give him, in principle, an effective defence during the first instance hearing. This particular issue of "(...) the negative obligation of the State not to hinder effective assistance from lawyers" will be returned to in the chapter on State interference with counsel that amounts to ineffective legal assistance *per se* (chapter 9). At this stage of the research, it is sufficient to conclude with the requirement of effective legal assistance in relation to Articles 5 (3) and (4). Therefore, it can be mentioned as a final remark, that in this context the Court does appear to construe a substantive Convention right to *effective* legal assistance, rather than a formal right to counsel (see also sub-section 5.3.1.3. and 5.4.).

5.3.2.3. *The right to counsel in relation to minimum defence rights under Article 6 (3)*

Having seen that the Court considers the right to counsel "critical" for police interrogations⁸⁴⁵, pre-trial detention proceedings and proceedings regarding the examination of allegations of ill-treatment (sub-section 5.3.1. and up to sub-section 5.3.2.2. and sub-section 5.2.4.1. respectively), it is also important to examine "other" pre-trial investigative or evidence gathering-acts as they are being called under EU Directive 2013/48/EU (sub-section 5.3.2.3.).⁸⁴⁶ As a rule, the Court requires the examination of evidence to take place at an adversarial trial hearing, but an exception can be made for the pre-trial examination of witness and "real" evidence.⁸⁴⁷ "Real" evidence includes, for example, documents⁸⁴⁸

⁸⁴³ *Istratii and others v. Moldova*, Judgment of 27 March 2007, HUDOC nos. 8721/05 8705/05 8742/05, para. 89.

⁸⁴⁴ *Istratii and others v. Moldova*, Judgment of 27 March 2007, HUDOC nos. 8721/05 8705/05 8742/05, para. 90.

⁸⁴⁵ See above in sub-section 3.1.1.3.

⁸⁴⁶ See above in sub-section 3.1.1.4. 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, Official Journal of the European Union L 294/1, 6 November 2013. Hereafter Directive 2013/48/EU. The Directive also entails a right to access to a lawyer during criminal proceedings before a court, if they have not waived that right, Preamble para.19 of the EU Directive 2013/48/EU.

⁸⁴⁷ *Melnikov v. Russia*, Judgment of 14 January 2010, HUDOC no. 23610/03, para. 65.

⁸⁴⁸ *Georgios Papageorgiou v. Greece*, Judgment of 15 October 2009, HUDOC no. 59506/00, para. 35.

and recorded expert statements or reports.⁸⁴⁹ For the purpose of the analysis that will follow in this sub-section, four cases will be cited in order to explore several other investigative measures (other than police interrogations, that is).

- *What if a minor accused is, but adult co-accused are not, entitled to legal assistance during a pre-trial identification procedure?*

A first relevant case is *Yunus Aktaş and others v. Turkey*.

While *Yunus* was a minor who was entitled under domestic law to a lawyer as from his placement in police custody, the others were adults who were not entitled to invoke their right to counsel. They were all submitted to a pre-trial identification procedure while they were in custody. The authorities did not permit the applicants, including the minor *Yunus*, an opportunity to invoke their right to assistance by a lawyer at this custodial identification parade. The victim identified the applicants during the identification parade as the perpetrators. Subsequently at trial, this victim retracted this positive recognition.⁸⁵⁰ In court, the defence was not given an opportunity to hear any witnesses, including this victim. The domestic court convicted *Yunus* and the other accused on the basis of *inter alia* the result of their pre-trial identification.

Before the Court *Yunus* and the other applicants complained about the fairness of the criminal procedure, because *inter alia* they had not been afforded a right to counsel during the pre-trial identification parade. While *Yunus* was a minor and thus was under national law entitled to assistance by counsel during the parade, the other adult accused were not.

The Court held that the authorities neglected to ensure for *all* accused persons that they could have assistance by counsel during the pre-trial custodial identification parade, because:

“De plus, la Cour note que la parade d’identification, effectuée elle aussi en l’absence d’un avocat, est devenue un élément de preuve dans les motifs de l’arrêt de la cour d’assises, laquelle a pris en compte l’ensemble des éléments du dossier. (...) Or le procès-verbal relatif à cette parade d’identification ne mentionne pas si les requérants ont été informés de leur droit d’être représentés par un avocat. (...)”⁸⁵¹

Thus, the Court concluded that, even though the applicants had had an opportunity to challenge the prosecution evidence during their trial hearing, Article 6 (1) taken together with Article 6 (3) (c) was violated.⁸⁵² Therefore, the authorities seem to owe the accused an obligation regarding his right to counsel during a custodial pre-trial identification parade, even if domestic law does not afford the accused such a right.

- *What if none of the accused is entitled to legal assistance during a pre-trial identification procedure?*

For the analysis of the authorities’ obligations regarding a pre-trial identification parade, a slightly different case than the *Yunus Aktaş and others*-case is *Laska and Lika v. Albania*. Because the first case might be explained due to equal protection of the different accused (the minor and the adult accused), it is important to also explore a case in which none of the accused were entitled to “a” role of counsel during a pre-trial identification parade.

The relevant facts of that case are that *Laska and Lika* did not have a lawyer present during police interrogations, nor before and during the pre-trial identification parade which was held shortly thereafter while the accused remained in custody. Together with another person (B.L.), the two accused had to stand in a line-up, wearing white and blue balaclavas, similar in colour to those worn by the perpetrators of the crime. The two other persons in the line-up wore black balaclavas. The persons in the line-up changed positions so as to change the conditions under which the parade was

⁸⁴⁹ For a court-appointed expert, e.g. *Bönisch v. Austria*, Judgment of 6 May 1985, HUDOC no. 8658/79. For a –pre-trial-court-appointed expert, see e.g. *Giuliani and Gaggio v. Italy*, Judgment of 24 March 2011, HUDOC no. 23458/02, para. 323.

⁸⁵⁰ *Yunus Aktaş and others v. Turkey*, Judgment of 20 October 2009, HUDOC no. 24744/03, para. 49.

⁸⁵¹ *Yunus Aktaş and others v. Turkey*, Judgment of 20 October 2009, HUDOC no. 24744/03, para. 52 and later twice in para. 55.

⁸⁵² See also *Mehmet Şerif Öner v. Turkey*, Judgment of 13 September 2011, HUDOC no. 50356/08, para. 21.

held. However, *Laska and Lika* continued to wear balaclavas that were distinct from the other participants in the line-up (blue and white rather than black) and the only ones worn by the perpetrators.

Before the Court *Laska and Lika* complained about the fairness of the criminal procedure because they did not have a lawyer present at the parade. Although there was no basis in the domestic law to have a lawyer attend this investigative measure, they argued that without counsel their right to a fair trial had been violated.

About the identification parade, the Court held that it had been “(...) tantamount to an open invitation to witnesses to point the finger of guilt at both applicants and B.L. as the perpetrators of the crime”.⁸⁵³ About the absence of a lawyer or lawyers during the identification parade, the Court concluded that:

“(...) it does not transpire from the case file that the applicants waived of their own free will, either expressly or tacitly, the entitlement to legal assistance at the time of the identification parade”.⁸⁵⁴

Although domestic law did not demand legal assistance during the pre-trial identification parade, the Court found that this investigative measure lacked “(...) independent oversight of the fairness of the procedure or opportunity to protest against the blatant irregularities”.⁸⁵⁵ In the absence of a lawyer, the pre-trial identification parade constituted a manifest disregard of the rights of the accused. Consequently, the fairness of the subsequent criminal trial phases was irretrievably prejudiced. Such irretrievable prejudice had not been, and could not be, repaired at a later stage of the proceedings. The Court explained about those subsequent court hearings, which had established irregularities pre-trial but nonetheless relied upon the positive identification for *Laska’s* and *Lika’s* conviction, that:⁸⁵⁶

“(...) neither the assistance provided subsequently by a lawyer nor the adversarial nature of ensuing proceedings could cure the defects which had occurred during the criminal investigation”.⁸⁵⁷

The Court held that Article 6 (1) had been violated. Hence, the Court appears to require that the authorities notify and allow counsel to be present at a pre-trial identification procedure, especially where the results thereof are being used for the accused’s conviction. Such use does not have to be decisive for the conviction; mere use appears to be sufficient. Apparently, whether or not domestic law affords the accused a right to counsel at this procedural moment is immaterial.

- *What if no accused is entitled to legal assistance during a pre-trial vehicle search?*

For “other” pre-trial investigative or evidence gathering-acts than police interrogations and identification procedures a third and penultimate case that will be discussed is *Lisica v. Croatia*.

The police arrested two accused persons with the surname *Lisica* on suspicion of robbing a bank’s security van.⁸⁵⁸ Subsequently, the police searched both a stolen VW car left at the scene of the crime and a BMW owned by the first applicant. Neither the applicants nor their counsel were present during the initial searches. The record of the search of the VW established that the plastic mould of one of the locks was missing. Two days later, a criminal investigation was opened against the applicants and they were placed in pre-trial detention. On the following day, another search of both vehicles was carried out on the basis of a search warrant and in the presence of the applicants’ defence lawyer. A plastic mould of “a” car lock was found in the first applicant’s BMW. The court relied on that mould, among other circumstantial evidence, as proof of the fact that it presumably came from the broken lock of the stolen VW used for the robbery. The court established that the BMW confiscated

⁸⁵³ *Laska and Lika v. Albania*, Judgment of 20 April 2010, HUDOC nos 12315/04 17605/04, para. 66.

⁸⁵⁴ *Laska and Lika v. Albania*, Judgment of 20 April 2010, HUDOC nos 12315/04 17605/04, para. 67.

⁸⁵⁵ *Laska and Lika v. Albania*, Judgment of 20 April 2010, HUDOC nos 12315/04 17605/04, para. 69.

⁸⁵⁶ *Laska and Lika v. Albania*, Judgment of 20 April 2010, HUDOC nos 12315/04 17605/04, para. 68.

⁸⁵⁷ *Laska and Lika v. Albania*, Judgment of 20 April 2010, HUDOC nos 12315/04 17605/04, para. 72.

⁸⁵⁸ *Lisica v. Croatia*, Judgment of 25 February 2010, HUDOC no. 20100/06.

by the police had been entered by two police officers, without either the applicants or their lawyer being present, sometime between the first unofficial (without a warrant) and the second official search. However, the court had also concluded that the mould had not been placed in the car by the police officers. The *Lisicas* were ultimately convicted.

The *Lisicas* complained that their criminal procedure had not been fair because of the way in which the vehicle search had been conducted. It has to be noted for the purpose of this research that they did not explicitly refer to the lack of an opportunity to invoke their right to legal assistance.

About the search of the VW and the first two searches of the BMW, the Court held that they did not comply “(...) with the minimum requirement that the defendant in the criminal proceedings is given an adequate opportunity to be present during the search”.⁸⁵⁹ The Court thereupon considered that the applicants in this case, who had already been arrested and thus had been identified by the authorities, were not informed of the two searches of the BMW and thus not given an opportunity to attend during the search.⁸⁶⁰ It continued to state that:

“In the present case the search of the VW (...) as well as the entry of the police into the first applicant’s [BMW] (...), both without the applicants or their counsel being present or even informed of these acts and without a search warrant for the search of the BMW (...), produced an important piece of evidence [i.e. the mould]” [Added by the author].⁸⁶¹

The Court concluded that the manner in which the encountered mould was used in the proceedings against the applicant had an effect on the proceedings as a whole and caused them to fall short of the requirements of a fair trial. This ruling may not imply that the Court considers it necessary that a lawyer is present during *all* vehicle searches if the accused or at the very least “neutral witnesses” would have been present. However, the Court required here the presence of persons who were unrelated to the police, not part of “the State apparatus” of the police and not an “ally of the prosecution”.⁸⁶² Moreover, it would have been possible to have a lawyer present at the car search, because the *Lisicas* had already been identified. After all, the *Lisicas* had already hired a private lawyer before the searches after having been made out as suspects. Seeing that the domestic court used the car mould as an important piece of evidence to convict the accused, the Court accordingly concluded that Article 6 (1) had been violated.⁸⁶³ Therefore, the Court appears to require that the authorities notify and allow counsel to be present at a car search regarding “real” evidence instead of testimonial evidence, especially where the results thereof are being used for the accused’s conviction.

- *What if the accused is not entitled to legal assistance during a pre-trial witness confrontation procedure?*

The reference to testimonial evidence above is relevant in the context of the last case that will be pointed out, *Melnikov v. Russia*.

The authorities had subjected *Melnikov* to a pre-trial face-to-face confrontation procedure with witness S., who had told the police that *Melnikov* was his accomplice in the commission of thefts during which S. himself took part. Before this confrontation, an officer questioned S. in the absence of both *Melnikov* and his lawyer.⁸⁶⁴ The authorities had informed both S. and *Melnikov*, in the absence of a lawyer, that they could put questions to each other. S. would have expressed that he did not want to exercise his right to put questions to *Melnikov*. *Melnikov* contended before the Court that he had not known of any right to pose questions to S. and for that particular reason did not sign the police record of the pre-trial face-to-face confrontation. At the trial phase, *Melnikov* could not examine S. as a witness who had at that stage evaded prosecution and was in hiding. The judge read out, in the interest

⁸⁵⁹ *Lisica v. Croatia*, Judgment of 25 February 2010, HUDOC no. 20100/06, para. 56.

⁸⁶⁰ *Lisica v. Croatia*, Judgment of 25 February 2010, HUDOC no. 20100/06, para. 57.

⁸⁶¹ *Lisica v. Croatia*, Judgment of 25 February 2010, HUDOC no. 20100/06, para. 60.

⁸⁶² *Lisica v. Croatia*, Judgment of 25 February 2010, HUDOC no. 20100/06, paras. 56 and 58.

⁸⁶³ *Lisica v. Croatia*, Judgment of 25 February 2010, HUDOC no. 20100/06, para. 53.

⁸⁶⁴ *Melnikov v. Russia*, Judgment of 14 January 2010, HUDOC no. 23610/03, paras. 72-76.

of an “(...) objective examination of the case”, S.’s pre-trial deposition despite *Melnikov*’s objection to that effect. The court convicted *Melnikov* on the basis of, amongst other evidence, the face-to-face confrontation with S.

Melnikov complained about the fairness of the pre-trial face-to-face confrontation procedure and thereby the overall fairness of the criminal procedure.

The Court held that the domestic court had done nothing more than to state that S.’s absence at the trial phase was counterbalanced by the fact that *Melnikov* had a previous opportunity to question S. during the pre-trial face-to-face confrontation.⁸⁶⁵ The Court ruled regarding this opportunity for a pre-trial confrontation of S. that:

“(...) the applicant was not assisted by counsel during the confrontation, apparently, because counsel had not been summoned to it. (...). Thus,, it is unlikely that in the absence of legal advice the applicant was in a position to understand the confrontation procedure and effectively exercise his right to examine a “witness” with a view to casting doubt on the authenticity and credibility of S.’s incriminating statement. The Court is not prepared to consider that the applicant validly waived his right to examine S.”⁸⁶⁶

The Court considered that the pre-trial confrontation procedure in the absence of a lawyer was not “(...) an appropriate substitute” for S.’s examination in open court.⁸⁶⁷ There was no doubt that the domestic courts at all instances had undertaken a careful examination of S.’s pre-trial deposition, as they themselves held in a reasoned verdict. Nonetheless, the authorities restricted *Melnikov*’s defence rights to an extent that was incompatible with the guarantees provided by Article 6.⁸⁶⁸ Therefore, the Court held that Article 6 (1) and 6 (3) (d) had been violated.⁸⁶⁹ Hence, this last case will also be taken into consideration in the following concluding remarks about the obligations of the authorities towards the accused to allow counsel to play “a” role during investigative or other evidence gathering-acts other than police interrogations.

Consequently, the EU Directive 2013/48/EU⁸⁷⁰ dictates that the authorities have to guarantee the right to counsel to the accused for investigative or other evidence gathering-acts such as identification parades, a car search and a face-to-face confrontation with a witness. The Court considers that the right to legal assistance is supportive of the right to examine, or to have examined, evidence against the accused in order to ensure a fair criminal procedure “as a whole”. When evidence is obtained and examined pre-trial and is used as evidence in court, that pre-trial examination must in Convention terms be “(...) an appropriate substitute”⁸⁷¹ for examination of the witness or “real” evidence at an adversarial hearing. Thus,, the Court appears to consider that the authorities have to ensure that the accused can invoke his right to legal assistance because it is “critical” for the fairness of the pre-trial investigative measure and thereby the criminal procedure “as a whole”. Consequently, counsel should be able to play “a” role in order to protect the rights of the accused, whether specifically under the right under Article 6 (3) (d) or more generally the right under 6 (1).

5.3.2.4. *The right to effective legal assistance in relation to minimum defence rights under Article 6 (3)?*

The previous sub-section indicates the importance of a further examination as to whether the Court also construes a Convention right to *effective* legal assistance at what the EU Directive 2013/48/EU

⁸⁶⁵ *Melnikov v. Russia*, Judgment of 14 January 2010, HUDOC no. 23610/03, para. 78.

⁸⁶⁶ *Melnikov v. Russia*, Judgment of 14 January 2010, HUDOC no. 23610/03, para. 79.

⁸⁶⁷ *Melnikov v. Russia*, Judgment of 14 January 2010, HUDOC no. 23610/03, paras. 80-81.

⁸⁶⁸ *Melnikov v. Russia*, Judgment of 14 January 2010, HUDOC no. 23610/03, para. 83.

⁸⁶⁹ *Melnikov v. Russia*, Judgment of 14 January 2010, HUDOC no. 23610/03, paras. 83-84.

⁸⁷⁰ See above in sub-section 3.1.1.4. 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, Official Journal of the European Union L 294/1, 6 November 2013. Hereafter Directive 2013/48/EU. The Directive also entails a right to access to a lawyer during criminal proceedings before a court, if they have not waived that right, Preamble para.19 of the EU Directive 2013/48/EU.

⁸⁷¹ *Melnikov v. Russia*, Judgment of 14 January 2010, HUDOC no. 23610/03, paras. 80-81.

would describe as “other” pre-trial investigative or evidence gathering-acts.⁸⁷² This sub-section will therefore examine how the Court gives the Convention right to counsel a formal or substantive interpretation, at these other “critical” pre-trial stages than police interrogations.

- *Begu v. Romania*

The relevant facts of the case of *Begu v. Romania* are that *Begu* was a police officer who voluntarily went to the police station.⁸⁷³ At the station, he was searched for reasons other than being an accused of any crime. The authorities did not formally arrest *Begu* for any offence or deprive him of his liberty for the purpose of interrogations by placing him in police custody or otherwise. Rather, the commander of *Begu* subjected him to a body search in order to look for evidence of the possible acceptance of a bribe as a professional error. This search was conducted in the presence of two witnesses and an appointed legal aid lawyer.

Begu complained before the Court about the fact that during the body search he had an appointed lawyer present, who he did not choose. Therefore, he complained that the authorities had not guaranteed him his right to *effective* legal assistance at the body search. *Begu* consequently did not contend that he was not afforded legal assistance at all, but rather that he had not had effective legal assistance as the Convention requires.

As a response, the Government contended before the Court that it could have done no more than appointing a lawyer to *Begu*.

The Court responded to *Begu*'s complaint by holding in general terms that it holds legal assistance at this early stage of a body search by the police to be important, with a reference to its *Salduz*-case:

“Dans l’affaire *Salduz* précitée (...), la Cour a souligné l’importance du stade de l’enquête pour la préparation du procès et la nécessité d’être assisté par un avocat dès le premier interrogatoire réalisé par la police, à moins qu’il ne soit démontré dans les circonstances de chaque espèce qu’une restriction à ce droit était nécessaire. La tâche de l’avocat consiste notamment à faire en sorte que soit respecté le droit de tout accusé de ne pas s’incriminer lui-même. Ce droit présuppose que, dans une affaire pénale, l’accusation cherche à fonder son argumentation sans recourir à des éléments de preuve obtenus par la contrainte ou les pressions au mépris de la volonté de l’accusé (...) ».⁸⁷⁴

The Court thus connects the importance of a lawyer at this pre-trial body search to the need for protection of the right of the individual (who here was not an accused) not to incriminate himself.⁸⁷⁵ The Court thereupon states that in this case the police had only retrieved objects in *Begu*'s pockets. They did nothing to “coerce” *Begu* into providing the police with statements that could potentially be obtained contrary to his will.⁸⁷⁶ Because the domestic court only used the “real” evidence of traces of bribes on his hands for *Begu*'s conviction, the Court concluded that the authorities had conducted the body search, which was done in the presence of a legal aid lawyer, in a manner that complied with the Convention. The Court, which realised that *Begu* had not had the lawyer of his choosing, concluded that the authorities had *not* significantly curtailed *Begu*'s freedom of action and thus violated the right to a fair trial in this case.

⁸⁷² See above in sub-section 3.1.1.4. 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, Official Journal of the European Union L 294/1, 6 November 2013. Hereafter Directive 2013/48/EU. The Directive also entails a right to access to a lawyer during criminal proceedings before a court, if they have not waived that right, Preamble para.19 of the EU Directive 2013/48/EU.

⁸⁷³ See the general principle formulated in *Martinen v. Finland*, Judgment of 21 April 2009, HUDOC no. 19235/03, para. 64.

⁸⁷⁴ *Begu v. Romania*, Judgment of 15 March 2011, HUDOC no. 20448/02, para. 139.

⁸⁷⁵ *Begu v. Romania*, Judgment of 15 March 2011, HUDOC no. 20448/02, para. 140.

⁸⁷⁶ *Begu v. Romania*, Judgment of 15 March 2011, HUDOC no. 20448/02, para. 140, with reference to *Saunders v. United Kingdom*, Judgment of 17 December 1996, HUDOC no. 19187/91, para. 69.

This *Begu*-case is important for several reasons, including its mention of the right to *effective* legal assistance at a body search of a person who voluntarily came to the police station and was at liberty to leave. Moreover, in this case the Court's use of the term of freedom of action of a suspect under the *Salduz*-rule in relation to the accused's rights to remain silent and the right not to incriminate himself (sub-section 5.3.1.2.). Thus., the Court appears to distinguish between the role that counsel should be able to play regarding the collection of, on the one hand, "real" evidence, and on the other possibly incriminating statements made by the accused. This sub-section thus gives an important indication as to what will have to be explored further in the next Convention chapter that takes a horizontal perspective (chapter 7).

5.3.2.5. Concluding remarks regarding legal assistance at pre-trial moments other than police interrogations

To conclude this entire sub-section 5.3.2., the similarities have to be noted between the obligations of the authorities regarding on the one hand, the right to counsel at police interrogations (sub-section 5.3.1.)⁸⁷⁷, and on the other pre-trial detention proceedings, proceedings regarding the examination of allegations of ill-treatment, and "other" pre-trial investigative or evidence gathering-acts (sub-section 5.3.2.). The Court requires that the authorities ensure access to counsel and in "certain cases" appoint legal aid counsel during these other pre-trial stages than police interrogations when legal assistance is "critical" for the fairness of the criminal procedure "as a whole" (sub-sections 5.3.1.1. to 5.3.1.4.). Legal assistance at these stages is important for the protection of the following rights of the accused: the right to remain silent, the right not to incriminate oneself, the right not to be unnecessarily detained, the right not to be ill-treated, the right to effectively participate and the right to be heard in a pre-trial hearing, as well as the right to examine (witness or "real") evidence against one. While the right to counsel is "critical" at procedural stages under Article 6 (sub-sections 5.3.2.3. and 5.3.2.4.), sometimes the Court also "derives" a right to legal assistance by a lawyer for pre-trial detention proceedings governed by Article 5 (sub-sections 5.3.2.1. and 5.3.2. 2.). Moreover, at these "critical" stages, the Court does not only construe the right to counsel formally, but also requires this right to be "practical and effective". In other words, cases have been described in which the Court requires the legal assistance provided by counsel to the accused to have been *effective* both for pre-trial detention proceedings and the "other" pre-trial investigative or evidence gathering-acts to comply with the Convention (sub-sections 5.3.2.2. and 5.3.2.4.). What the specific role of counsel will have to be for his legal assistance to be *effective* will be an important question for the next Convention chapter (chapter 7). This sub-section, which laid the foundations for that subsequent exploration, does indicate that the Court examines the obligation of authorities in relation to the right to counsel pre-trial, especially in light of the right of the accused to be effectively defended during the adversarial hearing. That "critical" stage concerns the first instance trial and the *de novo* appeal, and will be studied in the next sub-section (sub-section 5.3.3.).

5.3.3. Trial and *de novo* appeal stage

This sub-section will turn to the stage that, in the normal chronology of a criminal proceedings, follows after the pre-trial stages of police interrogations and other such pre-trial moments or junctures. The adversarial hearing is the first instance trial and can entail the appeal phase at which issues of fact and law are being examined *de novo*. In summary, the stages discussed here will be the trial and *de novo* appeal stage.

5.3.3.1. The right to counsel at the trial and *de novo* appeal stage

The Court holds "(...) that, although not absolute, (...) everyone charged with a criminal offence has a right to be effectively defended by a lawyer, assigned officially if need be", because it "(...) is one of the fundamental features of a fair trial."⁸⁷⁸ The Court deems the trial stage, which has to be adversarial, to be "key" for the fairness of the criminal procedure "as a whole", and therefore holds the following

⁸⁷⁷ See above in sub-section 3.1.1.3.

⁸⁷⁸ *Nalbandyan v. Armenia*, Judgment of 31 March 2015, HUDOC nos. 9935/06 23339/06, para. 140.

about the obligations of the authorities to ensure preconditions for the right to an effective defence before and at the adversarial hearing⁸⁷⁹:

“Paragraph 1 of Article 6 taken together with paragraph 3 (...), also requires the Contracting States to take positive steps, in particular to inform the accused promptly of the nature and cause of the accusation against him, to allow him adequate time and facilities for the preparation of his defence, to secure him the right to defend himself in person or with legal assistance, and to enable him to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. The latter right not only entails equal treatment of the prosecution and the defence in this matter (...), but also means that the hearing of witnesses must in general be adversarial”⁸⁸⁰.

As follows from this citation, the authorities also have their own responsibilities beyond ensuring the right to counsel to the accused, which have an effect on the effective defence of both the assisted and unassisted accused at trial.

First, a specific responsibility lies with the prosecutor, who has to ensure that a thorough, effective and independent criminal investigation has been conducted pre-trial and that its burden of proof is met in court.⁸⁸¹ In principle, doubts regarding the prosecution’s fulfilment of that burden of proof must therefore benefit the accused. Accordingly, relevant challenges to the – admissibility of – evidence by the defence in this respect have, *prima facie*, to be taken into account by the court (*in dubio pro reo*).

Second, the court is responsible for guaranteeing equality of arms and adversariality of the proceedings, including hearing the accused and to personally give the assisted and unassisted accused an opportunity to effectively participate in court.⁸⁸² To make explicit that obligation of the court towards an assisted accused rather than an unassisted accused, because of its relevance for this research, it has to ensure that the accused personally has:

“(…) a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed. The defendant should be able, *inter alia*, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence (...). The circumstances of a case may require the Contracting States to take positive measures in order to enable the applicant to participate effectively in the proceedings (...)”⁸⁸³.

Having discussed some case law already that indicates the obligations of the authorities regarding the right to counsel owed to the accused, the remainder of this sub-section will explore the question that has been asked in the context of previous sub-sections as well (sub-sections 5.3.1. and 5.3.2.). Does the Court construe the right to counsel formally, or is the right substantively interpreted so that *effective* legal assistance at trial is required for the Convention to be respected?

5.3.3.2. *The right to effective assistance by counsel at the trial and de novo appeal stage?*

It is important to highlight another aspect of the case of *Yaremenko v. Ukraine*, a case which has already been addressed when discussing appointment of counsel when a severe penalty is being risked (sub-section 5.2.2.).⁸⁸⁴ In the *Yaremenko*-case, in which the accused was believed to have murdered several taxi drivers, an issue that has not yet been discussed arose, concerning *Yaremenko*’s substantive right to *effective* legal assistance. In other words, the domestic court considered that

⁸⁷⁹ E.g. *Pakelli v. Germany*, Judgment of 25 April 1983, HUDOC no. 8398/78, para. 31.

⁸⁸⁰ E.g. *Barberà, Messegué and Jabardo v. Spain*, Judgment of 6 December 1988, HUDOC no. 10590/83, para. 78

⁸⁸¹ E.g. *Capeau v. Belgium*, Judgment of 13 January 2005 HUDOC no. 42914/98, para. 25 and *John Murray v. the United Kingdom [GC]*, Judgment of 8 February 1996, HUDOC no. 18731/91, para. 54.

⁸⁸² E.g. *Barberà, Messegué and Jabardo v. Spain*, Judgment of 6 December 1988, HUDOC no. 10590/83, para. 78 .

⁸⁸³ *Timergaliyev v. Russia*, Judgment of 14 October 2008, HUDOC no. 40631/02, para. 51.

⁸⁸⁴ *Yaremenko v. Ukraine*, Judgment of 12 June 2008, HUDOC no. 32092/02, para. 86. See *Shabelnik v. Ukraine*, Judgment of 19 February 2009, HUDOC no. 16404/03, para. 58.

Yaremenko had waived his right to a retained lawyer. Consequently, the bench appointed replacement legal aid lawyers to *Yaremenko* so that he would be legally assisted in court. However, *Yaremenko* contended that his privately retained lawyer had been removed after giving him advice on his right to remain silent and that the court-appointed “replacement” lawyers did not give him effective legal assistance.

Before the Court, *Yaremenko* complained about a violation of Article 6.

The Government argued before the Court that it had ensured that *Yaremenko* had replacement lawyers and thus guaranteed that he had had effective legal assistance.

The Court held that *Yaremenko* had not in fact had effective legal assistance because these “replacement” lawyers only saw him once before he was questioned before the trial phase. The replacement lawyers provided services that were, what the Court called, merely of a “(...) notional nature”.⁸⁸⁵ Moreover, the Court considered it to be “scarcely credible” that *Yaremenko* had waived his right to have his own privately retained lawyer present in court.⁸⁸⁶ Rather, the Court held that the authorities had *removed* the lawyer from *Yaremenko*’s case because his retained lawyer had informed the accused of his right to remain silent pre-trial.

Therefore, the Court holds that at trial the authorities cannot force the accused, who has a lawyer who can make submissions on his behalf, into self-representation.⁸⁸⁷ As a related issue, when at the trial phase an accused freely chooses to remain absent, the authorities also cannot deprive him of his right to be effectively represented by a lawyer in his absence.⁸⁸⁸ Overall, this means that the Court appears to construe the right to counsel at the “critical” stage of trial substantively by requiring that *Yaremenko* indeed had *effective* legal assistance in court, rather than formally.⁸⁸⁹ This description also ties back to the role division between counsel who has to defend the accused with zeal and the importance that the rights of the accused are being respected in a fair trial “as a whole”, for which the adversarial hearing is a central “critical” stage (sub-section 5.2.3.1.). Therefore, this description of the *Yaremenko* case also already lays the foundations for a further examination as to how counsel should act so that his trial services are indeed living up to the requirement of *effective* legal assistance, rather than being “notional” (chapter 7). Similarly, this case description is already relevant for the chapters regarding State interference with counsel and an intervention in the case out of *ineffective* legal assistance (chapters 9 and 11).

5.3.3.3. Concluding remarks regarding legal assistance at the critical stage of the adversarial trial hearing

To make concluding remarks about this entire sub-section 5.3.3., the Court considers that the authorities have to guarantee the right to counsel to the accused at the “critical” stage of the adversarial hearing, which includes the first instance trial and the *de novo* appeal. The trial stage might well be the most important phase for the Court to determine whether the criminal procedure “as a whole” was fair, because pre-trial preparation should culminate in an adversarial trial at which also equality of arms and adversariality are being guaranteed (sub-section 5.3.3.1.). Previous sub-sections have already indicated how the Court’s “as a whole” approach to violations to the right to counsel pre-trial can, in exceptional circumstances, be “cured” at the “critical” stage of trial. The centrality of the adversarial trial hearing had already been noted at the beginning of this chapter (sub-section 5.2.3.1.). This sub-section has also provided an exemplary case that shows how the Court construes a substantive right to *effective* legal assistance during the trial stage (sub-section 5.3.3.2.). The Court holds that the authorities have to allow counsel to play a role at the “critical” stage of the adversarial “key” for the fairness of the criminal procedure “as a whole” (sub-section 5.3.3.). Additionally, the Court concludes that some pre-trial damage to the accused can be “cured” during a truly adversarial trial hearing, which in itself has

⁸⁸⁵ *Yaremenko v. Ukraine*, Judgment of 12 June 2008, HUDOC no. 32092/02, para. 90.

⁸⁸⁶ *Yaremenko v. Ukraine*, Judgment of 12 June 2008, HUDOC no. 32092/02, para. 89.

⁸⁸⁷ E.g. *Hanževački v. Croatia*, Judgment of 16 April 2009, HUDOC no. 17182/07, para. 25 and *Yaremenko v. Ukraine*, Judgment of 12 June 2008, HUDOC no. 32092/02, para. 86.

⁸⁸⁸ E.g. *Van Geyselghem v. Belgium*, Judgment of 21 January 1999, HUDOC no. 26103/95, para. 34, *Krombach v. France*, Judgment of 13 February 2001, HUDOC no. 29731/96, paras. 84, 89 and 90, and *Sejdovic v. Italy* [GC], Judgment of 1 March 2006, HUDOC no. 56581/00, para. 92.

⁸⁸⁹ *Yaremenko v. Ukraine*, Judgment of 12 June 2008, HUDOC no. 32092/02, para. 86. See *Shabelnik v. Ukraine*, Judgment of 19 February 2009, HUDOC no. 16404/03, para. 58.

to abide by the principles of both equality of arms and adversariality to be fair (sub-sections 5.3.1. and 5.3.2.). All the minimum defence rights under Article 6 (3) but also those rights that are inherent in Article 6 (1) such as the right to remain silent, the right not to incriminate oneself, the right to attend the hearing, and the right to participate effectively during the hearing have to be protected at this “critical” trial stage. Having seen the importance attached to the right to assistance by counsel during first-instance proceedings, it is almost inevitable that the Court considers legal assistance to be also “critical” for legal remedies such as an appeal or an appeal in cassation (on points of law only) – the subject that will be addressed immediately below (sub-section 5.3.4.).

5.3.4. Appeal in cassation stage

This sub-section will turn to the appeal in cassation stage that in the normal chronology of a criminal proceedings, follows after the stage of the adversarial hearing, which includes the first instance trial and the *de novo* appeal stage. The title uses the civil law wording of appeal in cassation, but also applies to the common law phase of appeal in which only points of law are being adjudicated, rather than points of law and fact.

5.3.4.1. The right to counsel at appeal in cassation

Although under the Convention there is a separate Protocol regarding appeals⁸⁹⁰, which has not been ratified by every Member State such as the Netherlands, the Court has held that Article 6 is itself applicable to appeals⁸⁹¹ because:

“(...) the guarantees of Article 6 (...) continue to apply to the appeal proceedings, since those proceedings form part of the whole proceedings which determine the criminal charge at issue (...)”.⁸⁹²

Article 6 in that respect can foreshadow later procedural stages such as appeal in cassation, while the Court examines its nature in order to establish whether the authorities should have allowed the accused an opportunity to invoke his right to legal assistance.⁸⁹³ It has already been explained that Article 6 fully applies where the case has been remitted, where the appeal hearing is in fact a *de novo* hearing and where there was no full-fledged adversarial hearing earlier in the criminal procedure (sub-section 5.3.3.).⁸⁹⁴ It is important to expand here on that reading in order to mention that the Court considers Article 6, including the right to have access to a lawyer, not only relevant for an appeal at which it is effectively the first opportunity for an adversarial hearing with equality of arms, but also – though in a more specific manner – for appeals in cassation. The Court considers that, in principle, appeals must be available for all types of criminal offences, “(...) from the most straightforward to the most complex”.⁸⁹⁵ The reason for this is that the “(...) right to the fair administration of justice holds so prominent a place in a democratic society that it cannot be sacrificed for the sake of expedience”.⁸⁹⁶ The right to counsel at the stage of appeal in cassation is important especially in the context of equality of arms (also a lawyer on the side of the prosecution) and adversariality (can the bench hear complex issues of law by both sides of the defence and prosecution). While the Convention leaves a margin of appreciation as to whether or not Member States require mandatory assistance by counsel at the appeal in cassation stage, the assistance provided by counsel has to be *effective*. This has already been settled in the case of *Artico v. Italy* that has been mentioned at multiple stages in this research, due to its importance for this study into ineffective legal assistance and its redress within Convention-conforming criminal proceedings (sub-section 5.3.4.2.).

⁸⁹⁰ Article 2 to Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, Strasbourg, 22 September 1984.

⁸⁹¹ *Didier v. France* (dec.), Commission decision of 27 August 2002, HUDOC no. 58188/00, paras. 2-3 and *Lalmahomed v. the Netherlands*, Judgment of 22 February 2011, HUDOC no. 26036/08.

⁸⁹² *Ross v. the United Kingdom* (dec.), Commission decision of 11 December 1986, HUDOC no. 11396/85, para. 3.

⁸⁹³ *Ross v. the United Kingdom* (dec.), Commission decision of 11 December 1986, HUDOC no. 11396/85, para. 3.

⁸⁹⁴ *Samokhvalov v. Russia*, Judgment of 12 February 2009, HUDOC no. 3891/03, para. 44 with reference to *Momell and Morris v. the United Kingdom*, 2 March 1987, HUDOC nos. 9562/81 9818/82, para.58, as regards the issue of leave to appeal, and *Sutter v. Switzerland*, 22 February 1984, HUDOC no. 8209/78, para. 30, as regards the court of cassation.

⁸⁹⁵ *Lalmahomed v. the Netherlands*, Judgment of 22 February 2011, HUDOC no. 26036/08, para. 36.

⁸⁹⁶ *Lalmahomed v. the Netherlands*, Judgment of 22 February 2011, HUDOC no. 26036/08, para. 36.

5.3.4.2. *The right to effective assistance by counsel at the appeal in cassation stage?*

In *Artico v. Italy*, which has only been cited for the general principle in chapter 1, the Court held that the convicted person was unable to ensure a fair cassation hearing without effective assistance by counsel.⁸⁹⁷ *Artico* had a lawyer who had prepared a cassation appeal brief, but this lawyer was not allowed to attend the court hearing. Accordingly, *Artico* was in court on his own. In the cassation appeal brief upon which *Artico* ultimately had to plead alone in court the lawyer did not include the crucial issue of the statutory limitation of the indicted offence.

The Government argued before the Court that the lawyer was to blame because he had neglected to include this issue in his brief.

The Court held that the cassation brief was very extensive on other, factual issues. The authorities ought to have appointed a legal aid lawyer who was present during the cassation appeal hearing, as a matter of equality of arms during a cassation hearing at which the prosecutor was represented and out of adversariality so that the court would hear both the defence and prosecution side. In the Court's view only a lawyer could have countered the pleadings of the public prosecutor's department in a public hearing that was devoted to a thorough discussion of this complex legal issue of statutory limitation.

5.3.4.3. *Concluding remarks regarding legal assistance at the critical post-trial stages*

To end this section with concluding remarks that address sub-section 5.3.4., the Court considers the right to legal assistance to be critical for legal remedies in the aforementioned ways. Accordingly, the authorities have to provide preconditions for the accused, who can be afforded, in principle, adequate legal assistance and thus an effective defence during the appeal and the appeal in cassation stages (sub-section 5.3.4.1.). Sometimes the Court will find post-trial stages to be the natural follow-up after the adversarial trial stage, which it then examines more closely. Sometimes the Court will have to explore the appeal stage, especially the one that addresses issues of facts and law *de novo*, on its abidance of the principles of equality of arms and adversariality, due to damage done at pre-trial that has to be "cured". An example of the Court requiring *effective* legal assistance post-trial has been provided in this section as well (sub-section 5.3.4.2.). It is only natural that this case description of *Artico v. Italy* especially raises questions that this research will only be able to elaborate upon later in this book (chapters 7, 9 and 11). Therefore, this sub-section has deliberately limited the description to pointing out that the Court holds that the authorities have to ensure the right to counsel to the accused at the "critical" stage of appeal in cassation (post-trial stages) and that the Court appears to consider this right substantively by requiring the legal assistance provided to be *effective*. Both elements are essential for this research because (i) it forms the legal basis for having a founded Convention-complaint about ineffective legal assistance in the first place and (ii) it explains how the right to counsel has to be "practical and effective" in order for the Convention to be respected.

5.4. The Convention right to effective legal assistance?

Since 1980 at least, the Court appears to have recognised that several rights and principles are not fulfilled if counsel fails to provide *effective* legal assistance to the accused (sub-section 5.3.4.2.). At "critical" procedural stages – ranging from police interrogations to the appeal in cassation stage – the Court appears to explain that the Convention right to counsel will only be respected if *effective* legal assistance has been ensured. This observation is important because the right to counsel is a legal ground for a Convention-worthy complaint of *ineffective* legal assistance, as the leading theme for the central research question. In particular, it is imperative to note that the Court appears to interpret the Convention right to counsel as a substantive entitlement that will only be fulfilled if the accused has had *effective* legal assistance. The most important procedural phase for the Court to assess whether or not this substantive right has been guaranteed, appears to be the adversarial hearing. However, under certain circumstances, the Court also appears to determine whether the accused has had an effective defence by counsel's equally effective legal assistance pre- and post-trial. This observation is important for this study into ineffective legal assistance and its redress in Dutch criminal proceedings because of the strong leading assumption that the Court did not construe the right to counsel

⁸⁹⁷ *Artico v. Italy*, Judgment of 13 May 1980, HUDOC no. 6694/74, para. 34.

substantively. For this same reason, the next section will draw a conclusion that also takes into consideration this preliminary conclusion.

5.5. Conclusion

This conclusion sets out to answer the leading question for this chapter: What obligations do the authorities owe to the accused regarding his right to counsel under the Convention?

The answer to this question is fourfold, in accordance with the structure of this chapter that has been arrived at by taking a (first) vertical perspective that determines the obligations regarding the right of the accused to assistance by counsel owed by the State to the individual under the Convention.

First, the obligations owed by the authorities to the accused stem from the Convention right to legal assistance by retained or appointed counsel. Under the Convention, the authorities can have an obligation to ensure that the accused can retain counsel when he is “(...) charged with a criminal offence”, often referred to as providing access to a lawyer. In “certain cases”, the authorities have to go one step further and appoint a legal aid lawyer in the interests of justice. “Certain cases” concern an accused who is vulnerable, or who finds himself in situations that make him vulnerable, or both.

Second, the Court appears to take a “critical” stages-approach to the right to legal assistance. Consequently, the authorities are obliged to provide the accused with an opportunity to retain counsel at procedural stages or junctions that are “critical” for the fairness of the criminal procedure “as a whole”. Stages of the proceedings mentioned in this chapter include police interrogations, proceedings regarding pre-trial detention, pre-trial investigative or evidence gathering-acts “other” than police interrogations, trial, appeal (on points of law and facts) and appeal in cassation (points of law “only”). These same stages will, when implemented in the Netherlands, also become binding under EU Directive 2013/48/EU, to the extent explained above. As a related issue, the Court sometimes derives the right to counsel from the broader right of the accused to a fair trial “as a whole”. An example of a “derived” right to counsel is when the authorities owe a right to counsel for an accused who participates in proceedings regarding allegations of his ill-treatment because those proceedings have to guarantee equality of arms and adversariality.

Third, the Court construes the right to counsel as an entitlement, not an obligation. Consequently, the accused can waive his right to counsel, for example to proceed *pro se* during the critical stage of police interrogations. The Court does put an obligation on the domestic authorities – particularly the national courts – to check whether the accused has renounced his right to counsel up to the standard of “knowingly and intelligently”. This standard is higher than for waivers of other Convention rights such as the entitlement to attend the hearing or to lodge an appeal, which have to be done up to the normal “freely and unequivocally” waiver-standard. The reason the Court sets this higher standard is that the right to counsel is deemed to be “(...) a fundamental right among those which constitute the notion of fair trial” and ensures “(...) the effectiveness of the rest of the foreseen guarantees of Article 6 of the Convention”. The right to counsel thus requires the “special protection” of the “knowingly and intelligently” waiver-standard. Consequently, under the Convention, the authorities are obliged to ensure the right to legal assistance to the accused not only as an individual right of the accused but also as a procedural guarantee for the fairness of the criminal procedure “as a whole”.

Fourth and finally, repeated case law appears to indicate that the Court construes the right to counsel substantively by requiring that the accused has been afforded *effective* legal assistance during a fair trial, in particular during the “critical” stage of the “adversarial hearing” at the first instance trial or the *de novo* appeal. This focus on the adversarial hearing should not be misunderstood as if the Court would not require effective legal assistance pre- or post-trial, e.g. during police interrogations and pre-trial detention proceedings and appeal in cassation (*Pavlenko v. Russia*, *Lebedev v. Russia* and *Artico v. Italy*; sub-section 5.3.1.3, 5.3.3.2. and 5.3.4. respectively). Rather, it means that under its “as a whole”-approach, the Court will explore in particular whether the accused has had an effective defence at the first instance trial and/or the *de novo* appeal. An important initial observation that has to be made in this context is that the Court does not seem to find the mere presence and notional services of counsel to be sufficient to fulfill the Convention right. Instead, the Court appears to consider that the right to counsel has to be “practical and effective” and thus appears to assess – some elements at least – the quality of the counsel’s performance to determine that the right to a fair trial has been respected. The following chapters on the Convention will have to explore what this particular

observation means for the responsibilities of counsel, if any (chapter 7). Additionally, it prompts a further examination into the possible negative obligation that prohibits State interference (chapter 9) as well as the potential positive obligation that requires State intervention when authorities are confronted with ineffective legal assistance (chapter 11). Those explorations will require a horizontal and second and third vertical perspective respectively.

This conclusion regarding the right to counsel under the Convention, as explained in this chapter, will be relevant for the subsequent examination of the right to counsel in Dutch criminal proceedings. The next chapter will set out to do just that, by exploring how the right to counsel is being construed in the Netherlands (chapter 6).

CHAPTER 6. RIGHT TO COUNSEL IN DUTCH CRIMINAL PROCEDURE

6.1. Introduction

This chapter builds on the previous chapters, and pays particular attention to the question of the content and scope of Article 28 Sv and the directly applicable Article 6 (3) (c). This latter topic is particularly relevant for this research into ineffective legal assistance and its redress in Dutch criminal proceedings, because of two reasons at least. First, the right to counsel is important for this research, amongst other issues because it has to be applicable for there to be a legal ground for a Convention-worthy complaint of *ineffective* legal assistance in the first place. Therefore, it will be important to explore at what stages, according to Dutch law and case law, the authorities are required to ensure access to counsel or go one step further by securing legal assistance from appointed legal aid counsel within criminal proceedings. As a second and related reason, it will have to be determined whether under Dutch law and case law at these procedural stages or junctures counsel can merely be present to assist the accused (a formal interpretation) or should have provided the accused with *effective* legal assistance (substantive interpretation). The latter issue is relevant because chapter 2 on the conceptual framework has already explained that some Dutch scholars argue that neither Dutch law and case law nor the Court requires a substantive interpretation for the right to counsel to be respected. On the basis of that assumption, they submit that the authorities in Dutch criminal proceedings are required to intervene in the case “only” when “(...) the lawyer is absent or otherwise does practically nothing at all for the accused” contend that.⁸⁹⁸ On this basis, academics such as Spronken (and Prakken, amongst others) argue that the Court supposedly does not assess itself and, by extension, does not want domestic courts to inquire into the quality of the performance of counsel (sub-section 2.2.3.2.). Seeing this scholarly perspective, it is important to determine whether this reading of the Court’s case law, which does not seem to conform with the previous chapter, is also the prevalent understanding of what the right to counsel entails in Dutch criminal proceedings (chapter 5). This examination can only take place from a first vertical perspective because it centers on the relationship between the authorities and the accused whose right to an effective defence has to be guaranteed. From this perspective and as explained in chapter 2, this chapter will therefore seek to answer its leading question, which is: What obligations do the authorities owe to the accused regarding his right to counsel in Dutch criminal procedure?

This chapter will give a first indication of the important aspects of the conceptual framework of relevant rights, context and cross-cutting notions and perspectives. Most emphasis will be given to the relevant rights. This chapter will in particular seek to determine at what procedural stages or junctures the authorities have to guarantee that the accused can invoke his right to legal assistance in Dutch criminal proceedings (access to a lawyer). It will also determine when the authorities will have to go one step further by appointing a legal aid lawyer (appointment of a lawyer). This distinction is important for this research into ineffective assistance by counsel in Dutch criminal proceedings, because if an accused has access to a lawyer then in principle the accused can obtain assistance by counsel but in the case of an appointed lawyer the accused is assured thereof. The other aspects such as the possible responsibilities of counsel, the right not to experience State interference and State interventions out of protection of the right to effective legal assistance will be focused on more in the next substantive research chapters regarding Dutch criminal proceedings (chapters 8, 10 and 12).

Deliberately, this chapter mirrors the topics that have been discussed under the first vertical perspective towards the Convention (see chapter 5). Relevant findings of this previous chapter include the Convention right to retained and appointed counsel, the “critical” stages approach of the Court to the right to counsel, the waiver standard of “knowingly and intelligently” and the indications found as to the Convention right to counsel being interpreted as a substantive right to *effective* legal assistance.⁸⁹⁹ This chapter will take these findings into account especially in the concluding section of this chapter, which compares findings on the right to counsel that are presented in the previous and current chapter (section 6.6.). Ultimately, this structure will enable a comparison between these two

⁸⁹⁸ Spronken (2001) at 447 and 464. See also this same view reiterated in Prakken and Spronken, in: Prakken and Spronken (2009) at 15.

⁸⁹⁹ E.g. *Pishchalnikov v. Russia*, Judgment of 24 September 2009, HUDOC no. 7025/04.

descriptive chapters at the end of this chapter (section 6.6.), so that an evaluation can follow in the final chapter of this book when all research Parts can be seen in combination (chapter 13).

Outline

This Chapter, which is divided into five more sections, starts with general characteristics of the right to counsel in Dutch criminal procedure (section 6.2.). Thereafter, the right to counsel at the stages of the Dutch criminal procedure will be elaborated upon (section 6.3.). The subsequent section will deal with the unwaivable and mandatory right to counsel within Dutch criminal procedure (section 6.4.). Thereafter, the penultimate section will draw a conclusion on the basis of all four previous sections (section 6.5.). Finally, an overall conclusion will be drawn for the two chapters 5 and 6 that constitute the present Part III Right to counsel (section 6.6.).

6.2. Right to counsel in Dutch criminal procedure

6.2.1. Right to retained and appointed counsel

Central to all the following obligations regarding the right to counsel owed to the accused by the authorities is Article 28 Sv. This provision entitles the accused to be assisted by one or more lawyers and to have the opportunity to have contact with his lawyer “as far as possible”. The latter aspect will be explored in more detail in chapter 7, but it will be noted here that Article 50 Sv stipulates that the lawyer’s right to confidential communication with his client can be restricted. Between the defence lawyer and the accused, such communication can even be prohibited if the interest of the investigation so requires.

More specifically with regard to the right of the accused to retained and appointed legal aid counsel, Article 28 Sv provides the accused with the right to either choose to be assisted by counsel who is retained or, under specific conditions, to be guaranteed legal assistance by an appointed lawyer. From 1926 onwards, under Article 28 (1) Sv, the authorities have to ensure that the accused can have access to retained counsel or, under certain circumstances, they must go one step further by appointing a legal aid lawyer. Mostly, the accused is free to choose whether or not to be assisted by either retained or appointed counsel. However, Dutch law does not regulate that the appointed lawyer should be the counsel of the accused’s choosing.⁹⁰⁰

Article 28 Sv is construed as a *right*, so that the authorities should not force the accused into having the services of a lawyer against his will.⁹⁰¹ Whether or not an accused wants to defend himself in person or rather wants to be assisted by counsel is, in most situations, dependent on the free choice of the accused (Article 28 Sv).⁹⁰² This same point of reference applies to an accused who has been appointed a lawyer (Article 28 Sv). However, there are some exceptions when the appointment of a lawyer is mandatory. Examples are: if the accused is or has been in pre-trial detention because of a prosecutor- or judge of instruction-ordered detention (Articles 40 and 41 Sv) or when the accused is indigent (Article 42 (3) Sv). These exceptions will be revisited in more detail in the next sub-section (sub-section 6.2.2.1).

The free choice underlying Article 28 Sv also dictates that the authorities have to respect the rights, interests and wishes of the accused⁹⁰³, as well as the relationship of trust between the accused and his lawyer, which will in summary be referred to as the lawyer-client relationship.⁹⁰⁴ During most phases of the criminal procedure, the authorities must allow the accused to opt for a lawyer. Thereby, with a relationship of trust between them, they can prepare and lodge the best possible defence. Also connected to this right to legal assistance is the principle that the accused pays for the services of his

⁹⁰⁰ Röttgering (2005: 3.6 - Art 28 Sv, suppl. 150), in; Melai/Groenhuijsen (2005).

⁹⁰¹ See also *TK* 1913/14, 286, nr. 3, p. 39 MvT of ORO ad Article 29.

⁹⁰² Exceptions will be addressed in section 6.4.

⁹⁰³ See also Mevis in his annotation to HR 9 October 2007, ECLI:NL:HR:2007:BA5025, *NJ* 2008, 43 m.nt. Mevis, in which he labels the Hoge Raad’s verdict “surprising”, particularly because of its legal ground of Article 6 of the Convention and the activity required from the court who had ordered the accused to leave the room. According to Mevis, this decision goes against the trend of the legislator to limit this responsibility of the court.

⁹⁰⁴ De Roos (1991) at 21.

lawyer himself⁹⁰⁵, unless he is entitled to legal aid. Specific amounts for such payments are mentioned in a separate Statute on Legal Aid.⁹⁰⁶

6.2.1.1. Effectuation of the right to counsel

A case that will be examined here for this exploration about the effectuation of the right to counsel will be referred to as the *Requested stay to obtain a lawyer-case*.⁹⁰⁷ The appellant, who was a foreigner without good command of the Dutch language, had been convicted *in absentia* by the first instance court. Before the appeal court, he explained that he did not know of his earlier conviction and that, after being informed of the date and time of the first instance trial, he had asked his 13-year old son to call the court in order to request a stay of these proceedings. He had broken his leg and had thus been unable to come to the first instance court session. He did not know whether or not the trial judge had received the message from his son, or whether his request for a stay had been granted. He had wanted to attend the first instance trial, so he contended during the appeal stage. Moreover, during the appeal proceedings this unassisted accused informed the court that he did not know how to obtain a lawyer because he did not know how the legal system worked. Upon the prosecutor's response on this issue, the appellant asked for a stay of the procedure in order to obtain legal assistance. The appeal court rejected his request, resumed the investigation in court and gave the appellant the last word. The appeal was deemed inadmissible because the accused, after having been notified about the first instance hearing, had not lodged the appeal within 14-day time limit (408 Sv). Considering that the accused had not retained a lawyer earlier, the appeal court concluded that "(t)he request to stay the proceedings is rejected due to the aforementioned circumstances, which come at the accused's own risk and for which he should bear the consequences while no further clarification or reasoning by the appeal court was to be expected".⁹⁰⁸

The applicant complained before the Hoge Raad that the appeal court had discarded on insufficient grounds his request to stay the proceedings in order to obtain assistance by a lawyer. Or at the very least, he submitted, the appeal court had not given sufficient reasons for declaring the appeal inadmissible.

The Hoge Raad held that the appeal court could not have refused, on the basis of "unspecified circumstances", the unassisted appellant's request to stay the proceedings in order to obtain assistance by counsel. The Hoge Raad did not follow the reasoning that an unassisted appellant should bear the risk and the consequences of his decision not to retain a lawyer earlier in the proceedings. Therefore, the Hoge Raad overturned the case.

The AG had also advised the Hoge Raad to come to this conclusion, not only because of the unspecified circumstances, but also because the unassisted appellant had no assistance by a lawyer. According to the AG a *lawyer* can reasonably be expected to "(...) adequately formulate a request because he can be expected to know what is relevant in this respect. This same expectation should not be put on an accused who has no lawyer to assist him".⁹⁰⁹ Accordingly, the AG contended that – unlike the case where accused persons who have opted for assistance by *counsel* – the trial judge has to be active in three further ways in order to protect accused persons without assistance by counsel. The trial judge should ensure that a substantive defence is adequately laid down in the minutes of the hearing⁹¹⁰, that requests to hear witnesses in court are willingly considered⁹¹¹ and that less formal demands on the grievances in an appeal brief are set.⁹¹² These considerations of the AG are also

⁹⁰⁵ See sub-section 4.2.3.

⁹⁰⁶ Statute on legal aid compensation (in Dutch: Besluit vergoedingen rechtsbijstand 2000, *Stb.* 1999, 580, latest change 1 June 2008, *Stb.* 2008, 170).

⁹⁰⁷ HR 11 December 2007, ECLI:NL:HR:2007:BB7671, *NJ* 2008, 24.

⁹⁰⁸ HR 11 December 2007, ECLI:NL:HR:2007:BB7671, particularly in para. 3.2., *NJ* 2008, 24. The author's translation of: "Het verzoek tot aanhouding wordt - gelet op de hiervoor vermelde omstandigheden, welke voor rekening en risico van de verdachte komen - en waarvan ook naar het standpunt van de verdachte geen verdere verduidelijking of onderbouwing te verwachten is - afgewezen."

⁹⁰⁹ HR 11 December 2007, ECLI:NL:HR:2007:BB7671, in particular in para. 14, *NJ* 2008, 24. The author's translation of: "Van een raadsman kan men een behoorlijke onderbouwing van een verzoek verwachten omdat deze geacht mag worden op de hoogte te zijn van hetgeen daartoe relevant is, aan een verdachte kunnen dergelijke eisen niet worden gesteld.[5.]"

⁹¹⁰ HR 9 January 2007, ECLI:NL:HR:2007:AY9203, *NJ* 2007, 53.

⁹¹¹ HR 17 April 2007, ECLI:NL:HR:2007:AZ1720, *NJ* 2007, 251 about the authorities having to "willingly" construe the request to hear a witness in court by an unassisted accused.

⁹¹² HR 19 June 2007, ECLI:NL:HR:2007:AZ1702, *NJB* 2007, 1552.

relevant for the next three substantive research chapters, in which the responsibilities of the lawyer towards the accused and the possible requirements for the authorities to be active when confronted with ineffective legal assistance under the right to an effective defence will be explored in particular (chapters 8, 10 and 12; mostly 8 and 12). It will be noted here from a first vertical perspective that the appeal court, according to the AG, has to ensure that it stayed the proceedings so that the accused could obtain assistance by counsel or at least did not reject the request for a stay to hire counsel without sufficient reasons in its verdict. While this case has been explored from a first vertical perspective, it will also be important to compare it with another case in which an assisted accused requests a stay of the proceedings in order to obtain a new lawyer (section 8.2.). The remainder of this chapter, however, will continue with this first vertical perspective to other related issues (from sub-section 6.2.1.2. onwards).

6.2.1.2. *Appointed counsel: the specifics*

The specific features of obligations of the authorities regarding the appointment of counsel can be found in Articles 40-43 Sv. Under Article 40 Sv, once the accused is deprived of his liberty because of prosecutor-ordered detention and he has not retained counsel, the authorities have to provide this accused with legal aid irrespective of his financial situation. Under Article 41 Sv, once the accused is deprived of his liberty because of judge of instruction-ordered detention and he has not retained counsel, the authorities have to provide this accused with legal aid again irrespective of his financial situation. The authorities have to appoint a lawyer for the accused who is being deprived of his liberty by an order by the judge of instruction and have to guarantee the accused his right to free legal aid by appointed counsel during all subsequent stages of the procedure (under Article 41 Sv and Article 43 (2) Sv). If the accused has lodged an appeal and the accused had been in such pre-trial detention, the presiding appeal court judge has to appoint counsel *ex officio* (Article 41 Sv). Under Article 42 Sv, when the accused is deprived of his liberty for another offence than for which he is indicted by the prosecution and he is tried, he is deserving of an appointed legal aid lawyer unless he cannot be harmed in his defence during this period of deprivation of liberty, or unless the accused declines assistance by an appointed legal aid lawyer. Additionally, the authorities, which have to appoint a legal aid lawyer for the accused who is being deprived of his liberty by pre-trial detention ordered by the judge of instruction, also have to guarantee the accused his right to free legal aid by an appointed legal aid lawyer during all later stages of the procedure (under Article 40 Sv and Article 43 (2) Sv). In other words, once the legal aid lawyer is appointed, the right to legal aid remains in force during the entire procedure – regardless of whether or not the deprivation of liberty continues (Article 43 (1) Sv).

Also relevant is that on the basis of Article 44 of the Legal Aid Act, the Council for Legal Aid can appoint a lawyer at the request of an accused who does not have sufficient means to retain counsel (Article 12 Legal Aid Act). The Council only has to grant an indigent accused legal aid when it is “in the interest of the case”. For instance, the Council can reject the request for legal aid where the costs for legal assistance outdo the amount of the fine that would reasonably be the sanction for the offence that the accused is believed to have committed. The Council will usually also decline a request for assistance by an appointed legal aid lawyer where the accused could reasonably undertake his own defence. In practice this normally means that an accused, who is not being detained under an order by the prosecutor, will be entitled to legal aid after he is indicted. If the latter is not the case, legal aid will normally be provided when the pre-trial judge undertakes investigative acts during which counsel has a right to be present. Consequently, the Council that appoints legal aid counsel under these circumstances of Article 44 of the Legal Aid Act has to examine the seriousness of the case, which leads to a noticeable difference between indigent and non-indigent accused.⁹¹³ The right under Article 28 Sv appears to equally allow accused persons with and without sufficient financial means to a right to legal assistance. However, in practice an indigent accused will not always obtain legal services, where a person with sufficient financial means does benefit from assistance by counsel. The effects of this regulation that does not equally protect an accused with and without sufficient financial means will be revisited in the final section of this chapter (section 6.6.).

As a final remark concerning obligations of the authorities to appoint legal aid counsel, it is noticeable that over time the legislator has advanced the first procedural stage to require legal aid by

⁹¹³ See also Röttgering (2005: 3.3 - Art 28), in: Melai/Groenhuijsen (2005).

appointed legal aid counsel in the regular criminal procedure. At first, such free legal aid was only required for indigent accused at the beginning of the trial phase.⁹¹⁴ Nowadays, legal aid by appointed counsel is required for the prosecutor-ordered pre-trial deprivation of liberty and under some conditions at the stage of the first police interrogation or interrogations, which will be examined below (section 6.3.).

Given this trend of increasingly earlier required appointments of legal aid counsel in the normal criminal procedure, it is possible that, in the (near) future, the legislator will require it even sooner; possibly at police interrogations for both adult and minor accused, as will be addressed later on in this chapter (section 6.3.). Nonetheless, it has also been demonstrated that a natural line of progression concerning the right to legal assistance can suddenly be broken, as with the codification of the right under Article 28 Sv in 1926 (sub-section 4.2.3.). Consequently, there is no guarantee that an accused will become entitled to the appointment of legal aid counsel at police interrogations.

6.2.2. Unwaivable and mandatory legal assistance

Unlike most regulations regarding assistance by counsel, there are exceptions to the aforementioned rule of the right, rather than obligation, under Article 28 Sv.⁹¹⁵ In other words, the accused is not always free to opt for either self-representation or assistance by counsel – whether retained or appointed – in Dutch criminal proceedings.

The first two exceptions to the rule of free choice of the accused who cannot waive his right to counsel is that, at the trial stage⁹¹⁶, the authorities have to ensure assistance by counsel for both minors under the age of 16 and for persons who are suffering from a mental illness.⁹¹⁷ Even when these accused persons want to represent themselves or disagree with their counsel, the authorities are still required to compel them to have a lawyer.⁹¹⁸ On the other side of the same coin, these accused, who are usually deemed to be vulnerable⁹¹⁹, cannot waive their right to legal assistance for the court sessions. For them, a lawyer is both competent and obliged to act, even if the accused declares that he does not want legal assistance or is opposed to the way in which his lawyer conducts his defence. The lawyer concerned can make direct use of all the rights provided to minor defendants⁹²⁰ and to defendants who suffer from a mental illness or impediment⁹²¹ due to which they are assumed to be unable to properly defend their own interests. These exceptions demonstrate how the authorities are not “merely” required to intervene in the case when “(...) the lawyer is absent or otherwise does practically nothing at all for the accused”, as Spronken suggests.⁹²² Therefore, it does not appear to be correct to say that the authorities should always stay clear from the relationship between the accused and the criminal defence lawyer.

The second category of two exceptions to the rule of free choice of the accused for self-representation or legal assistance are two criminal procedural stages at which the accused cannot proceed without a lawyer: the appeal in cassation stage and the revision stage.⁹²³ The aforementioned obligation of the authorities regarding these two types of vulnerable accused has to be distinguished from compulsory assistance by counsel at the phase of appeal in cassation and of revision, because that category is different from the obligation under discussion. In other words, the authorities are not obliged to coerce a convicted person who seeks to complain before the Hoge Raad into having a lawyer against his will. This does not mean that the appeal in cassation phase is free from its own difficulties; for example, a convicted person who wants to make use of these legal remedies will have

⁹¹⁴ Spronken (2001) at 102.

⁹¹⁵ See differently *TK* 1913/14, 286, nr. 3, p. 39 MvT of ORO ad Article 29.

⁹¹⁶ HR 17 November 2009, ECLI:NL:HR:2009:BI2315, particularly in para. 3.3.3. See also Schalken in his note HR 17 November 2009, ECLI:NL:HR:2009:BI2315, *NJ* 2010, 143 m.nt. Schalken.

⁹¹⁷ Under Article 503 (2) Sv and Article 509a in conjunction with Article 509d (3) Sv. See e.g. for *Salduz* for minors, HR 21 December 2010, ECLI:NL:HR:2010:BO1576, *NJB* 2011, 184.

⁹¹⁸ See also HR 17 November 2009, ECLI:NL:HR:2009:BI2315 (*Hoogerheide*). See also its annotation in *NJ* 2010, 143 m.nt. Schalken. Also central to Franken (2011).

⁹¹⁹ For these persons, police interrogations have to be audio-recorded as of 1 October 2006, *TK* 11 December 2006, *TK*, 30 800 VI, no. 30.

⁹²⁰ Article 503 (1) Sv.

⁹²¹ Article 509a Sv in conjunction with Article 509d (3) Sv.

⁹²² Spronken (2001) at 447 and 464. See also this same view reiterated in Prakken and Spronken, in: Prakken and Spronken (2009) at 15.

⁹²³ See sub-section 4.2.2.

to retain a lawyer on his own initiative and that, if he is indigent, he can only request counsel, which the Council for Legal Aid might or might not grant.⁹²⁴

To return to the two provisions of unwaivable legal assistance for minors and persons with a mental illness, it is important to note that these two exceptions to the rule of free choice for self-representation or legal assistance appear to have an important effect. They seem to undermine, rather than reinforce, both the principle that an accused should be able to opt for a lawyer and the assumption that the accused has the ultimate say about the manner in which he wants to conduct his defence.⁹²⁵ Seeing that Dutch law requires that the authorities have to allow counsel to play “a” role at the trial stage for the specific aforementioned accused, it might be assumed that, but for counsel, the rights of the accused would not be protected. If that is indeed the reason, questions arise about the protection of these vulnerable persons at other stages of the proceedings, such as during police interrogations. Moreover, questions emerge that the law has yet to answer regarding the protection of other vulnerable accused such as persons with language problems or disabilities at the trial stage.

This assumption corresponds with other provisions regarding counsel that apply where the accused might suffer from a mental illness. Where the court assumes that the accused might not be *compos mentis*, counsel can be asked to discuss the mental capabilities of the accused in his absence (Article 300 Sv). Similarly, if the court determines that the mental capabilities of the accused who has been placed in pre-trial detention have to be examined, counsel can be requested to speak about the order for such an examination, alongside the accused (Article 317 Sv). A preliminary conclusion is pertinent regarding this regulation for both minors and persons suffering from a mental illness and this unwaivable right to assistance. Dutch law requires that these vulnerable accused have the benefit of legal assistance, which cannot be waived, for the effectiveness of their defence to be respected.

As a final remark, it is noticeable that both the arrangement of unwaivable and mandatory legal assistance apply “only” at and after the trial phase. Consequently, there is no such importance attached to the right to assistance by either a retained or appointed lawyer pre-trial, except for the specific procedural stages which will be examined in the next section (sub-section 6.3.).

6.3. Right to counsel: Stages of Dutch criminal procedure

6.3.1. The right to counsel at police interrogations in Dutch criminal procedure

Following the Court’s *Salduz v. Turkey* case⁹²⁶, the Hoge Raad⁹²⁷ held that a first procedural stage at which the Dutch authorities are obliged to ensure access to a lawyer to the accused⁹²⁸, is police interrogations.⁹²⁹ After this research was concluded (31 October 2015), the Hoge Raad went slightly further than its earlier interpretation, including the following notable decision: as of 1 March 2016 the arrested accused will be entitled to legal assistance *during* the first police interrogation, unless there

⁹²⁴ See sub-section 6.2.1.2.

⁹²⁵ HR 17 November 2009, ECLI:NL:HR:2009:BI2315, particularly in para. 3.4. See also Schalken in his note HR 17 November 2009, ECLI:NL:HR:2009:BI2315, *NJ* 2010, 143 m.nt. Schalken.

⁹²⁶ The *Salduz* case law has prompted many discussions in the Netherlands, which started with the Hoge Raad concluding and Borgers submitting that it does not follow from the case law of the Court that an adult accused has a right to legal assistance during police interrogations (e.g. starting with Schalken in his annotation to HR 30 June 2009, ECLI:NL:HR:2009:BH3079 (HR about *Salduz*) in *NJ* 2009, 349 m.nt. T.M. Schalken) and Borgers (2009) at 88-93 respectively), whilst Spronken argues that the reverse conclusion has to be drawn, first as a scholar and later also as an AG to the Hoge Raad (e.g. Spronken (2009) at 94-100 and AG Spronken, Conclusion, HR 26 November 2013, ECLI:NL:PHR:2013:1424 (Right to legal assistance during police interrogations [*Salduz*, Navone and Directive 2013/48/EU]), which has not been followed by the Hoge Raad in HR 26 November 2013, ECLI:NL:HR:2014:770. By the way, AG Spronken mentions in her conclusion that she thinks that only the Netherlands and Ireland seem to still not follow the Court’s *Salduz* doctrine on the issue of the assistance of counsel during police interrogations. See also Kraniotis (2011) at 79ff and before Borgers and Spronken, Malewicz and Hamer (2008) at 787. See also Franken and Röttgering, in: Prakken and Spronken (2009) at 215 anticipating the interpretation of the Court’s case of *Salduz v. Turkey* in the context of the experiment into counsel at police interrogations which was ongoing at the time in the Netherlands. See for the Court’s case law of *Salduz* and its doctrine sub-section 5.3.1. in particular.

⁹²⁷ E.g. Franken (2010: 4.1), in: Mevis et al (2010).

⁹²⁸ E.g. Franken (2010: 4.1), in: Mevis et al (2010).

⁹²⁹ Under Article 28 (1) Sv and HR 30 June 2009, ECLI:NL:HR:2009:BH3079 (HR about *Salduz*). See also its annotation in *NJ* 2009, 349 m.nt. Schalken. See also Franken and Röttgering, in: Prakken and Spronken (2009) at 215 anticipating the interpretation of the Court’s case of *Salduz v. Turkey* in the context of the experiment into counsel at police interrogations which was ongoing at the time in the Netherlands.

are compelling reasons to limit this right (22 December 2015).⁹³⁰ Given that this new *Salduz*-case of the Hoge Raad was only rendered after this study was completed and any changes for the accused will only take effect in the future (though near, on 1 March 2016; this book went to the printer on 11 February 2016), this overview maintains its original first description of the earlier decision (30 June 2009 and 1 April 2014) and then explains what the newer *Salduz* case adds to the existing interpretation (22 December 2015).

In its *Salduz* case law leading up to the newest decision – which will be discussed below – (22 December 2015), the Hoge Raad explained that it could give no general regulation under its task of developing the law⁹³¹, but did give the following two consequences to Article 28 (1) Sv.⁹³²

First, an adult⁹³³ accused who has been arrested⁹³⁴ by the police has a right to consult a lawyer prior to the first police interrogation.⁹³⁵ Accordingly, the authorities have a corresponding obligation to inform the accused about this right.⁹³⁶ The accused can waive⁹³⁷ his right to obtain assistance by counsel when he chooses to proceed on his own.⁹³⁸ According to the Hoge Raad, an adult accused does *not* have a right to have a lawyer *present* during police interrogations.⁹³⁹

Second, an underaged suspect is, next to the aforementioned right to consult counsel prior to police interrogations, also entitled to have a lawyer or a person of trust⁹⁴⁰ present during the “first” police interrogation.⁹⁴¹ Accordingly, the authorities are obliged to inform the minor accused about both his rights to prior consultation with, and presence of counsel during, police interrogations. The Hoge Raad holds that both rights for the minor accused, as well as the distinction between the right to counsel for adult and minor accused, follow from the *Salduz*-case.

Finally, for both situations, the Hoge Raad has attached a legal consequence to these obligations of the authorities regarding the right to counsel owed to the accused. When the authorities fail to provide the adult and minor accused with legal assistance at the stage of police interrogations in the two aforementioned ways, the Hoge Raad will deem it, as a rule, a procedural omission of abuse of

⁹³⁰ HR 22 December 2015, ECLI:NL:HR:2015:3608.

⁹³¹ See about this role perception of the Hoge Raad, e.g. HR 30 June 2009, ECLI:NL:HR:2009:BH3079 (HR about *Salduz*), para. 2.4. See also its annotation in *NJ* 2009, 349 m.nt. Schalken. That same deference to the legislator, but here about the question of whether a statement of personal details can be deemed a statement as meant in *Salduz*, has also been confirmed and reiterated in HR 23 April 2013, ECLI:NL:HR:2013:BZ8166.

⁹³² HR 30 June 2009, ECLI:NL:HR:2009:BH3079 (HR about *Salduz*), particularly in para 2.6.

⁹³³ At the time of the interrogation, eighteen years old, even though he was a minor during the commission of the offence, see HR 15 January 2013, ECLI:NL:HR:2013:BY5697, *NJB* 2013, 303.

⁹³⁴ The *Salduz* applies strictly to the offence for which the accused has been detained, and therefore not to an accused who has been indicted for another offence, see HR 3 July 2012, ECLI:NL:HR:2012:BW9264, *NJ* 2013, 513. This does mean that the accused is entitled to the *Salduz* protection if the accused has been arrested six days before the interrogation, e.g. HR 3 July 2012, ECLI:NL:HR:2012:BW9961, *NJ* 2013, 514.

⁹³⁵ E.g. HR 10 December 2013, ECLI:NL:HR:2013:1752, *NJ* 2014, 196 in which the Hoge Raad quashed a case of an (adult) accused who had been invited and thereupon arrested, but had not been alerted to his right to consultation, although the accused had mentioned that he had consulted a lawyer, thereupon confessed and that confession had been used as evidence against him.

⁹³⁶ See also EU Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, *OJ L* 142, 1.6.2012, at 1–10 of 10 June 2014, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32012L0013> [access on 19 December 2014]. The Dutch Implementation law of the aforementioned on the right to information in criminal proceedings (in Dutch: *Wet recht op informatie in strafprocedures*) has entered into force on 1 January 2015, and mentions the right of the accused to be informed before the first police interrogation about his right to legal assistance in Article 27c Sv.

⁹³⁷ E.g. for a waiver by the (adult) accused of the right to consultation before the first police interrogation, e.g. HR 16 September 2014, ECLI:NL:HR:2014:2670, *NJ* 2014, 461.

⁹³⁸ For a waiver for an (adult) accused, e.g. HR 22 January 2103, ECLI:NL:HR:2013:BY7886, *NJ* 2013, 71 and HR 10 September 2013, ECLI:NL:HR:2013:687, *NJ* 2013, 579.

⁹³⁹ An invitation by the pre-trial judge to the accused under Article 99 Sv to voluntary hand over drugs and weapons before confiscation is no interrogation under the *Salduz*-rule, despite the preceding remark that the accused is not obliged to answer questions, HR 29 January 2013, ECLI:NL:HR:2013:BY9008, *NJ* 2013, 88.

⁹⁴⁰ For example, a mother, HR 12 June 2013, ECLI:NL:HR:2012:BW7953, *NJ* 2012, 464.

⁹⁴¹ See HR 19 February 2013, ECLI:NL:HR:2013:BZ1363, *NJ* 2013, 146 which confirms the aforementioned Hoge Raad-*Salduz*-case 30 June 2009, ECLI:NL:HR:2009:BH3079, *NJ* 2009, 349 m.nt. Schalken. For the absence of a waiver by the minor accused of this right, because “(f)rom the sole circumstance that the lawyer who was consulted by the accused after his arrest before the first police interrogations had not expressed that he wanted to be present during the police interrogations, it cannot be inferred that the accused has unequivocally waived his right to be assisted during the interrogations by the police by a lawyer or another person of trust, e.g. HR 21 January 2014, ECLI:NL:HR:2014:133, *NJ* 2014, 197.

process (Article 359a Sv).⁹⁴² Consequently, as a rule⁹⁴³, the judge is required to exclude the accused's answers or full statement given to the police during interrogations from the evidence. If the aforementioned "*Salduz*"-rights have not been granted, Article 28 Sv will have been violated.⁹⁴⁴ Under such circumstances, the Hoge Raad will normally overturn the case.

In its *Salduz* case law - up to the newest decision which will be discussed below - (22 December 2015), the Hoge Raad repeatedly asked the *legislator* to lay down what obligations regarding the right to counsel at the stage of police interrogations the authorities owe to the accused.⁹⁴⁵ The legislator has already made a draft Statute for this purpose⁹⁴⁶ and the Hoge Raad requests the legislator to make haste with that piece of legislation.⁹⁴⁷ The Hoge Raad mentioned in its earlier case law that the new EU Directive on the matter⁹⁴⁸ should only be implemented before 27 November 2016. Therefore, this research concluded that, if the legislator chooses the ultimate deadline, it would mean that there have been at least seven years between the ruling of the Court on *Salduz* and its incorporation within the criminal proceedings in the monist country of the Netherlands.⁹⁴⁹

In its newest *Salduz* case (22 December 2015), the Hoge Raad opened with a reference to the time passed between the Court's *Salduz* case and the date of this new verdict – "more than six years of the Court's verdict of 2009 and one and a half year after the Hoge Raad's verdict of 2014."⁹⁵⁰ The Hoge Raad adds that "a legal arrangement regarding legal assistance at police interrogations (in Dutch: *verhoorbijstand*) has not yet been created." In the meantime, "the Court has decided in a number of cases that the absence of legal assistance at police interrogations can result in a violation of Article 6".⁹⁵¹ The Hoge Raad adds to this consideration the opinion that the Court has never expressly and unreservedly decided that under all circumstances a violation will occur when the lawyer of the accused is not present at the interrogation. Nonetheless, it considers that in light of the casuistic case law of the Court legal certainty benefits from the current tightening of the rules regarding legal assistance of the Hoge Raad as expressed in the case of 1 April 2014 addressed above.⁹⁵² In the light of this aim, the Hoge Raad will "assume from now on that an arrested accused will have the right of legal assistance during the interrogation by the police, unless there are compelling reasons to limit this right." According to the Hoge Raad, "(t)he accused can expressly or silently though always unequivocally renounce this right." This means that the accused will have to be "(...) informed *before* the start of the interrogation of his right to assistance by a lawyer [emphasis in the original text]." The

⁹⁴² For an exception to this rule because, despite the *Salduz* violation, the appeal court rejected the defence that also the police record regarding the determination of the identity and the voice recognition of the accused which included a reference upon the interrogations that the accused could be heard on the telephone taps, had to be excluded from the evidence, e.g. HR 15 April 2014, ECLI:NL:HR:2014:914 and 916, *RvdW* 2014, 664 and 662. For the rule, e.g. HR 10 January 2012, ECLI:NL:HR:2012:BT7095, *RvdW* 2012, 126 and HR 4 February 2014, ECLI:NL:HR:2014:234, *RvdW* 2014, 315. See, similarly, for personal data, HR 23 April 2013, ECLI:NL:HR:2013:BZ8166, *NJ* 2013, 268 and for an examination of blood, HR 27 November 2012, ECLI:NL:HR:2012:BY1220, *NJ* 2012, 697.

⁹⁴³ If the accused has had sufficient time to consult with a lawyer after his arrest and mentioned that he had had contact with a lawyer, exclusion of the statement as evidence has to follow nonetheless, e.g. HR 10 December 2013, ECLI:NL:HR:2013:1752, *NJ* 2014, 196 and if the accused comes to the station voluntarily and has not been arrested, HR 10 June 2013, ECLI:NL:HR:2013:CA2555, *NJ* 2013, 346 and similar HR 7 February 2012, ECLI:NL:HR:2012:BU6908, *NJ* 2012, 115 and HR 9 November 2010, ECLI:NL:HR:2010:BN7727, *NJ* 2010, 615. See also in case in which the statements were excluded following from an earlier miscarriage of justice, HR 17 September 2012, ECLI:NL:HR:2013:BZ9992, *NJ* 2014, 91 and HR 23 April 2013, ECLI:NL:HR:2013:BZ8166, *NJ* 2013, 268.

⁹⁴⁴ This same rule applies to the use as evidence against the accused of voice recognition and establishing the identity of a person, HR 15 April 2014, ECLI:NL:HR:2014:916, *NJ* 2014, 242.

⁹⁴⁵ E.g. HR 1 April 2014, ECLI:NL:HR:2014:770, *NJ* 2014, 268 and HR 1 April 2014, ECLI:NL:HR:2013:1424, *RvdW* 2013, 1443.

⁹⁴⁶ Statute on legal assistance during police interrogations (in Dutch: *Wijziging van het Wetboek van Strafvordering tot aanvulling van de regeling van het politieverhoor van de verdachte en diens aanhouding en voorgeleiding aan de public prosecutor, de invezekeringstelling en het recht op rechtsbijstand in het strafproces (Wet raadsman en politieverhoor)*, *Stb.* 2011, 526, entry into force 15 November 2011). See also Van der Kruijs (2011) at 3-6.

⁹⁴⁷ Current legislation has been altered in two legislative pieces: a law regarding the Directive and a law regarding the first phase of the police investigation of 13 February 2014. See sub-section 4.2.2.

⁹⁴⁸ See further under the final remark in this sub-section and under sub-section 5.3.1.4.

⁹⁴⁹ See for this observation, Schalken in his annotation to HR 1 April 2014, ECLI:NL:HR:2014:770, *NJ* 2014, 268.

⁹⁵⁰ HR 22 December 2015, ECLI:NL:HR:2015:3608, para. 6.3.

⁹⁵¹ HR 22 December 2015, ECLI:NL:HR:2015:3608, para. 6.3.

⁹⁵² HR 1 april 2014, ECLI:NL:HR:2014:770, *NJ* 2014, 268.

Hoge Raad clarifies that “(...) this right is not only applicable in relation to the first interrogation, but also the subsequent interrogations.”

The Hoge Raad makes it explicit that this tightening was based on not wanting to wait until prejudicial questions would have been posed to the ECJ on this issues (one of the options mentioned by the cassation counsel in the brief) and because EU Directive 2013/48/EU will have to be implemented soon (27 November 2016). Therefore, the Hoge Raad could “(...) assume that the aforementioned policy, organisational and financial choices have already been made.”⁹⁵³

In addition to tightening the rules and explaining the choice to effectively no longer wait until the legislator performed its role, the Hoge Raad also explains the consequences for a failure to allow the arrested accused to have assistance by counsel during the interrogation by the police, unless there are compelling reasons to limit this right. This is the same as yet mentioned for the previous *Salduz* case: an abuse of process (again under Article 359a Sv).⁹⁵⁴ The Hoge Raad explains that this means that, *if* a substantive defence to this effect has been lodged, the judge will have to assess whether a legal consequence has to be attached to the abuse of process and, if so, what legal consequence should follow.⁹⁵⁵ The judge will have to consider the factors, such as the serious of the abuse of process (Article 359a (2) Sv).

Interestingly, the Hoge Raad argues that the aforementioned abuse of process due to a lack of a right to consultation⁹⁵⁶ will be more serious than for absence of counsel during the police interrogation. Accordingly, the Hoge Raad adds that, as long as EU Directive 2013/48/EU has not yet been implemented in Dutch criminal proceedings, the legal consequence for the abuse of process of a lacking right to counsel during police interrogation “(...) does not necessarily have to lead to exclusion of evidence.”⁹⁵⁷ The Hoge Raad adds that “(...) Article 359a Sv does not exclude that – depending on the circumstances of the case – a reduction of the sanction is administered or that it is merely determined that an irreparable abuse of process has occurred.” The latter means that no consequence for the accused has to follow other than this mere mentioning in the verdict.

The last considerations of the Hoge Raad that will be mentioned here are those concerning how the judge should determine the seriousness of the abuse of process. The Hoge Raad argues that “(...) it is of particular interest if the interrogating police officers could assume in all reasonableness that they did not have to give the accused an opportunity to have legal assistance during the police interrogation.”⁹⁵⁸ “For this purpose, the court has to consider whether the police officers might not have known about this tightened set of rules regarding legal assistance and that it cannot be assumed that they will be immediately informed about the content of this case of the Hoge Raad and the consequences thereof for the administration of justice.” Therefore, the Hoge Raad considers that “(...) as of 1 March 2016, the rule that an arrested accused has a right to legal assistance by counsel during his interrogation by the police, will be executed in practice.”

While the Hoge Raad’s case law will already have an effect as of 1 March 2016, it is still important to address the legislative proposal of “Counsel and police interrogation”, if only because the Hoge Raad referred to it. This Statute will introduce a right for the arrested adult accused to consult with a lawyer for half an hour prior to the first police interrogation (Article 28a Sv *new*).⁹⁵⁹ If the accused has committed a criminal offence punishable with a custodial sentence of six or more years, the accused will get a conditional right to have a lawyer in attendance during police interrogations (Article 28b (1) Sv *new*). The condition is that the interest of the investigation can prohibit such attendance of counsel.

Where the presence of counsel is forbidden because the police invoke this interest of the investigation, the police or other interrogating authorities must inform the prosecutor (Article 28b (2) Sv *new*). Moreover, they must record the interrogation as determined by ministerial decree (Article

⁹⁵³ HR 22 December 2015, ECLI:NL:HR:2015:3608, para. 6.3.

⁹⁵⁴ HR 22 December 2015, ECLI:NL:HR:2015:3608, para. 6.4.1.

⁹⁵⁵ This consideration follows HR 30 March 2004, ECLI:NL:HR:2004:AM2533, *NJ* 2004, 376, as also cited by the Hoge Raad for this purpose. See sections 4.3.3. and 4.4. and especially chapter 12.

⁹⁵⁶ HR 30 June 2009, ECLI:NL:HR:2009:BH3079, *NJ* 2009, 349.

⁹⁵⁷ HR 22 December 2015, ECLI:NL:HR:2015:3608, para. 6.4.2.

⁹⁵⁸ HR 22 December 2015, ECLI:NL:HR:2015:3608, para. 6.4.3.

⁹⁵⁹ Concept 22 March 2011 (*in Dutch: Wijziging van het Wetboek van Strafvordering tot aanvulling van de regeling van het politieverhoor van de verdachte en diens aanhouding en voorgeleiding aan de public prosecutor, de in verzekeringstelling en het recht op rechtsbijstand in het strafproces (Wet raadsman en politieverhoor)*).

28b (3) *Sv new*). These expected changes are both a codification of the Hoge Raad's case law and an addition to it, since they require the presence of a lawyer during police interrogations for more serious crimes punishable by imprisonment of six or more years.⁹⁶⁰ Accordingly, more emphasis may have to be put on safeguards other than the participation of counsel for fair police interrogations and their accurate records, except for the aforementioned serious offences.⁹⁶¹ However, after the more than six years' long debates about police interrogations, the possible changes that might allow for a more significant role for counsel therein are certainly remarkable.

The legislator still has to enact a Statute on the right to counsel for an accused at the stage of police interrogations under current European criminal law and such future legislation (before 27 November 2016). For example, by requiring a right regarding translation and interpretation as well as information about the accused's rights, the legislator has started with the implementation of the expected Roadmap for strengthening the procedural rights of suspects and accused persons in criminal proceedings, appended to the Stockholm Programme approved by the European Council of 10-11 December 2010.⁹⁶² Two EU directives on interpretation and translation and a "letter of rights"⁹⁶³ have already been adopted.⁹⁶⁴ The Dutch legislator will have to implement the Directive on the right to have "access to a lawyer".⁹⁶⁵ That Directive has been explored separately (in sub-section 5.3.1.4.).⁹⁶⁶ The implementation law has been addressed in this sub-section and will have to be assessed in light of the case law of the Court (section 6.6.).

As a final remark about the Hoge Raad's interpretation of the *Salduz*-case, it is also important to elaborate upon its current policy implications. The public prosecution service has operationalised the *Salduz*-rule of access to a lawyer at the stage of police interrogations along three distinct categories of cases: A, B and C.⁹⁶⁷

Accused persons, who have been arrested for category A cases, require the prosecution to ensure the right to counsel during police interrogations in its most extensive form of both consultation with, and the presence of counsel. Such A cases involve, for example, children between the age of 12 and 15 or persons with a mental illness who are believed to have committed an offence which is punishable by imprisonment for at least 12 years and are thus eligible for pre-trial detention. In such cases an adult accused cannot waive his right to consultation whilst the minor cannot waive both rights of consultation before and presence of counsel during police interrogations. This regulation is thus different from the above-discussed case law of the Hoge Raad, in particular regarding an accused with a mental illness and the waivers of the right to counsel at the stage of police interrogations.

Category B cases are those that concern offences which are not listed under A but are equally eligible for pre-trial detention, while Category C cases encompass offences that are not eligible for pre-trial detention and involve less serious infringements. In both category B and C cases, the accused person can waive his right to legal assistance.

⁹⁶⁰ See section 5.3.1.4.

⁹⁶¹ E.g. this recommendation has already been made, though also problems in common law countries with access to counsel at police interrogations had been demonstrated, in Fijnaut (1987) at 13-501, particularly at 480-484 and Fijnaut, in: Groenhuijsen and Knigge (2001), at 671-755.

⁹⁶² Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (2009/C 295/01), 12 April 2009.

⁹⁶³ Directive, currently under negotiation on the basis of a Commission proposal, on the right to information, which will set out minimum rules on the right to receive information on one's rights, and on the charges, as well as on the right of access to the case file, COM(2010) 392, 20 July 2010.

⁹⁶⁴ Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation, OJ L280, 26.10.2010, p. 1.

⁹⁶⁵ What started with a proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest (SEC(2011) 686), later became 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, Official Journal of the European Union L 294/1, 6 November 2013. Hereafter Directive 2013/48/EU. See section 5.3.1.4.

⁹⁶⁶ See Jahae (2011) at 43-44.

⁹⁶⁷ Directive by the prosecution service in relation to the Act on legal assistance during police interrogations (in Dutch: OM Aanwijzing), 1 April 2010, Legal assistance at the stage of police interrogations, *Staatscourrant*, 2010, 16 March 2010, nr. 4003, under Article 130 (4) Wet RO.

In Category C cases, consultation can be given by telephone. Moreover, in these cases, the accused has to pay for the services of counsel. Consequently, in Category C cases a difference can arise between accused who have sufficient financial means and those who do not.

Moreover, in Category A cases the accused is entitled to legal aid, whilst in B and C cases he is not. To end this discussion about the prosecutor's guidelines on *Salduz*, it must be pointed out that this regulation results in some differences between indigent and non-indigent accused persons at the stage of police interrogations. Unless the accused or the offence of which he is suspected falls in category A, then the lack of equal protection regarding the right to counsel becomes noteworthy.

Therefore, it remains to be seen whether the legislator will take into consideration the case law of the Hoge Raad or the somewhat further reaching prosecutor's guidelines, bearing in mind that it also has to implement the EU Directive, as explained above (in sub-section 5.3.1.4.).⁹⁶⁸

6.3.1.1. Comparing Dutch law and case law on *Salduz* with the Convention and EU Directive

At this stage of the research, it is not yet opportune to enter into an evaluation of compliance of the approach of the Hoge Raad to the *Salduz*-case because this chapter intends to remain descriptive. However, given the various observations made about the *Salduz*-case in the previous and current chapter, it is important to give an initial indication as to how Dutch law and case law on *Salduz* compare with the Convention and the EU Directive 2013/48/EU.

A first observation arising from a comparison between Dutch law and case law on *Salduz* with the Convention and the EU Directive, indicates a possible issue with equal protection for persons who can afford to hire a lawyer and those who cannot at this stage prior to arrest. In other words, Dutch law does not entail a regulation of legal aid regarding the phase prior to arrest. Therefore, the law appears to make a distinction between indigent and non-indigent accused persons. Thus,, before the accused is arrested, only a person with sufficient financial means will usually obtain the assistance of counsel. Such a lack of equal protection – negatively put, discrimination – does not seem to comply with the Convention, because of the procedural guarantees of equality of arms and adversariality also before the stage of police interrogation. However, as mentioned earlier in this section, the Court's case law on the equal treatment of indigent and non-indigent (and other types of) accused still has to follow (in chapter 11 especially).

A related issue is that the Hoge Raad appears to hold that the *Salduz*-rule should apply “only” to interrogations at a police station when the accused is brought there after arrest. At least, the authorities do not seem to be obliged to grant the accused a right to consult with and/or have the presence of a lawyer if the interrogations are being held *outside* of the police station. Thus,, the Court's *Salduz*-case does not appear to allow for such an inference about the location of the interrogation, for instance in its case law about questions in public on the street during a road check (*Zaichenko*).

As a penultimate issue, the Hoge Raad used to “only” mention the “first” police interrogation in its dictum but has more recently extended this right to subsequent interrogations (22 december 2015). Therefore, the Hoge Raad as of 1 March 2016 appears to require more from the Dutch authorities than that they “merely” grant the accused his right to a lawyer prior to an entire series of police interrogations. Seen in conjunction with the *Salduz*-rule, the Hoge Raad in this newer case appears to have construed as correctly encompassing not only the first but also subsequent interrogation sessions. However, in its newest case, the Hoge Raad does suggest that the right to consultation before the first police interrogation would be more important than the right to have a lawyer present during the first and subsequent interrogation sessions. The case law of the Court does not appear to make such a distinction and also the EU Directive does not explain the case law of the Court as if the consultation right would be more significant than the assistance right, as the Hoge Raad would call them.

⁹⁶⁸ On 1 April 2014, the Hoge Raad has urged the legislator to hasten with a Statute regarding legal assistance at the stage of police interrogations, after AG Spronken has posed the question whether the *Salduz* case law entails a right for the accused in Dutch criminal proceedings to legal assistance *during* police interrogations (HR 1 April 2014, ECLI:NL:HR:2014:770 and ECLI:NL:HR:2013:1424, *NJ* 2014, 268 and *RvdW* 2013, 1443 respectively). See also VanderHallen et al (2014) at 11-178; and more broadly about pre-trial legal assistance rather than *Salduz*, Van Kampen and Leliveld (2013) at 2604-2609.

On a final note, the Hoge Raad's *Salduz*-case do not yet apply to other investigative measures than police interrogations such as crime scene visits and confrontations at which the authorities interrogate the accused and he thus risks answering questions or giving a full statement. These questions will have to be reserved especially for the final chapter on Dutch criminal proceedings though the case cited above regarding a crime scene visit following police interrogations did seem to imply that the *Salduz*-rule is not a once-only right (sub-sections 5.3.1.2. and 5.3.2.; see further chapter 12).

Therefore, the Hoge Raad's *Salduz*-case and its successors appear to indicate some fundamental differences at least with the Court's case law, as AG Spronken also concluded in a case of 26 November 2013.⁹⁶⁹ A further exploration will be needed, and will follow in the final chapter on Dutch criminal proceedings. The remainder of this chapter will continue with a description of the first vertical perspective to the right to counsel in order to determine the obligations of the authorities to the accused in relation to this right (chapter 12 and sub-section 6.3.2. onwards respectively).

6.3.2. Right to counsel at other moments than police interrogations

This sub-section addresses the right to counsel at other procedural stages than police interrogations at which the Dutch authorities are obliged under procedural law to ensure this right to the accused (Article 28 (1) Sv).⁹⁷⁰ In accordance with Article 28 (1) Sv, this sub-section will, similar to the sub-section regarding police interrogations, start with the obligation of the authorities to ensure at other procedural stages that the accused has access to a lawyer. Access to a lawyer means the accused can retain counsel if he so wishes. Thereafter, it will be determined when the authorities have to go one step further by appointing legal aid counsel for the accused. Under such circumstances, the accused will indeed be provided legal assistance by a legal aid lawyer. An overview will be provided per procedural stage or juncture of first, access to a lawyer and, second, appointment of a legal aid lawyer to the accused.

6.3.2.1. The pre-trial stage

A first other pre-trial juncture than police interrogations at which the Dutch authorities are obliged to afford the accused access to counsel is a search of the accused's home or any other place at his disposal (Article 99a in conjunction with Article 28 Sv).⁹⁷¹ During such a search the authorities are obliged to ensure that the accused can *retain* a lawyer. However, they do not have to *appoint* a lawyer because the accused has no right to legal aid. Consequently, if the accused is at liberty or lacks the financial means to retain counsel during such a search, to list two legal aid requirements in the Netherlands, normally the house search will occur in the absence of assistance by counsel. Article 99a Sv is a qualified right, moreover. An accused's request to retain a lawyer is not allowed to stall the process of truth finding (Article 28 (2) Sv).⁹⁷² Hence, the authorities can decide not to afford this right to counsel to the accused, if that condition applies. That latter qualification of this right will be revisited below (in chapter 8).

Another and last other pre-trial stage than police interrogations at which the authorities have to ensure that the accused can retain counsel, is when the prosecutor hears⁹⁷³ the accused before deciding on an order to pre-trial detention, which takes place after initial police custody.⁹⁷⁴ At such a hearing, the prosecutor can pose questions to the accused.⁹⁷⁵ During such a hearing, counsel can both be present and make "pertinent remarks".⁹⁷⁶ At this stage, the accused has no right to legal aid. Thus,, only the accused with sufficient financial means will normally obtain legal assistance (Article 57 (2) Sv). Consequently, a difference arises between accused persons who have sufficient financial means and

⁹⁶⁹ See AG Spronken, Conclusion, HR 26 November 2013, ECLI:NL:PHR:2013:1424 (Right to legal assistance during police interrogations [Salduz, Navone and Directive 2013/48/EU]).

⁹⁷⁰ E.g. Franken (2010: 4.1), in: Mevis et al (2010).

⁹⁷¹ See e.g. for another place than a home, HR 1 March 1994, ECLI:NL:HR:1994:ZD1066, *NJ* 1994, 526.

⁹⁷² See further in sub-section 3.3.3.

⁹⁷³ Article 57 (2) Sv.

⁹⁷⁴ Article 58 (2) Sv.

⁹⁷⁵ Article 59a (3) Sv.

⁹⁷⁶ See similarly Articles 63 (4) and 86 (2) Sv.

those who do not, and this distinction results in a lack of equal protection for indigent and non-indigent accused.

This obligation of the authorities regarding “only” access to counsel changes into an additional obligation of appointing counsel, irrespective of the accused’s financial position, when the accused is detained upon the prosecutor’s order (Article 40 and 57 (1) Sv). Unless such a detained accused has retained counsel, the authorities thus have to enable that the accused can make use of appointed legal aid counsel (Article 40 Sv).

In legal practice, a check on the legality of the prosecutor-ordered pre-trial detention and an examination of the grounds for a further deprivation of liberty in the form of judge ordered pre-trial detention will usually take place during one hearing.⁹⁷⁷ Consequently, the accused will normally already have a legal aid lawyer at this stage (Articles 40 and 41 Sv).⁹⁷⁸ The hearing by the judge of instruction must take place within three days and fifteen hours after the accused’s arrest (Article 59a Sv).

It is noteworthy that the authorities are not obliged to provide the accused with either access or appointment of legal aid counsel at other investigative or evidence-gathering acts, as they would be called under EU Directive 2013/48/EU. Pre-trial legal assistance is limited and at determined procedural stages, which has now come to include police interrogations in quite a specific manner of consultation before (adult) and the former coupled with presence of counsel during that juncture (minor) (see sub-section 6.3.1.; although that will change per 1 March 2016).

6.3.2.2. *The trial and appeal stages*

Turning to the trial and appeal stages, it is important to stress that the authorities structurally have to allow the right to counsel to the accused, unlike during some distinct pre-trial stages mentioned in the previous sub-sections. Dutch law is even quite specific about the relationship between counsel and the accused at trial. When the accused is assisted by a lawyer, the trial rights of counsel are understood to “derive” from the accused (Article 331 Sv).⁹⁷⁹

The trial stage is considered to be almost the natural culmination of the criminal investigation and the prosecution, and the accused normally has a free choice as to his defence by a lawyer or self-representation.⁹⁸⁰ The accused is, in principle, allowed to instigate his own defence, without any lawyer at all.⁹⁸¹

The will of the accused in relation to a defence by counsel is considered to be crucial; the accused is, as a rule, assumed to be capable of deciding how he wants to defend himself in the procedure against him.⁹⁸² When the lawyer assists the accused in his presence, the accused himself retains his own rights⁹⁸³, which he can thus exercise or personally waive during the hearings (Articles 381 and 397a Sv). If the accused is being detained or lacks the financial means to retain counsel, he is deserving of legal aid at the trial and appeal phases. Under such circumstances, the authorities thus have to go one step further than the provision of access to counsel and appoint a legal aid lawyer to the accused.

6.3.2.3. *Miscellaneous stages*

There are also some additional stages at which the authorities have to ensure that the accused has access to a lawyer. The authorities should allow the accused to invoke his right to retain counsel when subjected to certain measures and punishment. These are: an ongoing conditional punishment⁹⁸⁴, a special treatment programme upon a criminal conviction⁹⁸⁵ and a procedure concerning a delay of

⁹⁷⁷ Article 59a Sv.

⁹⁷⁸ Article 59a Sv.

⁹⁷⁹ Counsel can only represent the accused when the accused is present himself or when he has authorised counsel to act in *in absentia* procedures under Article 279 Sv Statute of 15 January 1998, *Srb.* 1998, 33. See also HR 23 October 2001, ECLI:NL:HR:2001:AD4727, *NJ* 2002, 77, m.nt. Reijntjes. See earlier in sub-section 2.2.3.

⁹⁸⁰ See earlier in section 1.1.

⁹⁸¹ See for this reasoning also Mevis in his annotation to HR 9 October 2007, ECLI:NL:HR:2007:BA5025, *NJ* 2008, 43 m.nt. Mevis. See earlier in section 1.1.

⁹⁸² Spronken (2001) at 290.

⁹⁸³ Corstens/ Borgers (2014) at 104-105.

⁹⁸⁴ Article 14h Sr.

⁹⁸⁵ Treatment under criminal law (in Dutch: *Terbeschikkingstelling (TBS)* Articles 38b and 509w Sr).

liberty before the special penitentiary chamber.⁹⁸⁶ Moreover, the authorities have to allow the convicted person to retain counsel in a revision procedure before the Hoge Raad.⁹⁸⁷ They must also ensure that the accused can retain counsel who can act in a separate procedure in which the State seeks to recover illegal proceeds from a crime that has been proved to have been committed in the ordinary criminal procedure. In such proceedings, the authorities have to agree with counsel assumedly acting under the same mandate as in a normal criminal procedure. The legal fiction is applied so that this specific procedure is the natural continuation of the normal procedure. As a final issue, both before and after the regular trial stage, the authorities have to permit counsel to act in extradition or related procedures regarding criminal investigations and prosecutions or the execution of a sentence abroad. During these diverse stages or instances, the accused who is being detained, or who lacks the financial means to retain counsel, is entitled to legal aid.⁹⁸⁸

6.3.2.4. Preliminary conclusions

A first preliminary conclusion entails that the authorities have to ensure the right to assistance by a lawyer for the accused at several separate procedural stages, such as for the trial and appeal phases even where Article 28 Sv does not explicitly mention this entitlement. Additionally, the right to legal assistance by both retained and appointed counsel originates in this one provision that is construed, emphatically, as a right of the accused rather than an obligation. The accused is accordingly entitled to *opt* for assistance by counsel who can ask to be allowed to attend certain distinct stages of the criminal procedure, seeing that the right to assistance by counsel is dependent upon, or derives from, the accused's will and his position.⁹⁸⁹

Dutch law requires that the authorities guarantee access to a lawyer to the accused, so that counsel can be retained at several stages when the authorities hear him or subject him to certain investigative measures or hearings but “only” where explicitly stipulated by law (e.g. Articles 38 (1) and 39 Sv).⁹⁹⁰ Such interactions between the authorities and the accused can take place during specific instances of the pre-trial stage, but also during the trial and appeal phases.

There are procedural stages at which the authorities have to guarantee that the accused can retain counsel whilst they do not have to guarantee legal aid.⁹⁹¹ The authorities are generally required to appoint legal aid counsel in three instances. A first instance is deprivation of liberty (Article 41 Sv). A second one is a lack of financial means to retain counsel under specific circumstances (Articles 40-49 Sv). Finally, in certain serious cases the authorities are required to appoint legal aid counsel (following the *Salduz* decision of the Hoge Raad, as mentioned above in this section, section 6.3.).

Finally, the description given above – of the obligations of the authorities towards the accused with regard to providing the accused access to a lawyer at several procedural stages – allows for another preliminary conclusion. When the rights of the (adult) accused are most deserving of protection such as during police interrogations, the authorities are not obliged under the law to have counsel play “a” role. Instead, where there is no counsel, such as during police interrogations for the adult accused, the authorities themselves have to actively guarantee the entitlements of the accused such as the right to remain silent by means of a caution (Article 29 Sv). Where a lawyer is present, the authorities will – of course – have to uphold these requirements in their interactions with counsel and without resorting to undue pressure in obtaining answers or a full statement from the accused.⁹⁹² Therefore, there are some stages during the criminal proceedings at which the Dutch authorities owe the accused the obligation of ensuring access to a lawyer as a pre-condition for an effective defence. However, the right to legal assistance is certainly not afforded at *all* criminal procedural stages for the criminal procedure in its entirety to be fair and it is not a continuous right from the first applicable juncture onwards.

⁹⁸⁶ Article 15b Sr. Similar to the economic chamber, there is some lay participation in contrast to all the other courts.

⁹⁸⁷ Revision (for the benefit and detriment of the accused) (in Dutch: *Herziening* Articles 458 and 464 Sv).

⁹⁸⁸ Acts on extradition (in Dutch: *Wet Overdracht Tenuitvoerlegging Strafvonnissen* (WOTS) and *Uitleveringswet*).

⁹⁸⁹ Röttgering (2005: 3.6 - Art 28 Sv, suppl. 150), in Melai/Groenhuijsen (2005).

⁹⁹⁰ Spronken (2001) at 203 and 228.

⁹⁹¹ Article 57 (2) Sv, to be discussed under the respective procedural moment.

⁹⁹² With regard to undue pressure in the absence of counsel, see e.g. HR 3 April 2007, ECLI:NL:HR:2007:AZ8410, *RvdW* 2007, 392.

6.4. Waiver of the right to counsel and the right to proceed *pro se*?

During the stages at which the accused has a right to counsel (section 6.3.) and where the exceptions of unwaivable and mandatory legal assistance do not apply (sub-section 6.2.2.), as explained above, the accused has a *right* to counsel in Dutch criminal procedure, rather than an obligation. Therefore, this section will turn to a further exploration as to how the accused can normally freely renounce his right to counsel in order to proceed on his own, for example during the appeal stage in Dutch criminal procedure. This *waiver* of the right to counsel is also important in relation to the accused's free choice regarding his defence as a first important element of his right to an effective defence in Dutch criminal proceedings (section 1.1.). For this section about waivers in the Netherlands, it is important to take into consideration the "knowingly and intelligently"-standard used by the Court for the waiver of the right to counsel under the Convention (sub-section 5.2.5.). Against this backdrop, this section will explore whether the Hoge Raad "sanctions" lower courts which have not *checked* whether the accused has renounced his right to assistance by counsel up to *what standard* (sub-section 6.4.1.). The subsequent sub-section will elaborate upon cassation cases in which the accused claimed *not* to have waived his right to counsel in order to proceed *pro se* on appeal, starting with an important case which has become a point of reference in subsequent similar cases: the *Hoogerheide*-case (sub-section 6.4.1.1.).

6.4.1. A waiver of the right to counsel to proceed *pro se*?

The Hoge Raad did not deal with many cases in which the accused claimed during the cassation stage that he had not renounced his right to counsel on appeal to proceed *pro se*.⁹⁹³ One such case is called *Hoogerheide*, after a Dutch village in which the facts of the case occurred.⁹⁹⁴ After the *Hoogerheide*-case, the Hoge Raad has adjudicated three similar cases. All four cases will be discussed in this sub-section, in order to determine whether the Hoge Raad has potentially established a *Hoogerheide*-rule. Ultimately, preliminary conclusions will be drawn on the basis of all four cases (sub-section 6.4.2.).

6.4.1.1. The *Hoogerheide*-case

The relevant facts of the *Hoogerheide*-case are that the accused was believed to have killed a young child of eight years old in a local school in that village. During the first instance proceedings, the accused had received legal assistance from three consecutive lawyers. After those proceedings, he was convicted of manslaughter. The first instance court had sentenced him to 12 years of imprisonment and detention under a hospital order (in Dutch: *terbeschikkingstelling*, 37a Sr).

During the appeal stage, the accused expressed a wish not to be legally assisted by counsel. He contended that, with a lawyer, he would not obtain a fair trial (sic). The appeal court nonetheless appointed a lawyer to represent him. This standby lawyer was present during the hearings and was available for consultations at any time during the court sessions if the accused so wished. The accused did not resort to this standby counsel, however. The appeal court, which had asked the accused at several junctures whether he wanted to proceed *pro se*, got a confirmation from the accused at all those occasions that the accused indeed wanted to represent himself in the proceedings against him. Throughout the entire appeal procedure, the accused also never asked for assistance by either the standby lawyer or any other counsel. The final judgment of the appeal court was a conviction of the unassisted accused for murder, which sentenced him to life imprisonment and detention under a hospital order. This appeal verdict thus contained a harsher imprisonment sentence than the first instance decision, i.e. life rather than 12 years of imprisonment and detention under a hospital order.

The accused complained before the Hoge Raad that the lower court had wrongly assumed that he had waived his right to counsel on appeal in order to proceed *pro se*. Or at the very least, he claimed, the appeal court had not given sufficient reasons in its verdict regarding this supposed waiver of his right to counsel.

The Hoge Raad considered four points. First, the authorities cannot impose a lawyer on an accused who opts for self-representation. Second, Dutch law prohibits assistance by counsel against the will of the accused. Third, the applicable deontological norms also forbid that counsel would act

⁹⁹³ See for some such cases HR 20 November 2011, ECLI:NL:HR:2011:BT6406, *NJ* 2011, 29 and HR 10 September 2013, ECLI:NL:HR:2013:687, *NJ* 2013, 579 m.nt Schalken.

⁹⁹⁴ HR 17 November 2009, ECLI:NL:HR:2009:BI2315 (*Hoogerheide*). See also its annotation in *NJ* 2010, 143 m.nt. Schalken. Also central to Franken (2011).

contrary to the accused's express or apparent will.⁹⁹⁵ Fourth, Dutch law makes a lawyer both competent and obliged to act for minors who have not reached the age of 16 years old⁹⁹⁶ and for persons suffering from a mental illness.⁹⁹⁷ The Hoge Raad explained further about this fourth point that, even if these vulnerable accused would not agree to legal assistance or the defence lodged by counsel, the lawyer would be required to assist them. In essence, the Hoge Raad thus stressed these two legal bases regarding the priority given to the accused's free choice in relation to his defence and the two explicit exceptions that call for mandatory legal assistance under Dutch law (for the three elements of an effective defence; section 1.1. and mandatory legal assistance section 6.2.2.). Against this background, the Hoge Raad added: "(t)his does not mean that in other types of situations the care for the defence as required under Article 6 of the Convention can be left entirely and always to the defendant alone [Emphasis added by the author]". Apparently holding that the present *Hoogerheide*-case constituted such "another situation", the Hoge Raad indicated that the authorities should not only have appointed a standby lawyer for the accused but also, seeing that the accused expressly waived the right to legal assistance thereafter, the court should have taken "(...) special care". The Hoge Raad explains how this "special care" requires three aspects in this case. First, the appeal court should have examined whether the accused waived his right to legal assistance up to the standard of "(...) unequivocally, deliberately and freely". Second, the court ought to have scrutinised whether or not the accused's decision is "(...) deserving of respect". Finally, the court should have ensured that, during the adjudication of the case, "(...) the position of the accused has been guaranteed" by "compensating for" by means of providing the requisite "information" that an unassisted accused will usually lack. "(T)his deficiency will have to be compensated for as far as possible by the trial judge", so the Hoge Raad held. To conclude, the Hoge Raad decided to overturn the *Hoogerheide*-case.

The AG and the Hoge Raad agreed.

Before this section will turn to its own original analysis of this *Hoogerheide*-case, it is important to note what scholars submit about this specific case. Some academics argue that the Hoge Raad might have overturned this case because the accused evidently had difficulties with the presentation of his defence.⁹⁹⁸ They contend that the Hoge Raad may have come to its cassation decision because there were doubts about the effectiveness of the accused's defence in court proceedings that resulted in a higher sentence. The last part of this analysis is correct because the accused was convicted of a "worse" crime (murder instead of manslaughter) and was sentenced harsher than at first instance after the appeal proceedings in which he participated, contrary to at first instance, *per se*. Although the Hoge Raad might have indeed concluded it needed to overturn this case because of possible ineffective self-representation, this section will explore whether this case can be relevant for this research into *ineffective legal assistance* and its redress in Dutch criminal proceedings. As explained in the previous chapter, the issue of the waiver of the right to legal assistance is important in this respect (sub-section 5.2.5.).

In summary, the overview of this case indicates that the Hoge Raad came to quash the *Hoogerheide*-case because of a three-tiered requirement placed on the appeal court. The appeal court has to: (i) check on the waiver of the right to counsel; (ii) examine whether the decision of the accused to proceed *pro se* was deserving of respect; and (iii) pay special attention to the position of the accused, particularly by providing him compensatory information which he will generally lack if he is a lay person who thereafter proceeds *pro se*. This section will explore more closely the Hoge Raad's decisions in the context of all three elements of this three-tiered requirement.

The Hoge Raad's verdict indicates that the appeal court had *not checked* whether the accused had renounced his right to counsel on appeal up to the standard of "(...) unequivocally, deliberately and freely" or whether this decision of the accused to proceed *pro se* should be respected in this instance. The lack of both "checks" became apparent by the lack of requisite reasons in the appeal verdict regarding this waiver of the right to counsel. Therefore, the Hoge Raad shows in its verdict how the first two elements of this three-tiered requirement were already "fatal" in the *Hoogerheide*-case. In other words, because the appeal court had not checked the waiver up to the standard and

⁹⁹⁵ Under Rule 9 of the Rules of Conduct 1992.

⁹⁹⁶ Under Article 503 (2) Sv.

⁹⁹⁷ Under Article 509a in conjunction with Article 509d (3) Sv.

⁹⁹⁸ See also Franken (2008) at 569-570.

whether or not this decision by the accused to proceed without counsel was deserving of respect, the case got overturned.

However, the Hoge Raad also explicitly mentioned the third element of an activity by the appeal court in its three-tiered requirement. This third element of information provision is important because it indicates what the appeal court has to do when an unassisted accused on his or her own might need from the court in order to obtain an effective defence. This requirement of information provision requires an active role of the appeal court, which cannot passively sit by and respond only to what the unassisted accused presents in court. Rather, the Hoge Raad might encourage appeal courts to intervene in the case when confronted with a lay person who opts for self-representation so that he will at least obtain the requisite information a lawyer could provide him with. Several important questions arise from this case. What information would the appeal court have to offer the accused? What information would a lawyer hold that a lay person might not possess? Would that be information that guarantees “an effective defence”? How active should the appeal court be – should it only respond to information requests by the accused or does it have to provide information on its own initiative, given the formulation chosen by the Hoge Raad? Reasoned extensively, is an *assisted* accused – like the unassisted accused in the *Hoogerheide*-case – also entitled to “compensating information” by the appeal court if he does not benefit from “*an effective defence*” because of the lawyer on his side? If so, by what means is an accused entitled to such “compensating information”?⁹⁹⁹

These questions are certainly relevant for this research but this chapter does not yet deal with a lack of an effective defence due to *ineffective assistance by counsel* in Dutch criminal proceedings. Rather, this chapter discusses the right to counsel and therefore cited the *Hoogerheide*-case because of the waiver of the right to legal assistance. Therefore, the aforementioned questions will be revisited in the chapter that deals with ineffective legal assistance (chapter 12). This means that, if and how this internal benchmark can be used for a further exploration of Dutch law and case law in this research into ineffective assistance by counsel and its redress within the criminal proceedings in the Netherlands, will be examined in the corresponding substantive research chapters on Dutch criminal proceedings (chapters 8, 10 and 12).

For the continuation of the present exploration of the waiver of the right to legal assistance, it is important to note the standard adopted in the *Hoogerheide*-case. As was explained above, the Hoge Raad overturned the *Hoogerheide*-case because the waiver of the right to counsel had not been checked up to the “(...) unequivocally, deliberately and freely”-standard. The remainder of this section will deal with *Hoogerheide*-like cases that also give information about the waiver of the right to counsel in the criminal proceedings in the Netherlands. Therefore, the next sub-section will address this issue of the waiver of the right to counsel (sub-section 6.4.1.2.).

6.4.1.2. *Hoogerheide*-rule?

This sub-section will continue with three *Hoogerheide*-like cases, because of their significance for this examination as to how the Hoge Raad deals in its case law with the waiver of the right to counsel at the appeal stage at least. This description will pay special attention to the standard that is being used by the Hoge Raad to determine whether or not the accused has renounced his right to counsel with the requisite procedural safeguards.

- *What if counsel supposedly suggested to the accused to proceed pro se?*

In 2011, a *Hoogerheide*-like case reached the Hoge Raad, which from now on will be labelled *2011 Counsel suggested waiver*-case.¹⁰⁰⁰ This case will only be discussed on its legal merits. Given that most of the relevant facts of this case can be easily inferred from the advice of AG Vegter to the Hoge Raad, this case will almost entirely be explained on the basis of that conclusion.

The relevant facts of the case were that the accused had received legal assistance at two out of five appeal court sessions and had been present alone in court when the appeal bench had examined his case on the substance. None of the accused’s four different lawyers had been present during more than one appeal hearing and one of them had not been present during any session at all. During a

⁹⁹⁹ See for a similar reasoning by AG Knigge which the Hoge Raad did not follow, thus not leading to overturning in the case, in the case HR 10 September 2013, ECLI:NL:HR:2013:687, particularly in para. 4.11., *NJ* 2013, 579 m.nt. Schalken, which is elaborated upon in sub-section 4.2.2.

¹⁰⁰⁰ HR 20 December 2011, ECLI:NL:PHR:2011:BT6406, *NJB* 2012, 201.

certain appeal court session, the accused remarked that he had opted to proceed *pro se* “(...) because his counsel would have opined that her presence would have been damaging for his case”. The appeal court had proceeded with the case and convicted the accused.

The AG came to the conclusion that the appeal court had not examined whether this accused had waived his right to legal assistance “(...) unequivocally, certainly and voluntarily” when he announced that, upon his lawyer’s suggestion to that effect, he would proceed *pro se*.¹⁰⁰¹ According to the AG, the appeal court had not scrutinised *for what reason* the accused had opted to proceed on his own, who moreover stressed that “(...) the earlier sessions on appeal did not demonstrate that the accused has had *an effective defence*”¹⁰⁰², because the facts of the case “do not indicate *the assistance of a well-prepared, involved lawyer* [Italics by the author]”. Therefore, the AG advised the Hoge Raad to quash the case.

The Hoge Raad did indeed overturn the case, thus taking a decision that corresponds with the advice of the AG. In other words, the Hoge Raad holds that the appeal court had not checked whether the accused had renounced his right to counsel up to the “unequivocally, deliberately and voluntarily”-threshold.¹⁰⁰³ The Hoge Raad added that the appeal court had not paid “special attention” “during the adjudication at trial to the position of the accused as to the provision of information to the accused”.¹⁰⁰⁴ The Hoge Raad added that “the appeal court” had failed to “prompt” the accused about “(...) the importance of legal assistance in this case and the consequences of his decision to proceed on his own”.¹⁰⁰⁵ The Hoge Raad concluded that, because assistance by counsel was “of fundamental interest” for the accused in this case, while the accused had not received it on appeal, the case had to be overturned.¹⁰⁰⁶

This *2011 Counsel suggested waiver*-case appears to reiterate the three-tiered requirement as established in the *Hoogerheide*-case. Not only does the waiver need to be checked up to the aforementioned standard and the accused’s decision on its fairness, but also the activity required from the appeal court which has to provide information to the accused who proceeds without legal assistance. Moreover, this case could, perhaps, be one in which the accused received *ineffective* legal assistance before and on appeal, as the AG appears to indicate with his references to the performance of the lawyers of the accused at least. The latter issue might give an indication of *ineffective* legal assistance in Dutch criminal proceedings, which will only be examined in the corresponding final substantive research chapter (chapter 12).¹⁰⁰⁷ It must be highlighted here that the Hoge Raad did quash the case and so consequently did not have the accused bear the consequences seeing that he might not have renounced his right to counsel up to the “unequivocally, deliberately and voluntarily”-threshold.

- *What if the accused previously had not had legal assistance?*

Another case that will be examined here in the context of the waiver of the right to counsel case came before the Hoge Raad two years later, in 2013 and will be called *2013 No need to examine a waiver*-case. Before discussing the case on its legal merits, some relevant facts of the case will be described, mostly on the basis of the AG’s advice to the Hoge Raad.

The accused, who had been convicted in her absence at first instance, appeared before the appeal court “(...) without a lawyer, any knowledge of the dossier, and without proper knowledge of the Dutch language”.¹⁰⁰⁸ When the chair asked the accused whether she understood the risk of an appeal, her response was “Oh”. The court warned her that it would come at her risk if she would not involve an expert, who might have been relevant because the accused had alleged that she had swung a knife at her niece “(...) because she had been possessed by an evil spirit”. Ultimately, the accused’s conviction on appeal resulted in a sentence that was four times higher than at first instance.

¹⁰⁰¹ AG Silvis, Conclusion, HR 20 December 2011, ECLI:NL:PHR:2011:BT6406, para. 5 quoting *Hoogerheide*’s r.o. 3.4.

¹⁰⁰² Equally, AG Silvis, Conclusion, HR 20 December 2011, ECLI:NL:PHR:2011:BT6406, para. 5 quoting *Hoogerheide*’s r.o. 3.4.

¹⁰⁰³ HR 20 December 2011, ECLI:NL:HR:2011:BT6406, particularly in para. 3.5, *NJB* 2012, 201.

¹⁰⁰⁴ Equally, HR 20 December 2011, ECLI:NL:HR:2011:BT6406, particularly in para. 3.5, *NJB* 2012, 201.

¹⁰⁰⁵ Equally, HR 20 December 2011, ECLI:NL:HR:2011:BT6406, particularly in para. 3.5, *NJB* 2012, 201.

¹⁰⁰⁶ HR 20 December 2011, ECLI:NL:HR:2011:BT6406, particularly in para. 3.4, *NJB* 2012, 201.

¹⁰⁰⁷ AG Silvis, Conclusion, HR 20 December 2011, ECLI:NL:PHR:2011:BT6406, para. 7, *NJB* 2012, 201.

¹⁰⁰⁸ See particularly Schalken in his annotation to HR 10 September 2013, ECLI:NL:HR:2013:687, *NJ* 2013, 579, m.nt. Schalken.

Before the Hoge Raad, the accused complained about two issues. The appeal court had not appointed a lawyer *ex officio* and had not examined whether the accused had needed assistance by a lawyer.

AG Knigge advised the Hoge Raad to quash this case. His conclusion opened with “(...) the care of the trial judge for an *effective defence* depends on the special features of the case [Italics by the author]”, reiterating the considerations of the *Hoogerheide*-case.¹⁰⁰⁹ The AG submitted that “(...) the examination of the waiver of the accused’s right to counsel has to be more intense where legal assistance is more of a fundamental interest”. “Most important for that consideration are the legal merits of the case and the punishment risked by the accused”. “Less clear is if, and if so to what extent, a relevant factor is whether the accused could have been deemed capable of lodging his own defence”, he added. “That [last] factor will be important certainly for the judge who has to provide information to the accused where respecting the decision of the accused to defend himself in person” [added by the author]. “But also with regard to the waiver of this right, this factor, albeit it indirectly perhaps, appears to play a role, in my opinion”, the AG submitted. He points out: “(t)he deficient manner in which the accused conducts his own defence, is an important indication that the accused might not have understood the [consequences] of his decision to defend himself without counsel, in my view [added by the author]”. “It can be inferred from an *inadequate defence* that the accused cannot comprehend what he misses [by not being assisted by counsel]”, the AG concluded [added and emphasised by the author]. Thereupon, the AG applied the facts of this case to this explanation of Dutch law and drew the following conclusion as to how the authorities should have acted in order to protect the right to an effective defence of this *unassisted* accused:

“The way in which the judge has to provide the care in relation to the defence by the accused depends, as said, on the special features of the case. The high demands that the Hoge Raad sets in HR 17 November 2009, LJN BI2315, NJ 2010/143 [the *Hoogerheide*-case mentioned above], in which the accused risked life imprisonment, which are imposed on the judge are not applicable to the same extent in the present case. The current case, however, has a similar characteristic that the court has not done for an effective defence what is required under its care. The appeal court has not pointed out to the accused that she was entitled to legal assistance and that she had a right to ask the court to stay the proceedings in order to obtain such assistance by counsel. The court did not even inquire into the reasons why the accused waived her right to counsel. During the proceedings the court had not provided the accused in any way with information that she required to be compensated in her lack of legal assistance. The comment to the accused during the trial that the lack of consultation of an expert comes at the risk of the accused, can hardly be seen as an attempt of the independent responsibility of the court to guarantee an effective defence. Rather, it gives an indication of the fact that the court did not consider that it was its own concern to ensure that the accused would have been guaranteed an appropriate defence [added by the author].”¹⁰¹⁰

Therefore, the AG advised the Hoge Raad to quash the case.

The Hoge Raad did not follow the AG’s advice, and considered both grounds in the cassation brief. First, the Hoge Raad found that the first ground did not result in cassation because the accused was not entitled to appointment of a legal aid lawyer as she had not been placed in pre-trial detention (Article 41 Sv).¹⁰¹¹ Second, the Hoge Raad held that the appeal court did not have to examine whether or not the accused required legal assistance in this case. After citing some elements of the above-cited *Hoogerheide*-case, the Hoge Raad concluded that “(...) the appeal court had not found a cause in the facts and circumstances related to the person and personality of the accused that required it to examine whether the accused had needed assistance by counsel – out of the guarantees for her right to a fair

¹⁰⁰⁹ AG Knigge, Conclusion, HR 10 September 2013, ECLI:NL:PHR:2013:588, particularly in para. 4.5., as an advice to the Hoge Raad’s case of HR 10 September 2013, ECLI:NL:HR:2013:687, *RvdW* 2013,1086.

¹⁰¹⁰ AG Knigge, Conclusion, HR 10 September 2013, ECLI:NL:PHR:2013:588, particularly in para. 4.11, as an advice to the Hoge Raad’s case of HR 10 September 2013, ECLI:NL:HR:2013:687, *RvdW* 2013,1086.

¹⁰¹¹ HR 10 September 2013, ECLI:NL:HR:2013:687, particularly in para. 2.3, *NJ* 2013, 579 m.nt. Schalken

trial”.¹⁰¹² Therefore, the appeal court’s decision had not encompassed a wrong legal opinion and was “not incomprehensible”, according to the Hoge Raad, which left the case intact.

The Hoge Raad and the AG disagreed.

Of course, the Hoge Raad could keep as closely as it did to the cassation brief. However, the conclusions regarding those more specific issues nonetheless prompted the AG into considerations that this same Hoge Raad found important in the *Hoogerheide*-case. As in the *Hoogerheide*-case, in this *Hoogerheide*-like case referred to as *2013 No need to examine a waiver*-case the accused also renounced his right to counsel to proceed *pro se*, though after he already had had assistance by lawyers. Consequently, this *2013 No need to examine a waiver*-case appears to be the first case in which the Hoge Raad appears to depart from the three-tiered requirement known here as the *Hoogerheide*-rule.

The specific facts and circumstances of this *2013 No need to examine a waiver*-case might justify this decision to leave the case in-tact because an accused is entitled to waive his (in this case: her) right to counsel and proceed *pro se*. Nonetheless, under those circumstances, the AG found it important to stress that an appeal court should not remain passive when confronted with a lack of “an effective defence” by this *unassisted* accused.

This is not the only difference of opinion between Dutch jurists about this *2013 No need to examine a waiver*-case. The annotator in the case, Schalken, agrees with AG Knigge rather than with the Hoge Raad. He mentions that “(...) the appeal court could have better stayed the proceedings so that the accused would have been enabled to effectuate her right to assistance by counsel”.¹⁰¹³ Schalken added: “(...) considering her income, she could have requested the council for legal aid to appoint her a lawyer (Article 42 (3) Sv)”.¹⁰¹⁴

Although the *2013 No need to examine a waiver*-case is important as it establishes that an accused can be free to not opt for legal assistance, it has to be distinguished from the above-cited 2009 *Hoogerheide*-case and the *2011 Counsel suggested waiver*-case. In these two other cases, the accused persons waived their right to counsel *after* having had legal assistance (which, moreover, might have been ineffective in the last case, as mentioned above as implied by the AG at least; *2011 Counsel suggested waiver*-case).

It is worth stressing here that in this last *2013 No need to examine a waiver*-case AG Knigge *even* suggested that the appeal court should have provided information to the unassisted accused whose defence was ineffective by equally ineffective self-representation. Moreover, the annotator Schalken added the possibility of a stay of the proceedings that the appeal court could have decided upon. The Hoge Raad did not find any such measure necessary and instead found that the appeal court had not made a legally wrong or incomprehensible decision. However, the Hoge Raad also does not establish in this case that this accused had renounced her right to counsel up to the waiver standard of “unequivocally, deliberately and voluntarily”. This last observation leads to the exploration of one more case that might fall in the category of *Hoogerheide*-like cases.

- *What if the court checks and points out the effect for the accused of his waiver of the right to counsel?*

Given that the facts of this last cited case from 2014 can be easily inferred from the advice of AG Vegter to the Hoge Raad, this case will be explained on the basis of that conclusion.¹⁰¹⁵

The accused argued on appeal that he wanted to proceed *pro se*, following which the appeal court had discussed with the, now unassisted, accused the facts of the case in detail.¹⁰¹⁶ Moreover, the appeal court had pointed out to this accused the importance of assistance by counsel several times during the court sessions. There remained some uncertainties in this case about whether or not the accused had been presented with the consequences of choosing self-representation or its legal

¹⁰¹² HR 10 September 2013, ECLI:NL:HR:2013:687, particularly in para. 2.4.3, *NJ* 2013, 579 m.nt. Schalken.

¹⁰¹³ See particularly Schalken in his annotation to HR 10 September 2013, ECLI:NL:HR:2013:687, *NJ* 2013, 579, m.nt. Schalken.

¹⁰¹⁴ See particularly Schalken in his annotation to HR 10 September 2013, ECLI:NL:HR:2013:687, *NJ* 2013, 579, m.nt. Schalken.

¹⁰¹⁵ HR 11 February 2014, ECLI:NL:HR:2014:1367.

¹⁰¹⁶ AG Vegter, Conclusion, ECLI:NL:PHR:2014:516, para. 3.9. as an advice to the Hoge Raad’s case of HR 11 February 2014., as an advice to the Hoge Raad’s case of HR 11 February 2014, ECLI:NL:HR:2014:1367.

implications. However, the AG considered that the appeal court had examined and provided sufficient information in the light of these requirements. Additionally, the accused had had seven lawyers in his case, did not risk imprisonment and had received sufficient time to decide whether or not to opt for self-representation on appeal. Moreover, once the accused had waived his right to counsel, the appeal court had inquired again whether the accused wished to be assisted by a lawyer. Also, the AG concluded that the case was not complex, whilst the accused's defence by way of self-representation could be deemed to have been "effective". Interestingly, while this is already important, the AG made an additional reference. He argued that in a situation in which the accused is entitled to legal aid because of being held in pre-trial detention (Article 41 Sv), (a situation that did not occur in the present case) the judge will "(...) also have to examine" whether the accused waived his right to legal assistance and "(...) provide the accused with information".¹⁰¹⁷ This additional consideration appears to come close to the finding of the Hoge Raad in the third above-cited case of *2013 No need to examine a waiver-case*. The AG advised the Hoge Raad to leave the case in-tact. The Hoge Raad left the case in-tact and did not provide any in-depth reasons (Article 81 (1) RO).

Thus, the Hoge Raad and the AG agreed in this final *Hoogerheide*-like case.

Two further issues are noteworthy. First, the AG mentions the following, in a footnote placed next to the sentence about the in-depth discussion of the facts of the case by the appeal court with the accused:

"It has to be noted that the author of the cassation brief on this point argues that the accused has not been able to initiate his defence by self-representation and could almost only answer the questions posed by the judge (issue 19). These questions can be seen, unlike the brief does, as attention of the appeal court for the special position of the accused. In the "streamlined" procedural model [for the appeal phase], supposedly these questions would not have been posed if the accused would have had assistance by counsel. The fact that the judge during the adjudication of the court at the hearing had not found it his task to examine *all* the requests from the significant amount of letters that the accused had written to the court before the appeal court session, I do not interpret as a shortcoming, unlike the cassation brief author (issue 16). Rather, attention by the appeal court for the special position of the accused in the absence of legal assistance does not mean that the accused has to be encouraged to reiterate at the session all sorts of requests that are evidently utterly pointless. A *sensible* lawyer would have dissuaded the accused to submit these requests [added and emphasised by the author]."¹⁰¹⁸

This last citation is not only important for the interpretation of the expectations of the appeal court which has to interact with the defence (here: the unassisted accused). It also indicates what the AG expects of counsel of an assisted accused. Apparently, at least as this footnote implies, it is the "sensible lawyer's" task to dissuade the accused from submitting requests to the court that are evidently utterly pointless. This last issue will have to be revisited in the context of the responsibilities which the lawyer might owe to the accused within criminal proceedings (chapter 8). At this stage of the research, it is important to analyse the above-cited *2014 Explicit and checked waiver-case* in full in relation to the observations made about the check by an appeal court of the waiver by an accused who is entitled to appointed legal aid counsel, rather than to retained counsel.

AG Vegter emphasises, as supplementary reasoning, that the appeal court would have an additional obligation regarding an accused who would be assisted by a legal aid lawyer (Article 41 Sv). The AG does not explain this heightened obligation of the appeal court as opposed to its obligation towards an accused who can retain a lawyer on appeal (Article 28 Sv). It might be understandable that authorities which had to go one step further than allowing the accused to retain counsel (access to counsel) have to make sure that the accused has had effective legal assistance by this appointed legal aid lawyer (appointment of counsel). For *appointed* counsel, the appeal court

¹⁰¹⁷ AG Vegter, Conclusion, ECLI:NL:PHR:2014:516, para. 3.5., as an advice to the Hoge Raad's case of HR 11 February 2014, ECLI:NL:HR:2014:1367.

¹⁰¹⁸ AG Vegter, Conclusion, ECLI:NL:PHR:2014:516, footnote 10., as an advice to the Hoge Raad's case of HR 11 February 2014, ECLI:NL:HR:2014:1367.

would have to examine whether the accused who had no assistance by counsel could have managed without legal assistance. For *retained* counsel, the appeal court would have to explore the effects of the choice not to be legally assisted when the accused opts out of access to counsel (Article 28 Sv).¹⁰¹⁹ However, out of equal legal protection, it can be argued that it should not matter whether legal assistance is being provided by retained or appointed counsel. This also appears to be the position of the Court. It would not be fair if an accused who has the funds to hire counsel, for example, would be “better off” in terms of the legal assistance by the lawyer provided than the indigent accused who necessarily gets an appointed counsel (section 5.4.). Furthermore, as an internal benchmark, the Hoge Raad – which held legal assistance “of fundamental interest” for the accused at the procedural stage of appeal – can hardly argue that a defence by an appointed legal aid lawyer would be “more important” than if the services are being provided by a retained lawyer (Article 28 Sv).¹⁰²⁰ Therefore, the AG’s additional reasoning raises further questions as to whether there is an appropriate and fair distinction being made between retained or appointed counsel in relation to an effective defence in Dutch criminal proceedings. This issue will have to be taken up in the corresponding final substantive research chapter on Dutch criminal proceedings (chapter 12). It is worth concluding here with the remark that the Hoge Raad did not consider it necessary to give an in-depth exploration of this case, in which the appeal court checked the waiver of the right to counsel and its possible effect for the accused in this *2014 Explicit and checked waiver*-case. Therefore, also this last case is important to determine how the Hoge Raad deals with the waiver of the right to counsel by an accused on appeal. Again, the Hoge Raad does not establish in this case that this accused had renounced his right to counsel up to the waiver standard of “unequivocally, deliberately and voluntarily”. Against this background and particularly with emphasis on the “original” *Hoogerheide*-case, the next sub-section will draw conclusions about all four above-cited *Hoogerheide*-like cases (sub-section 6.4.1.3.).

6.4.1.3. Preliminary conclusions about the *Hoogerheide*-case and its rule

The Hoge Raad in its *Hoogerheide*-case found that when the authorities are confronted with a lack of “an effective defence”, they have to actively protect the “position of the accused” by “providing him with information”. Hence, the Hoge Raad does not seem to consider this right to be important for the accused alone, but also for a fair trial with truth finding. Rather, the Hoge Raad appears to hold that the right to “an effective defence” is not only as a personal right of the accused but also as a procedural guarantee for a fair criminal procedure in its entirety. This observation is important for this research because issues with a lack of “an effective defence” cannot only arise for an unassisted accused but also for an assisted accused whose lawyer gives him only ineffective legal assistance.

Seen from the perspective of this research into ineffective legal assistance and its redress in Dutch criminal proceedings, this *Hoogerheide*-case and its successors prompt further questions regarding the distinction this research makes between unassisted and assisted accused. When the authorities are confronted with a lack of “an effective defence” by ineffective assistance by counsel, rather than inadequate self-representation, should the bench also “pay special attention to the position of the accused” and “provide the accused with information”? Should the appeal court intervene in the case as under the *Hoogerheide*-rule for an assisted accused whose lawyer gives him only ineffective legal assistance? Will the Hoge Raad quash the case if the appeal court does not provide the assisted accused, who receives ineffective legal assistance, with information? These questions will have to be reserved for the final chapter on Dutch criminal proceedings that deals with the approach to ineffective legal assistance and its redress within this process in the Netherlands (chapter 12). However, this overview will lay the foundations for this further exploration.

In the 2009 *Hoogerheide*-case, the Hoge Raad and the AG agreed that the case needed to be quashed because the appeal court had not checked *inter alia* whether the accused had waived his right to counsel to proceed *pro se* up to the standard of “(...) unequivocally, deliberately and freely”. The Hoge Raad added that the appeal court would have to provide the unassisted accused with information if his defence through self-representation was ineffective as a result. In 2011, the Hoge Raad and the AG agreed on the same *Hoogerheide*-rule (*2011 Counsel suggested waiver*-case). In 2013, the AG still

¹⁰¹⁹ See section 6.2. Counsel can only represent the accused when the accused is present himself or when he has authorised counsel to act in *in absentia* procedures under Article 279 Sv Statute of 15 January 1998, *Stb.* 1998, 33. See also HR 23 October 2001, ECLI:NL:HR:2001:AD4727, *NJ* 2002, 77, m.nt. Reijntjes.

¹⁰²⁰ HR 20 December 2011, ECLI:NL:PHR:2011:BT6406, particularly in para. 3.4, *NJB* 2012, 201.

mentioned the *Hoogerheide*-rule in his advice to the Hoge Raad, but the latter did not follow it (2013 *No need to examine a waiver*-case). In 2014, both the AG and the Hoge Raad seem to think the *Hoogerheide*-rule has been applied (2014 *Explicit and checked waiver*-case). Only the AG provided additional reasoning to the effect of a requirement of a check on the waiver of the right to appointed legal aid counsel only, rather than requiring a similar check for retained counsel (Article 41 Sv; 2014 *Explicit and checked waiver*-case). That latter point will have to be examined on its fairness as to whether a distinction between appointed and retained counsel on the basis of the *effectiveness* of their legal assistance can be made under the Convention (chapter 12). Finally, these cases will need to be explored because of the yet established “knowingly and intelligently waiver”-standard for the right to counsel under the Convention at “critical” stages such as the appeal phase (sub-section 5.2.5.; further in chapter 13). This exploration is important because the Court has explicitly set a higher standard than “unequivocally, deliberately and voluntarily”-threshold for the waiver of the right to counsel which should, as said, meet the “knowingly and intelligently waiver”-standard (sub-section 5.2.5.; further in chapter 13). To reiterate the words of the Court itself, a higher waiver-standard than the “unequivocally, deliberately and voluntarily” is required for renouncing the right to counsel because “(...) the right to counsel, being a fundamental right among those which constitute the notion of fair trial and ensuring the effectiveness of the rest of the foreseen guarantees of Article 6 of the Convention, is a prime example of those rights which require the special protection of the knowing and intelligent waiver standard”.¹⁰²¹

6.4.2. Preliminary conclusions about the right to counsel: waiver and restrictions

In this chapter that sought to determine the obligations of the authorities regarding the right to counsel toward the accused, it was important to explore under what circumstances the accused can renounce his right to counsel at the “critical” stage of the criminal procedure of the appeal phase. The line that appears to emerge from the case law of the Hoge Raad in this section is that it does not require a waiver of the right to counsel up to the “knowingly and intelligently”-standard, like the Court does. Rather, the Hoge Raad appears to require only the lower “unequivocally, deliberately and voluntarily”-threshold. Also, the Hoge Raad appears to have established the *Hoogerheide*-rule under which the judge would not be allowed to remain passive. Rather, the appeal court has to provide “compensating information” to the unassisted accused who has waived his right to counsel but thereupon proceeded *pro se* resulting in self-representation that potentially did not amount to “an effective defence”.

6.5. Conclusion

This conclusion will answer the leading question for this chapter: What obligations do the authorities owe to the accused regarding his right to counsel in Dutch criminal proceedings?

The answer to this question is fourfold, following the outline of the chapter. This answer is based on a first vertical perspective taken to the obligations regarding the right of the accused to assistance by counsel owed by the authorities to the individual in Dutch criminal procedure.

First, a more general inference stemming from this chapter on the right to counsel is that, overall, the obligations owed by the authorities toward the accused in Dutch criminal proceedings are being shaped by an earlier and increased application of that right. The significance of assistance by a lawyer at the pre-trial, trial and post-trial stages has been increasingly recognised in Dutch criminal procedure (section 6.2). For example, legal assistance is now required for more stages than before, such as on appeal in cassation and revision (for the benefit of the accused; sub-section 6.2.2.). Moreover, since *Salduz*, the right to assistance by counsel has to be afforded sooner in the process, i.e. at the stage of police interrogations. Therefore, not only does Dutch law and case law require the right to counsel at more procedural stages, but it also does so earlier on in the proceedings.

More specifically, under Article 28 Sv, the authorities have to ensure that the accused can retain one or more defence lawyers or, under certain circumstances, they must go one step further by appointing a legal aid advocate. Mostly, the accused is free to choose whether or not to be assisted by either retained or appointed counsel. However, Dutch law does not regulate that the appointed legal aid lawyer should be counsel of the accused’s *choosing*. *Ex officio* appointment by authorities is required when the accused is deprived of his liberty as of the prosecutor-ordered detention and he has

¹⁰²¹ *Pishchalnikov v. Russia*, Judgment of 24 September 2009, HUDOC no. 7025/04, para. 78.

not retained counsel, irrespective of his financial situation (Article 40 Sv). Moreover, the authorities have to appoint a lawyer for the accused who is being deprived of his liberty by an order from the judge of instruction and have to guarantee the accused his right to free legal aid by appointed counsel during all subsequent stages of the procedure (under Article 41 Sv and Article 43 (2) Sv). If the accused has lodged an appeal and the accused had been in such pre-trial detention, the presiding appeal court judge has to appoint counsel *ex officio* (Article 41 Sv). Consequently, once the lawyer is appointed, the right to legal aid remains in force during the entire procedure, regardless of whether or not the deprivation of liberty continues (Article 43 (1) Sv).

As a final noteworthy element regarding the scope of the right to counsel, it is important to stress two exceptions to the rule of free choice of the accused whether or not to opt for assistance by counsel at the trial stage and thereafter. A first exception to that rule of free choice entails that, at trial, the authorities have to ensure legal assistance for both minors under the age of 16 and for persons who are suffering from a mental illness (unwaivable legal assistance). A second exception is that the authorities cannot and do not allow the accused to proceed without a lawyer at two criminal procedural stages: the appeal in cassation stage and the revision stage (mandatory legal assistance). The arrangement of unwaivable and mandatory assistance by counsel apply “only” at and after the trial phase. Consequently, pre-trial, there is no such unwaivable right or mandatory arrangement for legal assistance by either a retained or appointed lawyer.

Second, the authorities have obligations regarding the right to counsel in Dutch criminal proceedings at the following procedural stages. After the Court’s *Salduz v. Turkey* case, the Hoge Raad has held that the authorities have to ensure that the adult accused can have a right to consultation with counsel before the first police interrogation while the minor accused can have such a consultation right before, and a right of attendance of counsel during, police interrogations. As of 1 March 2016, this will change into a right also of attendance of counsel during police interrogations for the arrested adult accused (22 December 2015). While this is an important development, the Hoge Raad still holds the right to consultation to be more important than the right to assistance during police interrogations. This shows in the consequences that the Hoge Raad holds should attach to an abuse of process of either the right to consultation or assistance during police interrogations. Other procedural stages are a house search and when the prosecutor hears the accused before deciding on an order to pre-trial detention, which takes place after initial police custody. As of the trial stage, the authorities structurally have to allow the right to counsel to the accused. Dutch law is even quite specific about the relationship between counsel and the accused at trial. When the accused is assisted by a lawyer, the trial rights of counsel are understood to “derive” from the accused (Article 331 Sv). There are also miscellaneous stages at which the authorities have to ensure that the accused can invoke his right to retain counsel when subjected to certain measures and punishment.

Third, during the aforementioned stages at which the accused has a right to counsel (section 6.2.) and where the yet reiterated exceptions of unwaivable and mandatory legal assistance do not apply (sub-section 6.2.2.), the accused has a *right* to counsel in Dutch criminal procedure, not an obligation. Consequently, the accused can normally, for instance, freely waive his right to counsel in order to proceed on his own during the appeal stage in Dutch criminal procedure.

Fourth and finally, with regard to the waiver of the right to counsel, some more general conclusions will have to be drawn from the limited – but nonetheless relevant – cases of the Hoge Raad. In 2009 and up to 2011, the Hoge Raad and the AG appear to examine whether the appeal court had checked whether the accused had waived his right to counsel on appeal up to the standard of “(...) unequivocally, deliberately and freely” (in the *Hoogerheide-* and *2011 Counsel suggested waiver-*cases). In a more recent case of 2013, the AG still advised the Hoge Raad to examine whether the accused had renounced his right to counsel up to the aforementioned standard, but the Hoge Raad did not consider that necessary because the accused had not had legal assistance before that at all (*2013 No need to examine a waiver-*case). This decision appears to be reasonable because an accused is normally allowed to proceed *pro se*, unless, as the Hoge Raad also established in the *Hoogerheide-*case, there are exceptions of the right being unwaivable or mandatory. However, one issue has to be mentioned about this case that is directly relevant for this research into ineffective legal assistance – even though this case concerned an unassisted, rather than an assisted, accused. That is, in this *2013 No need to examine a waiver-*case, the Hoge Raad referred to the fact that this accused did not have a right to legal aid by appointed counsel (Article 41 Sv). One could possibly infer from this case that,

apparently, a check on an appeal court regarding a waiver of the right to legal assistance by appointed legal aid counsel would require “more effort” than in cases in which the accused has retained counsel. However, that latter additional protection for the accused who is entitled to appointed legal aid counsel has to be examined on its fairness as to whether a distinction can be made under the Convention between legal assistance by appointed legal aid and retained counsel on the basis of their *effectiveness* (chapter 12). Turning to the final cited case, in 2014, both the Hoge Raad and the AG appear to consider that the appeal court had checked whether the accused had waived his right to counsel up to the standard of “(...) unequivocally, deliberately and freely”. Also in that case, the AG referred to Article 41 Sv. As a final remark about all these cases under the *Hoogerheide*-rule, they will need to be explored because of the yet established “knowingly and intelligently waiver”-standard for the right to counsel under the Convention at “critical” stages such as the appeal phase (see sub-section 5.2.5.; further in chapter 12).

Finally, with regard to ineffective legal assistance and its redress in Dutch criminal proceedings, the *2011 Counsel suggested waiver*-case must be highlighted. The AG in this case mentioned the difficulties with regard to the legal assistance that this accused apparently received. Thus., the AG appears to have taken a more holistic approach than the Hoge Raad to the waiver of the right to counsel, by also taking into consideration facts and circumstances that could be contrary indications of “an effective defence”. There are certainly reasons to consider a case in which the accused renounces his right to counsel on the basis of the advice by his lawyers and thereupon proceed *pro se*, because that waiver might perhaps have been the culmination of ineffective legal assistance pre-appeal (further discussed in chapter 12). However, in the present case, that particular aspect has remained unexamined because the Hoge Raad overturned the case. That latter situation is, of course, important for the accused who did not have to bear the consequences of what might have been ineffective legal assistance pre-appeal in this case. However, it is noticeable that this decision has not been made with a reference to ineffective legal assistance under the *Artico*-rule.

6.6. Overall conclusion Part III Right to counsel

This overall conclusion aims to answer the leading question for both chapters on the Convention and Dutch criminal proceedings respectively: What obligations do the authorities owe to the accused regarding his right to counsel?

The answer to this descriptive question draws from a first vertical perspective that assesses the aforementioned obligations regarding the right to counsel owed by the authorities to the accused in that relationship of the State to the individual. A comparison will be made regarding the right to counsel under the Convention and in Dutch criminal proceedings. In keeping with chapter 2 on the conceptual framework that set out aspects such as the relevant rights, context and cross-cutting notions and perspectives, this overall conclusion will not yet extend to an examination of the compliance of Dutch criminal proceedings with the Convention. That aspect of the research will have to be reserved until the evaluative central research question is answered (chapter 13). This overall conclusion will be an important building block for that final chapter, because there can be no ineffective assistance by counsel within Convention-conforming Dutch criminal proceedings and questions about its redress if there is no legal basis because the right to counsel has not been effectuated. It has to be noted that any answer sought to the aforementioned central question for this Part III Right to Counsel takes into consideration the factors that affect conclusions that can be drawn on the basis of the case law of the Court and the contextual background information provided about Dutch criminal proceedings (chapters 3 and 4). The answer to the central question posed in this overall conclusion is fourfold, following the outline of the chapters and, in particular, the two concluding sections of the respective chapters (sections 5.4. and 6.5.).

First, both the Convention and Dutch criminal procedure regulate that the authorities have to ensure that the accused can retain counsel and that, under certain circumstances, they have to go one step further by appointing legal aid counsel. The Convention construes these circumstances by requiring legal aid by appointed counsel for vulnerable persons or persons who find themselves in vulnerable situations (or both). In the Netherlands, some situations that make persons vulnerable are regulated as requiring legal aid by appointed counsel. However, not all such situations, such as police custody – a “critical” stage according to the Court – require legal aid by an appointed lawyer in Dutch criminal proceedings.

Moreover, Dutch law and case law do not regulate the appointment of legal aid counsel for vulnerable persons, but do contain an unwaivable right to counsel protecting children and persons with a mental illness *at trial*. That special protection to vulnerable persons does not extend to more stages of the criminal procedure, which the Court would deem “critical” for the fairness of the criminal procedure “as a whole”. For example, at the stage of police interrogations a minor accused would, but an adult accused with a mental illness would not, be entitled to both consultation before and presence of counsel during police interrogations. The example of the special protection offered by this unwaivable right to counsel *at trial* for both children and persons with a mental illness is only one example of this special category of unwaivable and mandatory assistance by counsel in Dutch criminal proceedings. Assistance by counsel for the accused is obligatory on appeal in cassation and on revision.

Second (as implied in this earlier description, but as becomes especially apparent when turning to the stages of the criminal proceeding), it is important to compare how the Court and Dutch law and case law approach the right to counsel. Under the Convention, the authorities are obliged to guarantee to the accused that he can normally retain counsel at “critical” stages of the criminal procedure. While Dutch criminal proceedings already have to abide by the minimum guarantees under the Convention in this respect of the “critical” stages, it is important to emphasise that these same stages will, when implemented in the Netherlands, also become binding under EU Directive 2013/48/EU, to the extent explained above. Returning to the Convention, it should be highlighted that, for the Court, the emphasis lies on the right of the accused to an effective defence by equally effective assistance by counsel at the “adversarial trial”. This approach appears to be rooted in the idea that counsel can assist the protection of the personal rights of the accused in particular. For example, Dutch law and case law only require assistance by counsel at the stage of police interrogations in quite a limited manner, following the *Salduz* case. This example shows in particular the interpretation of requiring *Salduz*-protection for minor accused but not for persons with a mental illness, which are deserving of an unwaivable right to counsel at the trial stage. Thus,, Dutch criminal procedure appears to take a more *ad hoc* approach, by comparison with the Court’s more structural approach. Moreover, Dutch law and case law do not require legal assistance from the first police interrogation during “other” investigative and evidence-gathering acts except the search and hearings of the accused pre-trial. Consequently, Dutch law and case law do not allow the accused to invoke his right to counsel, for example during confrontation proceedings when the right to examine witnesses or have witnesses examined by the authorities can be at stake and during investigative acts such as a crime scene visit when questions can be posed to the accused as during police interrogations. Therefore, it can be inferred from these few examples that Dutch criminal proceedings have recognised both an earlier (right to counsel at the stage of police interrogations) and enhanced (making legal assistance mandatory at the stages of cassation as well as revision) right to counsel. However, in comparison with the more structural approach of the Court with its focus on “critical” stages, the approach in the Netherlands is more *ad hoc* and not as rooted in whether personal rights of the accused are at risk.

Third, the aforementioned structural, rather than *ad hoc*, approach of the Court is also demonstrated by examples of the “derived” right to counsel. In proceedings that examine allegations of ill-treatment of the accused which have to abide by equality of arms and adversariality, the Court concludes a right to counsel on the basis of the overall right to a fair trial. Moreover, the Court can determine – based on equal protection between accused who are and who are not eligible for legal assistance – that they should both be afforded this right under the Convention. Different to this, Dutch law and case law appear to normally require a legal basis for the right to counsel under Article 28 Sv, as can be seen by the interpretation of the *Salduz*-case: done with close recognition of the specific facts of the case as shown by granting more protection to a minor (*Salduz* was a minor, after all). A more generally “derived” right to counsel has not been encountered in this chapter (chapter 6) – either from the overall fairness of the criminal proceedings or from equal protection of, for example, the accused in pre-trial detention and at liberty. An important consideration in this respect is that, on the basis of this chapter, it can only be stated that it will be explored further whether *the Hoge Raad* derives a right to counsel from Article 6 or from the overall fairness of Dutch criminal proceedings (chapters 8, 10 and 12).

An important similarity within this context of the more structural approach by the Court to the right to counsel compared with the more *ad hoc* approach in Dutch criminal proceedings, is that the

right to counsel is construed as an entitlement rather than an obligation. Starting with the Convention, the Court acknowledges that an accused who wants to proceed *pro se* can waive his right to counsel, for instance. For that waiver to conform to the Convention, the Court does check whether the national courts have ensured that the accused has renounced the right to counsel up to the standard of “knowingly and intelligently”, holding that this right is deserving of “special protection”. In earlier cases, the Hoge Raad did appear to assess whether lower courts checked that the accused waived his right to counsel but to a lower standard of “(...) unequivocally, deliberately and freely”, which resembles the normal waiver standard of the Court regarding rights such as the right to attend a hearing and appeal “freely and unequivocally”. Therefore, the Hoge Raad does not appear to provide that same higher standard that ensures “special protection” as required by the Court. Rather, the Hoge Raad appears to apply the standard for waivers that the Court uses for other rights of the accused such as the right to remain silent, the right to lodge an appeal and the right to attend an appeal hearing. Finally, in one of these *Hoogerheide*-like cases, the *2011 Counsel suggested waiver*-case, the AG mentioned the difficulties, left unexamined, that the accused apparently suffered with the legal assistance provided to him, which could possibly have been ineffective legal assistance that amounted ultimately in his waiver of the right to counsel. The decision of the Hoge Raad to overturn the case is, of course, important for the accused who did not have to bear the consequences of what might have been ineffective legal assistance pre-appeal in this case. However, it has to be stressed that this decision has not been made with a reference to ineffective legal assistance under the *Artico*-rule (see chapter 11).

As the fourth and last important component of this overall conclusion, the overall interpretation of the right to counsel is relevant. The Court appears to construe the right to counsel as a substantive right to *effective* legal assistance, as the two preliminary examples regarding police interrogations and proceedings about pre-trial detention indicated. This appears to be an important first benchmark for ineffective assistance by counsel in Dutch criminal proceedings, and will therefore have to be revisited in the remainder of this research (especially chapter 13). This interpretation of the right to counsel is particularly relevant because the Hoge Raad, differently than the Court, appears to interpret this right formally. For example, the case law illustrations – regarding the waiver by counsel who recommended the accused to proceed without her – does not seem to require a right to counsel that is “practical and effective”, as the Court would label it. A second important benchmark appears to be the Court’s “critical” stages approach. With an emphasis on an effective defence by equally effective assistance by counsel at the adversarial trial, the Court appears to assess whether the accused’s fair trial rights have been guaranteed. “Critical” stages can also exist before and after trial, as the examples of cases that required effective legal assistance during police interrogations and at cassation appear to have indicated. Both benchmarks of the interpretation of the right to counsel and the “critical” stages approach are therefore possibly germane for this entire research. As noted in the introduction to this overall conclusion of Part III Right to counsel, this answer – concerning the obligations owed by the authorities to the accused regarding his right to counsel so that an effective defence within criminal proceedings can, in principle, be guaranteed – will be an important building block for this research into ineffective assistance by counsel and its redress in Dutch criminal proceedings.

On a final note, it is important to realise that this conclusion regarding the right to counsel under the Convention and in Dutch criminal proceedings, as explained in this Part III Right to counsel, will be relevant for the subsequent examinations. In turn, these explorations will address the possible responsibilities of counsel and the negative and positive obligation of the authorities towards the accused in relation to the right to *effective* legal assistance (Parts IV to VI). The next chapter will start with the first theme, by exploring if counsel owes any responsibilities towards the accused under this right to *effective* legal assistance under the Convention (chapter 7).

PART IV LAWYER-CLIENT RELATIONSHIP

CHAPTER 7. LAWYER-CLIENT RELATIONSHIP UNDER THE CONVENTION

7.1. Introduction

This chapter builds on the previous chapters, and makes an important shift in terms of its perspective by exploring from a horizontal view if the Court ascribes any responsibilities to counsel out of an effective defence of the accused within criminal proceedings. This topic is particularly relevant for this research into ineffective legal assistance and its redress in Dutch criminal proceedings because scholars such as Spronken argue that Article 6 (3) (c) has no “(...) horizontal effect”.¹⁰²² Consequently, she argues that neither the Court nor – by extension – domestic authorities ought to examine counsel’s performance within the criminal process.¹⁰²³ As a corollary, according to Spronken, the authorities in Dutch criminal procedure are required to intervene “only” in the case when “(...) the lawyer is absent or otherwise does practically nothing at all for the accused”.¹⁰²⁴ While State interventions will be examined later in this book, this chapter will have to lay the foundations for this exploration by assessing whether under the Convention counsel owes any responsibilities to the accused under the lawyer-client relationship. Therefore, this chapter seeks to answer the following leading question: What, if any, responsibilities does counsel owe to the accused within criminal proceedings under the Convention?

Certainly, this horizontal perspective to the case law of the Court will mostly mean that inferences will be drawn from cases with a distinct vertical character. After all, the Court deals with a complaint of an applicant about a violation of a Convention fair trial right for which the State is primarily responsible. Nonetheless, it is proposed here that some responsibilities of the lawyer towards the accused out of an effective defence within criminal proceedings under the Convention can possibly be discerned. To that end, this chapter will explore *if* the Court assesses the conduct of counsel, has the accused bear the consequences thereof and does not hold the State ultimately responsible under the Convention.

This chapter will draw on several findings that were presented in the previous substantive research chapter on the Convention (chapter 5). For example, that chapter has established that the Court requires that counsel can play “a” role at stages that are “critical” for the fairness of the criminal proceedings “as a whole”.¹⁰²⁵ What *specific* role counsel should play at these “critical” stages will be the subject of this chapter.¹⁰²⁶

A first indication will be given here of the important aspects of the conceptual framework of relevant rights, context and cross-cutting notions and perspectives. Most attention will be paid to the relevant rights under the horizontal perspective and the conduct of counsel. The other aspects of the conceptual framework will be focused on more in the next substantive research chapters regarding the Convention (chapters 9 and 11).

Intentionally, this chapter mirrors the topics that will be discussed under the horizontal perspective towards Dutch criminal procedure (see chapter 8). Ultimately, this structure will enable a comparison between these two descriptive chapters (section 8.6.), so that an evaluation can follow in the last chapter of this book (chapter 13).

Outline

This chapter consists of four more sections. First, this chapter examines the Court’s case law in order to determine whether under the Convention counsel owes responsibilities towards the accused regarding an effective defence (section 7.2.). The second sub-section deals with counsel’s control over defence strategy (section 7.3.). Thereafter, this section proceeds to the exploration of the role of

¹⁰²² E.g. Spronken (2001) at 637. See also T. Prakken and T.B.N.M. Spronken, in: Prakken and Spronken (2009) at 15.

¹⁰²³ Spronken (2001) at 637.

¹⁰²⁴ Spronken (2001) at 447 and 464. See also this same view reiterated in Prakken and Spronken, in: Prakken and Spronken (2009) at 15.

¹⁰²⁵ See section 5.3.

¹⁰²⁶ See Cape (2001) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=271046.

counsel at the aforementioned “critical” stages of the criminal proceedings (section 7.4.). Finally, a conclusion will be drawn on the basis of these sections (section 7.5.).

7.2. Lawyer-client relationship

7.2.1. Choice of retained counsel

The accused’s right to retained counsel includes the right to select counsel of “one’s own choosing”, but that right is not absolute, as the following examples will indicate (see also sub-section 2.3.3.). The authorities can set standards of qualifications of practice of law by allowing “only” members of the Bar to provide an accused with assistance without violating the Convention, rather than lay relatives of the accused.¹⁰²⁷ Moreover, the authorities can also restrict the number of lawyers on a certain defence team without violating the Convention right.¹⁰²⁸ Additionally, the authorities can legitimately set stricter rules on lawyers acting before the highest domestic courts than for those who act before lower courts.¹⁰²⁹ The authorities can also refuse to accept lawyers whose joint legal assistance presents a possible conflict of interest.¹⁰³⁰ Finally, when retained counsel has systematically failed to appear in court and has thereby caused the first instance trial hearing to be repeatedly postponed, the authorities can appoint a new lawyer to replace the previous counsel without being held in violation of Article 6 (3) (c).¹⁰³¹ Not all scheduling requirements will be accepted, however, as the following comparison between two cases can demonstrate.

A first case that will be elaborated upon here concerns an appeal in cassation during which retained counsel did not attend the hearing: *Tripodi v. Italy* from 1994.¹⁰³²

The accused’s lawyer fell sick and failed to ask for an adjournment to ensure that he would be replaced at a hearing in the court of cassation. Counsel also did not file a written memorial despite knowing that he would be unable to attend that session.

Tripodi complained before the Court that the court of cassation had examined her appeal in the absence of her lawyer and had failed to appoint a lawyer to take his place. Her lawyer has made written submissions for the court of cassation hearing and was informed of the day of the respective hearing. However, her lawyer did not appear and did not take any action to be replaced with another lawyer.

The Court considered the entirety of the proceedings and the special features of the procedure in the court of cassation, which decides points of law with essentially written proceedings. The Court held that the authorities could not be held responsible for the lawyer’s conduct where the applicant’s counsel made no reasonable efforts to be replaced. The shortcomings in the case were, by majority judgment, not imputable to the State. Therefore, the Court found no violation of Article 6.

The second, newer case is from 2009, *Hanževački v. Croatia*.¹⁰³³

Hanževački was suspected of a copyright violation and had assistance of a lawyer of his choosing. This lawyer fell ill a day before the court hearing. On the morning of the court proceedings, his lawyer did not inform the court by telefax in accordance with domestic law. Rather, he mentioned it by telephone. In court, *Hanževački* asked the trial judge to adjourn the last hearing, so that the lawyer of his choosing could be present. The trial court refused to honour his request. Ultimately, the court convicted *Hanževački* in the absence of his lawyer.

Before the Court *Hanževački* complained that his right to a fair trial, in particular his right to be assisted by a lawyer of his choosing, had been violated.

The Government stressed that *Hanževački* had been deprived of legal assistance for reasons entirely imputable to his counsel. They submitted that the lawyer had neglected to inform the trial court of his illness by telefax. Moreover, the government argued that the absence of the defence

¹⁰²⁷ E.g. *Mayzit v. Russia*, Judgment of 20 January 2005, HUDOC no. 63378/00, para. 68.

¹⁰²⁸ E.g. *Croissant v. Germany*, Judgment of 25 September 1992, HUDOC no. 13611/88.

¹⁰²⁹ E.g. *Meftah and others v. France*, Judgment of 26 July 2002, HUDOC nos. 32911/96 35237/97 34595/97, para. 45.

¹⁰³⁰ *Pavlenko v. Russia*, Judgment of 1 April 2010, HUDOC no. 42371/02, paras. 107-111 including the following two citations.

¹⁰³¹ E.g. *Croissant v. Germany*, Judgment of 25 September 1992, HUDOC no. 13611/88.

¹⁰³² *Tripodi v Italy*, Judgment of 22 February 1994, HUDOC no. 13743/88, para. 30 (five votes to two).

¹⁰³³ *Hanževački v. Croatia*, Judgment of 16 April 2009, HUDOC no. 17182/07, para. 25 including the following citation. See differently the earlier case of *Tripodi v Italy*, Judgment of 22 February 1994, HUDOC no. 13743/88, para. 30 (five votes to two).

lawyer did not result in an issue with equality of arms and adversariality. At this concluding hearing the prosecution was also absent.

The Court noted that *Hanževački* had been constantly assisted by a lawyer of his choosing, save for the final hearing held before the first instance court. Before that hearing the applicant had given his evidence, like all the witnesses requested by the defence. In addition, the Court held that the lawyer had informed the authorities by telephone instead of telefax. However, the Court concluded that there was no evidence of bad faith by the lawyer or an attempt to unnecessarily delay the proceedings. Upon this assessment of the conduct of counsel, the Court considered that:

“(...) one of the most important aspects of a concluding hearing in criminal trials is an opportunity for the defence, as well as for the prosecution, to present their closing arguments, and it is the only opportunity for both parties to orally present their view of the entire case and all the evidence presented at trial and give their assessment of the result of the trial. The Court considers that the choice made by the prosecution not to attend the concluding hearing in the case against the applicant cannot have any effect on the right of the accused to be represented by a lawyer of his own choosing.”

The Court concluded that, under these circumstances of the absence of counsel of the accused’s choosing at this concluding hearing of the adversarial trial hearings, “(...) the applicant was not able to defend himself through legal assistance of his own choosing to the extent required under the Convention. There has accordingly been a violation of Article 6 § 1 taken together with Article 6 § 3 (c) of the Convention.”¹⁰³⁴

The Court can thus examine the specifics of the case and determine what the effects were of the absence of assistance by counsel of the accused’s “own choosing” for the accused’s personal rights. The Court did not hold *Hanževački*’s counsel responsible for his possible failure to report his absence at trial in accordance with the law and thus did not have the accused bear the consequences of counsel’s conduct either. Rather, the Court assessed counsel’s conduct, finding that there was no evidence of bad faith or an attempt to unnecessarily delay the proceedings on the lawyer’s behalf, and held that the absence of counsel damaged the personal right of the accused to defend himself through counsel “of his own choosing”. It also follows from all cases on this subject that, if the right to counsel of the accused’s choosing is erroneously denied, it amounts to a violation of Article 6 without regard to the effectiveness of the subsequent legal assistance by the replacement lawyer.¹⁰³⁵ Certainly, interventions in the case in order to offer redress for ineffective legal assistance within the criminal process in order to protect the right of the accused to an effective defence, which will be examined in chapter 11, is a separate issue from a violation of the right to retained counsel of one’s choosing, as was explained in this sub-section.

7.2.2. Selection of appointed counsel

When appointing defence counsel, the authorities must have regard to the accused’s wishes, but these wishes can be overridden when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice.¹⁰³⁶ Thus,, the accused’s right to counsel “of his own choosing,” is necessarily subject to certain limitations where legal aid by appointed counsel is concerned, since it is for the authorities to decide whether the interests of justice require that the accused be defended by counsel appointed by them. For example, in the case of *Croissant v. Germany*, the accused had retained two lawyers and objected to the third counsel appointed by the authorities. The Court found that the domestic court’s reasons were relevant and sufficient, namely serving the interests of justice by avoiding interruptions and adjournments.¹⁰³⁷ Moreover, such permissible restrictions include situations in which the legal aid lawyer is being replaced.¹⁰³⁸ The Commission, for example, made it explicit that it cannot find it unreasonable, in view of the general desirability of limiting the total costs of legal aid, that authorities take a restrictive approach to requests to replace legal aid lawyers once

¹⁰³⁴ *Hanževački v. Croatia*, Judgment of 16 April 2009, HUDOC no. 17182/07, para. 29.

¹⁰³⁵ E.g. *Croissant v. Germany*, Judgment of 25 September 1992, HUDOC no. 13611/88.

¹⁰³⁶ *Croissant v. Germany*, Judgment of September 25 1992, HUDOC no. 13611/88.

¹⁰³⁷ *Croissant v. Germany*, Judgment of September 25 1992, HUDOC no. 13611/88.

¹⁰³⁸ *Lagerblom v. Sweden*, Judgment of 14 January 2003, HUDOC no. 26891/95.

they have been appointed to an accused's case and have undertaken certain activities in that case.¹⁰³⁹ The Court – which supposes that the accused will “usually” have “a higher degree of trust and confidence in the lawyer of the accused's own choosing” and can thus be expected to provide the best possible defence – thus requires that the accused is assisted by an appointed lawyer who is *capable* of providing effective legal assistance, rather than requiring that the accused *always* has the lawyer “of his own choosing”.¹⁰⁴⁰

7.3. Counsel's control over strategy

Although the accused has a right to proceed *pro se* (see chapter 5), if the accused proceeds with counsel, the Court can hold the lawyer responsible for strategic decisions contrary to the accused's wishes, as the three following examples will indicate (sub-sections 7.3.1. to 7.3.3.). These examples will also explain that the Court has come to consider as well the effect on the rights of the accused of what was, authorities appear to allege, ineffective assistance by counsel.

7.3.1. Counsel's responsibilities as pertaining to trial strategy

A first case that can aid the assessment of whether the Court finds that counsel owes responsibilities towards the accused as to certain (trial) conduct, is *Stanford v. the United Kingdom*.¹⁰⁴¹

The facts of the case are such that the lawyer of *Stanford* conducted the cross-examination of a witness who was allegedly the accused's rape victim. *Stanford* had complained about his inability to hear the cross-examination to the prison officer who watched over him in the dock as well as to his lawyer, but not to the domestic court. The domestic court ultimately convicted *Stanford*, amongst other pieces of evidence upon the in-court witness testimony of this alleged rape victim.

Before the Court, *Stanford* complained that he had not been able to hear the cross-examination, which deprived him of his right to effectively participate in court. He had allegedly not been able to “hear and follow” all that happened in court.

The Court concluded that *Stanford* had indeed been unable to hear and follow the cross-examination by his lawyer and that he had complained about these difficulties, albeit not to the domestic court. Accordingly, the Court examines *Stanford's* complaint taking into consideration three conditions in the case. First, *Stanford* had had an effective defence, seeing that he was effectively assisted by a lawyer who could hear everything that was said and was able to take the accused's instructions at all times. Second, his lawyer, “(...) who had lengthy experience in handling criminal cases”, had decided not to alert the court concerning the accused's hearing difficulties for “tactical reasons” (the Court appears to equate tactical reasons with defence strategy, contrary to common usage of short- mid-term versus long-term conceptual issues).¹⁰⁴² Counsel had wanted to avoid the jury gaining the impression of witness intimidation. Lastly, *Stanford* did not openly disagree with his lawyer's strategic decision not to inform the court about his difficulties to hear the cross-examination at the trial phase. On the basis of all three considerations, the Court concluded that there had been no failure by the United Kingdom to ensure that the applicant received a fair trial. Hence, there has been no breach of Article 6 (1). In other words, the Court appears to hold *Stanford's* responsible for his decision not to request a different positioning of his client and ultimately had the accused *Stanford* bear the consequences thereof.

Although the accused has a right to “hear and follow” the proceedings against him, counsel can be held responsible for a strategic decision as to whether or not to ask for his client to be re-positioned. In other words, a horizontal perspective towards Article 6 (3) (c) of the Convention demonstrates that counsel holds responsibilities towards the accused in so far as defence strategy is concerned, at least. Consequently, the accused has to bear the consequences of this strategic conduct of counsel.

Spronken argues that this *Stanford*-case is evidence of a manifest shortcoming of counsel. However, that qualification has not been given by the Court and it also does not appear in its reasoning or the facts of the case.¹⁰⁴³ Rather, *Stanford's* lawyer made a strategic decision and the Court holds

¹⁰³⁹ *Van Ulden v. the Netherlands*, Application No. 24588/94, Commission admissibility decision of 21 May 1997.

¹⁰⁴⁰ *Kuralić v. Croatia*, Judgment of 15 October 2009, HUDOC no. 50700/07, paras. 45-49.

¹⁰⁴¹ *Stanford v. the United Kingdom*, 23 February 1994, HUDOC no. 16757/90, para. 27.

¹⁰⁴² *Stanford v. the United Kingdom*, 23 February 1994, HUDOC no. 16757/90, para. 27.

¹⁰⁴³ Spronken (2001) at 464.

counsel responsible for a judgment that can reasonably be made by a professional lawyer, because strategy normally falls under counsel's control. This is also how the Court explains the *Stanford*-case itself:

“In the case of *Stanford v. the United Kingdom* the Court found no violation arising from the fact that the accused could not hear some of the evidence given at trial due to poor acoustics in the courtroom, in view of the fact that his counsel, who could hear everything that was said and was able to take his client's instructions at all times, chose for tactical reasons not to bring the accused's hearing difficulties to the attention of the trial judge (...).¹⁰⁴⁴

7.3.2. Counsel's responsibilities as pertaining to appeal strategy

Given that the case of *Stanford* concerned the first instance stage, it is also important to explore two cases that took place on appeal, which will be contrasted in this sub-section. The first case is *Hermi v. Italy* from 2006, which will hereafter be followed by a second case of *Kononov v. Russia* from 2011.

The facts of this case are that *Hermi* had not been transported to the courtroom and therefore did not attend his appeal hearing. His two privately retained lawyers had not asked whether the appellant could be brought to the courtroom. Moreover, *Hermi* had not complained when he was not being transported to the appeal court.

Before the Court, *Hermi* complained that his right to attend his appeal hearing had been violated.

The Court did not agree and held that *Hermi* waived his right to attend the appeal hearing, so that there was no violation of Article 6 (1).¹⁰⁴⁵ Judge Myjer, a judge in this case, concluded in a speech and journal article that the decision from the accused *Hermi* and both his lawyers to not complain about the lack of transport, was “a lawyers' tactic” to get the Court to ultimately overturn the case.¹⁰⁴⁶

Whether or not the Court indeed sniffed out such a tactic, the Court does hold the defence and thereby also the lawyers responsible for not complaining about the lack of transport at the first available moment. Therefore, from a horizontal perspective, counsel can hold responsibilities regarding – actual or perceived – defence strategy pertaining to getting the case overturned by the Court towards the accused.

This case of *Hermi* can be contrasted with a later case of *Kononov v. Russia* from 2011 which also concerned an accused who did not attend the appeal hearing. According to the Government, *Kononov*'s lawyer had not given the appellant the requisite advice about how to request leave to attend the appeal hearing *pro se* as alleged ineffective assistance by counsel at least. However, the Court observed with regard to *Kononov*'s complaint that counsel could not be held responsible for supposed ineffective advice in this respect, because of the following role division between counsel and the authorities:

“(...) during the trial proceedings the applicant was assisted by counsel of his own choosing. However, later he discharged his representative. In any event, the Court considers that, even assuming that it was a part of the lawyer's duty to inform the applicant about peculiarities of appeal procedure, the presiding judge, being *the ultimate guardian of the fairness of the proceedings*, cannot be absolved of his or her responsibility to explain to the defendant the procedural rights and obligations and secure their effective exercise (...) [emphasis added by the author].”¹⁰⁴⁷

The Court did not ascribe the alleged lack of advice by counsel, which the Government appears to have considered being ineffective legal assistance by the lawyer, as to the steps the accused ought to have taken in order to be present at the appeal hearing as responsibilities to counsel. Thus,, the Court

¹⁰⁴⁴ *Grigoryevskikh v. Russia*, Judgment of 9 April 2009, HUDOC no. 22/03, para. 81.

¹⁰⁴⁵ *Hermi v. Italy* [GC], Judgment of 18 October 2006, HUDOC no. 18114/02.

¹⁰⁴⁶ B.E.P. Myjer, *In toga venenum? The limits of freedom of expression in and around the courtroom in the case-law of the European Court of Human Rights*. Available at www.coehelp.org/mod/resource/view.php?inpopup=true&id=1420.

¹⁰⁴⁷ *Kononov v. Russia*, Judgment of 27 January 2011, HUDOC no. 36376/04, para. 43.

did not shift the blame to the lawyer, who allegedly failed to inform the accused as to how to request leave to appear at the hearing, but held the domestic authorities – notably the national courts – responsible for failing to respect the accused’s right to attend the appeal hearing. Evidently, the Court has come to emphasise in its case law the *effect for the accused* where counsel has not explained to him how to request leave to appeal and does not allow the accused to bear the consequences where his personal right to attend the appeal hearing has been harmed.

All three cases of *Stanford*, *Kononov* and *Hermi* confirm an earlier ruling by the yet cited *Artico*-case already issued in 1980, in which the accused was found entitled to “(t)he right to an adequate defence either in person or through a lawyer, [a] right [that is] being reinforced by an obligation of the State to provide free legal assistance in certain cases [added by the author]”¹⁰⁴⁸ ¹⁰⁴⁹. This ruling and its successors seem to imply that the Court requires that, at least at trial, the defence of the accused has to be “adequate” for the right to effective legal assistance to be guaranteed.¹⁰⁵⁰ The Court holds that, for an effective defence at trial, the accused should be able to take the decisions in his own defence¹⁰⁵¹, preferably with advice by counsel.¹⁰⁵² For that advice to be Convention conforming, the lawyer should protect the rights, interests and wishes of the accused zealously.¹⁰⁵³ A zealous defence entails that counsel should be, amongst other issues, “[able to] assess the relevance and usefulness of a defence argument” [added by the author]”.¹⁰⁵⁴ Consequently, the Court expects of counsel at trial, for the right to legal assistance to be effective, that he, within legal bounds and with respect for professional and deontological rules as well as court order, makes an assessment of defence arguments and pleads the case.¹⁰⁵⁵ Counsel has a large amount of discretion as to the way in which he decides how to plead the defence case at trial, as long as the rights, interests and wishes of the accused are protected zealously and in conformity with the procedures and other rules.¹⁰⁵⁶ The Court holds that a strategic decision can reasonably fall under that discretion, as long as the “personal” rights of the accused are respected. To explain this notion of “personal” rights, it is here noted that the Court appears to consider there to be a role division between counsel as advisor and the accused as decision-maker. Certain decisions, though they may have a strategic element, are so “personal” for the accused that counsel must abide by his client’s wishes and cannot go against them. In other words, where the lawyer does not follow the instructions of the accused as to matters that are within the accused’s control, rather than counsel’s control over strategy, an issue with a fair trial might arise – as can be inferred from the cases cited above. Examples of “personal” rights that were important in the above-cited cases are the right to remain silent, the right not to incriminate oneself, the right to attend a hearing, and the right to appeal.

7.3.3. Counsel’s exceptional responsibilities as pertaining to hearing witnesses pre-trial

This sub-section will explore whether, *because of* the lawyer’s conduct pre-trial which falls in the purview of strategy, the Court can conclude that no violation of the right to a fair trial has occurred while the defence has had *no* opportunity at all to hear at “any” stage of the criminal procedure a witness, whose testimony was subsequently being used for the accused’s conviction.¹⁰⁵⁷ Normally, the

¹⁰⁴⁸ E.g. *Artico v. Italy*, Judgment of 13 May 1980, HUDOC no. 6694/74, para. 33.

¹⁰⁴⁹ E.g. *Ebanks v. the United Kingdom*, Judgment of 26 January 2010, HUDOC no. 36822/06, para. 79 and *Dembukov v. Bulgaria*, Judgment of 28 February 2008, HUDOC no. 68020/01, para. 50, stating the same but for an *in absentia* defence.

¹⁰⁵⁰ E.g. *Mađer v. Croatia*, Judgment of 21 June 2011, HUDOC no. 56185/07, para. 153. GC request pending

¹⁰⁵¹ *Ebanks v. the United Kingdom*, Judgment of 26 January 2010, HUDOC no. 36822/06, para.82.

¹⁰⁵² *Poitrimol v. France*, Judgment of 23 November 1993, HUDOC no. 14032/88; *Dembukov v. Bulgaria*, Judgment of 28 February 2008, HUDOC no. 68020/01 para. 50 and *Pishchalnikov v. Russia*, Judgment of 24 September 2009, HUDOC no. 7025/04. See also for the same general principle on appeal see *Orlov v. Russia*, Judgment of 21 June 2011, HUDOC no. 29652/04.

¹⁰⁵³ *Nikula v. Finland*, Judgment of 21 March 2002, HUDOC no. 31611/96, para. 54. See also *Panovits v. Cyprus*, Judgment of 11 December 2008, HUDOC no. 4268/04 and *Kyprianou v. Cyprus*, Judgment of 15 December 2005, HUDOC no. 73797/01,.

¹⁰⁵⁴ *Kyprianou v. Cyprus*, Judgment of 15 December 2005, HUDOC no. 73797/01, para. 182

¹⁰⁵⁵ See further in chapter 6. See also *Mutatis mutandi Ciupercescu v. Romania*, Judgment of 15 June 2010, HUDOC no. 35555/03, paras. 150-154 and *Sakhnovskiy v. Russia*, Judgment of 2 November 2010, HUDOC no. 21272/03, para. 102.

¹⁰⁵⁶ See earlier in section 5.2.3.

¹⁰⁵⁷ See also *Vidgen v. the Netherlands*, Judgment of 10 July 2012, HUDOC no. 29353/06. See also HR 10 July 2012, ECLI:NL:HR:2013:BX5539, NJ 2012/649 m.nt. Schalken, a case which the Court “likened to Lucà and to Tahery’s case

Court would not accept a case in which the defence has had no opportunity at all to hear the witness whose testimony is important as evidence for the accused's conviction, as arises from the many cases cited in the previous chapter on the Convention (chapter 5). Therefore, it is worth exploring the following case of *S.N. v. Sweden*.¹⁰⁵⁸

In this case, the accused *S.N.* was believed to have committed sexual acts with a ten-year-old boy (called *M.*). During the pre-trial stage, *S.N.* received a copy of the preliminary investigation report and had a legal aid lawyer appointed to represent him. He had an opportunity to submit observations and to request additional interviews and other investigative measures. On behalf of *S.N.*, his lawyer requested that *M.* be interviewed once again by the police. For this second police interview, the lawyer asked the police officer to pose questions *inter alia* about the time and place at which the alleged sexual acts had been committed. The suspect and his lawyer had not requested that the child witness be heard before the courts. Video- and audio-recordings of the two interviews with *M.* had been submitted to the domestic courts. After the trial stage, the domestic court convicted *S.N.* based upon *M.*'s statements which had been given during both the first and the second interview and witness declarations by his mother and his teacher who both explained the boy's behaviour after the alleged acts. The court used the witness testimony of this child for *S.N.*'s conviction.

Before the Court *S.N.* complained that his counsel had been prevented from putting questions directly to *M.* so that his right to confront witnesses had been violated. He contended that he was not afforded his right under Article 6 (3) (d) on account of the questioning of *M.* who the defence could not hear in court. Even if counsel would have been allowed to be present during the second interview, the lawyer would not have been allowed to pose questions directly to the child, *S.N.* alleged. Only the police officer was allowed to do so, he claimed. A request to hear *M.* in the courts would have been to no effect because such requests were never granted. *S.N.*'s contention was that he was convicted solely on the basis of *M.*'s witness testimony without an opportunity for him personally or for his lawyer to confront that witness.

The Government contended before the Court that the defence had not requested to hear the child in court and mentions that Article 6 cannot be interpreted to mean that counsel should be entitled to directly put questions to a child witness.

The Court agrees with *S.N.* that the statements of the child witness were virtually the sole evidence and that a request to hear *M.* in the courts would not have resulted in the appearance of the child in the courts. Having said that, the Court appears to hold counsel responsible for his absence during the second police interview, finding that:

“(...) the second police interview with *M.* during the pre-trial investigation was held at the request of the applicant's counsel who considered that further information was necessary. On account of the absence of *M.*'s legal counsel (...), the applicant's counsel was not present during the interview, nor was he able to follow it with the help of technical devices in an adjacent room. However, he consented not to be present, notwithstanding the resulting handicap to the defence, and he also accepted the manner in which the interview was to be conducted. It was open to the applicant's counsel to ask for a postponement of the interview until such time as *M.*'s counsel was free to attend. However, he chose not to do so. It was also open to him to request that the second interview be videotaped, which would have enabled him to satisfy himself that the interview had been conducted fairly. However, he did not avail himself of that possibility either. Furthermore, it is clear from the facts submitted by the parties that the applicant's counsel was able to have questions put to *M.* by the police officer conducting the interview. Having subsequently listened to the audiotape and read the transcript of the interview, counsel for the applicant was apparently satisfied that the questions he had indicated to the police officer had actually been put to *M.* (...)”¹⁰⁵⁹

in *Al-Khawaja and Tahery*” on the issue of, here a statement of a witness to a foreign, German police officer, which was used as “the “sole” evidence of the applicant's criminal intent and thus “decisive” for the applicant's conviction” (para. 46). The reparations case followed in HR 4 June 2013, ECLI:NL:HR:2013:CA1782, *NJ* 2013, 333.

¹⁰⁵⁸ *S.N. v. Sweden*, Judgment of 2 July 2002, HUDOC no. 34209/96, para. 48.

¹⁰⁵⁹ *S.N. v. Sweden*, Judgment of 2 July 2002, HUDOC no. 34209/96, paras. 49 and 50.

The Court continues to explain under its “as a whole” approach that any possible pre-trial damage to the accused’s right to hear the child witness had been “cured” by the domestic court, which had taken “(...) extreme care” when considering the statement of M. who was only heard in the absence of both the lawyer and the accused at pre-trial, i.e. not in court.¹⁰⁶⁰ In other words, the first instance court used the child victim’s statement, which had not been tested by the defence at any stage of the procedure for the defendant’s conviction, under “(...) high standards” of “(...) procedure and content”. Both the first court and the appeal court had seen the videotape of the first police interview. The record of the second interview was read out at first instance and the audiotape of that interview was played at the appeal phase. The defence and the prosecution were invited to challenge its admissibility, authenticity and probative value. Moreover, the domestic courts had taken into account the fact that some of the information given by M. had been vague and uncertain and lacking in detail. Both domestic courts had also considered the leading nature of some of the questions put to M. during the police interviews. In these circumstances, the Court was satisfied that the “(...) necessary care was applied in the evaluation of M.’s statements”. Given that the Court had no reason to believe that S.N. disagreed with his lawyer’s decision not to insist on attending the (second) police interview at which he could put questions to M. directly, the Court found that the applicant’s right under Article 6 (3) (d) had been respected. Therefore, the Court held that the accused should bear the consequences of counsel’s conduct (being absent during the second police interview and declining to complain later about that situation causing as a consequence the child witness to not be heard at any stage of the proceedings). The Court appears to have concluded that the inability of S.N. to confront the witness in the courts was “cured” by the video and audio recordings that were shown as well as by their careful examination by the domestic court.

To conclude on this case, the Court can hold that – as an exception – the right under Article 6 (3) (d) has been respected where others have examined the witness on the accused’s behalf, provided that the defence rights have been strictly respected during the subsequent adversarial hearing in which the domestic courts took “(...) extreme care” in how it used the evidence for the accused’s conviction.¹⁰⁶¹ The case of *S.N. v. Sweden* does raise the question whether it matters that the accused does not appear to have openly disagreed with counsel in court and thus did not blatantly show a lack of consent regarding counsel’s pre-trial and trial conduct, which might have been strategy (as in *Stanford* for example, as explained in sub-section 7.3.3.). The exceptional nature of this *S.N.*-case will be explained in more detail below (in sub-section 7.4.2.2.).

7.3.4. Preliminary conclusions about counsel’s control over strategy

The accused has a right to proceed *pro se* (see chapter 5) but, if the accused proceeds with counsel, the Court can hold the lawyer responsible for strategic decisions contrary to the accused’s wishes, as the three above-cited examples have indicated (section 7.3.). These examples have also explained that the Court has come to consider the effect on the rights of the accused of what authorities appear to allege was ineffective assistance by counsel. The above-explained role division between counsel as advisor and the accused as decision-maker also means that certain decisions, though they may have a strategic element, are so “personal” for the accused that counsel must abide by his client’s wishes and cannot go against them. In other words, where the lawyer does not follow the instructions of the accused as to matters that are within the accused’s control, rather than counsel’s control over strategy, an issue with a fair trial almost inevitably appears to arise. From this perspective, it is worth examining what role is being expected of counsel as it pertains to functions that have been ascribed to the lawyer under the Convention.

¹⁰⁶⁰ When this is solely or to a decisive extent for the conviction, see e.g. *Unterpertinger v. Austria*, Judgment of 24 November 1986, HUDOC no. 9120/80., paras. 31-33; *Saidi v. France*, Judgment of 20 September 1993, HUDOC no. 14647/89, paras. 43-44; *Lucà v. Italy*, Judgment of 27 February 2001, HUDOC nos 43870/04 43870/04; and *Solakov v. the former Yugoslav Republic of Macedonia*, Judgment of 31 October 2001, HUDOC no. 47023/99, para. 57.

¹⁰⁶¹ See Summers (2007) at 3-184, particularly at 129-155 and J.R. Spencer, *Hearsay Evidence in Criminal Proceedings*, Oxford: Hart Publishing, 2008, paras. 2.19-2.22.

7.4. Counsel as advisor and accused as decision-maker about “personal” rights at least

Counsel’s role is being explained in light of the following “functions”¹⁰⁶² of counsel¹⁰⁶³ by both the Commission and the Court. First, in the case of *Can v. Austria*,¹⁰⁶⁴ the Commission concluded that:

“(…) the functions which the counsel has to perform (…) include not only the preparation of the trial itself, but also the control of the lawfulness of any measures taken in the course of the investigation proceedings, the identification and presentation of any means of evidence at an early stage where it is still possible to trace new relevant facts and where the witnesses have a fresh memory, further assistance to the accused regarding any complaints which he might wish to make in relation to his detention concerning its justification, length and conditions, and generally to assist the accused who by his detention is removed from his normal environment”.¹⁰⁶⁵

Because the case from which this citation is taken resulted in a friendly settlement and thus not in a case that was examined on its merits, a more recent case will be turned to. In the case of *Dayanan v. Turkey* from 2009, the Court held that a detained accused is, for the purpose of police interrogations, entitled to a lawyer who can perform the following functions:

“En effet, l’équité de la procédure requiert que l’accusé puisse obtenir toute la vaste gamme d’interventions qui sont propres au conseil. A cet égard, la discussion de l’affaire, l’organisation de la défense, la recherche des preuves favorables à l’accusé, la préparation des interrogatoires, le soutien de l’accusé en détresse et le contrôle des conditions de détention sont des éléments fondamentaux de la défense que l’avocat doit librement exercer”.¹⁰⁶⁶

When both cases are seen in conjunction, at least four functions of counsel in the unity of the defence together with the accused¹⁰⁶⁷ can be inferred:

1. The organisation of the defence, including the preparation of the adversarial trial hearing;
2. The gathering and testing of evidence, including witness evidence¹⁰⁶⁸;
3. The check of investigative measures and use of other means to discover – exculpatory – materials; and
4. For detained suspects, the check of the detention situation, including its justification, length and conditions and a more humanitarian type of assistance.

In the following sub-sections, it will be examined to what extent the Court’s case law recognises these functions of counsel in the lawyer-client relationship, in relation to the aforementioned “personal” rights of the accused as far as possible during the aforementioned “critical” stages of the proceedings (chapter 5).

7.4.1. The functions of counsel

¹⁰⁶² *Can v. Austria* (dec.), Commission’s report of 12 July 1984, HUDOC no. 9300/81, para. 55.

¹⁰⁶³ E.g. in *Salduz v. Turkey* [GC], Judgment of 27 November 2008, HUDOC no. 36391/02, para. 54. See also para. 55 of the report the Commission and the case *Artico v. Italy*, Judgment of 13 May 1980, HUDOC no. 6694/74, para. 33

¹⁰⁶⁴ See section 7.3.

¹⁰⁶⁵ *Can v. Austria* (dec.), Commission’s report of 12 July 1984, HUDOC no. 9300/81, para. 55.

¹⁰⁶⁶ *Dayanan v. Turkey*, Judgment of 13 October 2009, HUDOC no. 7377/03, para. 32.

¹⁰⁶⁷ See also Dayanan’s list of functions for counsel as reiterated in *Karadağ v. Turkey*, Judgment of 29 June 2010, HUDOC no. 24036/05, and *Adamkiewicz v. Poland*, Judgment of 2 March 2010, HUDOC no. 54729/00.

¹⁰⁶⁸ *Dayanan v. Turkey*, Judgment of 13 October 2009, HUDOC no. 7377/03, para. 32. See also the concurring opinion of Judge Zagrebelsky, joined by judges Casadevall and Türmen annexed to the case of *Salduz v. Turkey* [GC], Judgment of 27 November 2008, HUDOC no. 36391/02.

7.4.1.1. *The organisation of the defence and check on investigative measures*

Two functions of counsel – “organising the defence in the light of the preparation for an adversarial trial” and “checking investigative measures used against the accused”¹⁰⁶⁹ – are relevant at least for the protection of the “personal” rights to remain silent and not to incriminate oneself, for example at the “critical” pre-trial stage of police interrogations¹⁰⁷⁰. The Court states the following about the role of counsel in relation to these two “personal” rights of the accused at police interrogations¹⁰⁷¹:

“L’avocat [fait] (...) l’informer sur son [le suspect’s] droit à garder le silence et de ne pas s’auto-incriminer avant son premier interrogatoire [et] de l’assister lors de cette déposition et lors de celles qui suivirent, comme l’exige l’article 6 de la Convention [Additions by the author]”¹⁰⁷².

The description of the role expected of counsel at the stage of police interrogations can best be explained by means of an overview of the case of *Ebanks v. the United Kingdom* (see also sub-section 11.2.2.). The relevant facts of the case are that *Ebanks* was implicated by another person in a murder after he had already been arrested for an unrelated offence of theft. He allegedly wanted to plead in the domestic court that he had not made any voluntary statements to the police. Those statements were later used at the trial as evidence against him. He contended that his lawyers had wrongly advised him on this issue. *Ebanks* contended that his lawyers had informed him that, if he wanted to argue that he had made no voluntary statement to the police at all, he should give evidence at the trial hearing. Under oath *Ebanks* would then have had to explain the instructions that he had given to, and the advice he subsequently received from, his lawyers during the pre-trial stage.

Ebanks complained about two factual issues, the first concerning his decision not to give evidence at trial and the second regarding his instructions to his lawyers at trial as to whether to put before the court his denial that he made a statement to the police. The applicant complained that, in reaching its decision on these matters, the Court of Appeal ought to have heard *evidence viva voce*.

The Court responded by making the following distinction between two types of situations:

“(...) Any defendant subsequently convicted will naturally feel aggrieved if he had an alternative defence which was not, in the event, pursued. He may convince himself, often unrealistically, that the alternative defence would have been successful where the actual defence run was not. However, it is not in the interests of justice to allow a defendant to seek to advance such alternative defence after his conviction unless there are special circumstances which give rise to a real concern that *the legal representation at trial was defective in a fundamental respect* [emphasis added by the author]”.

Thus, the Court does not require that the quality of the services of counsel should be what the accused would ideally wish, nor a perfect defence. However, the Court does hold that counsel should provide good advice about the right of the accused to remain silent or else will hold that the assistance by that lawyer is “(...) defective in a fundamental respect”. It has to be noted here that such fundamentally defective assistance by counsel also entails “special circumstances” that oblige the authorities to intervene in the case under the *Artico*-rule.¹⁰⁷³

Therefore, the Court appears to highlight how important it is that the accused can make decisions in relation to his right to remain silent and the right not to incriminate himself, as those are rights that are so personal that the accused has the ultimate say about them. Accordingly, this reasoning suggests that the lawyer should also follow the accused’s directions regarding such personal rights.

The Court thus expects that, at police interrogations, counsel’s role is supportive of the protection of the right to remain silent and the right not to incriminate oneself. This role of counsel as

¹⁰⁶⁹ See above in 7.4.

¹⁰⁷⁰ See above in 5.3.

¹⁰⁷¹ See *Brusco v. France*, Judgment of 14 October 2010, HUDOC no. 1466/07, para. 45 above in 3.3.1.

¹⁰⁷² *Brusco v. France*, Judgment of 14 October 2010, HUDOC no. 1466/07, para. 54.

¹⁰⁷³ *Ebanks v. the United Kingdom*, Judgment of 26 January 2010, HUDOC no. 36822/06, para. 79.

advisor to the accused, who remains the decision-maker about his personal rights to remain silent and not to incriminate himself, is understandable because counsel can usually determine neither how the police interrogate a suspect nor how the suspect wants to make use of these two rights. In this respect, it is important to reiterate that under the Convention the right to remain silent entails the entitlement to choose whether or not to answer any questions. The right not to incriminate oneself is the right not to answer questions in a way that one provides evidence against oneself.¹⁰⁷⁴ Given that these two rights are different in nature and encompass different objectives, though they are intimately connected, the advice that counsel can give in relation to these rights also differs. Counsel can advise the accused to answer only some questions or to make a full statement, and can also inform the accused about the legal consequences of adverse inferences that can be drawn from his silence when used as evidence for his conviction, for example. Normally, the Court will assess whether there is indeed a situation that “(...) clearly called for an explanation” in determining whether the domestic courts could infer from the accused’s silence that he did not speak to prevent giving an indication of his guilt, which the Court refers to as adverse inferences.¹⁰⁷⁵

The Court does not only want counsel to play such an advisory role at interrogations by the police but also other authorities such as the gendarmes or a prosecutor.¹⁰⁷⁶ This advising role of counsel is not only foreseen for custodial police interrogations but also when the accused’s freedom of action is significantly curtailed by another condition than placement in custody.¹⁰⁷⁷ Finally, this role of counsel – to help protect the right of the accused to remain silent and the right not to incriminate himself – is not only significant during the “first” police interrogation but also when the accused remains in custody and is subjected to subsequent crime scene visits or other types of investigative measures during which the authorities pose questions – as will be examined further below (in subsection 7.4.1.2.).¹⁰⁷⁸

Regarding the scope of this role of counsel, it is important to note that the Court finds that counsel should give advice to the accused about his rights, so that the accused can thereupon take his own decisions about rights that are “personal” such as the right to remain silent and the right not to incriminate oneself.¹⁰⁷⁹ The advice of counsel should enable the accused to take decisions in his case with an understanding about the legal consequences that can be attached to his possible answers or silence.¹⁰⁸⁰ With regard to such legal consequences of answers to police or other authorities’ questions, the Court considers that, where silence can be used as evidence of guilt regarding the indicted offence by the accused, counsel has a role to play regarding the “fundamental dilemma” that arises about the right to remain silent.¹⁰⁸¹

- *What role does counsel have to play in relation to this fundamental dilemma?*

The fundamental dilemma, which occurs when adverse inferences can be drawn from the accused’s silence, has been explained further by the Court. On the one hand, an accused can choose to effectuate his right to remain silent and subsequently have that silence be used as (supporting) evidence of his guilt. On the other hand, the accused can answer questions or make a full statement without knowing whether his information would help to prove his innocence or rather to build the prosecution’s case. If

¹⁰⁷⁴ E.g. *Ramanauskas v. Lithuania* [GC], Judgment of 5 February 2008, HUDOC no. 74420/01; *Teixeira de Castro v. Portugal*, Judgment of 9 June 1998, HUDOC no. 25829/94; *Vanyan v. Russi, a*, Judgement of 15 December 2005, HUDOC no. 53203/99; and *Khudobin v. Russia*, Judgment of 26 October 2006, HUDOC no. 59696/00.

¹⁰⁷⁵ *John Murray v. the United Kingdom* [GC], Judgment of 8 February 1996, HUDOC no. 18731/91, para. 66 including the following citation. See also *Averill v. the United Kingdom*, Judgment of 6 June 2000, HUDOC no. 36408/97 and *Magee v. the United Kingdom*, Judgment of 6 June 2000, HUDOC no. 28135/95.

¹⁰⁷⁶ E.g. *Fatma Tuñç v. Turkey* (no. 2), Judgment of 13 October 2009, HUDOC no. 18532/05, respectively *Hüseyin Habip Taşkın v. Turkey*, Judgment of 1 February 2011, HUDOC no. 5289/06, *Öcalan v. Turkey* [GC], Judgment of 12 May 2005, HUDOC no. 46221/99, para. 131.

¹⁰⁷⁷ E.g. *Aleksandr Zaichenko v. Russia*, Judgment of 18 February 2010, HUDOC no. 39660/02, para. 54. See above in section 5.3.

¹⁰⁷⁸ *Pishchalnikov v. Russia*, Judgment of 24 September 2009, HUDOC no. 7025/04. See also *Karadağ v. Turkey*, Judgment of 29 June 2010, HUDOC no. 24036/05.

¹⁰⁷⁹ See also *Panovits v. Cyprus*, Judgment of 11 December 2008, HUDOC no. 4268/04.

¹⁰⁸⁰ See also *Aleksandr Zaichenko v. Russia*, Judgment of 18 February 2010, HUDOC no. 39660/02, para. 54.

¹⁰⁸¹ *John Murray v. the United Kingdom* [GC], Judgment of 8 February 1996, HUDOC no. 18731/91, para. 66 including the following citation. See also *Averill v. the United Kingdom*, Judgment of 6 June 2000, HUDOC no. 36408/97 and *Magee v. the United Kingdom*, Judgment of 6 June 2000, HUDOC no. 28135/95.

the accused faces such a dilemma, the Court holds that counsel should be able to assist the accused, regardless of the apparent effect of the legal assistance on the procedural position of silence or not of the accused. In other words, even if the accused, who did not receive legal assistance during police interrogations and remained silent, did not change this procedural position of silence at the subsequent trial when he did get legal assistance, the Court explains¹⁰⁸²:

“(…) it is not for the Court to speculate on what the applicant’s reaction, or his lawyer’s advice, would have been had access not been denied during this initial period. As matters stand, the applicant was undoubtedly directly affected by the denial of access and the ensuing interference with the rights of the defence”¹⁰⁸³.

Where counsel plays the role described above, the Court considers that this particular role has the potential to contribute to avoiding miscarriages of justice and fulfilling the aims of Article 6.¹⁰⁸⁴ Counsel can help to check that the prosecution meets its burden of proof at trial in a manner that does not violate the right of the accused to answer police questions where he so wishes and with prior and informed consent. For this same reason, Judge Fura-Sandström explains the “purpose” of a role of counsel at police interrogations as follows:

“The right to be assisted by a lawyer is part of the privilege against self-incrimination (...) as ‘a “bright line” rule (beyond which nobody should cross) [that is] intended to forever extinguish the use of coercion but allowing pressure. The purpose of the rule is to neutralise the distinct psychological disadvantage that suspects are under while dealing with the police’¹⁰⁸⁵.

Seeing the importance attached by the Court to the advice of counsel to the accused at police interrogations, two further cases will be explored in which counsel actually advised the accused to remain silent; advice which the accused followed. These cases can help to determine what role of counsel in his relationship with the accused at the critical stages of police interrogations and trial conform to the Convention, so that the rights of the accused to remain silent and not to incriminate himself are being safeguarded accordingly. Both cases also refer to the right to effective assistance by counsel at the “critical” stages of police interrogations and trial.

- *What if the accused follows counsel’s advice about remaining silent during interrogations?*

The first case, *Beckles v. the United Kingdom*, concerns an accused who was suspected of having committed several offences against a victim X., including robbery, false imprisonment and attempted murder. The police found victim X. near his flat. Upon their arrival *Beckles* mentioned to the police that the victim had not been pushed out of the window but had jumped of his own accord. The police advised him to wait before making any statements until he was questioned at the police station in the presence of a lawyer. *Beckles* followed the advice of the police and had a consultation meeting with his lawyer. During the police interrogations, at which the lawyer was also present, *Beckles* answered each question by replying “no comment”. Subsequently, in court, *Beckles* expressed the view that he was willing to forego his legal privilege in order to elaborate on the reasons why he had followed his lawyer’s advice to remain silent during the police interrogations. However, neither the prosecution nor the domestic court asked *Beckles* to forego his legal privilege and to explain his reasons for remaining silent during the police interrogations. The jury convicted him of the three offences with which he had been charged, inferring from his silence during the police interrogations that he was guilty of all the indicted offences.

¹⁰⁸² *John Murray v. the United Kingdom [GC]*, Judgment of 8 February 1996, HUDOC no. 18731/91, para. 50. See also *Averill v. the United Kingdom*, Judgment of 6 June 2000, HUDOC no. 36408/97, para. 60.

¹⁰⁸³ *John Murray v. the United Kingdom [GC]*, Judgment of 8 February 1996, HUDOC no. 18731/91, paras. 68 and 70.

¹⁰⁸⁴ E.g. *Marttinen v. Finland*, Judgment of 21 April 2009, HUDOC no. 19235/03, para. 60 and *Saunders v. the United Kingdom*, Judgment of 17 December 1996, HUDOC no. 19187/91, para. 68.

¹⁰⁸⁵ Concurring opinion of Judge Fura-Sandström annexed to *Mkhitaryan v. Russia*, Judgment of 2 December 2008, HUDOC no. 22390/05. See also the dissenting opinion of Mrs E. Fura-Sandström, joined by Mr B.M. Zupančič annexed to *Galstyan v. Armenia*, Judgment of 15 November 2007, HUDOC no. 26986/03, para. 84.

Before the Court, *Beckles* complained that his right to remain silent and his right to effective legal assistance had been violated. The Government's response to this complaint was that the fault lay with *Beckles* and his lawyer. Allegedly, *Beckles* and his lawyer had failed to insist on explaining at trial why counsel had advised *Beckles* to remain silent and why *Beckles* had followed that advice. The authorities claimed that they had to respect the freedom of the defence of *Beckles* and his lawyer, who had evidently, according to the Government, freely determined the defence in this respect.

The Court found that, although the matters put to *Beckles* during the police interrogations were incriminating and that they "(...) clearly called for an explanation", *Beckles'* right to remain silent, his right not to incriminate himself and his right to effective legal assistance had been violated. This ruling – which explains the possible responsibilities of counsel pertaining to the rights of the accused – is important, because the Court stated:

"(...) At his trial the applicant explained to the jury that he did not respond to police questioning since he had been advised not to do so. The applicant was prepared to elaborate on this reason and to testify to the content of his solicitor's advice at the police station. (...) Nevertheless, the Court considers that the trial judge failed to give appropriate weight in his direction to the applicant's explanation for his silence at the police interview and left the jury at liberty to draw an adverse inference from the applicant's silence notwithstanding that it may have been satisfied as to the plausibility of the explanation given by him".¹⁰⁸⁶

Therefore, the Court concluded that the authorities had violated Article 6 (1) because of the way in which they dealt with an accused who remained silent upon the advice of his lawyer.

- *What about counsel's role if adverse consequences are being drawn from the accused's silence during interrogations?*

The second case regards two applicants both named *Condron*. Counsel assisted them before and during police interrogations and had advised the *Condrons* to exercise their right to remain silent by answering no questions at all during the police interrogations, which they did. In court, the *Condrons* were convicted by a jury that drew adverse inferences from their silence during the police interrogations in custody, holding that they did not speak out of guilt of the offence.

Before the Court, the applicants complained that both their right to remain silent and their right to effective legal assistance had been violated because they had been penalised for remaining silent on the basis of their lawyer's advice.

Taking this complaint into consideration, the Court held that:

"(...) the very fact that an accused is advised by his lawyer to maintain his silence must also be given appropriate weight by the domestic court. There may be good reason why such advice may be given. The applicants in the instant case state that they held their silence on the strength of their solicitor's advice that they were unfit to answer questions".¹⁰⁸⁷

The Court found that the two *Condrons* had "(...) good reason" to remain silent, while the facts of the case indicate that the *Condrons* at the time when they were being interrogated in custody might have been under the influence of heroin:

"They acted on the strength of the advice of their solicitor who had grave doubts about their fitness to cope with police questioning. Their solicitor confirmed this in his testimony in the *voir dire* proceeding".¹⁰⁸⁸

The Court finds that:

¹⁰⁸⁶ *Beckles v. the United Kingdom*, Judgment of 8 October 2002, HUDOC no. 44652/98, paras. 60 and 64.

¹⁰⁸⁷ *Condron v. the United Kingdom*, Judgment of 2 May 2000, HUDOC no. 35718/97, para. 58-60.

¹⁰⁸⁸ *Condron v. the United Kingdom*, Judgment of 2 May 2000, HUDOC no. 35718/97, para. 61.

“(…) there is an overwhelming need to exercise caution in drawing adverse inferences when the explanation for a defendant’s silence in the face of police questioning is that he was *following legal advice*” [emphasis added by the author].¹⁰⁸⁹

Because of the way in which the authorities dealt with an accused who remained silent upon the advice of his lawyer, the Court concluded that Article 6 (1) had been violated. Thus,, the Court does not only take into consideration whether counsel had the opportunity to advise the accused about his right to remain silent but also whether the assisted accused could follow this advice by not answering any questions.¹⁰⁹⁰

With regard to the complaint by the *Condrons* that their right to assistance by counsel under Article 6 (3) (c) had been violated, it is noteworthy that the Court did not deem it necessary to examine that issue separately from the breach of the right to remain silent. Having regard to its finding on the applicants’ complaint under Article 6 (1), the Court considered that the issues which the complainants raise from the standpoint of Article 6 (3) (b) and (c) amount in reality to a complaint that they did not receive a fair hearing.

Therefore, both cases of *Beckles* and *Condron* indicate how important it is to the Court that counsel can advise the accused about his right to remain silent and right not to incriminate himself, as rights that have been directly connected to the fairness of the criminal procedure “as a whole”. Rather than finding such a role of counsel important “only” to the right to remain silent or the right to an effective defence, the Court finds it “critical” for the right to a fair trial “as a whole”. Moreover, the Court also wants to see that the accused has been able to follow this advice of counsel. Therefore, it is not enough that counsel has been able to advise the accused as to his right to remain silent and right not to incriminate himself, but the authorities should also not “penalise” an accused who follows this advice of his lawyer. It is only natural that this exploration about the functions expected of counsel already raises questions about the obligation of authorities to intervene in the case that may arise when counsel has *wrongly* advised the accused about his right to remain silent and right not to incriminate oneself.¹⁰⁹¹ Therefore, the description given above will be taken into account during the additional examination regarding the obligation owed by the authorities towards the accused, which will be reserved for the chapter regarding redress for ineffective assistance by counsel (chapter 11).

To conclude, counsel has important functions related to “(…) organising the defence in the light of the preparation for an adversarial trial” and “(…) checking investigative measures used against the accused”.¹⁰⁹² These functions are important with regard to the protection of the personal rights of the accused to remain silent and not to incriminate oneself, while counsel’s role therein also serves as a guarantee against ill-treatment by the authorities during, for example, police interrogations. Ultimately, counsel is the advisor and the accused is the decision-maker, so that certain decisions, though they may have a strategic element, are so “personal” for the accused that counsel must abide by his client’s wishes and cannot go against them¹⁰⁹³, as will be revisited in the chapter regarding ineffective assistance by counsel (chapter 11). In other words, an issue with a fair trial almost inevitably appears to arise where the lawyer does not follow the instructions of the accused as to matters that are within the accused’s control because of “personal” rights – rather than counsel’s control over strategy.

¹⁰⁸⁹ *Condron v. the United Kingdom*, Judgment of 2 May 2000, HUDOC no. 35718/97, para. 74.

¹⁰⁹⁰ E.g. *John Murray v. the United Kingdom [GC]*, Judgment of 8 February 1996, HUDOC no. 18731/91, para. 43; a comparison with the burden of proof where the suspect gave answers: *Telfner v. Austria*, Judgment of 20 March 2001, HUDOC no. 33501/96, para. 17 and *Krumpholz v. Austria*, Judgment of 18 March 2010, HUDOC no. 13201/05 13201/05, paras. 33 and 34. See also *John Murray v. the United Kingdom [GC]*, Judgment of 8 February 1996, HUDOC no. 18731/91, paras. 45-52, and *Adetoro v. the United Kingdom*, Judgment of 20 April 2010, HUDOC no. 46834/06.

¹⁰⁹¹ *Ebanks v. the United Kingdom*, Judgment of 26 January 2010, HUDOC no. 36822/06, para. 79.

¹⁰⁹² See above in 5.2.3.1.

¹⁰⁹³ *Ebanks v. the United Kingdom*, Judgment of 26 January 2010, HUDOC no. 36822/06, para. 79.

7.4.1.2. *The check of investigative measures and use of other means to discover (exculpatory) materials*

This expectation of the role of counsel as explained mostly regarding police interrogations (subsection 7.4.1.2.), is also relevant for the aforementioned third function of “the check of investigative measures and use of other means to discover – exculpatory – materials” at other investigative and evidence-gathering acts. For instance, during car searches and identification parades, both the Commission and the Court expect counsel to be able to “control” their lawfulness.¹⁰⁹⁴ Counsel should be able to check whether the rights of the accused have been protected during the investigative measure conducted by the authorities.¹⁰⁹⁵ This is a complementary role vis-à-vis those authorities which are obliged to ensure a thorough, effective and independent criminal investigation.¹⁰⁹⁶ Sometimes the fairness of such measures might be guaranteed where counsel is merely present¹⁰⁹⁷, for instance when the investigative measure pertains to an object (i.e. a car search). However, when the accused – as in police interrogations – is posed questions, the Court appears to require more than mere attendance of counsel. Under such circumstances, counsel should be able to help to protect the accused’s right to remain silent and the right not to incriminate oneself by being able to make interventions (i.e. an identification parade¹⁰⁹⁸).¹⁰⁹⁹

In all these cases regarding investigative measures other than police interrogations, not a single case has been encountered in which the Court held counsel responsible for neglecting to protect the right to remain silent and the right not to incriminate oneself. Accordingly, the Court does not have the accused bear the consequences of conduct of the lawyer that harms the accused in terms of his personal rights, at least.

7.4.1.3. *The function of counsel in relation to the detained accused*

The specific fourth and final function identified assistance by a lawyer to a detained accused. For example, that function applies during police custody¹¹⁰⁰ or during other types of pre-trial detention such as detention on remand.¹¹⁰¹ It is also important to explore what role the Court expects counsel to play as of the accused’s placement in custody. For example, the Court held:

“(…) an accused person is entitled, as soon as he or she is taken into custody, to be assisted by a lawyer, and not only while being questioned (...). Indeed, the fairness of proceedings requires that an accused be able to obtain the whole range of services specifically associated with legal assistance”.¹¹⁰²

It is important to specify that the Court finds that this “whole range of services” consists of the discussion of the case, the organisation of the defence, the collection of evidence, preparation for questioning, support for the accused in distress and checking on the conditions of detention.¹¹⁰³ In addition to the said range of legal services, a role of counsel for a detained accused is important as “(...) a fundamental safeguard against ill-treatment”.¹¹⁰⁴ Counsel’s role in assisting a detained accused takes at least two forms, which are both complementary to the authorities.

First, counsel can assist the monitoring of the accused’s detention and serve a more “humanitarian” function of helping a person in distress. Counsel does not personally have to guarantee

¹⁰⁹⁴ *Can v. Austria* (dec.), Commission’s report of 12 July 1984, HUDOC no. 9300/81, para. 55.

¹⁰⁹⁵ E.g. *Kaya v. Turkey*, Judgment of 19 February 1998, HUDOC no. 31753/02, para. 89 and *M.C. v. Bulgaria*, Judgment of 4 December 2003, HUDOC no. 39272/98, para. 181.

¹⁰⁹⁶ E.g. *Enukidze and Girgvliani v. Georgia*, Judgment of 26 April 2011, HUDOC no. 25091/07, para. 242, *Tsintsabadze v. Georgia*, Judgment of 15 February 2011, HUDOC no. 35403/06 35403/06, para. 242 and *M.C. v. Bulgaria*, HUDOC no. 39272/98, Judgment of 4 December 2003, para. 181.

¹⁰⁹⁷ *Lisica v. Croatia*, Judgment of 25 February 2010, HUDOC no. 20100/06, para. 56.

¹⁰⁹⁸ *Yunus Aktaş and others v. Turkey*, Judgment of 20 October 2009, HUDOC no. 24744/03 and *Laska and Lika v. Albania*, Judgment of 20 April 2010, HUDOC nos 12315/04 17605/04.

¹⁰⁹⁹ See also *Melnikov v. Russia*, Judgment of 14 January 2010, HUDOC no. 23610/03, para. 79.

¹¹⁰⁰ E.g. *Dayanan v. Turkey*, Judgment of 31 October 2009, HUDOC no. 7377/03, paras. 31 and 32.

¹¹⁰¹ E.g. *Castravet v. Moldova*, Judgment of 13 March 2007, HUDOC no. 23393/05, para. 47.

¹¹⁰² E.g. *Dayanan v. Turkey*, Judgment of 31 October 2009, HUDOC no. 7377/03, para. 32.

¹¹⁰³ E.g. *Dayanan v. Turkey*, Judgment of 31 October 2009, HUDOC no. 7377/03, para. 32.

¹¹⁰⁴ *Salduz v. Turkey* [GC], Judgment of 27 November 2008, HUDOC no. 36391/02, para. 54. See also *Artyomov v. Russia*, Judgment of 27 May 2010, HUDOC no. 39272/98, para. 204.

the protection of the detained accused's rights: that is the obligation of the authorities. Counsel should "only" check that the authorities respect these rights.¹¹⁰⁵ Following the Commission's use of this term, the notion of detention includes its justification and length as well as the conditions of detention under which the accused is being held.¹¹⁰⁶

Second, counsel can help a detained accused who cannot undertake investigative measures in person, which the accused who is at liberty can freely carry out. Under such circumstances, the Court requires that role of counsel to be observed out of equal protection for an accused who is not detained and therefore free to gather information and/or evidence.

In these cases concerning situations of a detained accused such as police custody and other types of pre-trial detention, not a single case has been found in which the Court held counsel – who did not play the requisite, above-depicted role – responsible for ineffective legal assistance. The governments in these cases certainly alleged ineffective assistance by counsel. In no case, did the Court hold those "failures" to be responsibilities of the lawyer towards the accused under the Convention for which the accused has to bear the consequences. Instead, the Court examined whether the authorities could reasonably have ascribed those issues as responsibilities of counsel with which the accused agreed as an implicit waiver of his rights. The Court held that the authorities could not.

7.4.1.4. *The organisation of the defence during an adversarial trial*

The Court has held repeatedly "that, although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial".¹¹⁰⁷ With regard to all four aforementioned "functions" of counsel, which were mostly pre-trial functions, it is important to note how significant the Court holds the preparation of the trial stage to be, when explaining the right of the accused to effective participation at the adversarial trial hearing or hearings:

"(...) *inter alia* the right to compile notes in order to facilitate the conduct of the defence, irrespective of whether or not the accused is represented by counsel. Indeed, the defence of the accused's interests may best be served by the contribution which the accused makes to his lawyer's conduct of the case before the accused is called to give evidence (...)"¹¹⁰⁸

The Court appears to see the pre-trial role of counsel under the Convention mostly in the light of the priority of the accused's right to an effective defence at an adversarial hearing. As will be examined here, the Court apparently centralises the court phase under its "as a whole" approach, exploring to what extent counsel's pre-trial role contributed to the guarantee of an effective defence at trial.

That exploration will take into consideration what the trial role is of counsel vis-à-vis the accused as decision-maker regarding rights that he holds personally. Therefore, it will be important to revisit the views that both the Commission and the Court hold about counsel's function related to "the presentation of the defence case for the adversarial trial hearing".¹¹⁰⁹ Regarding this function, the Court holds that counsel should advise the accused so that the latter can "(...) select, with the advice of counsel, the defence which he wishes to put before the court".¹¹¹⁰ An exception of counsel's responsibility for strategic trial conduct has already been mentioned above.¹¹¹¹

So far, no cases about effective representation of an accused who chooses not to attend the trial hearing (*in absentia*) have been cited in this chapter. For such cases, it is important to emphasise that the Court considers the right of attendance of an accused at his own trial phase to be "(...) of capital importance".¹¹¹² The capital importance lies in the accused's personal "(...) right to a hearing" and "(...) the need to verify the accuracy of his statements and compare them" with other evidence

¹¹⁰⁵ See above in 7.3.

¹¹⁰⁶ *Can v. Austria* (dec.), Commission's report of 12 July 1984, HUDOC no. 9300/81, para. 55.

¹¹⁰⁷ *Nalbandyan v. Armenia*, Judgment of 31 March 2015, HUDOC nos. 9935/06 23339/06, para. 140.

¹¹⁰⁸ *Moiseyev v. Russia*, Judgment of 9 October 2008, HUDOC no. 62936/00, para. 214.

¹¹⁰⁹ See above in section 7.2.

¹¹¹⁰ *Ebanks v. the United Kingdom*, Judgment of 26 January 2010, HUDOC no. 36822/06, para.82.

¹¹¹¹ See above *Stanford v. the United Kingdom*, 23 February 1994, HUDOC no. 16757/90 in sub-section 7.3.1.

¹¹¹² E.g. *Dembukov v. Bulgaria*, Judgment of 28 February 2008, HUDOC no. 68020/01, para. 51.

such as witness statements, for example.¹¹¹³ The Court also holds that an accused cannot be compelled to attend his trial hearing at the expense of losing his right to *effective* representation by counsel in his absence.¹¹¹⁴ Although the Court understands that Member States discourage unjustified absences of the accused, they should not be enforced by limiting the right under Article 6 (3) (c). For accused persons who seek to evade justice, arrangements can be made. Under such circumstances, the resulting sanctions have to be proportionate whilst, moreover, the absence of the accused agrees with the public interest. In any case, trials *in absentia* are not allowed to come at the expense of representation *in absentia* by counsel.¹¹¹⁵ The authorities cannot prohibit counsel, who attends the trial phase for the apparent purpose of defending the accused in his absence, from giving him the opportunity to do so.¹¹¹⁶ For the right to an effective defence *in absentia* to be guaranteed, the right to *effective* legal representation has to be safeguarded.¹¹¹⁷

To make some concluding remarks about this sub-section, the Court appears to hold counsel's trial role to consist of the zealous protection of the accused's rights, interests and wishes at the adversarial trial hearing.¹¹¹⁸ The Court finds that counsel cannot "substitute" the accused in court. Counsel has to advise the accused about the available options for exercising his personal rights, even if the lawyer thinks the right would be better served in another way. The role of counsel at the trial stage consists of assistance to the accused as to how to take decisions on how best to plead the defence case in court, with the aim of reaching the best possible outcome for the accused. Ultimately it is the accused who decides how to use or forsake his personal rights. Only if counsel makes a strategic trial decision as explained with the case of *Stanford v. the United Kingdom*, can it be held a responsibility of counsel towards the accused.¹¹¹⁹ However, in any other circumstances, the Court will assess counsel's conduct and explore its effects on the rights of the accused in order for the accused not to bear the consequences of counsel's (negative) conduct. If the authorities allege that counsel supposedly failed to perform a defence activity or offended the bench, the Court examines on its own terms what the effect thereof has been on the personal rights of the accused. The Court will not equate all supposed responsibilities of counsel with a *waiver* of the accused about rights such as the right to remain silent, the right to attend the hearing, the right to hear and follow the proceedings and the right to confront witnesses. Finally, legal representation *in absentia* of an accused who freely waives his right to attend the trial and thus chooses to be absent, nonetheless has to be effective, as in the case for attending assisted accused persons.

7.4.1.5. *The organisation of the defence for appeal and appeal in cassation*

The role of counsel after trial has not yet been examined. This sub-section will turn to that role of counsel during an appeal on points of fact and law and/or to an appeal on points of law only (an appeal in cassation).

The Court, which does not consider that the phases following the first instance trial stage are of equal importance to ensure the Convention rights of the accused, finds that the appeal phases should be just as fair as the trial and pre-trial stages.¹¹²⁰ This sub-section will deal predominantly with specific aspects that are unique to the role of counsel at the appeal and appeal in cassation stages, for instance in the light of the question of whether the Court finds that counsel is not allowed to waive a personal right of the accused to make use of legal remedies.¹¹²¹

Regarding the fairness of the appeal or appeal in cassation stages, it has to be highlighted that, for equality of arms and an adversarial hearing, the Court considers it important that a lawyer for the

¹¹¹³ E.g. *Dembukov v. Bulgaria*, Judgment of 28 February 2008, HUDOC no. 68020/01, para. 51.

¹¹¹⁴ See also *Ebanks v. the United Kingdom*, Judgment of 26 January 2010, HUDOC no. 36822/06, para.82.

¹¹¹⁵ E.g. *Van Geyselghem v. Belgium*, Judgment of 21 January 1999, HUDOC no. 26103/95, para. 34, *Krombach v. France*, Judgment of 13 February 2001, HUDOC no. 29731/96, paras. 84, 89 and 90, and *Sejdovic v. Italy* [GC], Judgment of 1 March 2006, HUDOC no. 56581/00, para. 92.

¹¹¹⁶ E.g. *Van Geyselghem v. Belgium*, Judgment of 21 January 1999, HUDOC no. 26103/95, para. 33, *Sejdovic v. Italy* [GC], Judgment of 1 March 2006, HUDOC no. 56581/00, para. 93.

¹¹¹⁷ See also *Ebanks v. the United Kingdom*, Judgment of 26 January 2010, HUDOC no. 36822/06, para.82.

¹¹¹⁸ See above in section 5.2.

¹¹¹⁹ See above in section 7.3.1.

¹¹²⁰ *Lalmahomed v. the Netherlands*, Judgment of 22 February 2011, HUDOC no. 26036/08.

¹¹²¹ *Mutatis mutandi Ebanks v. the United Kingdom*, Judgment of 26 January 2010, HUDOC no. 36822/06, and *Morris v. the United Kingdom*, Judgment of 20 January 1984, HUDOC no. 38784/97, para. 91.

appellant can address technical issues such as the clarification of appeal grounds, e.g. statutory limitations.¹¹²² A lay person will usually be unable to address such complex legal issues on his own. As a consequence of having a lawyer present at an appeal stage, such issues will be addressed by lawyers on both sides: the defence and the prosecution. Moreover, the Court often considers the complexity of the law to be an important factor in deciding that a lawyer must be appointed to the accused who wishes to lodge an appeal.¹¹²³ This way the appellant can adequately make use of his right to a fair criminal procedure “as a whole”.

Although an appeal and an appeal in cassation will usually be a continuance of what has occurred at first instance, the Court can also consider the appeal to be the first instance for the protection of certain minimum defence rights. For instance, the absence of a request by the lawyer and the accused to hear a witness earlier in the criminal procedure does not, in the Court’s view, have to constitute a waiver of the *accused’s* right to examine that witness on appeal.¹¹²⁴ When confronting the witness is relevant *prima facie* on appeal, the appeal court must provide the defence with an opportunity to confront that witness at this second instance.¹¹²⁵ Under such circumstances, the appeal court cannot allege that the defence – or *de facto* counsel – should have asked to hear a witness earlier in the proceedings. If the *prima facie*-test is being met, the witness should be heard on appeal, even if the witness could potentially have been heard on an earlier instance.

Similarly, where not having had an opportunity to comment on *prima facie* relevant evidence at first instance, under the Convention the last-instance has to give the defence such a chance.¹¹²⁶ Under such conditions, the authorities are not allowed to consider the right as having been waived because the defence had earlier implicitly renounced its right to examine that piece of evidence. Under this approach, the Court can take into account several circumstances that may have changed between the first and the later instances. For example, there may be a new lawyer during the appeal stage than at the lower instance and the appeal lawyer may learn of new important evidence which was unknown at earlier stages. Moreover, the domestic appeal court may itself be informed about novel aspects of the case and the appellant may have proceeded without any counsel including the lawyer who acted for him at first instance. The Court will take such specific facts of the case into account.

In addition, the Court has held that the authorities had violated Article 6 when they held counsel ultimately responsible for failing to request the hearing of a witness or to consider certain evidence at an earlier stage of the proceedings, thus depriving the accused of his right to do so during the appeal phase. These examples are a further consequence of what has already been said about waivers in sub-section 5.2.5.

Against the background of these general considerations about the fairness of the appeal and appeal in cassation stages, the Court accepts that counsel controls the defence strategy on appeal or on an appeal in cassation (e.g. *Hermi v. Italy* but not *Kononov v. Russia*). However, the Court does not permit a complete abstention from an appeal or an appeal in cassation if the accused expresses his desire to make use of the legal remedies, as that is his personal right. Accordingly, counsel can refuse to lodge an appeal or an appeal in cassation on technical issues that the accused may want to argue but that the lawyer considers a contravention of his professional obligations.¹¹²⁷ However, the Court does not permit counsel to completely disregard the accused’s request to lodge such an appeal or an appeal in cassation.¹¹²⁸ In this way, the Court ensures that a lawyer can make decisions about the legal remedy on the one hand, whilst the *accused* is given an opportunity to make use of his right to use a legal remedy, on the other. The reason to set requirements for a decision to fully forgo an appeal by a lawyer is to protect the appellant’s right to access higher courts.¹¹²⁹ One such requirement is a reasonable time frame to communicate the decision to the appellant, i.e. not three days before the

¹¹²² *Artico v. Italy*, Judgment of 13 May 1980, HUDOC no. 6694/74, para. 34.

¹¹²³ See above in section 5.2.2.

¹¹²⁴ E.g. *Delta v. France*, Judgment of 19 December 1990, HUDOC no. 11444/85. See further chapter 9.

¹¹²⁵ E.g. *Melnikov v. Russia*, Judgment of 14 January 2010, HUDOC no. 23610/03, paras. 79.

¹¹²⁶ E.g. *M.S. v. Finland*, Judgment of 22 March 2005, HUDOC no. 46601/99.

¹¹²⁷ E.g. *Staroszczyk v. Poland* and *Siałkowska v. Poland*, Judgment of 22 March 2007, HUDOC no. 59519/00 and HUDOC no. 8932/05 respectively, paras. 129 and 106.

¹¹²⁸ *R.D. v. Poland*, Judgment of 18 December 2001, HUDOC nos 29692/96 34612/97.

¹¹²⁹ E.g. *Staroszczyk v. Poland* and *Siałkowska v. Poland*, Judgment of 22 March 2007, HUDOC no. 59519/00 and HUDOC no. 8932/05 respectively, paras. 129 and 106.

appeal hearing.¹¹³⁰ This is because the Court finds those few days to be too short for the appellant to have a realistic opportunity of bringing an appeal in cassation before the highest domestic court, for which he would have needed to find another lawyer. A second requirement is that a lawyer should prepare a written legal opinion on the prospects of an appeal.¹¹³¹ Such a brief makes it possible for the Court to objectively assess whether this refusal was not arbitrary.

To conclude, the Court holds that an appeal and an appeal in cassation will usually be a continuance of what has occurred at first instance. However, the Court also examines whether at these phases the rights of the appellant were indeed protected. The Court follows this line of reasoning because it does not accept that counsel can be compelled to face a dilemma that would prejudice an effective defence at the appeal hearing.¹¹³² A lawyer cannot be coerced into having to examine evidence already before an appeal or, by neglecting to do so, to have the accused lose his personal right to examine evidence at the appeal hearing. The appellant has a right to an effective defence at the appeal hearing, which means that although counsel can control the defence strategy, the appellant has his own decisions to take, particularly about his personal rights. Therefore, the authorities are only allowed to consider the defence position at a stage prior to the appeal phase as a waiver of the appellant's right at the appeal hearing if they are sure that the appellant has personally renounced his right and a fair procedure "as a whole" has been ensured. For a waiver, it must be certain that the appellant himself – freely and on an informed basis – chose not to make use of the right that is entitled to him. Thus, for the fairness of the appeal, the right to an effective defence can be equally important as at first instance, as well as other related minimum defence rights such as the right to examine witnesses or other evidence. These are responsibilities of the authorities, which they cannot relinquish by alleging that counsel gave ineffective legal assistance and should therefore be held responsible, *de facto* having the accused bear the consequences.

7.4.2. Effects of the Court's "as a whole" approach in assessing counsel's pre-trial role

7.4.2.1. A first "as a whole" approach effect on examining investigative measures

The Court's "as a whole" approach pays special attention to the question of whether counsel has at the very least provided the accused with a minimum of effective legal assistance at the adversarial trial hearing.¹¹³³ Consequently, this approach influences the ideas of the Court about what counsel could do pre-trial, which can be explained on the basis of the case of *Laska and Lika v. Albania*. This case has already been touched upon from the other, vertical perspective in chapter 5.¹¹³⁴ It will be explored here from a horizontal perspective.

Some relevant facts of the case for its examination at this stage of the research are that the suspects *Laska and Lika* were subjected to a pre-trial identification parade which happened in the absence of a lawyer. The Court ruled that the parade had been without the requisite "(...) independent oversight of the fairness of the procedure". That had resulted in "(...) an opportunity to protest against the blatant irregularities".¹¹³⁵ The Court concluded that the parade without "a" role of counsel amounted to a violation of the right to a fair trial of the two applicants. This provides an interesting starting point for a further examination as to what that role of counsel at the parade should have entailed.

Either counsel can have a one-time chance to protest irregularities with the identification parade only at that pre-trial stage without an opportunity to do so at the trial stage, or counsel can have the freedom to decide whether he wanted to protect the rights of the accused, either during the pre-trial stage or during the trial phase.¹¹³⁶

¹¹³⁰ *Siałkowska v. Poland*, Judgment of 22 March 2007, HUDOC no. 8932/05, para. 114.

¹¹³¹ E.g. *Gillow v. the United Kingdom*, Judgment of 24 November 1986, HUDOC no. 9063/80, para. 69; *Vacher v. France*, Judgment of 17 December 1996, HUDOC no. 9063/80, paras. 24 and 28; *Tabor v. Poland*, Judgment of 27 June 2006, HUDOC no. 12825/02, para. 42; *Staroszczyk v. Poland*, Judgment of 22 March 2007, HUDOC no. 59519/00, para. 129; *Siałkowska v. Poland*, Judgment of 22 March 2007, HUDOC no. 8932/05, para. 106.

¹¹³² See in chapter 4 for the Dutch equivalent "rechtsverwerking". See Israel and LaFave (2006) at 252-253.

¹¹³³ E.g. *Ebanks v. the United Kingdom*, Judgment of 26 January 2010, HUDOC no. 36822/06.

¹¹³⁴ *Laska and Lika v. Albania*, Judgment of 20 April 2010, HUDOC nos 12315/04 17605/04.

¹¹³⁵ *Laska and Lika v. Albania*, Judgment of 20 April 2010, HUDOC nos 12315/04 17605/04, para. 68. See also *Yunus Aktaş and others v. Turkey*, Judgment of 20 October 2009, HUDOC no. 24744/03.

¹¹³⁶ E.g. *Laska and Lika v. Albania*, Judgment of 20 April 2010, HUDOC nos 12315/04 17605/04.

If only the former once-off choice is available, counsel will face a fundamental dilemma. A lawyer cannot change the course of investigative measures. Therefore, at best counsel can suggest how to arrange their fairness.¹¹³⁷ When the lawyer would make suggestions to the authorities about how they should conduct the parade, the lawyer runs the risk of assisting the gathering of incriminating evidence against the suspect. If counsel is compelled to make such suggestions at the pre-trial stage at the expense of being allowed to take issue with the investigative measure later at the trial hearing (in Dutch: *rechtsverwerking*), then two personal rights are at stake. If counsel were to be required to suggest to the authorities how to fairly conduct the pre-trial investigative measure, counsel could risk helping build the case against the accused. Under such circumstances, the accused's personal right not to incriminate himself would be at stake. If counsel would indeed assist in building a case against the accused, counsel would not guarantee the accused's personal right to effective legal assistance.¹¹³⁸ Additionally, counsel should provide the accused with effective legal assistance, at the trial hearing in particular. This can mean that counsel chooses to take issue with the investigative measure in court when favourable to the best possible outcome for the accused. Then the defence should in unison be able to determine how to plead the case.

Therefore, the Court, which particularly examines counsel's pre-trial work in the context of the fairness of the criminal procedure "as a whole", cannot but require that counsel should have freedom to decide if and when to take issue with the pre-trial measure, either at the pre-trial stage or at the trial hearing.¹¹³⁹ Moreover, counsel must have corresponding freedom to decide together with the accused how to conduct the defence at the trial stage. Therefore, the Court can only accept that counsel should be allowed to freely choose whether to wait and plead issues with the investigative measure during the adversarial trial phase.¹¹⁴⁰ Alternatively, counsel should be free to complain immediately during the pre-trial investigative measure¹¹⁴¹ without forsaking the right of the accused to effective legal assistance later in court.¹¹⁴²

In other words, the Court cannot allow a lawyer to be *obliged* to take issue with the investigative measure¹¹⁴³ when it takes place or, by neglecting to do so, to have the accused lose his opportunity to object to the investigative measure at the adversarial trial.¹¹⁴⁴ Such a role of counsel would not abide by all the earlier case law cited regarding the role of counsel as advisor to an accused who has the ultimate say about his personal rights.

7.4.2.2. A second "as a whole" approach effect on testing evidence against the accused

It is also important here to revisit the earlier supposition in this study that the case of *S.N. v. Sweden* was a very extraordinary exception to the existing exception added by the Court itself, stating "(...)" that where a conviction is based to a decisive degree on untested witness statements, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6 of the Convention" (see sub-section 7.3.3. for the discussion of this case).¹¹⁴⁵ In a series of similar cases that concerned child witnesses who were not heard in court, which were delivered before and after *S.N. v. Sweden*, the Court has held that:

“(...) no procedures were introduced by the authorities to counterbalance the difficulties faced by the defence and the applicant was not given an adequate and proper opportunity to challenge and question this witness against him (compare and

¹¹³⁷ See also *Doorson v. Netherlands*, Judgment of 26 March 1996, HUDOC no. 20524/92, para. 75.

¹¹³⁸ E.g. *Ebanks v. the United Kingdom*, Judgment of 26 January 2010, HUDOC no. 36822/06.

¹¹³⁹ See also *Ebanks v. the United Kingdom*, Judgment of 26 January 2010, HUDOC no. 36822/06, para.82.

¹¹⁴⁰ E.g. *Salduz v. Turkey* [GC], Judgment of 27 November 2008, HUDOC no. 36391/02, para. 53.

¹¹⁴¹ *Panovits v. Cyprus*, Judgment of 11 December 2008, HUDOC no. 4268/04. See also *Nikula v. Finland*, Judgment of 21 March 2002, HUDOC no. 31611/96, para. 54.

¹¹⁴² E.g. *Ebanks v. the United Kingdom*, Judgment of 26 January 2010, HUDOC no. 36822/06.

¹¹⁴³ See also *Melnikov v. Russia*, Judgment of 14 January 2010, HUDOC no. 23610/03.

¹¹⁴⁴ *Nikula v. Finland*, Judgment of 21 March 2002, HUDOC no. 31611/96, para. 54. See also *Kyprianou v. Cyprus*, Judgment of 15 December 2005, HUDOC no. 73797/01 and *Panovits v. Cyprus*, Judgment of 11 December 2008, HUDOC no. 4268/04.

¹¹⁴⁵ See the Court's Judge Myjer who explains that the Court can smell a lawyers' tactics so that it does condemn the authorities for a violation in B.E.P. Myjer, *In toga venenum? The limits of freedom of expression in and around the courtroom in the case-law of the European Court of Human Rights*. Available at www.coehelp.org/mod/resource/view.php?inpopup=true&id=1420.

contrast *S.N. v. Sweden*, where the applicant failed to avail himself of the opportunity at the pre-trial stage to have questions put to the child complainant). The mere fact that the prosecuting authorities did not have such an opportunity either is not sufficient for a finding that the applicant was not put in a disadvantageous position *vis-à-vis* the other party”.¹¹⁴⁶

In somewhat more recent case law, the Court has added to the pre-trial counterbalancing confrontation of a witness by the police in the absence of a lawyer where the child victim is not heard in court to underline the importance of audio and/or video recordings¹¹⁴⁷ as well as of the presence of forensic psychology experts.¹¹⁴⁸ The Court still prioritises the opportunity for the court, the prosecutor and the defence to observe the behaviour of the witness or victim during questioning.¹¹⁴⁹ In addition, the Court considers it important that the accused has had an opportunity to – at least – observe the demeanour of the witness or victim under direct questioning, in order to point out to his lawyer or to the court certain points with which he disagrees or considers untrue. The domestic court has to ensure that:

“(…) the applicant was given the opportunity of challenging the authenticity of the evidence and of opposing its use. In addition, the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy (…)”¹¹⁵⁰

Although counsel can be held ultimately responsible for some pre-trial conduct as pertaining to hearing witnesses,¹¹⁵¹ normally the Court requires more of the adversarial trial hearing and the domestic court than what was done in *S.N. v. Sweden*, as can be illustrated with the case of *Bocos-Cuesta v. the Netherlands*.¹¹⁵² In this case, four children who were also alleged victims of sexual assault and acts of indecency were heard by the police. These interviews were not video- or audio-recorded. The court held that hearing the children as witnesses would possibly force them to relive a very traumatic experience and that their interests outweighed those of the applicant in that respect. Additional evidence came from witnesses who were heard in court while the defence had been able to pose them questions. *Bocos-Cuesta* was convicted on the basis of the statements made by the four children to the police, which in effect was the only direct evidence. The other indirect but corroborative evidence came from two other witnesses. The Supreme Court rejected the applicant’s appeal for the same reason and upheld the conviction. *Bocos-Cuesta* complained before the Court that his right to witness confrontation was violated. The Court examined the complaint by holding that:

“(…) throughout the entire trial proceedings, the applicant clearly and repeatedly requested the courts to allow the defence to question the four children. (...) Although [the Court of Appeal] noted that the remark by the applicant’s lawyer after the hearing of witnesses (...) that he did not wish to hear any further witnesses could be interpreted as also referring to the four children, it did not base its decision on such an interpretation but on other substantive grounds. Moreover, the Supreme Court did not reject the applicant’s complaint about the refusal of his request to hear the children on the basis that he had withdrawn it, but assessed and accepted as correct the reasons

¹¹⁴⁶ *W.S. v. Poland*, Judgment of 19 June 2007, HUDOC no. 21508/02, para. 63; *A.L. v. Finland*, Judgment of 27 January 2009, HUDOC 23220/04, para. 42.

¹¹⁴⁷ E.g. *Asch v. Austria*, Judgment of 26 April 1991, HUDOC no. 12398/86, para. 30.

¹¹⁴⁸ See the dissenting opinions in *S.N. v. Sweden*, Judgment of 2 July 2002, HUDOC no. 34209/96 as also shown in the case’s summary in *Al-Khawaja and Tahery v. the United Kingdom*, Judgment of 20 January 2009, HUDOC nos 26766/05 22228/06. See also *EHRC* 2009, 39 and *NJ* 2010/515.

¹¹⁴⁹ E.g. *Haas v. Germany* (dec.), Commission decision of 17 November 2005, HUDOC no. 73047/01; *J.G. v. Austria*, Commission decision of 19 February 1992, HUDOC no. 15853/89; and *K.J. v. Denmark* (dec.), Commission decision of 31 March 1993, HUDOC, no. 18425/91.

¹¹⁵⁰ *Sharkunov and Mezentsev v. Russia*, Judgment of 10 June 2010, HUDOC no. 75330/01, para 96.

¹¹⁵¹ See for instance *S.N. v. Sweden*, Judgment of 2 July 2002, HUDOC no. 34209/96 in chapter 6, section 6.2.2.

¹¹⁵² *Bocos-Cuesta v. the Netherlands*, Judgment of 10 November 2005, HUDOC no. 54789/00, para. 66 including the citation below. See also *A.S. v. Finland*, Judgment of 28 September 2010, HUDOC no. 40156/07; *W.S. v. Poland*, Judgment of 19 June 2007, HUDOC no. 21508/02; *A.L. v. Finland*, Judgment of 27 January 2009, HUDOC 23220/04; and *D. v. Finland*, Judgment of 7 July 2009, HUDOC no. 30542/04.

given by the Court of Appeal for its refusal of that request. The Court, therefore, finds that the applicant cannot be regarded as having waived his rights under Article 6 as to the hearing of these witnesses [added by the author].”

The Court concluded that the accused should not have to bear the consequences of his lawyer’s conduct. The Court does not accept a waiver by the lawyer of a personal right of the accused. This is because although they can be assumed to act in unison, the accused has a final say regarding this right which he wanted to exercise, as was evident from the open disagreement between counsel and the accused.

Thus,, the Court does not only take into consideration the conduct of counsel but also whether the lawyer has indeed protected the personal rights of the accused. Accordingly, a lawyer is not held responsible if his decision, whether tactical¹¹⁵³ or strategic or not, results in harm to the accused in terms of his personal rights. Personal rights are, for instance, the right to remain silent¹¹⁵⁴, the right not to incriminate oneself¹¹⁵⁵, the right to attend the hearing¹¹⁵⁶ and the right to an effective defence, primarily at the adversarial trial hearing, which includes testing evidence that is used against the accused.¹¹⁵⁷ On personal rights, counsel can advise, but he will ultimately have to follow the accused’s decision on attitude or procedural course. In this way the exclusive right of the accused to personally choose between making use of, and waiving, his personal rights are protected because they are crucial for the fairness of the criminal procedure “as a whole”. The accused must personally – as well as unequivocally and voluntarily – waive his personal rights, while, moreover, the effects of such a decision may not run contrary to the public interest.

7.4.3. Largely lacking information about counsel’s role about evidence gathering

Although the case law explains many issues about counsel’s role and the according responsibilities during all procedural stages, an unanswered question is how the Court construes the function of counsel of “(...) gathering evidence”. Particularly unknown still is how the Court deals with “(...) discovering – exculpatory – evidence” by other means than “checking investigative measures”. It is questionable whether the Court finds that counsel has a separate, autonomous duty to gather evidence under the Convention.¹¹⁵⁸ So far the Court has emphasised the obligations of the prosecution to disclose evidence that is *prima facie* relevant for the defence, especially when this is necessary for the accused to exonerate himself.¹¹⁵⁹ The Court does not explain whether the obligation of the authorities to disclose this evidence is conditional upon a request by the defence or not. Therefore, it is largely unknown whether the authorities have to only disclose such evidence where called for by the defence or have to do so on their own initiative. Certainly, the Court finds equality of arms and adversariality important. By disclosing information *ex officio*, the authorities bring the defence to the same level of information as the prosecution. However, it cannot be inferred from this case law that the defence has no obligation to gather – exculpatory – evidence.

On another note, it shows that the Court does seem to reward additional activity by the defence in relation to gathering of evidence.¹¹⁶⁰ The Court held that, out of the principle of fairness, the defence should be allowed to submit written statements which it gathered itself. This is the case when the defence had gathered its own written statements from a prosecution witness to whom the defence could not pose questions at any stage of the proceedings. Evidently, where the defence is active in this way, the accused must be allowed to introduce evidence. However, on the basis of this case it cannot be concluded that either the defence or counsel has an obligation to gather – exculpatory – evidence.

To conclude on this last issue, it is difficult to draw conclusions on the basis of this case law for the possible obligation of the lawyer acting for the accused to independently gather – exculpatory – evidence. However, it has been demonstrated above that the Court as a rule views the defence as a

¹¹⁵³ *Stanford v. the United Kingdom*, 23 February 1994, HUDOC no. 16757/90.

¹¹⁵⁴ E.g. *John Murray v. the United Kingdom [GC]*, Judgment of 8 February 1996, HUDOC no. 18731/91.

¹¹⁵⁵ E.g. *Aleksandr Zaichenko v. Russia*, Judgment of 18 February 2010, HUDOC no. 39660/02.

¹¹⁵⁶ E.g. *Kononov v. Russia*, Judgment of 27 January 2011, HUDOC no. 36376/04, para. 43.

¹¹⁵⁷ E.g. *Ebanks v. the United Kingdom*, Judgment of 26 January 2010, HUDOC no. 36822/06.

¹¹⁵⁸ *Dayanan v. Turkey*, Judgment of 31 October 2009, HUDOC no. 7377/03, para. 32.

¹¹⁵⁹ E.g. *Natunen v. Finland*, Judgment of 31 March 2009, HUDOC no. 21022/04.

¹¹⁶⁰ *Mirilashvili v. Russia*, Judgment of 11 December 2008, HUDOC no. 6293/04, paras. 226-227.

unity between the lawyer and the accused. This latter point also appears to manifest itself in the last cited case. For that same reason, it seems unlikely that the Court will hold counsel alone responsible for “failing” to perform this function of gathering – exculpatory – evidence. The burden of proof is on the prosecution, after all. This means that, in general, the prosecution must prove the case against the accused beyond all reasonable doubt. This also means that, if there is any doubt, the presumption of innocence prevails and the Court will consider that the prosecution has not met its burden of proof.

7.5. Conclusion

This conclusion intends to answer the leading question for this chapter: What, if any, responsibilities does counsel owe to the accused within criminal proceedings under the Convention?

The answer to this question is fourfold, following the outline of the chapter that has arisen from taking a horizontal perspective that explores the relationship between counsel and the accused.

First, it is important to get a better understanding of possible responsibilities owed by counsel to the accused against the important background that has been laid out in this chapter. This background entails that the accused’s right to retained counsel includes the right to select counsel of “one’s own choosing”, but that right is not absolute. For example, permissible scheduling requirements can reasonably limit the right to the lawyer of choice in a specific case. However, the Court does require that, when the authorities favour such scheduling requirements, the effects of the absence of assistance by counsel of the accused’s “own choosing” does not damage the accused’s personal rights. In other words, the Court does seem to assess what the impact is on the rights held by the accused in the proceedings against him of a restriction of the choice of counsel who can be assumed to be the person preferred by the accused and thus a person of trust. With regard to the right to appointed legal aid counsel, it is inevitable that the accused’s right to appointed counsel “of his own choosing,” is necessarily subject to certain limitations. After all, it is for the authorities to decide whether the interests of justice require that the accused be defended by counsel appointed by them. Consequently, the Court requires that the accused is assisted by an appointed lawyer who is capable of providing effective legal assistance, rather than requiring that the accused always has the lawyer “of his own choosing”. The latter does not mean that the Court does not assume that the preferred lawyer in principle can be assumed to be the person who is most capable of providing the accused with effective legal assistance in fair criminal proceedings. Nonetheless, also this general assumption that counsel – and particular preferred counsel – will serve the rights, interests and wishes of the accused, will be tested as to whether or not the actual lawyer in the case lived up to that promise.

Second, under the Convention, the accused has a right to proceed *pro se* (chapter 5) but, if the accused proceeds with counsel, the Court can hold that lawyer responsible for strategic decisions contrary to the accused’s wishes (e.g. *Stanford v, the United Kingdom*; section 7.3). This means that, according to the Court, once the accused has decided to retain counsel or has been appointed legal aid counsel, then counsel has control over strategy. For a proper understanding of the impact of this finding that was seen thanks to a horizontal perspective, it must be stressed that Spronken explains this Court case by arguing that the *Stanford*-case is exemplary of a manifest shortcoming of counsel. However, that reading of the case does not seem to follow the Court’s own qualification of a tactical decision by counsel.

Third, this earlier idea of counsel’s control over defence strategy – perhaps even if going against the wishes of the accused – also corresponds with the role division foreseen between the accused and his lawyer. The Court appears to hold that the accused should make certain decisions, though they may have a strategic element, that are so “personal” for the accused that counsel must abide by his client’s wishes and cannot go against them. For example, the Court appears to come to such judgments in cases regarding the personal rights of the accused of the right to remain silent, the right not to incriminate oneself, the right to attend the hearing and the right to an effective defence, primarily at the adversarial trial hearing. All these cases appear to show that the lawyer must follow the instructions of the accused as to matters that are within the accused’s control, rather than counsel’s control. Counsel’s control over strategy and this role division between the accused and his lawyer are particularly important at the adversarial hearing. During that adversarial hearing, mostly at first instance and sometimes during appeal *de novo* depending of the facts of the case, the Court appears to consider that the defence lawyer should be the decision-maker regarding defence strategy and the accused ought to be the decision-maker about his personal rights. This particular role division also

appears to underpin the four delineated functions of counsel. Those functions are (i) the organisation of the defence, including the preparation of the adversarial trial hearing; (ii) the gathering and testing of evidence, including witness evidence; (iii) the check of investigative measures and use of other means to discover – exculpatory – materials; and (iv) for detained suspects, the check of the detention situation, including its justification, length and conditions and a more humanitarian type of assistance. For instance, the Court holds that counsel’s advice regarding the accused’s personal rights to remain silent and not to incriminate oneself is so important that the accused must not be “penalised” for following it. In other words, the Court appears to have made some limited decisions as to what can reasonably be held the proper responsibility of counsel, while this chapter has also mentioned cases in which the authorities could not blame the lawyer for conduct that resulted in irreparable harm to those personal rights of the accused. This particular distinction will certainly be important for the remainder of this research because this appears to be the way in which the Court distinguishes between actual and alleged ineffective assistance by counsel within criminal proceedings (chapters 9 and 11).

Fourth and final, with regard to all these findings, a more general conclusion about the Court’s “as a whole” approach to the functions of counsel should not be overlooked. As implied, the Court holds that an effective defence by equally effective assistance by counsel particularly at the “critical” adversarial hearing is essential for the right to a fair trial in its entirety. A first consequence of this approach is that the Court does not allow a lawyer to be obliged to take issue with the investigative measure when it takes place or, by neglecting to do so, has the accused be “penalised” by losing, in particular, a personal right to object to the investigative measure at the adversarial trial. For instance, the Court appears to examine whether the accused, rather than counsel, has actually renounced a right such as the right to silence, and thus does not infer that the lawyer must have done so on the accused’s behalf. A second consequence is that normally a conviction cannot be based to a decisive degree on untested witness statements, by supposing that counsel could possibly have played a more active pre-trial role as to the requesting and attending the witness hearing. Convention rights are not interpreted as one-off rights that lose their protective force if not effectuated at the first possible procedural opportunity. Often, the Court appears to assess, as far as possible without being affected by hindsight knowledge, whether the assisted accused has had his rights protected in the interaction between counsel and the authorities when it mattered most. This is not to say that this chapter has found equal information about all four aforementioned functions of counsel mentioned. On the contrary, hardly any case law has been encountered that helps to construe the fourth remaining function of (actively) discovering – exculpatory – evidence by other means than (passively) checking investigative measures.

On the basis of this chapter, it must be stressed that the Court does appear to imply some responsibilities of counsel towards the accused regarding defence strategy, but with an eye for the protection of personal rights of the accused that the lawyer cannot waive, normally, on the accused’s behalf. As the term implies, these rights are so personal that only the accused has control over them. Perhaps, this might even mean that under the Convention counsel will have to follow the instructions of the accused, even if the lawyer were to think that the accused’s rights would be better served without following such instructions. With this information gathered, the next chapter will turn to this same topic of the responsibilities of counsel but in Dutch criminal proceedings.

CHAPTER 8. LAWYER-CLIENT RELATIONSHIP IN DUTCH CRIMINAL PROCEDURE

8.1. Introduction

This chapter builds on the previous chapters and continues to evolve their viewpoint by exploring, from a horizontal perspective whether counsel has any responsibilities regarding effective legal assistance towards the accused in a fair Dutch criminal procedure. This topic is particularly relevant for this research into ineffective legal assistance and its redress in Dutch criminal proceedings, because scholars such as Spronken argue that, because Article 6 has no “(...) horizontal effect”¹¹⁶¹, domestic authorities – as well as the Court – ought not to examine the counsel’s performance at all.¹¹⁶² This particular idea that Article 6 (3) (c) in particular has no horizontal effect is important because it forms a significant basis for the frequently encountered argument that the authorities in Dutch criminal proceedings are required to intervene in the case “only” when “(...) the lawyer is absent or otherwise does practically nothing at all for the accused”.¹¹⁶³ While that issue of State intervention will only be addressed in the last Part of this research, the present chapter lays an important foundation as to the responsibilities that counsel may owe towards the accused regarding his effective defence. For that to be done well, it is worth reiterating that Spronken negatively formulates aspects of a formal interpretation of the right to legal assistance. She refers to full absenteeism or unwillingness to act of counsel. In summary, this a bar below which counsel should not fall. She also does not explain in great detail what the near absence of activity by counsel would entail. Contrary to this position, chapter 2 already laid out how Harris, O’Boyle and Warbrick, as well as Trechsel, *positively* formulate ideas in relation to a material interpretation of the right to *effective* legal assistance. That is, they stress minimum guarantees in relation to an effective defence for which counsel has to play the role of watchdog of procedural regularity. They suggest that counsel has to protect the rights of the accused so that, by extension, a fair trial can also be guaranteed. Therefore, from a horizontal perspective focused on the lawyer-client relationship, this chapter sets out to answer the following leading question: What, if any, responsibilities does counsel owe to the accused in Dutch criminal proceedings?

Findings of the previous chapter will be taken into consideration because of the binding nature of the Convention in Dutch criminal proceedings, such as the choice of retained and the selection of appointed counsel (section 7.2.). Particular attention will be paid as well to counsel’s control over strategy as explained above (section 7.3.). Finally, the findings about counsel’s role in the lawyer-client relationship will also be taken into account (section 7.4.), as seen in the context of the rights of the accused that are so “personal” that it is the accused who should be able to make decisions about them, rather than counsel. A comparison between the Convention and Dutch criminal proceedings will be made in the concluding section of this descriptive chapter, which will compare findings on the lawyer-client relationship that are presented in the previous and current chapter (section 8.6.).

Moreover, this chapter builds on the previous chapter on Dutch criminal procedure (chapter 6), in which it has been established that the authorities have to ensure a right to assistance by counsel to the accused at more stages of the criminal procedure, and earlier during it, than before. Assistance by counsel at these stages is apparently “a good thing”.¹¹⁶⁴ It will be explored here *what* role counsel should play at these procedural stages or junctures.

One specific finding worth reiterating from chapter 6 is the conclusion of an AG, who refers to three domains in which the trial judge should “compensate” the unassisted accused for his lack of legal assistance: (i) a substantive defence has to be adequately laid down in the minutes of the hearing¹¹⁶⁵; (ii) requests to hear witnesses in court have to be willingly considered¹¹⁶⁶; and (iii) demands on the grievances in an appeal brief should be less judged to lesser formal standards.¹¹⁶⁷ Reasoned *a contrario*, the AG appears to imply that in relation to these three defence activities the defence and *de*

¹¹⁶¹ E.g. Spronken (2001) at 637. See also T. Prakken and T.B.N.M. Spronken, in: Prakken and Spronken (2009) at 15.

¹¹⁶² Spronken (2001) at 637.

¹¹⁶³ Spronken (2001) at 447 and 464. See also this same view reiterated in Prakken and Spronken, in: Prakken and Spronken (2009) at 15.

¹¹⁶⁴ See Cape (2001) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=271046.

¹¹⁶⁵ HR 9 January 2007, ECLI:NL:HR:2007:AY9203, *NJ* 2007, 53.

¹¹⁶⁶ HR 17 April 2007, ECLI:NL:HR:2007:AZ1720, *NJ* 2007, 251 about the authorities having to “willingly” construe the request to hear a witness in court by an unassisted accused.

¹¹⁶⁷ HR 19 June 2007, ECLI:NL:HR:2007:AZ1702., *NJB* 2007, 1552.

facto counsel can reasonably be said to have more responsibilities than an unassisted, lay accused (see further chapters 10 and 12).

The most relevant aspects of the conceptual framework of relevant rights, context and cross-cutting notions and perspectives will be addressed here in relation to the above-noted sub-question. Most attention will be paid to the relevant rights under the horizontal perspective to the accused's right to an effective defence and thus also the conduct of counsel. The other aspects will be focused on more in the next substantive research chapters regarding Dutch criminal procedure (chapters 10 and 12).

Deliberately, this chapter revolves around as far as possible the same topics that have been discussed under the horizontal perspective towards the Convention in the previous chapter (see chapter 7). Ultimately, this structure will enable a comparison between these two chapters, so that an evaluation can follow in the last chapter of this book (chapter 13).

Outline

This chapter consists of four more sections. First, Dutch law and deontology will be scrutinised in order to determine whether counsel owes responsibilities towards the accused regarding an effective defence (section 8.2.). Thereafter, an exploration will follow of possible responsibilities of counsel toward the accused regarding the defence strategy, rather than “personal” rights of the accused (section 8.3.). The penultimate section provides a conclusion on the basis of these sections (section 8.4.). Finally, an overall conclusion regarding Part IV Lawyer-client relationship will be provided (section 8.5.).

8.2. The lawyer-client relationship

The previous chapter regarding the right to counsel in Dutch criminal proceedings, chapter 6, has indicated how, since 1926, the position of counsel under criminal procedural law is dependent upon, or derives from, the accused's will and his position.¹¹⁶⁸ Tradition still appears to more or less shape today's criminal procedure in that the authorities should allow the accused to decide how he wants to defend himself in the criminal procedure against him, whether with or without counsel. In this respect, Prakken and Spronken argue that because of the “inquisitorial procedural culture” counsel has a “marginal role”, because “(...) the lawyer can often do not much more than check the legitimacy of the coercive measures and (morally) support the accused when he is not being heard”.¹¹⁶⁹ Whether or not this categorization by Prakken and Spronken still holds true at present – a position which, it should be noted, they took before the Hoge Raad's case implementing the Court's case of *Salduz* – it will be examined here by turning to the question of whether counsel owes certain responsibilities to the accused in the lawyer-client relationship in Dutch criminal procedure.¹¹⁷⁰ Given that Prakken and Spronken have reservations about such a horizontal perspective to the right of the accused to an effective defence, it is informative that another Dutch scholar Boksem states the following:

“Only when counsel – thanks to the presence of good procedural conditions ensured by the authorities – is actually given the possibility to assist his client with the requisite actions and advice, there can be an effective defence and thus a precondition for a fair trial can be respected. In this regard, the guarantees that can be provided by the state, *are not a sufficient condition*. The *lawyer himself* will have to guarantee that the quality and commitment are as they ought to be. If counsel falls short in those ways, legal assistance cannot be effective, naturally [Emphasis added by the author]”.¹¹⁷¹

¹¹⁶⁸ See chapter 3, e.g. Röttgering (2005: 3.6 - Art 28 Sv), suppl. 150, in: Melai (2005.).

¹¹⁶⁹ Prakken and Spronken, in: Prakken and Spronken (2009) at 8.

¹¹⁷⁰ See Spaniol (1990) at 62-65; Spronken (2003) at 30-32 in particular; Spronken and Attinger (2005) at 6-8 and Stavros (1993) at 201-221.

¹¹⁷¹ The author's translation of Boksem (2007) at 35: “Alleen wanneer de raadsman - door de aanwezigheid van goede randvoorwaarden - daadwerkelijk in de gelegenheid wordt gesteld zijn cliënt met raad en daad bij te staan, kan er sprake zijn van een effectieve verdediging en is aan een belangrijke voorwaarde voor een eerlijk proces voldaan. Daarbij geldt wel dat de garanties die de overheid kan bieden, niet allesbepalend zijn. De raadsman zelf zal ervoor moeten zorgen dat de kwaliteit en inzet in orde zijn. Als de raadsman op die onderdelen tekortschiet, is de rechtsbijstand natuurlijk nog niet effectief”.

Thus,, Boksem also contends that there might be responsibilities of counsel toward the accused so as to ensure that his legal assistance is effective. Following this line of reasoning where some responsibilities of counsel toward the accused might exist in addition to the obligations of the authorities to ensure the accused his right to counsel (chapter 6), this chapter will therefore continue in this spirit by setting out what the assisted accused can reasonably expect of his lawyer, relating to the position of counsel within criminal proceedings and the other applicable norms.

Generally speaking, it is only reasonable that *more* can be expected of counsel than of a lay accused, who lacks the supposed training, experience and skills that a lawyer can be expected to possess. *How much more* can be expected of counsel is particularly important for this research into ineffective legal assistance. After all, if *too much* is expected of counsel, problems with ineffective legal assistance might inevitably arise that may have consequences for the accused. The potential difficulties with a fair trial lie in the situation that the accused might get no redress in Dutch criminal proceedings. Whilst the assisted accused cannot expect his lawyer to breach procedural and substantive criminal law, other examples that nonetheless result in the accused having to bear the consequences of his lawyer's conduct might be less clear-cut. The analysis in this chapter will therefore focus in particular on the latter, more complex situations.

The horizontal perspective, which aims to determine possible responsibilities owed by the lawyer to the accused, is not only important for ineffective legal assistance but also has the potential to shed light on other issues regarding what is expected of the lawyer in Dutch criminal proceedings in the broader sense. For example, an analysis of an effective defence by counsel – and in particular ineffective legal assistance that has the potential to harm the rights of the accused – can help to interpret notions such as independence of the lawyer from the State and the accused. These two notions raise questions. For instance, is it reasonable to assume that counsel in Dutch criminal proceedings will keep a professional distance from the accused considering the latter's effective defence? If so, what does such independence from the lawyer toward the accused mean for the conduct expected from counsel when the accused and lawyer disagree about a defence strategy? Does counsel owe specific responsibilities to others than the accused, so that he for example has to disclose information about imminent danger of a witness or report crimes that his client is about to commit? These questions, in addition to other pertinent ones, will be sought to be answered in the remainder of this section.

8.2.1. Choice of retained counsel and selection of appointed counsel

The first book of the Dutch Criminal Procedural Code, Title III “Counsel”, includes a separate arrangement for assistance by counsel in criminal proceedings (Articles 37-51 Sv). The first provision determines who can act as counsel (Article 37 Sv). Two further provisions regulate the choice of the accused for counsel (Articles 38 and 39 Sv). The appointment of a lawyer for an accused who has no retained counsel, including regulations about changing appointed lawyers and their payment, is adopted in a longer section (Articles 40-49 Sv). At the end of the book, two additional provisions regulate the contact and communication between counsel and the accused, also when the latter is detained and the access to items in the dossier (Articles 50-51 Sv).

Under the Code, the accused's right to retained counsel includes the right to select counsel of one's choice. That right is not absolute, however. For example, Article 38 Sv refers to lawyers who are professionals who are qualified to practice law. Consequently, lay persons whom the accused might perhaps prefer over qualified lawyers can legally be restricted from providing assistance to the accused. Another permissible restriction is a refusal to accept counsel whose joint legal assistance of co-accused presents a conflict of interest.¹¹⁷² Finally, authorities have to be circumspect about the right to retained counsel so that some delay as a necessary corollary of this right might have to be accepted. Consequently, the accused's choice of counsel might sometimes be restricted because of scheduling requirements.¹¹⁷³

Dutch law is also clear about the permissible restrictions to the right of the accused to appointed legal aid counsel. Even more so than the limitations to the selection of appointed legal aid

¹¹⁷² Article 46 Lawyers Act, Rules 29 and 16 of Rules of Conduct, see further sub-section 8.2.2.

¹¹⁷³ See HR 31 May 2005, ECLI:NL:PHR:2005:AT1758, *NJ* 2005, 416 yet discussed in sub-section 8.2.2..

counsel, the law does not require the appointment of the lawyer of the accused's choosing.¹¹⁷⁴ However, legal practice is to appoint the counsel of the accused's choice.

8.2.2. Permissible restrictions to the right to retained counsel of the accused's choice?

Because there is a common assumption that counsel of the accused's choosing will be best at providing the accused an effective defence, this sub-section will explore Dutch law and case law regarding restrictions of choice of retained counsel and selection of appointed counsel.

First, it is important to explore how the Hoge Raad deals with restrictions upon the right to retained and appointed counsel. In this context, it will be reiterated that the Court can hold that Article 6 (1) in conjunction with 6 (3) (c) has been violated if the accused has had legal assistance by retained counsel of his choice save for the final hearing because the lawyer could not attend that session (sub-section 7.2.1.). This Hoge Raad case that will be discussed here concerns an assisted accused, who had fired counsel at the end of the trial proceedings and who had requested a stay of the proceedings in order to obtain a *new* lawyer also for the last session. Although the reason for the absence of the retained counsel of the accused's choice was different, both accused did not enjoy legal assistance by the lawyer "of his own choosing" as the Court would call it.

The remainder of this sub-section will examine three cases. First, a case will be explored in which the accused requested a stay of the proceedings in order to obtain a new lawyer, which can give an indication as to how the Hoge Raad restricts the right to counsel of the accused's choice *per se*. Thereafter, two cases will be contrasted that can indicate how the Hoge Raad approaches an appeal court that deals with disturbances of court order, either by the lawyer of the assisted accused or by the unassisted accused himself. A comparison between the two cases of an assisted accused and the one case regarding an unassisted accused will be particularly relevant in light of the fact that no remedy is open to a decision of the judge related to court order under Article 273 (3) Sv.

First, a case, which will henceforth be referred to as *Requested stay to obtain a new lawyer*, revolved around an accused who was suspected of the following: possessing a firearm contrary to the law, maltreatment, and a threat to the life of person S.¹¹⁷⁵ The appellant had slept in when witness S. had been heard and had also been absent when questions were posed to witness K. while his lawyer had had an opportunity to pose questions to both witnesses. During the fourth session, the appellant stated that he wanted to hear three witnesses, including K., in court. He insisted on hearing them, in particular because witness K. supposedly did not want to change her incriminating testimony out of fear that she would be criminally prosecuted for perjury, as he had already mentioned at first instance. The accused contended that he had never had an opportunity to pose questions to witness K., allegedly because for the first instance court session the police had not sent him to court on time and he had no money to come at his own expense. The accused informed the court that he had appealed for the purpose of hearing these three witnesses in court, and that he had said the same thing to his lawyer. He stated that he wanted to dismiss his lawyer. The appeal court then stayed the proceedings for the lawyer and the accused to confer. Upon the resumption of the proceedings, counsel informed the appeal court that he had to withdraw from the case. The accused no longer trusted him; a difference of opinion about the hearing of witnesses on appeal had arisen between them.¹¹⁷⁶ The court explained to the accused that if he were to dismiss his lawyer, no legal aid counsel would be appointed on his behalf because he would no longer qualify for legal aid. Accordingly, he would risk having to defend himself in person. The appellant responded with: "Several times I have asked to hear certain persons as witnesses. I feel that I have not been given the opportunity to do so. I now dismiss my lawyer."¹¹⁷⁷ The lawyer left the courtroom, and the prosecution presented the accused, who had invoked his right

¹¹⁷⁴ See sub-section 6.2.1.

¹¹⁷⁵ HR 31 May 2005, ECLI:NL:PHR:2005:AT1758, NJ 2005, 416.

¹¹⁷⁶ HR 31 May 2005, ECLI:NL:PHR:2005:AT1758, particularly in para. 5, NJ 2005, 416. The author's translation of: "*Na hervatting deelt de advocaat mede, zakelijk weergegeven: Ik ben genoodzaakt de verdediging neer te leggen, nu cliënt het vertrouwen in mij heeft opgezegd. Ik kan niet méér mededelen dan dat het een meningsverschil over de in hoger beroep op te roepen getuigen betreft.*"

¹¹⁷⁷ HR 31 May 2005, ECLI:NL:PHR:2005:AT1758, particularly in para. 5, NJ 2005, 416. The author's translation of: "*De verdachte verklaart hierop, zakelijk weergegeven: Ik heb meermalen aangeven dat bepaalde personen als getuige gehoord moeten worden. Ik vind niet dat ik daartoe de kans heb gehad. Ik ontsla nu mijn advocaat.*"

to remain silent regarding the indicted offences, with a new complaint by witness S. regarding maltreatment. The accused replied that he knew nothing about a new complaint, expressed his surprise, and mentioned that “(...) he had no lawyer, that he wanted another one, and asked for a stay of the proceedings”. The prosecution expressed the view that the procedure should not be stayed, because it found that the appellant was trying to gain control over the proceedings by complaining about the absence of legal assistance, which amounted to an abuse of process.¹¹⁷⁸ The appeal court mentioned that it had already anticipated such conduct by the appellant and had therefore explicitly pointed out to him the possible consequences of dismissing his lawyer. Given that the appellant nonetheless chose to proceed on his own, the court considered there to be no reason to stay the proceedings. The court resumed the investigation and convicted the appellant of all three offences.

The applicant complained before the Hoge Raad that the appeal court had rejected his request, on insufficient grounds, to stay the proceedings and continued with the investigation at the hearing without giving him an opportunity to be assisted by a lawyer after a breach of confidence had occurred with the advocate whom he had dismissed.

The Hoge Raad found that there had been three prior appeal hearings during which the accused had had assistance by a lawyer. The appellant had had sufficient time to confer with his lawyer about the confrontation of other witnesses, the Hoge Raad adds. Although those witnesses were confronted in the accused’s absence because he had not attended these hearings due to his own reasons, the court had heard them in the presence of authorised counsel. Evidently the court must have assumed that this request to stay the proceedings was made by an appellant who was himself to blame for the resulting breach of confidence with his lawyer, as a consequence of which he no longer had legal assistance. Finally, the Hoge Raad held that this breach of confidence between the lawyer and his client was not incomprehensible considering what had happened between them on an earlier occasion. Therefore, the Hoge Raad concluded that the appeal court’s decision not to stay the proceedings implied that the interest of adjudication within a reasonable time had prevailed over the interest of the appellant to obtain assistance by counsel for the remainder of the procedure. That conclusion by the appeal court was neither based on an incorrect legal opinion nor incomprehensible. Consequently, the Hoge Raad left this case intact.

The Hoge Raad and the AG agreed in this case.

It can be understandable that the Hoge Raad comes to such a decision in the case because the right to legal assistance by retained counsel of one’s choice is not absolute and can be limited due to considerations of scheduling requirements out of concerns of judicial administration (*Requested stay to obtain a new lawyer*-case). The Hoge Raad “reads into” the verdict that the appeal court must have had the interest of adjudication within a reasonable time as trumping the interest of the appellant to obtain assistance by new counsel for the remainder of the procedure. In this case, the Hoge Raad thus appears to take a formal approach to assistance by counsel by not exploring the quality of the performance of the fired counsel. Rather, the Hoge Raad holds that the accused has had assistance by counsel and therefore was not entitled to yet another counsel at this late stage of the proceedings when the reasonable time of the process also played a role. In other words, the right to assistance by counsel of the accused’s choice is not absolute and a restriction can be found in the administration of justice due to considerations of scheduling requirements.

Nonetheless, it is important to reiterate that the Court had held that “(...) one of the most important aspects of a concluding hearing in criminal trials is an opportunity for the defence, as well as for the prosecution, to present their closing arguments, and it is the only opportunity for both parties to orally present their view of the entire case and all the evidence presented at trial and give their assessment of the result of the trial.” Thus,, the Court explored what the *effect* of the absence of counsel at the last hearing was on the personal right of the accused regarding his right to assistance by counsel of the accused’s choosing. However, the Hoge Raad does not. It seems that no problem might arise with the Convention because the absence of services of a lawyer can be “attributed” “to a

¹¹⁷⁸ HR 31 May 2005, ECLI:NL:PHR:2005:AT1758, particularly in para. 5, NJ 2005, 416. The author’s translation of: “*De advocaat-generaal deelt mede, zakelijk weergegeven: Ik verzet mij er tegen dat het onderzoek opnieuw wordt geschorst. Ik krijg de indruk dat de verdachte probeert de regie in handen te krijgen. Als hij zich in dit stadium beroept op het ontbreken van rechtsbijstand dan is dat naar mijn mening procesmisbruik.*”

considerable degree” to the accused’s “own action”¹¹⁷⁹, so that a complaint about a lack of effective legal assistance before an appeal court can be held to have been manifestly ill-founded. However, it is important to note this difference in approach as to the effect on the rights of the accused versus giving reasonable time priority, over the interest of the appellant to obtain assistance by new counsel for the remainder of the procedure.

This last observation is also relevant for a comparison with another case about a request for a stay to obtain counsel (sub-section 6.2.2.1.). The Hoge Raad *did* quash a case regarding a rejected request for a stay to obtain a lawyer in the first place (*Requested stay to obtain a lawyer-case*) but *not* a new lawyer (*Requested stay to obtain a new lawyer-case*). From a rights-based perspective that stresses the effects for the accused who was made to proceed *pro se*, it can be questioned why the firing of counsel makes the rejection of the request by the accused permissible. After all, both accused had no assistance by counsel of their choice and only the wholly unassisted accused had his case overturned by the Hoge Raad. This particular issue of restrictions on the rights of the accused, particularly if those are “personal” rights that fall within the realm of the accused’s control, rather than the lawyer’s control over strategy, is also relevant for the remainder of this chapter.

This section will now shift to an equally relevant case law overview regarding the question of what are permissible restrictions upon the choice of retained or selection of appointed counsel. The first case concerns an appeal court that deals with disturbances of court order by the lawyer of the assisted accused, while the second case concerns, quite similarly, an unassisted accused who is being removed himself because of disturbing court order.

This first case, which will be labelled *Counsel prohibited from pleading*, concerned an accused who was suspected of having damaged two F-16 fighter aircrafts and breaking the window of a hangar at the barracks.¹¹⁸⁰ During the appeal phase, the presiding judge accepted that the accused’s lawyer’s pleadings could be annexed to the minutes of the hearing up to the point of inappropriate remarks in the brief. The lawyer remarked in court that the Hoge Raad suffers from “blind obedience” and a “lack of moral courage to defend the legal order against a criminal political leadership that maintains a criminal nuclear system”.¹¹⁸¹ The judge interrupted the lawyer, informed him that it was an inappropriate phrase and warned him that if he were to continue to express himself in such a way, he would be held to have disturbed the order of the proceedings and would be prohibited from continuing with the pleadings. Thereupon, the lawyer added: “(t)he Hoge Raad manifests itself as a subservient and unscrupulous lackey of the political leadership of our country”.¹¹⁸² The presiding judge interrupted the lawyer again, informed him that he considered this to be an inappropriate remark directed at the judiciary and asked counsel how he should understand this remark, given the oath sworn by the lawyer to honour and respect the judiciary (in Dutch: *rechterlijke macht*). The lawyer answered by stating that the oath that he had sworn should not preclude him from telling the truth. The judge thereby warned the lawyer once more that he should refrain from making remarks that are inappropriate for the judiciary and the prosecution. Thereupon counsel continued with: “(t)he Hoge Raad has relinquished a priori its judicial integrity regarding nuclear weapons and has made a political choice to unconditionally support a criminal political leadership”.¹¹⁸³ The judge interrupted the lawyer, adding “(t)his is the end of it.” The judge prohibited counsel from saying anything else and ordered counsel to take a seat in the public gallery or leave the courtroom. Thereupon counsel left. The appeal court allowed the accused to address the bench, although the case records do not given an indication as to

¹¹⁷⁹ Commission admissibility decision of 1 March 1991, *Tage Ostergren and Others v. Sweden*, HUDOC no. 13572/88, (inadmissible).

¹¹⁸⁰ HR 2 March 2010, ECLI:NL:HR:2010:BJ9897, *NJ* 2010, 303 m.nt. Buruma.

¹¹⁸¹ HR 2 March 2010, ECLI:NL:HR:2010:BJ9897, particularly in para. 4, *NJ* 2010, 303 m.nt. Buruma. The author’s translation of: ‘Veeleer lijkt er sprake te zijn van een kritiekloze volgzzaamheid ten aanzien van de Hoge Raad, alsook van een gebrek aan zedelijke moed om de rechtsorde te verdedigen tegenover de schaamteloze serviliteit van de Hoge Raad ten opzichte van een misdadige politieke leiding, die vasthoudt aan de nucleaire systeemmisdaad’ (onderdeel 4.1.2., p. 5).

¹¹⁸² HR 2 March 2010, ECLI:NL:HR:2010:BJ9897, particularly in para. 4, *NJ* 2010, 303 m.nt. Buruma. The author’s translation of: ‘manifesteert de Hoge Raad zich als serviele en gewetenloze lakei van de politieke leiding van ons land’ (onderdeel 4.5.1, p. 9).

¹¹⁸³ HR 2 March 2010, ECLI:NL:HR: 2010:BJ9897, particularly in para. 4, *NJ* 2010, 303 m.nt. Buruma. The author’s translation of: ‘Dat de Hoge Raad terzake van de kernwapens bij voorbaat zijn rechterlijke integriteit prijsgeeft en de politieke keuze maakt voor onvoorwaardelijke steun aan een misdadige politieke leiding’ (onderdeel 4.5.2, p. 9).

the extent to which he could do so, and the accused was given an opportunity to make a closing speech. The appellant did so and was sentenced to six months' imprisonment.

The applicant complained before the Hoge Raad that the presiding judge had prohibited the lawyer from continuing to plead his case. Also, the appellant contended that the judge's decision to have the lawyer withdraw from the case was contrary to the freedom of speech and the prohibition of preventive censorship.¹¹⁸⁴

The Hoge Raad considered that counsel for the defence had been prohibited from continuing to plead the case after the presiding judge had told him, on numerous occasions, to avoid inappropriate remarks about the judiciary and the prosecution. Counsel was prohibited from proceeding with his pleadings on the ground that he had "(...) disturbed the order at the hearing by repeatedly expressing himself in this way".¹¹⁸⁵ The Hoge Raad considered that the presiding judge had made this decision in order to maintain order at the hearing. Given that there is no legal remedy available against such a decision by a judge under Article 273 (3) Sv¹¹⁸⁶, the Hoge Raad concluded that this appeal in cassation was inadmissible and left the case intact.

Apparently, the Hoge Raad shared the view of the AG, who added that the ground for the appeal in cassation did not include a complaint about a violation of Article 6 of the Convention. His conclusion included the question of which defence right can be violated when a lawyer, who is repeatedly warned to remain within the limits of the law, is prohibited from continuing to speak¹¹⁸⁷ and he thereby queried: Is there any difficulty in pleading a defence case without committing a criminal offence?

The annotator Buruma found that *if* the cassation lawyer would have mentioned Article 6 of the Convention in the brief, the Hoge Raad could not have avoided "the real issue" of the resulting restriction on the defence and if that should have been compensated by the appeal court. Buruma is of the opinion that, given the punishment of six months imprisonment that was imposed on the appellant, the Hoge Raad – prompted thereby by the cassation lawyer – should have given insight into how the right to counsel had been restricted at the factual instances and if the appeal court's decision was not incomprehensible in that light.

While Buruma has a point regarding the absence of this ground in the appeal in cassation brief, there are three other issues with this case that are especially noteworthy in this research into ineffective legal assistance and its redress in Dutch criminal proceedings. First, the Hoge Raad left this case in-tact while the accused ended up without a (new) lawyer during his closing speech without having received the protection of checking whether the accused, who had legal assistance, wanted to proceed *pro se*. Second, the Hoge Raad does not explicitly consider the *impact* on the accused of the restriction of a lawyer's ability to zealously defend the accused's rights, interests and wishes in court. Punishment, or the threat thereof, imposed on counsel can negatively affect how the lawyer attempts to protect the accused's position in an independent and partisan manner and in doing so he should do his utmost for his client.¹¹⁸⁸ Putting emphasis on the consequences for the accused is necessary for an effective defence to be construed as both an individual right of the accused and a procedural guarantee for a fair trial. Third and final, restrictions resulting from the protection of court order are acceptable

¹¹⁸⁴ HR 2 March 2010, ECLI:NL:HR:2010:BJ9897, particularly in para. 3, NJ 2010, 303 m.nt. Buruma. The author's translation of: *'Het eerste middel behelst de klacht dat het verdedigingsrecht van verzoeker is geschonden, doordat de voorzitter op de terechtzitting van 28 februari 2008 het woord heeft ontnomen aan diens raadsman; althans zou deze beslissing van de voorzitter in strijd zijn met de vrijheid van meningsuiting en het verbod van preventieve censuur.'*

¹¹⁸⁵ HR 2 March 2010, ECLI:NL:HR:2010:BJ9897, particularly in para. 4, NJ 2010, 303 m.nt. Buruma. The author's translation of: *'door zich bij herhaling op die wijze uit te laten de orde ter zitting verstoort'*.

¹¹⁸⁶ The Hoge Raad thereby reaffirmed its earlier judgment laid down in HR 9 October 2001, ECLI:NL:HR:2001:AB3318, NJ 2001, 658.

¹¹⁸⁷ HR 2 March 2010, ECLI:NL:HR: 2010:BJ9897, particularly in para. 7, NJ 2010, 303 m.nt. Buruma. The author's translation of: *"Overigens valt niet goed in te zien in welk opzicht het verdedigingsrecht is geschonden door aan de herhaaldelijk^[1.] gewaarschuwde raadsman (om binnen de grenzen van de wet te blijven) het woord te ontnemen. Men kan toch ook pleiten zonder strafbare feiten te plegen? Bovendien heeft het hof - anders dan in HR NJ 2008, 43 - de verdachte het woord en het laatste woord verleend."* The cited case is HR 9 October 2007, ECLI:NL:HR:2007:BA5025, NJ 2008, 43., NJ 2008, 43 m.nt. Mevis.

¹¹⁸⁸ See for instance the cases concerning counsel of Panovits in ECtHR, *Kyprianou v. Cyprus* [GC], Judgment of 15 December 2005, HUDOC no. 73797/01 and the accused in *Panovits v. Cyprus*, Judgment of 11 December 2008, HUDOC no. 4268/04 which were both adjudicated prior to the aforementioned Hoge Raad case, and will be dealt with in chapter 6.

under Dutch law, while deontology also prohibits counsel to disturb court order¹¹⁸⁹, but are regulated under Article 273 (3) Sv, to which no appeal in cassation is open. That last point is relevant in the context of an unassisted accused who was restricted to proceed with his self-representation because of a disturbance of court order.

Comparison with an unassisted accused who is himself prohibited from defending himself

The above-cited *Counsel prohibited from pleading*-case will here be compared with a case in which the *unassisted* accused was prohibited from continuing with his own defence by way of self-representation.

This case, which will be labelled *Unassisted accused prohibited from defending*-case, concerns an accused who was believed to have committed several sexual offences including rape and human trafficking for sexual exploitation, as well as being a member of a criminal organisation.¹¹⁹⁰ After the first instance proceedings the accused no longer wanted to be assisted by counsel. During the appeal hearing he vociferously interrupted the prosecutor at least three times and was thereby removed from the courtroom. He did not re-enter or otherwise participate in the case. After the prosecutor finished his submission and concluded by proposing that a sentence of 12 years imprisonment should be imposed, the court ended the criminal investigation and sentenced the accused to a custodial sentence of 12 years.

The applicant complained before the Hoge Raad that on appeal he, as a person who was not assisted by a lawyer, had not received a fair trial due to his removal from the courtroom. He had received no opportunity to be informed about the prosecution's entire submission, had not been given an opportunity to respond thereto and had not been able to make a closing speech.

The Hoge Raad established that the accused no longer wanted the services of the lawyer who acted on his behalf at first instance due to a difference of opinion between them. Additionally, the accused had not expressed the view that he wanted to make use of the services of another appointed lawyer. A letter to the court-appointed lawyer from the accused confirmed that he no longer wanted legal assistance; he expressly opted for self-representation during the appeal stage. The appellant, who had already been warned by the presiding judge on two prior occasions, had been removed from the courtroom when he had again disturbed the order of the court for a third time. The presiding judge had done so by making use of a provision to guarantee the court's order by having the appellant removed after continued disturbances (under Article 273 (3) Sv). Although the procedure had thus far been fair, the Hoge Raad considered the appeal court to have been at fault for neglecting to examine whether the appellant, after his removal from the courtroom, would have been able to re-enter without any such disturbances, in order to possibly plead his defence if he was able and willing to do so. According to the Hoge Raad, a lack of such an opportunity in view of the proposed sentence of 12 years' imprisonment for an unassisted accused, violated Article 6 of the Convention. Therefore, the Hoge Raad overturned the case.

Interestingly, the Hoge Raad did not follow the AG's advice who had considered the presiding judge's competence under Article 273 (3) Sv to be one which is of a factual nature against which the appellant could not appeal in cassation. Therefore, he submitted, the Hoge Raad could only carry out a marginal test. According to the AG, the accused had dismissed four lawyers and had made it clear that he no longer wanted to be assisted by counsel. He had been removed from the courtroom on the last day of a 16-day appeal court hearing when the trial investigation had ended by the prosecutor bringing the case to a close. The judge could therefore be assumed to have concluded that, given the repeated warnings that he had given to the accused, the latter must have been unwilling to change his behaviour so that the court had to end the proceedings in the accused's absence. The accused had been given an opportunity to take the consequences of his persistent obstructive behaviour into account due to the numerous warnings given by the judge. Therefore, considering that the criminal procedure had reached this end stage, the judge apparently did not consider it desirable to, for instance, stay the proceedings in order for a technical device to be installed by means of which the accused could have heard what was happening in the courtroom from wherever he was located. Therefore, the AG advised the Hoge Raad to leave the case intact.

¹¹⁸⁹ See further sub-sections 8.3. and 8.4.

¹¹⁹⁰ HR 9 October 2007, ECLI:NL:HR:2007:BA5025, NJ 2008, 43 m.nt. P.A.M. Mevis.

The annotator Mevis has pointed out that the focus in criminal procedural law is on the accused's opportunity to plead his case, therefore the legal right to make a closing speech at one's trial is given to the accused. Accordingly, Mevis contends, an appeal court should have checked whether the unassisted appellant, before the closure of the investigation in court, could have re-entered the courtroom without any further disturbances to the order of the court – even when the sentence demanded would have been lower than the custodial sentence of 12 years imposed in this case. In Mevis' view the appellant could easily have been taken to the court's public gallery to attend behind a glass partition or given access to a one-way audio link so as to hear and follow the proceedings. Moreover, while taking into consideration this emphasis on the accused's right to conduct his own defence, Mevis criticised the Hoge Raad for making a reference, in general terms, to Article 6 of the Convention without any specific mention of the applicable rights in that broadly formulated right to a fair trial. He thereby concludes that:

“Right at the time when the legislator chooses to limit the judge's *ex officio* responsibility in favour of a more contradictory procedure (without, by the way, giving the defence the requisite means to take part in such a procedure), the Hoge Raad has emphasised even more strongly the autonomous responsibility of the judge in a situation in which the accused himself – *nota bene* – has put himself on the side lines. (...) With weight being given to the judge's autonomous responsibility, the Hoge Raad has made it apparent which demands of a fair trial an appeal court should comply with. Consequently, the resulting material decision in this case is more than commendable. Once again, it shows that the Hoge Raad, as the ultimate guardian of the quality of the criminal procedure, cannot be dispensed with. But our highest court can do better than write: “given Article 6 of the Convention” (...).”¹¹⁹¹

Mevis's standpoint appears adequate, but as an addition it must be noted that it is difficult to understand why a fair criminal procedure would be guaranteed if the accused were to be allowed to “only” listen and thus to passively take part in the proceedings when representing himself during the appeal stage. The Hoge Raad appears to have assumed that this unassisted appellant should have been given the opportunity to actively defend himself against the charges, to contest the prosecutor's submissions, to address the demand of 12 years' imprisonment et cetera. In that way the reference to Article 6 of the Convention by the Hoge Raad can be understood. In concluding that this case might indicate distinct ideas about the role that an accused should be allowed to play if he were to be allowed to re-enter the courtroom after being initially ejected for disturbing the court order, it must be noted how Mevis describes the role of the accused in the required interactions between all the participants in the quoted paragraph. It can be questioned whether the accused's role should be limited to hearing and passively following the procedure, as Mevis seemed to assume. Perhaps, instead, the accused should be allowed to actively conduct his defence, so that the court could possibly benefit from an adversarial trial phase.

Concluding comparison between the two cases of restrictions on (un-)assisted accused

A comparison between the two cases of *Counsel prohibited from pleading*-case and *Unassisted accused prohibited from defending*-case demonstrates how the Hoge Raad is inconsistent in deciding that no remedy is open to a decision of the judge related to court order under Article 273 (3) Sv. Unlike the AGs who are consistent, the Hoge Raad leaves the case of counsel who is prohibited to plead in the case in-tact (*Counsel prohibited from pleading*-case) while overturning the case in which the authorities restrict the unassisted accused to plead in his own case (*Unassisted accused prohibited*

¹¹⁹¹ See Mevis's annotation to the Hoge Raad's case of HR 9 October 2007, ECLI:NL:HR:2007:BA5025, NJ 2008, 43 m.nt. P.A.M. Mevis. The author's translation of his position: “*Precies op een moment dat de wetgever er voor kiest om de ambtshalve verantwoordelijkheid van de rechter terug te dringen ten faveure van een meer tegensprekelijk strafproces (zonder de verdediging daartoe overigens een alleszins adequaat instrumentarium te bieden), benadrukt de Hoge Raad die ambtshalve verantwoordelijkheid van de rechter eens te meer, juist in een situatie waarin het - nota bene - de verdachte zelf is die zich buiten spel zet. (...) Eens te meer blijkt dat we de Hoge Raad als hoogste bewaker van de kwaliteit van de strafrechtspleging niet kunnen missen. Maar die hoogste rechter van ons kan veel beter dan 'gelet op art. 6 EVRM.'*”

from *defending*-case). Lower courts can infer from this difference between the cases that they can place restrictions on counsel while a lay person will have to be approached “more willingly”. While there is no difficulty with the latter, more willing, approach towards an unassisted accused, it is problematic that the Hoge Raad is inconsistent about the basis upon which this distinction between the two cases is being made. Certainly, no appeal is open to a decision of the judge related to court order under Article 273 (3) Sv. Even more important is the lack of recognition of the consequences for the *accused* of the Hoge Raad’s decision to leave the first cited case in-tact (*Counsel prohibited from pleading*-case). The accused has to pay the price for the conduct of his lawyer while he might be harmed twice because the assistance by the lawyer did not seem to benefit the accused. The particular issue of whether the assistance in this case amounted to ineffective legal assistance will have to be reserved for the chapter on that subject (chapter 12). At this stage of the research, however, it can be stressed that the Hoge Raad in the two cited cases does not deal consistently with restrictions placed on unassisted and assisted accused by the authorities which removed the defence, whether by counsel or the accused, because of court order. Thus,,the conduct of counsel who disturbed the court order comes at the procedural risk for the accused, while the unassisted accused has to be actively protected.

8.3. Counsel’s control over strategy under Dutch law?

8.3.1. Responsibilities of counsel under Dutch law and deontology

The aforementioned provisions regulate predominantly *who* can act as counsel under confidentiality and with access to law enforcement information, as demonstrated above, but not *how* the lawyer should act when assisting the accused. That latter issue will be examined further on the basis of the independent competences of counsel and competences that are given to the lawyer as the representative of the accused – also called “derived” competences – under the Code (e.g. Articles 331, 503 (1) and 509d (3) Sv).

8.3.1.1. Responsibilities of counsel under Dutch criminal procedural law

Three aspects are relevant with regard to these competences of counsel in Dutch criminal proceedings.

First, because the accused is entitled to free contact and communication, there is also an arrangement for his lawyer. Counsel has free access to the accused. This arrangement allows the lawyer to speak with the accused alone. Moreover, it ensures, in principle, that the accused and his lawyer can have unrestricted and uncontrolled correspondence (in Dutch: *vrij verkeer*).

Second, because the accused has a right to access to files in the dossier, another set of provisions concerns how counsel can get such access.

Third, because the accused has a right to have a lawyer present during several procedural stages at which he is being heard, interrogated or submitted to (other) coercive measures, there is a similar set of provisions on how counsel can live up to the rights of the accused (for these procedural stages see chapter 6 regarding Articles 23 (2) and (4), 30-31, 50, 62 and 99 Sv, for instance). Case law determines further how such competences and/or rights have to be interpreted.¹¹⁹² For example, access to items in the dossier can be provided to counsel alone, rather than to both the lawyer and his client as an undivided unity.

From these provisions and the independent competences of counsel under Dutch criminal procedural law, three responsibilities of counsel towards the accused can be inferred.

First, counsel has to abide by the detained accused’s right to privileged contact and communication between them (Article 50 (1) Sv).¹¹⁹³ Counsel has to keep confidential what the accused has confided to him. Counsel has discretion in this regard, but he is not allowed to abuse this freedom to confer with the accused where it hinders “the interest of the investigation” (Article 50 (2) Sv). Therefore, under Dutch criminal procedural law, counsel has at least a responsibility to his detained client, to be in privileged contact and communication and to keep to himself the information given to him by the accused. This two-way relationship between the accused and his lawyer is relevant for the possible responsibilities of counsel towards the accused. However, it also indicates an obligation of the *authorities*. After all, they have to ensure that the detained accused can consult with

¹¹⁹² HR 7 May 1996, ECLI:NL:HR:1996:AB9820 (Dev Sol), NJ 1996, 687, para. 5.9.

¹¹⁹³ The third title of the Code of 1926.

and obtain advice from his lawyer and share his instructions with counsel (Article 28 (2) Sv). In this way, they ensure that, thanks to the contact with his detained client, counsel can provide expert advice to the detained accused who can, thereupon, base the decisions in the case against him.

A second responsibility of counsel is that he has to excuse himself as a witness in the criminal procedure in which he assists the accused (Article 218 Sv). If counsel discloses confidential information contrary to this legal obligation, he can be sanctioned under substantive criminal law (Article 272 Sr). Impliedly, counsel might thus have an autonomous responsibility not to disclose privileged information with a wide scope. Even if the accused were to dispense his lawyer from his right of counsel not to disclose confidential information (in Dutch: *verschoningsrecht*), counsel has an independent obligation:¹¹⁹⁴ the lawyer must keep confidential anything the accused has told him in the privileged lawyer-client relationship. This provision enables the accused to turn to a professional lawyer who acts under a right of counsel not to disclose confidential information and cannot breach – or be forced to breach – his confidence, under the sanction of being prosecuted.

A third and final responsibility of counsel is that he cannot ask questions to the accused that, by answering, would breach lawyer-client confidentiality when he poses questions to the accused in court (Article 286 (4) Sv). Under this provision, the trial judge and subsequently the prosecution ask their questions. Thereafter, also the lawyer can pose questions to the accused. Counsel will thus have to be careful not to disclose information himself or have the accused disclose information that is protected by privilege when he interacts with his client in court.

These are three responsibilities owed by the lawyer to the accused under the Code of 1926, which emphasise privilege and confidentiality. However, evidently, these provisions do not concern what the Court would call the “*whole range*” of services of a lawyer for the accused, if the latter is to obtain an effective defence.¹¹⁹⁵ Therefore, the remainder of this sub-section will continue with an examination of other provisions in the Code that allow counsel to act upon the procedural rights of the accused. Arguably, such provisions give “derived” responsibilities to counsel, because they have not been directly afforded to the lawyer but allow counsel to only make use of these rights when he acts for the accused as rights that are, in the lawyer-client relationship, extended to counsel.

A first “derived” right of counsel is based on the right of the accused to take cognizance of the items in the dossier¹¹⁹⁶ (Article 51 Sv in conjunction with Articles 30-34 Sv).¹¹⁹⁷ When assisting the accused, counsel can also get access and insight in such items.

Second, rather as a general clause, the Code affords counsel at the trial and appeal stages “(...) the same procedural rights as the accused” (Article 331 Sv, respectively for appeal Article 331 Sv in conjunction with Article 415 Sv). Counsel can only exercise these rights when the accused attends the trial or if counsel represents the absent accused in so-called *in absentia* proceedings (Article 279 Sv).

Regarding those *in absentia* proceedings, it has to be noted that, despite this clear terminology, whether counsel can actually exercise these rights in *in absentia* proceedings is, as will be explained below, being debated by Spronken and Wöretshofer.¹¹⁹⁸ At this stage of the research, it is important to first discuss another related “derived” right of counsel from the accused.

For *in absentia* proceedings, another provision that encompasses a “derived” right of counsel lies in the freedom of the accused to decide whether or not to attend the trial session or sessions (Article 279 Sv). When the accused freely chooses to remain absent, the authorised counsel is allowed to represent him *in absentia*, thus making all the accused’s rights available to the lawyer (Article 279 Sv). Although consequently counsel can usually exercise the same rights as the accused, there might still be some “personal” decisions that the accused will have to make because the proceedings are directed against him rather than his lawyer. For example, it seems that the law requires that the accused, rather than counsel, decides whether or not he wants to attend the trial and lodge an appeal

¹¹⁹⁴ See e.g. about how the hearing of counsel as a witness does not fit in Dutch criminal procedure, HR 26 March 2013, ECLI:NL:HR:2013:BZ5399, NJ 2013, 207.

¹¹⁹⁵ Prakken (1999) at 15.

¹¹⁹⁶ Under the title of ‘*Bevoegdheden van den raadsman betreffende het verkeer met den verdachte en de kennisneming van processtukken*’, Articles 50 and 51 Sv. See Kwakman (2006) at 500-508.

¹¹⁹⁷ See e.g. Franken (2010: 1.4), in: Mevis et al (2010) and Franken (2010)) at 403-418.

¹¹⁹⁸ Spronken and Wöretshofer, in: Prakken and Spronken (2009) at 481-484.

against the first instance verdict.¹¹⁹⁹ Thus, the accused has a personal say as to how his defence rights are being exercised and how his case is being pleaded, as is often summarized with a reference to the accused as *dominus litis*.¹²⁰⁰ This particular doctrine will be explored below because of its consequences for a further exploration of the responsibilities that counsel might owe toward the accused (see sub-section 8.2.2.4.). At this point of the research, a preliminary conclusion about the provisions cited above can be given on the basis of an important observation by Prakken, who states:

“What has not been regulated in the code is *how* the defence should be provided. Given this minimal legal arrangement, it can be inferred that counsel has a position that has been derived of the accused and that the defence, moreover, has some privileges that should enable the work as well as the professional contribution by counsel which requires confidentiality regarding the contact with the accused in case the accused is subjected to a criminal investigation or detained. Counsel thus does not have more rights than his client and should not want to have more rights either [Emphasis by the author]”.¹²⁰¹

Prakken firmly disagreed with the offer made to her as counsel to get access to the items in the dossier that the client did not get. Nonetheless, the case law has given this one additional “right” to counsel rather than the accused regarding that access to items in the dossier for counsel alone. Consequently, counsel will have to decide how to deal with this right that has not been provided to the accused. The description given above indicates responsibilities of the lawyer to the accused that certainly seem to not cover *all* the defence activities that a lawyer will normally have to perform where assisting the accused. Therefore, criminal procedural law appears to provide an insufficient basis for an analysis of the potential responsibilities that counsel might owe to the accused whose defence is at stake.

Given this interim conclusion, it is relevant to point out additional regulations regarding the lawyer-client relationship. Those are laid down in contract law (Book 7, Title 7 Dutch Civil law), the law on legal assistance and its corresponding decrees, the Lawyers Act, the applicable disciplinary law and the codes of conduct by the Dutch Bar and international (Bar) associations. Some of these deontological norms will be highlighted, especially those that might help to explain what responsibilities counsel owes to the accused who is being assisted, because of the focus of this study on ineffective assistance by counsel in Dutch criminal proceedings.¹²⁰² Given that the focus of this research is on Dutch criminal procedural law and case law rather than on disciplinary law, no detailed description of disciplinary cases against counsel will follow. However, the Lawyers Act and both binding and non-binding codes of conduct for criminal defence lawyers will be touched upon in the next sub-section. After all, those norms might regulate the professional conduct that the accused can reasonably expect of his lawyer in Dutch criminal proceedings.

8.3.1.2. Responsibilities of counsel under Dutch deontological norms

All lawyers in Dutch proceedings are more or less bound by the same deontological norms under the Lawyers Act¹²⁰³ and the binding Rules of Conduct 1992.¹²⁰⁴ This means that criminal defence lawyers

¹¹⁹⁹ E.g. for the personal right to attend the hearing, see Wöretshofer (1998) at 1054-1055; Prakken and Wöretshofer, in: Prakken and Spronken (2009) at 457-550, particularly at 538-539. For the personal right to lodge an appeal in cassation, which argued *a contrario* cannot be done without disclosing one’s personal identification details, HR 27 February 2014, ECLI:NL:HR:2014:2915, *RvdW* 2014, 1177.

¹²⁰⁰ For exceptions, see sub-section 4.2.3 and Franken (2007) at 360-369.

¹²⁰¹ The author’s translation of Prakken (1999) at 15: “Wat nadrukkelijk niet in het wetboek staat is hoe er verdedigd moet worden. Op grond van deze summere wettelijke regeling kan ervan uit worden gegaan dat de raadsman een van de verdachte afgeleide positie heeft en dat daarnaast de verdediging enige privileges heeft die het werken mogelijk moeten maken en die aan de beroepsuitoefening van een advocaat inherente vertrouwelijkheid van het contact met de cliënt beschermen voor de situatie dat die cliënt een verdachte is tegen wie een strafvorderlijk onderzoek loopt en voor de situatie dat die cliënt gedetineerd is. De raadsman heeft dus buiten die privileges niet meer rechten dan zijn cliënt heeft en moet die ook niet willen hebben”.

¹²⁰² Goldsmid (2007); Goldstein Bolocan (2002); and Kidd (1987) at 856-872.

¹²⁰³ Article 46 Lawyers Act requiring counsel to act as he ought to act is further determined in the Rules of Conduct 1992 and the non-binding Profile of Defence counsel, i.e. *Statuut voor de strafrechtsadvocaat*, see *Vademecum Advocatuur*, (2006), at 304.

¹²⁰⁴ *Vademecum Advocatuur* (2006) at 304.

largely have to abide by the same professional norms as lawyers who perform in civil and administrative proceedings. Even more so, most deontological norms, which aim to guarantee adequate professionalism, make hardly any distinction between lawyers acting in criminal proceedings, on the one hand and civil or administrative law procedures, on the other.¹²⁰⁵ The exceptions for criminal defence lawyers are to be found in only a handful of the binding Rules and in the so-called Profile of Defence Counsel, which is non-binding.¹²⁰⁶ This overview will almost always present the general rules first and, thereafter, the exceptions that are specific for criminal defence lawyers.

All lawyers are required under the Lawyers' Act to abide by five core values: independence, partisanship, expertise, integrity, and confidentiality.¹²⁰⁷ These values, which are rather abstract, determine further obligations for lawyers acting in all types of legal proceedings.¹²⁰⁸ Disciplinary courts interpret these norms, with a further reference to the binding Rules of Conduct 1992, which translate these values into separate norms for the conduct of counsel, as follows.¹²⁰⁹ The Rules set out that all lawyers have to ensure a "good administration of justice" and thus act in conformity with the confidence in the Bar and their profession.¹²¹⁰

Specifically, the criminal defence lawyer is obliged to not mislead the judge. Ultimately, if counsel goes against that latter norm, he can be sanctioned under disciplinary law.¹²¹¹ Also, counsel is prohibited from disrespecting the judicial authorities by unnecessary insults, to give a further illustration of a specific norm for criminal defence lawyers.¹²¹²

Moreover, general norms that apply to all lawyers require them to serve the interests of their clients rather than their own. For example, this norm is applicable when all lawyers have to determine their approach to and dealing with the case.¹²¹³ Furthermore, all lawyers must inform their clients of important information, facts, and liaisons.¹²¹⁴ They are also all required to rectify the situation if there is a conflict of interest.¹²¹⁵ All lawyers are prohibited from acting contrary to the express or apparent will of their client. That latter norm is connected with the duty to act in accordance with the overall obligation of the aforementioned norm of good administration of justice.¹²¹⁶

Specific Rules for criminal defence lawyers relate to three more issues. First, criminal defence lawyers are prohibited from seeking to hear prosecution witnesses in advance to their hearing in court.¹²¹⁷ A second norm relates to the media in two further ways.¹²¹⁸ Counsel is barred from divulging the actual dossier to the media. Moreover, counsel is encouraged to be reticent in providing the media with information that can harm the interests of third persons or the legitimate interests of the police and prosecution. Third and final, counsel has to confer with the accused about how to conduct the defence.¹²¹⁹

¹²⁰⁵ E.g. Loth (2003) at 24-30; Kaptein, in: Kole et al (2009) at 142-154; for the need to have particular deontological norms for the criminal defence, see Luban (1993) at 1729-1766; and the debate amongst authors: Simon (1993a) at 1703-1743; and Simon (1993b) at 1767-1772. See also Luban (2007) at 1-331, particularly at 65-95.

¹²⁰⁶ Statuut voor de raadsman in strafzaken van de NVSA, Vastgesteld in de vergadering van de Nederlandse Vereniging van Strafrechtadvocaten op 13 november 2003, available on: <http://www.nvsa.nl/statuut>. See also De Roos (1995) at 159-164.

¹²⁰⁷ I.e. independence, partisanship, expertise, integrity and confidentiality (the author's translation of the Dutch: *onafhankelijkheid, partijdigheid, deskundigheid, integriteit en vertrouwelijkheid*). See also Van Oostrum (2002) at 48 in particular and Wolfson (2009) at 57-69.

¹²⁰⁸ Rule 20 Rules of Conduct 1992 and Rule 4.4 of the European Code of Conduct for lawyers within the European Community 2006.

¹²⁰⁹ See especially Spronken (2001) at 491-508.

¹²¹⁰ Rule 1 Rules of Conduct 1992.

¹²¹¹ E.g. Prakken and Wöretshofer, in: Prakken and Spronken (2009) at 492-493 and at 528 Court of Appeal of Disciplinary Measures, 23 May 2005, also in light of Article 3 (2) *Advocatenwet*, the author's translation "sworn to the "honour of the judicial authorities", of "eerbied voor de rechterlijke autoriteiten zweert".

¹²¹² E.g. Prakken and Wöretshofer, in: Prakken and Spronken (2009) at 492-493 and at 528.

¹²¹³ Rule 5 Rules of Conduct 1992.

¹²¹⁴ Rule 6 Rules of Conduct 1992.

¹²¹⁵ Rule 7 (2) Rules of Conduct 1992.

¹²¹⁶ Rule 9 Rules of Conduct 1992. See also Franken and Spronken (2001) at 1-18, available at <http://arnop.unimaas.nl/show.cgi?fid=2956>; and Boksem et al (2004) at 1-49, the statuut itself at 21-41.

¹²¹⁷ Rule 16 (2) Rules of Conduct 1992.

¹²¹⁸ Rule 10 (2) Rules of Conduct 1992. Reticence of course entails that a lawyer is not prohibited from submitting facts that are harmful for third persons, if those are in the interest of the accused, see Spronken (2001) at 585 and 586, footnotes 317 and 318.

¹²¹⁹ Rule 15 Rules of Conduct 1992.

Seen in conjunction, it seems that the good administration of *criminal* justice requires that counsel takes into account respect for the judiciary and for third persons in so far as they respect the rights, interests and wishes of the accused.¹²²⁰ Deontological norms thus emphasise that the accused is *dominus litis* in the proceedings against him.

More efforts have been made to identify norms for criminal defence lawyers. A non-binding Profile of Defence Counsel has been drafted, which reinforces that counsel is not free to act contrary to the accused's own apparent will.¹²²¹

This Profile puts forward the view that counsel should not overrule the rights, interests and wishes of the accused. For example, when the lawyer and the accused disagree, the criminal defence lawyer can refuse to take on or withdraw from a case.¹²²² If counsel is to withdraw from a case, he is required to do so cautiously and has to notify the accused in a timely manner, so that the accused is not harmed by the advocate's decision.¹²²³

These non-binding norms therefore largely seem to comply with the binding Lawyers Act and the Rules of Conduct 1992. However, they set a few more specific requirements on counsel, particularly in relation to the requirement not to act against the accused's rights, wishes and interests when a disagreement were to arise between counsel and the accused.

In sum, both binding and non-binding norms¹²²⁴ on criminal defence lawyers appear to recognize the importance of the responsibilities for counsel towards the accused. Counsel should not violate the apparent or express will of the accused.¹²²⁵ Under the *dominus litis* doctrine, this means what Spong calls double independence of the lawyer from both the State and the accused.¹²²⁶ Dutch law and deontology attach considerable value to the centrality of the accused in his defence, whether assisted by retained or appointed counsel.¹²²⁷

To conclude, the deontological norms do not answer in detail what the accused can reasonably expect from his lawyer within criminal proceedings, and this inference conforms with what has been stated about the provisions under the Code. For instance, if a dilemma arises about counsel's responsibilities with regard to alleged breaches of norms, different scholars emphasise different elements of norms. For example, the hypothetical in which counsel seeks to stall the procedure attracts different responses. Some scholars put more emphasis on the apparent will of the accused.¹²²⁸ However, others stress the full independent professional responsibility of counsel regarding dealing with the case (e.g. under rule 9 Rules of Conduct and Article 10 Lawyers Act).¹²²⁹ As a result, some scholars argue that stalling is permitted if it is in the interest of the accused, who moreover agreed to it. The others submit that counsel should not stall proceedings out of professional norms. It might therefore best to conclude with the remark that it will depend on the facts of the case whether stalling abides procedural, deontological or other norms.

As a final remark, some norm-compliant behaviour does not evoke many difficulties, for example counsel cannot act contrary to Dutch substantive and procedural criminal law. However, other norms are less clear as to the responsibilities owed by counsel towards the accused. Interestingly, that latter point attracts *common* agreement amongst scholars, even amongst those who dispute how the hypothetical of stalling should be perceived. They all settle on a lack of a coherent, systematic legal foundation for the position and tasks of the defence in Dutch criminal proceedings.¹²³⁰ A further exploration will have to follow, therefore, by turning to counsel's procedural responsibilities vis-à-vis other participants, because this regulated interaction might shed the requisite further light on what the accused can expect of his lawyer in Dutch criminal proceedings.

¹²²⁰ Legal privilege: under Articles 218 Sv as well as 96a Sv and Article 46 Lawyers Act as well as Rule III.6 Rules of Conduct 1992; counsel's partisan role: Article 46 Lawyers Act Rule III.5 deontological norms Rules of Conduct 1992.

¹²²¹ Franken and Spronken (2001) at 1-18.

¹²²² Linked with Rule 7 (2) Rules of Conduct 1992.

¹²²³ E.g. Raad van Discipline Amsterdam, 1 September 2009, YA 0085, No. 09-069.

¹²²⁴ See also Nederlandse Orde van Advocaten (2012).

¹²²⁵ Kaptein (2013) at 15-17.

¹²²⁶ Spong, in: Klip et al (2004) at 79-86, particularly at 82-84. See also Mout, in: Enschedé et al (1987) at 383-391, particularly at 388.

¹²²⁷ See also Franken, in: Röttgering and Van Oosten (2008), at 29-38, particularly at 37-38.

¹²²⁸ Prakken and Spronken, in: Prakken and Spronken (2009) at 15.

¹²²⁹ Blom and Hartmann, in: Groenhuijsen and Knigge (1999) at 207-208.

¹²³⁰ Blom and Hartmann, in: Groenhuijsen and Knigge (1999) at 202.

8.3.1.3. Responsibilities of counsel in interaction with other criminal procedural participants

This chapter has already addressed responsibilities of counsel that are *derived* from some rights of the accused, but not yet how counsel is dependent on *other* participants in Dutch criminal procedure in order to examine or have examined witnesses, for example. Because of the focus of this research on ineffective legal assistance and its redress in Dutch criminal proceedings, most emphasis will be put again on the provisions that regulate the interaction regarding defence activities in the Code.

The defence in Dutch criminal proceedings usually depends on the authorities to hear witnesses, although the defence can bring its own witnesses to court. Consequently, if counsel and the accused decide that it would be important for an effective defence to hear a witness, they will often have to rely on the authorities to allow the defence to hear that witness.

Pre-trial, as a rule, the police hear witnesses in the absence of the accused and his lawyer.¹²³¹ The police make a written transcript, which can later be added to the dossier. The defence obtains such statements at the latest ten days before the trial stage. Often the defence will therefore have a first opportunity to consider requests to hear witnesses in court upon the receipt of the dossier, unless pre-trial they have requested the pre-trial judge to hear those witnesses. The hearing of witnesses by the pre-trial judge usually depends on a request by the defence to hear them.¹²³²

That is, the defence can request the judge of instruction to hear witnesses during the pre-trial stage. The defence has to submit this request on time, i.e. before the trial started. If the defence submits this request to the pre-trial judge to hear a witness belatedly, there is a further risk. The first instance court can render inadmissible the appeal against the decision of the pre-trial judge not to hear the witnesses.¹²³³

This responsibility of counsel to submit the request on time corresponds with the “new” role of the pre-trial judge. The pre-trial judge has been provided with a somewhat new task in the pre-trial criminal investigation under a recent Statute. Rather than having a more investigative role, the pre-trial judge has now gained a more supervisory role (Article 170 Sv).¹²³⁴

Whilst the prosecutor still has the lead in this investigation, the judge of instruction has gained the task of conducting certain investigative measures. The pre-trial judge can conduct such measures, including the hearing of witnesses, either on his own initiative or upon the request of the defence or order of the prosecution (Article 180 Sv and further). Where the judge of instruction hears a witness, often counsel and sometimes the accused can be present. Usually, the prosecutor is allowed to attend. For instance, when the judge of instruction hears a witness who falls within the special category of threatened witnesses, counsel and the prosecutor are mostly present whilst the suspect is generally absent.¹²³⁵ Thus, there appear to arise some responsibilities of counsel towards the accused as “derived” from his responsibility towards other participants. Counsel has to determine in a timely manner whether or not to request to hear witnesses. In other words, a relatively active stance in relation to the hearing of witnesses pre-trial is expected of the defence in Dutch criminal proceedings.

With regard to hearing witnesses on trial, the defence is also dependent upon the authorities. If the defence wants to hear a witness in court whom he cannot bring to trial, the defence will have to request the prosecutor to summon the witness (Article 263 Sv).¹²³⁶ The prosecutor can deny such a request *inter alia* on the ground that he considers that the denial will not reasonably harm the accused in his defence (Article 264 Sv). When this request to confront a witness in court has been denied by

¹²³¹ Mols, in: Prakken and Spronken (2009) at 298 and 302-306. HR 22 December 2015, ECLI:NL:HR:2015:3608.

¹²³² Article 210 Sv.

¹²³³ District Court Zeeland-West-Brabant, 27 July 2013, ECLI:NL:RBZWB:2013:5654. See also PG Fokkens who notices this trend by pointing out, additionally, Rb Rotterdam 24 April 2013, ECLI:NL:RBROT:2013:BZ9514 and ECLI:NL:RBROT:2013:BZ9515; Rb Noord-Nederland, 16 May 2013, ECLI:NL:RBNNE:2013:CA0791; Rb Noord-Holland, 23 May 2013, ECLI:NL:RBNHO:2013:6084; Rb Amsterdam, 8 August 2013, ECLI:NL:RBAMS:2013:5862 and Rb Den Haag, 13 August 2013, ECLI:NL:RBDHA:2013:11349, and questions whether the judge of instruction should only finish the investigative measures yet initiated, in his conclusion to HR 6 January 2015, ECLI:NL:PHR:2015:118, which the Hoge Raad follows in ECLI:NL:HR:2015:505. See also this latter case’s annotation in *NJB* 2015, 560 in which the relationship between the pre-trial and trial judge is examined.

¹²³⁴ See also Van Kempen (2011) at 8-24 and Van Kampen (2011) at 29-35.

¹²³⁵ Article 226a Sv and further Franken and Röttgering, in: Prakken and Spronken (2003) at 260.

¹²³⁶ E.g. HR 1 July 2014, ECLI:NL:HR:2015:1496, *NJ* 2014, 441 m.nt. Borgers for an overview judgment regarding the request and hearing of witnesses requested by the defence. See also section 4.2. and 4.3.

the prosecutor, the defence can request the trial judge to confront the witness¹²³⁷ (Article 263 (4) Sv). The judge can reject that request against the same standard (Article 288 (1) sub c Sv).

Moreover, if the defence has not made a request to hear a witness in court up to ten days prior to the trial hearing, the court will consider the request to have been made at the trial hearing (Article 315 Sv). Under such circumstances, the court can prohibit the defence request according to the standard that it is not “necessary” to hear the witness at the session (Articles 315 and 328 Sv, for appeal under Article 415 Sv with a comparable standard).

If the defence – and *de facto* counsel for the assisted accused – does not submit the request on time and/or does not provide the requisite reasoning per standard, the risk is that the court can consider this request either “to not be in the interest of the defence”¹²³⁸ or “not out of necessity for the court”. Under such circumstances, the court can reject hearing the witnesses on trial.¹²³⁹

With regard to the reasoning of the decision in the verdict to not hear a witness in court, it is important to note that, in both situations, the verdict has to contain a reason or reasons as to why the court declined the defence request to confront the witness at the trial phase. The defence can thereby benefit from a reasoning of the court on the rejection of the request to hear witnesses whether found “not to be in the interest of the defence”¹²⁴⁰ or “not out of necessity for the court”. Just like pre-trial, but this time for trial, the defence has to determine in a timely manner whether or not to request to hear witnesses in court.

It will be important to examine whether the same active stance is required from an unassisted accused, both pre-trial and trial, because this might be difficult for a lay person (see chapter 10). Whilst more can be expected of counsel than a lay person, it will be significant to explore possible differences in relation to witness requests that are being made by an unassisted accused or by an accused who has a lawyer on his side.

This last issue is particularly relevant because scholars such as Prakken argue that, increasingly, the position of the lawyer within criminal proceedings is being ascribed to the accused, in the sense that the initiative for several procedural activities has been put on the defence.¹²⁴¹ If such defence activities are done wrongly or not at all, Prakken submits, the accused bears the consequences. She ascribes this increase in responsibilities of counsel to the new adversarial criminal procedure. The new procedure demands that the defence submits several requests and lodges substantive defences, whilst, she believes, the *ex officio* control by the judge is being minimised. Moreover, she submits that the defence is “forced to take its chances” at the first available opportunity at the expense of a loss of rights (in Dutch: *rechtsverwerking*).¹²⁴² She contends that because of the increasing level of initiative placed on the defence and the idea that rights can be lost out of a waiver by not using them at the earliest available procedural stage, the accused becomes increasingly dependent on the quality of his lawyer.

Therefore, Prakken raises the question about the options to which the accused can resort in Dutch criminal proceedings when he is confronted with a lawyer who does not live up to his expectations. This question about redress for ineffective legal assistance cannot be answered at this stage of the research, but it is linked to a point that has to be made here.

Before turning to that aspect, it is also relevant to observe that another scholar, Röttgering, concludes that counsel has gained *more* responsibilities in Dutch criminal proceedings.¹²⁴³ Röttgering emphasises that the trial judge no longer has to actively safeguard, as judges did 20 years ago, the “(...)

¹²³⁷ This is usually only different where the judge of instruction allows the defence as a unit or the lawyer on his own to be present during the pre-trial stage, when he will allow the lawyer to put questions to that witness (Article 177 Sv).

¹²³⁸ E.g. Groenhuijsen and Knigge (2004) at 44-48.

¹²³⁹ See Boksem (2007) at 14.

¹²⁴⁰ E.g. Groenhuijsen and Knigge (2004) at 44-48, particularly at 47-48.

¹²⁴¹ Prakken (2005) at 69, citing Franken (2004) and also footnote 41 which refers to Franken (2004): HR 6 May 1986, ECLI:NL:HR:1986:AB9411, *NJ* 1987, 60; HR 12 October 1999, ECLI:NL:HR:1999:AA3804, *NJ* 20001, 11; HR 14 October 1997, ECLI:NL:HR:1997:ZD0820, *NJ* 1998, 243. Her additional point is that the case law places increasing demands on substantive defence, which if not met, allow the court not to reason its verdict, e.g. HR 19 December 1995, ECLI:NL:HR:1995:ZD0328, *NJ* 1996, 249; HR 23 November 1999, ECLI:NL:HR:1999:AA3794, *NJ* 2000, 128 and especially the pivotal verdict of HR 30 March 2004, ECLI:NL:HR:2004:AM2533, *NJ* 2004, 376. The Statute that “streamlined” the appeal would have been significant in this respect, Statute of 10 November 2004, *Staatsblad* 579.

¹²⁴² Groenhuijsen and Knigge (1999) at 35.

¹²⁴³ E.g. Röttgering (2005: 3.3 –Art. 28) in Melai/Groenhuijsen (2005). See for other scholars sub-section 4.3.2.

interests of the accused, which counsel might overlook”.¹²⁴⁴ She submits that counsel might have to adapt to this supposedly changed role of the trial judge who was originally more active in offering legal protection to an accused, and potentially when faced with ineffective assistance by counsel. This new role of counsel would supposedly not only exist for the hearing of witnesses but also for substantive defences and arguments of the defence that are being submitted to the court.¹²⁴⁵

Both scholars immediately tie in the supposed increased responsibilities of counsel in relation to other participants with that (third) vertical perspective regarding possible obligations of the authorities to offer redress to the accused.¹²⁴⁶ However, *increased* responsibilities of counsel towards the accused *do not necessarily mean* that the authorities can have their role *depend* more on the defence – and the prosecution for that matter. Both trends *can* happen separately, after all. For instance, there could be more responsibilities placed on the criminal defence lawyer whilst the judge still has to be an active truth-finder. Whether or not these two aforementioned trends happen in tandem can only be examined later in this research. For that exploration, a (second and third) vertical perspective will have to be taken so as to determine the possible obligations towards the accused of the authorities, when confronted with actual or alleged ineffective legal assistance (in chapters 10 and 12). Those examinations can best be done on the basis of a case law analysis. The remainder of this chapter continues with an exploration of the possible responsibilities owed by the lawyer towards the accused under the lawyer-client relationship, mostly through Dutch scholarly work.

8.3.1.4. Responsibilities of counsel in interaction with the accused

As shown above, some responsibilities owed by counsel to the accused depend on the relationship with *other* participants in Dutch criminal procedure, regarding the hearing of witnesses at least. Therefore, it is important to explore here whether additional responsibilities of counsel towards the accused originate in the lawyer-client relationship. With regard to that relationship, as mentioned at some earlier points in this research, scholars often pose the question that is summarised as “Who is *dominus litis*?”¹²⁴⁷

Mout and Spong answer this question by contending that counsel has “double independence”, i.e., from both the State and the accused.¹²⁴⁸ Consequently, counsel should in principle make use of all rights and procedural means that are favourable to the accused. However, the lawyer can opt to forsake those if they result in, literally, “(...) evidently unreasonable action”.¹²⁴⁹ Spronken agrees with this view.¹²⁵⁰ However, she adds that disciplinary law has determined one requirement for such an evidently unreasonable action by counsel. The lawyer should give reasons to the accused for his actions.

Spronken uses a somewhat different description than Mout and Spong by writing that counsel is dependent on the accused “in a limited manner”¹²⁵¹, which essentially promotes the same idea.¹²⁵² She submits that counsel is bound by written and unwritten guarantees of criminal procedure because counsel’s position is derived from the position of the accused.¹²⁵³ Given that the accused is not required to cooperate in the process against him, neither is counsel. Consequently, in principle counsel certainly does not have to cooperate in finding evidence against the accused. Spronken wonders whether this position concerning the role and conduct expected of counsel should also be understood to mean that the lawyer should not “hinder” the work of the authorities, as some scholars

¹²⁴⁴ Röttgering also refers for that purpose to HR 17 June 1980, ECLI:NL:HR:1980:AC6917, *NJ* 1980, 575, m.nt. Van Veen regarding the Court’s case of *Lerschegger v. Austria*, Judgment of 28 September 1999, HUDOC no. 26644/95. See further in sub-section 4.3.2.

¹²⁴⁵ E.g. Röttgering (2005: 3.3 –Art. 28) in Melai/Groenhuijsen (2005).

¹²⁴⁶ E.g. Röttgering (2005: 3.3-Art. 28) in Melai/Groenhuijsen (2005); Spronken (2001) at 464; Franken (2007) at 360-3691 Boksem (2009) at 1-19, especially 13-16; and Franken (2011) at 1109-1117.

¹²⁴⁷ Mout, in: Enschedé et al (1987) at 383-391, particularly at 388 and Spong, in: Klip et al (2004) at 79-86, particularly 82-84.

¹²⁴⁸ Mout, in: Enschedé et al (1987) at 388 and Spong, in: Klip et al (2004) at 82-84.

¹²⁴⁹ Hof van Discipline, 18 March 1991 as mentioned in Lawyers Act 1992, at 552.

¹²⁵⁰ Spronken (2001) at 650-651.

¹²⁵¹ Hof van Discipline, 18 March 1991 as mentioned in Lawyers Act 1992, at 552.

¹²⁵² Spronken (2001) at 650-651; Mout, in: Enschedé et al (1987) at 383-391, particularly at 388; and Spong, in: Klip et al (2004) at 79-86, particularly 82-84.

¹²⁵³ Prakken (1999) at 16 and Spronken (2001) at 320-321.

presuppose.¹²⁵⁴ She draws a parallel with counsel who is prohibited from harming, in the media, the interests of third persons or the legitimate interests of the police and the prosecution.¹²⁵⁵ She finds it difficult to define such “hindrance of truth finding”. Except for situations in which counsel acts contrary to the Code of 1926 and to deontological norms, she poses the explicit question of what does hindrance exactly entail?¹²⁵⁶

Loth disagrees with the above-given two rather similar role descriptions of counsel, and indicates that deontological limits should be placed on counsel’s role that in his opinion is largely uncodified.¹²⁵⁷ He wants to escape from the “positivistic view” of law and deontology, as he describes it. This perspective amounts to a well-practised “trick” to avoid uncodified, but nonetheless existing, responsibilities, as he calls it. He argues that given the object and purpose of criminal procedural law¹²⁵⁸, counsel’s role and conduct should not be governed by the private interests of the accused “alone”.¹²⁵⁹ Counsel has responsibilities under what he calls a “(...) public responsibility”.¹²⁶⁰ He does not define that responsibility in detail, but does hold that counsel should not “simply act as the accused’s mouthpiece”.¹²⁶¹

Spronken disagrees with Loth and does so on the basis of two uncodified notions of “partisanship” and “independence”.¹²⁶² In Spronken’s view, these notions should govern counsel’s responsibilities, so that the lawyer has a great deal of freedom in assisting the accused. This freedom is not absolute, however.

This notion of independence also triggers several questions. Does Spronken mean independence “merely” from the State, the judge, other authorities and third persons¹²⁶³ or also from the accused? Spronken appears to contend that there is general agreement that counsel cannot be required to actively encourage truth finding. That would mean that such independence is also shaped by the idea that it may not be in the accused’s interests to have the truth emerge.

A follow-up question is what the responsibility to find the truth should mean for the responsibilities of counsel towards the accused under the latter’s right to an *effective* defence. This responsibility appears to be shaped by the common agreement that counsel cannot make evidence disappear or assist in its disappearance. However, the extent to which the lawyer and the accused can actively seek defence evidence is unknown.

The issue of searching for evidence is even more pertinent when the accused is, for instance, detained with a complete prohibition on contact with third persons (Article 62 Sv). How can an accused ensure that he has in his possession the requisite evidence that exculpates him if he is not free to collect it? In addition, the good administration of justice may (also) entail counsel’s responsibility for the efficiency of the criminal procedure.¹²⁶⁴ Counsel is sometimes blamed for “playing the system” with the effect of decelerating an efficient criminal procedure in which the truth may be found or even making truth finding impossible.¹²⁶⁵

Therefore, it is difficult to infer what “public responsibility” should entail, given that it will not always be in the accused’s best interest to have a speedy criminal procedure, for instance.

¹²⁵⁴ *Ibid.* Rule 30 Rules of Conduct 1992, now positively formulated in the sense that counsel is only allowed to provide the judge and other parties with accurate information.

¹²⁵⁵ *Ibid.* Rule 10 Rules of Conduct 1992.

¹²⁵⁶ Mols, in: Adriaans (1993) at 11-24., particularly at 16.

¹²⁵⁷ Loth (2003) at 24-30, especially at 28 and at 30.

¹²⁵⁸ Spronken (2001) at 292; Corstens/ Borgers (2014) particularly at 96; and De Roos (1991) at 32.

¹²⁵⁹ Loth (2003) at 24-30.

¹²⁶⁰ A debate that can be summarised with this rather vague term since it started with the question whether or not a sixth core value for the lawyer of ‘*de publieke verantwoordelijkheid voor de rechtsbedeling*’ (‘public responsibility for the dispensation of justice’) should be introduced into the law governing the conduct of all lawyers, not only criminal defence lawyers (Lawyers Act).

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¹²⁶² Spronken (2001) at 629-642.

¹²⁶³ Compare Rule 2 (1) of Rules of Conduct 1992 and Rule 2 (1) of the Code of Conduct for European Lawyers, CCBE, 31 January 2008.

¹²⁶⁴ E.g. Spronken (2001) at 317 and Franken and Spronken (2001) at 1-18.

¹²⁶⁵ E.g. Beelaerts van Blokland (1999) at 55-60.

However, independence of counsel is also not wholly defined. The codified law and deontological norms as well as the non-binding profile do not answer all questions. Therefore, the following subsection will attempt to combine the insights of the previous ones, particularly highlighting outstanding unanswered questions.

8.4. Counsel as advisor and the accused as decision-maker under Dutch law?

8.4.1. *The impact of the unclear responsibilities of counsel on ineffective legal assistance*

For the topic of ineffective legal assistance, which required this horizontal perspective, it is very difficult to conclude on possible responsibilities that counsel might owe toward the accused in the lawyer-client relationship in Dutch criminal proceedings. The previous section has indicated some independent and some derived responsibilities of counsel and several preliminary ideas about their bearing on the accused. However, overall, it appears that the horizontal perspective does not give conclusive answers as to the responsibilities owed by the lawyer toward the accused in Dutch criminal procedure. A clear division of roles seems hard to infer between the assisted accused and his lawyer under procedural law and case law as well as deontology. Some components of counsel's role, for example in relation to witness requests, rely on the interaction with other participants who are authorities. Moreover, while there is common agreement that the accused is *dominus litis*, this does not help to construe possible responsibilities of counsel toward the accused.

It is therefore important to give a first indication of how Dutch criminal proceedings appear to manage the tension between truth finding, the protection of rights and in particular the autonomy of the accused in the process. As explained in chapter 2, in accordance with the civil law tradition most legal powers regarding truth finding rest with the authorities.¹²⁶⁶ As noted in chapter 4, in this respect, Dutch criminal procedure for the most part appears to correspond with the traditional emphasis on the role of the authorities in relation to truth finding. This role division has an influence on the management of the tension between truth finding and the protection of the rights of the accused, which in line with the findings presented in this chapter appears to be done in two ways.¹²⁶⁷

First, the tension between the autonomy of the accused and the importance of an accurate outcome through an effective defence¹²⁶⁸ has been managed by requiring that the authorities still mostly have a role to play in protecting the rights of the accused. For instance, the prosecutor is assumed to take a "magisterial" stance which includes the protection of the rights of the accused.¹²⁶⁹ In practice, this does not mean that the prosecutor cannot be a crime fighter. However, it does mean that most statutes regarding the role of the prosecutor also emphasise that the prosecutor has to take into consideration the rights, wishes and interests of the accused when exercising his role. Gutwirth and De Hert explain this "solution" as the Dutch legislator giving priority to more adversarial elements that are instrumental to the existing more inquisitorial framework.¹²⁷⁰ Other scholars confirm that most changes to Dutch criminal procedure have been those that do not (significantly) conflict with a more inquisitorial framework because of legal culture.¹²⁷¹ According to Knigge, the legislator has cherry picked the statutes that it can easily place in the existing framework of an active trial judge seeking the truth and guaranteeing the fairness of the criminal procedure.¹²⁷² Therefore, there appears to be common agreement as to the resulting influence of the civil law tradition and the correspondingly more inquisitorial traits of current Dutch criminal proceedings. This observation is relevant for this research into ineffective legal assistance and its redress in Dutch criminal proceedings because it indicates how the authorities have to ensure preconditions for the accused's right to an effective defence by counsel in a way that the lawyer is not a full-fledged "party" to the proceedings, as in a more adversarial criminal procedure. This less than full party-role of counsel is also reflected through

¹²⁶⁶ Cleiren (2008) at 272-285.

¹²⁶⁷ See also Cleiren (2001) at 9-31, particularly at 30-31; Melai, in: Groenhuijsen (2002) at 67-78; and J. Silvis, aant. 4 bij art. 272, suppl. 119, 2000, in: Melai (losbl.).

¹²⁶⁸ See also Jackson (2009) at 1-18.

¹²⁶⁹ Franken (2013) at 157-164.

¹²⁷⁰ See for the influence of legal culture and the adoption of outer-cultural phenomena, Friedman, in: Nelken (1997) at 33-39, particularly at 34.

¹²⁷¹ See Brants et al, in: Brants et al (2003) at 1-27.

¹²⁷² E.g. Knigge (2002) at 221-236.

the ways in which the tension between the autonomy of the accused and the importance of an accurate outcome through an effective defence can be “managed”. It cannot be the full responsibility of counsel to ensure an effective defence, because the authorities still play an important role in relation to truth finding in a fair trial in Dutch criminal proceedings.

Second, the tension is also being “managed” by allowing counsel to increasingly play “a” role during Dutch criminal procedure. For example, counsel now has a role to play at police interrogations.¹²⁷³ However, constraints during the pre-trial phase might make it difficult for the lawyer to fulfil the role expected of him at trial, at least.¹²⁷⁴ For example, under Dutch law counsel is not allowed to be present during criminal proceedings where the accused is an adult and no other exceptions apply, though this will change as of 1 March 2016.¹²⁷⁵ If counsel is absent during police interrogations whilst the accused has to take a position in which his statements to the police can be used in evidence against him then it can, depending on the facts of the case, result in difficulties with the accused’s effective defence (the Hoge Raad still does not appear to find assistance during police interrogations to be as important as consultations before police interrogations).¹²⁷⁶

From a rights perspective, both aforementioned components can have a particular impact on the trial stage. There are legitimate questions about the degree to which counsel can already perform the pre-trial defence role that corresponds with the aspired more contradictory trial position.¹²⁷⁷ Moreover, it is questionable whether the trial authorities actually protect the rights of the accused, given that they are under the law required to do so, given the cases cited above regarding, for example, waivers of the accused’s right to counsel.¹²⁷⁸ A further relevant query is whether there is enough room for the best possible contradiction between the defence and prosecution to give sufficient room to equality of arms and adversariality, so that the subjective position of the accused is also being sufficiently heard.¹²⁷⁹

This overview leads back to the questions with which this chapter opened. However, several of those cannot be answered by referring to the two notions of partisanship and independence that according to Spronken govern counsel’s responsibilities towards the accused in Dutch criminal proceedings.¹²⁸⁰ Firstly, should the notion of partisanship entail other limits placed on counsel than those under Dutch law and deontological norms? Are there additional limits other than not misleading the judge or otherwise failing to respect the judicial authorities and harming the interests of third persons or the legitimate interests of the police and prosecution in the media? Moreover, interpreting the notion of the independence of counsel remains a difficult issue, notwithstanding the fact that all the aforementioned norms stress its importance.

An answer to these aforementioned questions cannot easily be given, but a relevant starting point for that answer does seem to be that, under Dutch law, counsel has – relatively speaking – considerable freedom in taking on and pursuing the defence.¹²⁸¹ Namely, the lawyer can refuse to take on a case or withdraw from a case where this is considered to be necessary. Under such circumstances, he has to notify the accused in good time and do so very carefully, so that the accused is not harmed by this decision.¹²⁸² Moreover, Rule 9 of the Rules of Conduct by Counsel 1992 does not allow the lawyer to go against the apparent will of the accused. Finally, under this same code of conduct counsel who assists multiple clients and faces a conflict of interest, has to take the initiative to seek to avoid such a situation and to withdraw from the case.¹²⁸³ Thus, the independence of the lawyer is at least shaped by the initial freedom of counsel to take on a case and to withdraw from a case in Dutch

¹²⁷³ Röttgering (2005: 3.3 –Art. 28), in: Melai/Groenhuijsen (2005).

¹²⁷⁴ Gutwirth and De Hert (2001) at 1048-1087.

¹²⁷⁵ HR 22 December 2015, ECLI:NL:HR:2015:3608.

¹²⁷⁶ HR 22 December 2015, ECLI:NL:HR:2015:3608, para. 6.4.2.

¹²⁷⁷ Corstens/ Borgers (2014) at 100 particularly; Spronken (2001) at 438; Mevis (2009) at 482; Brants et al, in: Brants et al (2003) at 20-24.

¹²⁷⁸ See also Foqué and ‘t Hart (1990) at 126-128.

¹²⁷⁹ Hildebrandt (2002) at 1-538, particularly at 335-336.

¹²⁸⁰ Nederlandse Orde van Advocaten, *Wet- en regelgeving: Verhouding tot de cliënt*. 2012, available on: <http://advocaten.advocatenorde.nl/nova/novvade.nsf/c70ce544d407054ec12569f1004485c2/083b18b9611e0ff3c12570b900334188?OpenDocument> [last accessed on 25 February 2014].

¹²⁸¹ Rule 7 (2) Rules of Conduct 1992.

¹²⁸² E.g. Raad van Discipline Amsterdam, 1 September 2009, *LJN*: YA 0085, No. 09-069.

¹²⁸³ Rule 7 (2) Rules of Conduct 1992.

criminal proceedings if a disagreement between him and the accused arises. Such freedom often does not exist in common law traditions with a more adversarial criminal procedure. Known as the cab-rank rule, criminal defence lawyers in such proceedings often have to take on each accused.¹²⁸⁴

Returning to Dutch criminal proceedings, it is also noteworthy that specifically the cited deontological norms also appear to highlight this independence of counsel in that criminal defence lawyers have to zealously protect the accused's rights, interests and wishes against the usually more powerful State in Dutch criminal proceedings. The tension between the State that acts in the common good to find the truth in fair proceedings and the protection of the accused in a criminal procedure instigated against the accused by that same State might justify special norms for criminal defence lawyers alone. Under specific norms for criminal defence lawyers, they are required to, within the bounds of the law¹²⁸⁵, conduct the defence independently and in a partisan manner with zeal. For this reason Groenhuijsen and Knigge argue the following regarding the question of witnesses and third persons listed above¹²⁸⁶:

“The elementary rights of the defence – simply put the presumption of innocence and the right to a fair trial – always trump the entitlements and interests of victims and witnesses. Differently put: the criminal procedure has to protect victims and witnesses, but can never do so in a way that consequently an unfair criminal procedure or violation of the presumption of innocence has to be accepted.”

Spronken's notions of partisanship and independence are thus essential for this examination into possible responsibilities that counsel might owe to the accused in the lawyer-client relationship in Dutch criminal proceedings. Counsel seems obliged to take the role of actively protecting the rights of the accused, primarily at the adversarial trial stage – particularly if that court phase is or has become “more contradictory”¹²⁸⁷ or more adversarial – whether or not because of the Court's case law in part or in whole. After all, if the aforementioned freedom of defence is taken seriously, it is the accused who determines how the defence should be conducted.

Consequently, counsel has to give qualitatively good legal assistance to ensure that the accused's right to an effective defence is guaranteed. Thus, counsel has to act predominantly in such a way that the rights, interests and wishes of the accused are guaranteed. His own professional obligation prohibits him to make use of means that run counter to that subjective position of the accused. Counsel should not override the accused's position and should respect that the accused has the ultimate say about his personal rights. In summary, counsel provides advice and the accused makes the decisions about the rights that he, and not his counsel, holds because the proceedings are directed against him. If the lawyer ultimately disagrees with the decisions of the accused in his case, he can withdraw from the case.

8.4.2. The impact of the emphasis on trial responsibilities on ineffective legal assistance

This emphasis on counsel's responsibilities to the accused primarily at the more contradictory trial stage has a bearing on the pre-trial phase.¹²⁸⁸ That is, counsel's responsibilities towards the accused at trial foreshadow the role and conduct expected of counsel pre-trial, also under new legislation that attempts to make the pre-trial stage more adversarial.¹²⁸⁹

¹²⁸⁴ E.g. Tague (2001) at 137-173.

¹²⁸⁵ Any criminal activity on the part of a lawyer should not be considered to be legitimate and thus effective assistance to the accused.

¹²⁸⁶ E.g. Groenhuijsen and Knigge (2004) at 172. The author's translation of: “De elementaire rechten van de verdediging - laten we het maar even houden op de onschulds-presumptie en het recht op een eerlijk proces - gaan steeds en onverkort boven aanspraken en belangen van slachtoffers en van getuigen. Anders gezegd : het strafproces strekt ook tot bescherming van slachtoffers en getuigen, maar dit kan niet zo ver gaan dat daardoor een oneerlijk proces of schending van het onschulds-vermoeden op de koop toegenomen zou kunnen worden.”

¹²⁸⁷ See sub-section 4.2.2.2.

¹²⁸⁸ E.g. Van der Meij (2010) particularly at 238-242 and at 566-573.

¹²⁸⁹ E.g. Act on experts in criminal cases (in Dutch: *Wet deskundigen in strafzaken*, *Stb.* 2009, 33, entry into force 1 January 2013) and the Act on reinforcing the position of the judge of instruction (in Dutch: *Wet versterking positie rechter-commissaris*, *Stb.* 2012, 408, entry into force 1 January 2013).

This effect on the pre-trial stage will be indicated with an example of the right to have an expert appointed in light of counsel's obligation to give the accused effective legal assistance. It will in particular explore the issue of the theory of the waiver (in Dutch: *rechtsverwerking*).¹²⁹⁰ Under current legislation, during the pre-trial stage counsel can request to have his own expert examined in order to rebut the testimony of an expert called by the prosecutor.¹²⁹¹ Or he can ask the judge of instruction to appoint such an expert.¹²⁹² Such a request can be very helpful for counsel and the accused. However, it can also cause a fundamental dilemma due to the theory of a waiver.

In other words, the results of any expertise that the defence puts forward after he had requested counter expertise via the prosecutor or the judge of instruction, which might be incriminating, have to be included in the dossier.¹²⁹³ The judge can deem counsel to have been too late in requesting what in the Dutch context would be called a contra expertise at the trial stage while this decision has binding effect on the accused. Under such circumstances, the accused's rights to examine the evidence against him and to introduce exculpatory evidence could be at stake.¹²⁹⁴ Consequently, counsel might no longer feel free to wait until the opportune stage to request a contra expertise, such as at the trial phase. He might have reasonable grounds to believe that his trial request will be ruled out of time.

Taking this reasoning into account, a trial judge, who is confronted with a defence request for an expert to be heard, should, in principle, not be allowed to reject it by arguing that it has not been made at the first available moment. The court should indulge every reasonable assumption against the waiver that the defence wanted no expert to be involved. Rather, it would have to assume that the defence wanted to have an expert at the moment that was most opportune for the defence. Moreover, if the judge can find that by omitting to do so the defence – and *de facto* counsel – has waived the right of the accused to ever hear the expert, the rights of the accused can end up being harmed.¹²⁹⁵ It can be problematic to require a pre-trial proactive role for counsel combined with a trial judge who can decide in hindsight that counsel must have waived the right of the accused. The accused has a personal right to have the evidence against him examined. There is no reason to believe that he waived his right, because counsel failed to ask for the involvement of an expert at the earliest available stage. Under such circumstances, the accused would have to bear the consequences of counsel's conduct because it would then come at the "procedural risk" of the accused.¹²⁹⁶

However, what about the fairness of the criminal procedure against the accused if counsel is being held responsible by the trial judge for an alleged omission to act during the pre-trial stage? If the accused cannot, or can no longer, invoke his personal right to have a contra expert heard in court, is there no role to play by the court as under its own role in a fair criminal procedure?¹²⁹⁷

It is "only" the accused who has the ultimate say about his personal rights, also pre-trial, so that the lawyer should not normally be deemed to have renounced a right on the accused's behalf. Therefore, counsel should in principle have the freedom to decide if and at what procedural stage to request a contra expertise, while respecting the rights, interests and wishes of the accused.

Effective legal assistance requires that counsel neither assists in gathering incriminating evidence against the accused nor misses out on an opportunity to ensure a proper examination of the evidence against the accused. Therefore, this reasoning about the theory of the waiver raises issues with the right of the accused. From a rights perspective, this theory of the waiver prompts questions which will be reserved for chapters 10 and 12.

This particular perspective on counsel's responsibilities, primarily at a potentially more contradictory trial stage, also has an influence on the right to legal representation in cases *in absentia* in Dutch criminal procedure. Instead of being together at the more contradictory court session, this arrangement allows for counsel to act without (immediate) instructions from the accused on the basis

¹²⁹⁰ Franken, in: Jordaans et al (2005) at 161-169, particularly at 168.

¹²⁹¹ Article 150a (3) Sv.

¹²⁹² Article 231 Sv.

¹²⁹³ Franken and Röttgering, in: Prakken and Spronken (2009) at 245-246.

¹²⁹⁴ See e.g. Article 6 (3) (d) of the Convention.

¹²⁹⁵ See for this reasoning: Groenhuijsen and Knigge (2001), at 497-588 and for this risk: Van der Meij (2010), particularly at 569.

¹²⁹⁶ See for this concept of being at the procedural risk of the accused (in Dutch: *rechtsverwerking*), Van der Meij (2010), particularly at p. 393.

¹²⁹⁷ See Vellinga-Schootstra (2010) at 439-456; Van Kempen (2011) at 8-24; Van der Kruijs (2011) at 3-6; Van Kampen (2011) at 29-35; De Jonge and Van Nederpelt (2011) at 41-47.

of what the counsel perceives to be the scope and content of the authorisation.¹²⁹⁸ There does not have to be a problem with effective legal representation *in absentia* if counsel is of the opinion that he has sufficiently prepared the case together with the accused. Furthermore, if counsel considers himself to be authorised, he can vigorously defend the absent accused.¹²⁹⁹

However, there can be a risk with the way in which the lawyer represents the absent accused that can come at the procedural risk of the accused.¹³⁰⁰ What if, retrospectively, the accused disagrees with the manner in which the lawyer has represented him in his absence? The explanation given to the statute is that the accused can thereupon find a solution in a complaint under disciplinary law (especially when this happens on appeal and no further factual instance is open to the accused).¹³⁰¹ However, as demonstrated above, disciplinary law – like civil law – has no bearing on the course or outcome of the criminal procedure.¹³⁰² From a rights perspective, questions arise about this arrangement about *in absentia* legal representation by counsel to the accused, which will be reserved for subsequent chapters (chapters 9 and 10 as well as 11 and 12).

As a penultimate issue, the ideas formulated above regarding counsel's responsibilities at a potentially more contradictory trial phase also have an impact on the existing scheme of mandatory legal assistance during an appeal in cassation. The relationship between counsel and the accused mostly rests on the voluntary choice of the accused to opt for counsel. As has been stressed many times above, Dutch law entitles the accused to legal assistance – it is not an obligation. However, legal assistance is obligatory, such as at this stage before the Hoge Raad. For an accused person who is deprived of his liberty during the pre-trial stage, mandatory legal assistance can be justified by the fact that he cannot seek his own evidence to counter the forthcoming accusation. However, for any other circumstances the grounds for mandatory legal assistance and the lawyer-client relationship in appeals in cassation (when often no such evidence has to be sought because the proceedings concern issues of law only) cannot be easily explained.¹³⁰³ One of the most pertinent issues will be where counsel, contrary to the wishes of the accused, does not want to submit grounds for an appeal in cassation to the Hoge Raad.¹³⁰⁴ Under such circumstances, the effect of mandatory legal assistance is most stark.

Scholarly opinions about such a disagreement between the accused and counsel in relation to cassation are diverse. Verstraeten wants counsel to mention that he has lodged an appeal in cassation due to the express wish of the accused.¹³⁰⁵ Spronken turns to disciplinary cases in civil law.¹³⁰⁶ She considers that counsel should not note such an explicit basis because that would not benefit the unity of the defence. Elzinga opts to allow counsel to decide whether there is a defensible position for the defence which deserves an appeal in cassation.¹³⁰⁷ That decision by counsel would also allow the Hoge Raad to determine the issue.

Unlike the aforementioned scholars, it is also important to emphasise a rights perspective. The accused has a personal right to lodge this legal remedy. Therefore, the accused should be able to decide whether or not he wants his appeal in cassation to be adjudicated by the Hoge Raad. The accused should therefore be central in these considerations about a disagreement between the accused and counsel in relation to cassation.

If counsel considers that an appeal in cassation will evidently result in unreasonable action¹³⁰⁸, he should give reasons to the accused¹³⁰⁹ in good time. Under such circumstances, the accused will have an opportunity to find another lawyer who can assist him.

¹²⁹⁸ TK 1996/1997, 24 692, nr. 6, at 6.

¹²⁹⁹ For an *in absentia* defence, the accused will have to authorize counsel, see e.g. the Hoge Raad's case of HR 8 December 2009, ECLI:NL:HR:2009:BK5617, NJ 2010, 175 m.nt. Schalken. Moreover, the court can reject the request to stay the proceedings by the lawyer who has been authorized to defend the accused *in absentia*, if the lawyer does not explicitly argue that the accused wanted to be present, as follows from the Hoge Raad's case of HR 5 January 2010, ECLI:NL:HR:2010:BK2145, NJ 2010, 176 m.nt. Schalken.

¹³⁰⁰ TK 1996/1997, 24 692, at 7-8; *Kamerstukken I* 1996/1997, 24 692, nr. 228b, at 3.

¹³⁰¹ TK 1996/1997, 24 692, at 7-8; *Kamerstukken I* 1996/1997, 24 692, nr. 228b, at 3.

¹³⁰² See sub-section 4.3.1.

¹³⁰³ De Roos (1991) at 21.

¹³⁰⁴ Spronken (2001) at 287.

¹³⁰⁵ Verstraeten (2002) at 540.

¹³⁰⁶ Spronken (2001) at 540.

¹³⁰⁷ Elzinga (1998) at 1-357, particularly at 340.

¹³⁰⁸ Mout, in: Enschedé et al (1987) at 383-391, particularly at 388; and Spong, in: Klip et al (2004) at 79-86, particularly 82-84.

Given the aforementioned relationship between the accused and his lawyer, it seems fair that the Hoge Raad ought not to construe the conduct of counsel who does not want to submit grounds for an appeal in cassation as a waiver of this right to lodge a legal remedy of the accused.¹³¹⁰ Therefore, the responsibility of counsel, who has accepted the task of drafting the notice of appeal, would accordingly be to formulate it to the best of his ability or to refer the accused to another lawyer. The accused should be able to expect that from his cassation lawyer.

8.4.3. The impact of the emphasis on trial responsibilities on waivers

This particular idea regarding the role and conduct expected of counsel in Dutch criminal procedure is largely in disagreement with a perspective promoted by the research project *Strafvordering 2001*¹³¹¹ in so far as a lack of a proactive pre-trial role by counsel can be understood by the trial judge as a waiver of a defence right (in Dutch: *rechtsverwerking*).¹³¹² This disagreement might stem from what foreign scholars often do when they ascribe counsel's rather passive role – especially during the pre-trial stage – to the inquisitorial origin of (Dutch) criminal procedure.¹³¹³ Contrary to the theory of the waiver, a more active pre-trial role for counsel would not easily fit in the entire proceedings because in this way legal tradition continues to have an important influence on the current procedure.¹³¹⁴ This principled idea of the responsibilities of counsel towards the accused regarding how to plead the defence, which explains his position in relation to the – personal – rights of the accused, requires compliance with the freedom of the defence in a *Rechtsstaat*.¹³¹⁵ The freedom of the defence corresponds with the notions underlying criminal law and deontology, also in so far as the Code of 1926 indicates the relation of the lawyer towards the other participants and the accused. The freedom of the defence centralises the position of the *accused* in the criminal procedure and indicates how the lawyer is his adviser. The accused takes the decisions relating to his defence and thus especially his personal rights which counsel should not renounce – or exercise for that matter – on the accused's behalf. This distinction can translate in responsibilities of counsel owed to the accused that concern the personal rights of the accused versus responsibilities that rather concern the strategy of the defence without an impact on such personal rights.

The *Strafvordering 2001* scholars Groenhuijsen and Knigge do not use this distinction explicitly, but give an explanation that could accommodate it, as follows.¹³¹⁶ They argue that the judge should test the defence only “marginally” because of the confidentiality between counsel and the accused. That confidentiality means that the lawyer cannot always present all interests of the defence in court.¹³¹⁷ They submit that this is especially true if, in all reasonableness, it is questionable whether an “objective interest” of the defence can be at stake where the judge has to afford counsel all freedom. That objective interest could lie in the personal rights of the accused, because the judge might have to go beyond that marginal test only if without it rights could be harmed about which the accused – and thus not his lawyer – has a personal say.

The distinction between counsel's responsibility for the strategy of the defence, on the one hand, and the accused's ultimate say about his personal rights, on the other, can hardly be made in the abstract. However, in specific cases it might be helpful to use this in order to determine when that so-called objective interest is at stake. It therefore appears to be relevant to explore how the regulation of the lawyer-client relationship in Dutch criminal proceedings compares with the rights-based approach thereto of the Court. After the conclusion regarding this chapter (section 8.5.), such a comparison will be made in the last section of this chapter (section 8.6.).

¹³⁰⁹ Hof van Discipline, 18 March 1991, Lawyers Act 1992, at 552.

¹³¹⁰ Article 437 (2) Sv.

¹³¹¹ E.g. Groenhuijsen and Knigge (2001) at 497-588.

¹³¹² Groenhuijsen and Knigge (1999) at 35.

¹³¹³ E.g. Hodgson, in Grunewald (2008) at 45-59 and Field and West (2003) at 261-316.

¹³¹⁴ See above in section 6.4.

¹³¹⁵ See for this term also section 2.2. Spronken, in: Mols and Wladimiroff (1998) at 191-202, particularly at 200.

¹³¹⁶ Groenhuijsen and Knigge (2004) at 90.

¹³¹⁷ Groenhuijsen and Knigge refer to Spronken (2001) at 327-328, who takes into consideration the annotation by 't Hart to HR 12 January 1999, ECLI:NL:HR:1999:AC2332, *NJ* 1999, 450.

8.5. Conclusion

This conclusion aims to answer the leading question for this chapter: What, if any, responsibilities does counsel owe to the accused in Dutch criminal proceedings?

The answer to this question is fourfold, following the outline of the chapter that has emerged from taking a horizontal perspective that explores the relationship between counsel and the accused.

First, it is important to note that the accused's right to retained counsel includes the right to select counsel of "one's own choosing". However, that right is not absolute, as the example of permissible scheduling requirements seem to indicate. The accused's right to appointed counsel of the accused's choice is not granted under Dutch law. Moreover, this right to a legal aid lawyer is also necessarily subject to certain limitations because it is for the authorities to decide whether the interests of justice require that the accused be defended by counsel appointed by them because of the directly binding Convention in the Netherlands. Consequently, Dutch law requires that the accused is assisted by an appointed lawyer, without requiring that he is capable of providing effective legal assistance, and the accused is not always entitled to the appointed legal aid lawyer of his choice.

Second, an important, but partial answer to the leading question of this chapter, appears to be that the line that appears to emerge from this chapter is that counsel has responsibilities in relation to confidentiality and privilege. However, Dutch law and deontology do not seem to indicate *how* counsel should provide legal assistance within the criminal process. Also, Dutch law and deontology do not appear to delineate what types of decisions fall within the realm of the control of counsel and the accused. For example, this chapter has not been able to assess whether counsel can be held responsible for the defence strategy or that Dutch law and deontology would require that the accused has an ultimate say about rights that are so personal to him that only he should decide as to how to exercise these rights. Dutch law and case law do see the defence as a unity. That unity might even be almost absolute, though there is an acknowledgment of the fact that the accused should be the leading person in the defence where consisting also of counsel. This last point also leads to the third issue of the role division between the accused and his lawyer.

Third, for this partial answer, it is also noteworthy that the role division between counsel and the accused is not fully clear under Dutch law and deontology. Hardly any distinction appears to be made between what can be expected of either counsel or the accused under Dutch law and deontology. Both Dutch law and deontology explain how counsel should give priority to the rights, wishes and interests of the accused. However, they do not give a good indication as to what responsibilities counsel owes to the accused within the lawyer-client relationship and what decisions are for the accused, who is seen as leading person in the defence, to decide upon. Moreover, responsibilities of counsel towards the accused are being shaped further in the relationship between counsel and the other participants and the accused. The latter means that counsel is somewhat dependent on the authorities for certain defence activities such as hearing of witnesses.

As a fourth and final point, there appears to be an agreement that, within that unity of the defence, that Dutch procedural law and deontology as well as the relation between counsel and the other participants and the accused find the accused to be the leading person in the defence, the *dominus litis*. This means that counsel should further the rights, interests and wishes of the accused without acting contrary to the law and deontological norms, as explained in this conclusion. Consequently, the emphasis in this respect appears to be placed on the freedom of counsel not to take on or to withdraw from the case, if he does not want to follow the instructions of the accused regarding how to exercise personal rights of the accused.

In this respect, it has to be pointed out that, both in content and in scope, Dutch procedural law and deontological norms do not set out in detail what conduct of counsel amounts to ineffective assistance by counsel in Dutch criminal proceedings. Clear examples of prohibited counsel aside – e.g. that the lawyer cannot breach criminal law and deontological norms, simply put – there are hardly any performance standards of counsel under either the Code or codes of conduct. Consequently, only a partial answer can be provided to the leading question of this chapter regarding the obligations of the lawyer towards the accused in ensuring the effectuation of the accused's effective defence in Dutch criminal proceedings.

For the continuation of this research, it has to be highlighted that this chapter has hardly been able to establish what ineffective legal assistance in Dutch criminal procedure actually entails and whose decision it is that it was actual, rather than alleged. Therefore, this examination will have to

follow in the subsequent chapters regarding Dutch criminal proceedings (chapters 10 and 12). Before getting to such subsequent chapters, however, the present chapter will end with an overall conclusion for this Part IV Lawyer-client relationship (see section 8.6.).

8.6. Overall conclusion Part IV Lawyer-client relationship

This overall conclusion sets out to answer the guiding question for both chapters on the Convention and Dutch criminal proceedings respectively: What, if any, responsibilities that are most relevant for the subject of ineffective legal assistance does counsel owe to the accused so that an effective defence within criminal proceedings can, in principle, be guaranteed?

A horizontal perspective has been taken in order to assess the aforementioned responsibilities regarding an effective defence within criminal proceedings owed by counsel to the accused in that lawyer-client relationship. A comparison will be made here on the basis of both chapters as to counsel's responsibilities towards the accused under the Convention and in Dutch criminal proceedings, combining in particular the two concluding sections of the respective chapters (sections 7.4. and 8.5.). Conforming with chapter 2 on the conceptual framework, which has provided a structure for this research upon aspects such as the relevant rights, context and cross-cutting notions and perspectives, this overall conclusion will not extend to an evaluation. An examination of the compliance of Dutch criminal proceedings with the Convention on this topic will only be done in the final chapter when the central research question will be answered (chapter 13). It has to be noted that any answer sought to the aforementioned central question for this Part IV Lawyer-Client Relationship takes into consideration the factors that affect conclusions that can be drawn on the basis of the case law of the Court and the contextual background information provided about Dutch criminal proceedings (chapters 3 and 4). The current overall conclusion will serve as an important component of that last chapter. After all, the two related main research themes – ineffective legal assistance and its redress in Dutch criminal proceedings – had to distinguish actual from alleged instances which relies on determinations as to which conduct counsel can reasonably be held responsible for. For that reason, the answer to the aforementioned descriptive question will here be provided by following the fourfold outlines of the previous and this chapter.

First, both under the Convention and Dutch law and case law the accused has a right to retain counsel, which includes the right to select counsel of “one’s own choosing”. This right is not absolute, neither under the Convention nor under Dutch law and case law, as the examples of permissible scheduling requirements under both headings can indicate. The fair and effective administration of justice can thus trump the right of the accused to obtain legal assistance by preferred counsel under both the Convention and Dutch law and case law. With regard to the right to appointed legal aid counsel, it is important to note that Dutch law does not require that legal aid counsel is of the accused’s choice, as the Convention normally does seem to require. Under both headings, this right is necessarily subject to certain limitations, however, because it is for the authorities to decide whether under the Convention the interests of justice require that the accused be defended by counsel appointed by them. Consequently, both the Court and Dutch law and case law require that the accused is assisted by an appointed lawyer who is capable of providing effective legal assistance, rather than requiring that the accused always has the appointed legal aid lawyer “of his own choosing” who, however, is being supposed to provide the best possible defence, in principle.

Second, while the accused is usually free to opt for legal assistance, where he does the Court can hold counsel responsible for defence strategy (e.g. *Stanford v. the United Kingdom*; section 7.3.). It is noticeable that Dutch law and deontology do not seem to be explicit as to counsel’s control over defence strategy. In other words, the cited Convention cases seem to determine how the Court can hold counsel ultimately responsible for decisions that can reasonably fall within the realm of control of the lawyer because they concern defence strategy which is not dealt with in the same way in the Netherlands.

Third, having seen the two previous concluding sections of the two chapters, a comparison must be made between the approach by the Court and Dutch criminal proceedings to the lawyer-client relationship. The Court appears to hold a division of roles between counsel and the accused which consists of the lawyer having control over strategy and the accused being the ultimate decision-maker about personal rights. Dutch law and deontology do not appear to regulate either, so this particular examination will be continued in the context of the exploration of Dutch case law on the two other

elements of an effective defence in a fair trial (chapters 10 and 12). However, the Court's case law also suggests that certain decisions, though they have a strategic element, are so "personal" that counsel must abide by the accused's wishes. Such decisions that fall within the control of the accused concern "personal" rights such as the right to remain silent, the right not to incriminate oneself, the right to attend a hearing, and the right to appeal. Dutch law and case law do not appear to make that distinction between the lawyer as advisor and strategist and the accused as decision-maker about "personal" rights at least. An example of how the Hoge Raad, differently than the Court, does not seem to require that lower courts examine with reasons in their verdict, is that scheduling requirements that result in a lack of assistance by counsel of the accused's choice do not damage the accused's personal rights (*Requested stay to obtain a new lawyer-case*, seen by comparison with *Requested stay to obtain a lawyer-case*; sub-section 6.2.2.1.).

As a fourth and final point, Dutch law and case law indicate that the responsibilities of counsel towards the accused are being guided by the principles of independence and partisanship underlying both procedural law and deontology, as well as the relationship between counsel and the other participants and the accused. Consequently, the accused has to be the leading person in the defence: the *dominus litis*. Accordingly, counsel should further the rights, interests and wishes of the accused without acting contrary to the law and deontological norms. As a result, the idea underlying the Court's case law (regarding the role division of counsel's control over strategy while the accused is decision-maker for his personal rights) does not seem to be structurally impossible in Dutch criminal proceedings because of the aforementioned implied principles of independence and partisanship at least. Given that this chapter on Dutch criminal proceedings cannot yet provide an answer as to how actual and alleged ineffective legal assistance can be distinguished, the remainder of this research will have to explore that issue (chapters 10 and 12).

Therefore, those two benchmarks provided by the Court's case law will be taken into consideration during the further exploration of what entails ineffective legal assistance and its redress in Dutch criminal procedure. First, under the Convention's minimum guarantees there appears to be no actual, rather than supposed, ineffective legal assistance if the decision of counsel reasonably falls within defence strategy over which the lawyer has control, even if it goes against the accused's wishes. Second, there does appear to be actual, rather than supposed, ineffective legal assistance if a decision by counsel – that might have a strategic element – results in damage to a "personal" right of the accused. These preliminary findings will have to be verified on the basis of additional case law of the Court in order to see whether a *vertical* perspective also confirms the existence of these two benchmarks, especially as underpinned by the right to substantive *effective* legal assistance. This will be done in the next Convention chapters (chapters 9 and 11). Furthermore, the following chapters on Dutch criminal proceedings will have to explore further how case law in particular can potentially separate actual from alleged ineffective legal assistance as well but in the criminal process in the Netherlands (chapters 10 and 12).

On a final note, it is important to realise that this conclusion regarding the lawyer-client relationship under the Convention and in Dutch criminal proceedings, as explained in this corresponding Part IV, will be relevant for the subsequent examinations. In turn, these explorations will address the possible negative and positive obligation of the authorities towards the accused in relation to the right to *effective* legal assistance (Parts V and VI). The next chapter will start with the first theme, by exploring State interference with counsel under the Convention (chapter 9).

PART V STATE INTERFERENCE WITH COUNSEL

CHAPTER 9. STATE INTERFERENCE WITH COUNSEL UNDER THE CONVENTION

9.1. Introduction

This chapter builds on the previous chapters and shifts back to what will be a second vertical perspective in order to explore how the Court deals with State interference with counsel or, as it has been called above by the Court, “(...) the negative obligation of the State not to hinder effective assistance from lawyers” (see sub-section 5.3.2.2.). This topic is particularly relevant for this research into ineffective legal assistance and its redress in Dutch criminal proceedings, because scholars such as Prakken and Spronken argue that hardly any intervention in the case by the authorities is legitimate because they almost always and inevitably constitute State interference with counsel.¹³¹⁸ To explain this difference further, an obligation of the State to not hinder effective assistance from lawyers (negative obligation) might be quite different from an obligation of the State to not be passive when confronted with ineffective assistance from lawyers (positive obligation). However, scholars such as Prakken and Spronken appear to submit that any actions by the authorities almost inevitably violate the freedom of the defence, unless, for example, authorities prevent the disturbance of the order of the court or deal with the use of competencies by counsel that cannot reasonably assist the accused in any legal interest that is worthy of protection.¹³¹⁹ This particular interpretation, that does not distinguish between State interference and intervention, is important because it forms a significant basis for the related idea which normally appears to be followed in Dutch criminal proceedings. This is the idea that the authorities are required to intervene “only” in the case when “(...) the lawyer is absent or otherwise does practically nothing at all for the accused”.¹³²⁰ Before this last central issue for this research into ineffective assistance by counsel can be dealt with, it must be explored whether the Court holds that the authorities should not interfere with counsel because it amounts to ineffective legal assistance *per se*, which can, contrary to what Prakken and Spronken argue perhaps, consist of more than “only” instances where the lawyer is absent or is almost fully inactive.¹³²¹ Therefore the leading question for this chapter, which is sought to be answered below, is: What obligations do the authorities owe to the accused so that they do not hinder an effective defence by interfering with counsel under the Convention?

This chapter will draw on several findings that were presented in the previous substantive research chapter on the Convention (chapter 7), in which it has been established what the Court considered regarding the lawyer-client relationship in terms of the choice of retained and the selection of appointed counsel (section 7.2.). Moreover, how the Court can hold counsel responsible for defence strategy and have the accused bear the consequences of such conduct of the lawyer will be taken into consideration (section 7.3.). Ultimately, the findings about the divisions of roles between the lawyer as advisor and the accused as decision-maker regarding rights that are so “personal” that only the accused, rather than counsel, has the final say about them, will also be taken into account.

A first indication will be given here of the important aspects of the conceptual framework of relevant rights, context and cross-cutting notions and perspectives. Most attention will be paid to the right to a lawyer-client relationship without State interference. The other aspect regarding the right to effective legal assistance especially, will be focused on more in the next substantive research chapter regarding the Convention (chapter 11).

Intentionally, this chapter mirrors the topics that will be discussed under the second vertical perspective towards Dutch criminal procedure (see chapter 10). Ultimately, this structure will enable a comparison between these two chapters, so that an evaluation can follow in the last chapter of this book (chapter 13).

¹³¹⁸ Prakken and Spronken (2009) at 15-16.

¹³¹⁹ Prakken and Spronken (2009) at 16 and Spronken (2001) 330-333.

¹³²⁰ Spronken (2001) at 447 and 464. See also this same view reiterated in Prakken and Spronken, in: Prakken and Spronken (2009) at 15.

¹³²¹ Prakken and Spronken, in: Prakken and Spronken (2009) at 15. Despite the fact that Prakken earlier explained that the Court does not just require a formal right to legal assistance but a substantive right to *effective* legal assistance in Prakken (1999), at 12-13.

Outline

This chapter consists of four more sections. The first section will delve into State interference with counsel by means of state-imposed restrictions on counsel (section 9.2.). Subsequently, this chapter will turn to defective appointment of legal aid counsel (section 9.3.). Thereafter, an exploration regarding State interference in the lawyer-client relationship will follow (section 9.4.). Finally, a conclusion will be drawn on the basis of these sections (section 9.5.).

9.2. State-imposed restrictions on counsel

When examining possible responsibilities owed by the lawyer towards the accused under the lawyer-client relationship, it has already been highlighted that under the Convention the authorities must avoid, as far as possible, interfering in the freedom of the defence by either unassisted or assisted accused. It was also explained that where the defence consists of the assisted accused and his lawyer, the authorities should accordingly also prevent any *interference* with counsel and thus prevent meddling in the lawyer-client relationship. Therefore, for the assisted accused, both the freedom of the defence and the privileged lawyer-client relationship are important notions that must be respected.

The issue of state-imposed restrictions on counsel will here be explored on the basis of the case of *Hüseyn and Others v. Azerbaijan*.¹³²² The relevant facts of the case are that four accused persons, *Hüseyn* and *others*, were suspected of having organised mass disorder resulting in injuries to numerous people and damage to property. Their lawyers contended that they could not provide *Hüseyn* and *others* with effective legal assistance because of the restrictions placed upon them by the authorities. All of the applicants' lawyers, starting from the domestic court's very first preliminary hearings and at various times throughout the trial proceedings, repeatedly complained about the limited time and facilities for the preparation of the defence. In addition, the lawyers alerted the domestic court to the issue that the police had applied pressure outside of the courtroom, for instance, by assaulting them. These complaints by the lawyers of *Hüseyn* and *others* eventually culminated in the refusal to deliver closing speeches at the hearing by three out of four lawyers. The lawyers did not formally withdraw their services, but remained as the representatives of *Hüseyn* and *others*. Consequently, after their refusal to act for the accused persons, the lawyers no longer actively participated in the remainder of the trial hearings. The domestic court rejected the lawyers' application as being groundless, holding that the lawyers had in fact been able to provide effective assistance to the accused. The lawyers had, supposedly, ample opportunity to consult the investigation file. The domestic court stressed that they could participate in oral arguments and should not have refused to assist the accused persons at this late stage of the proceedings. Finally, the domestic court considered that the lawyers did not have a good reason for acting in this way which allegedly amounted to "shirking their duties". *Hüseyn* and the *others* were convicted.

Hüseyn and the *others* complained before the Court that they had not had effective legal assistance at the hearing. Thus, as the submission read before the Court stated, the authorities had deprived them of their right to an effective defence by means of legal assistance.

The Government refuted this by reiterating the arguments that the domestic court had also used.

The Court held that:

"(...) irrespective of whether any or all of the lawyers' claims about alleged obstacles to the adequate performance of their job had any merit, their eventual refusal to give closing addresses and to actively participate in the trial in other ways from that moment clearly resulted in a situation where the accused *were left without any effective legal assistance during a considerable portion of the trial*. The applicants' inability to receive effective representation was thus manifest and was brought to the Assize Court's attention in a clear manner, namely by way of repeated complaints and applications in this regard made by both the applicants and their lawyers and by the very fact of the lawyers' refusal to take part in the oral submissions. (...) While the State cannot be held responsible for the quality of representation by a lawyer of the

¹³²² *Hüseyn and Others v. Azerbaijan*, Judgment of 26 July 2011, HUDOC nos. 35485/05 35680/05 36085/05 45553/05.

applicant's own choosing, *it should nevertheless ensure that such a lawyer has an opportunity to fulfil his or her obligations in the best possible conditions*. Where it is clear that the lawyer is unable to represent his client effectively owing to the lack of time and facilities to organise a proper defence, *appropriate positive measures* should be taken to remedy the situation [emphasis added by the author]”.¹³²³

The Court considered that no such remedy was provided by the domestic court. Its verdict was at the very least “(...) superficial and contradictory” in nature, according to the Court. Also, that verdict served only as a perfunctory approach to the matter that revealed an apparent lack of concern by this domestic court. The Court held the domestic court responsible for failing to attempt to independently and comprehensively assess the alleged problems repeatedly raised by both the accused and their lawyers.¹³²⁴ According to the Court, the domestic court ought to have ensured:

“(...) at least a certain level of examination (...) of the specific allegations made by the lawyers; for example, the Assize Court should have requested and had regard to detailed information on the time and facilities afforded to them for consulting the prosecution evidence. Should the Assize Court have concluded that there had indeed been obstacles preventing the lawyers from doing their work properly, it should have attempted to remedy the situation by removing those obstacles. For example, it could have adjourned the hearings for a certain period in order to allow the lawyers to familiarise themselves with the case file to a sufficient extent. (...)”¹³²⁵

Therefore, the Court concluded that there has been a violation of Article 6 (1) taken together with Article 6 (3) (c) of the Convention because *Hüseyn and others* were deprived of effective legal assistance.¹³²⁶ This particular remedy – an adjournment allowing the lawyers to familiarize themselves with the case – will have to be revisited when the issue of ineffective assistance by counsel will be addressed (chapter 11). At this stage of the research, it is worth emphasising that, for this issue of State interferences, the Court has held that the domestic court must not hinder the lawyer in providing the accused with an effective defence, especially at the adversarial trial hearing or hearings.¹³²⁷ The Court considered that the (judicial) authorities should not interfere with criminal defence lawyers who have a “(...) duty to defend their clients’ interests zealously” because:

“(...) It follows that it should be primarily for counsel themselves, subject to supervision by the bench, to assess the relevance and usefulness of a defence argument without being influenced by the potential “chilling effect” of even a relatively light criminal penalty or an obligation to pay compensation for harm suffered or costs incurred”.

The domestic court cannot impose a (threat of a)¹³²⁸ sanction that restricts or inhibits the lawyer's freedom to zealously defend the assisted accused's rights, interests and wishes (see section 7.3.).¹³²⁹ Where authorities place restrictions on counsel's freedom of expression in the form of (future) potential punishment, the effect can be that the accused is bereft of his right to an effective defence.¹³³⁰

¹³²³ *Hüseyn and Others v. Azerbaijan*, Judgment of 26 July 2011, HUDOC nos. 35485/05 35680/05 36085/05 45553/05, paras. 181 and 184.

¹³²⁴ *Hüseyn and Others v. Azerbaijan*, Judgment of 26 July 2011, HUDOC nos. 35485/05 35680/05 36085/05 45553/05, para. 182.

¹³²⁵ *Hüseyn and Others v. Azerbaijan*, Judgment of 26 July 2011, HUDOC nos. 35485/05 35680/05 36085/05 45553/05, para. 183.

¹³²⁶ See also *Nalbandyan v. Armenia*, Judgment of 31 March 2015, HUDOC nos. 9935/06 and 23339/06.

¹³²⁷ *Nikula v. Finland*, Judgment of 21 March 2002, HUDOC no. 31611/96, para. 54 including the two citations below.

¹³²⁸ *Nikula v. Finland*, Judgment of 21 March 2002, HUDOC no. 31611/96, para. 56.

¹³²⁹ *Nikula v. Finland*, Judgment of 21 March 2002, HUDOC no. 31611/96, para. 55.

¹³³⁰ *Panovits v. Cyprus*, Judgment of 11 December 2008, HUDOC no. 4268/04, para. 95.. See also Harris et al (2014), at 525 and McBride (2009) at 268-269.

9.3. Defective appointment of legal aid counsel

So far the rights to retained and appointed counsel have been dealt with largely in the same manner, but a specific issue, which is only relevant for appointed legal aid lawyers, has to be noted in the context of State interferences with counsel. Therefore, this section will examine how the Court deals with authorities, which are permitted under the Convention not to appoint a lawyer when there is a conflict of interest¹³³¹, who appoint legal aid counsel deficiently or not at all.

This issue of defective appointment of counsel by the authorities is relevant for this research into ineffective assistance by counsel within Convention-conforming criminal proceedings because of their intricate connection. The Court has held that the appointment of a lawyer is in itself “insufficient” to guarantee effective legal assistance, as was held in the *Artico*-case and as was explained above (see the introduction in chapter 1 and for more detail about this *Artico*-case in the following sub-section 11.2.1.).¹³³²

Therefore, it will be explored here what types of defective appointment amount to *per se* ineffective legal assistance according to the Court, so that domestic courts do not even have to assess whether the subsequent assistance by counsel was nonetheless effective because of the violation of Article 6 (3) (c) *per se*.¹³³³ After all, if the lawyer is appointed defectively, reasons may arise to conclude that counsel could not fulfil his responsibilities at all towards the accused under the lawyer-client relationship, such as related to defence strategy (see sub-section 7.2.3.1.).

The first case explored here, is that of *Jelcovas v. Lithuania*.¹³³⁴

Jelcovas was believed to have committed a robbery. After the first two rounds of proceedings, *Jelcovas* asked to be appointed a lawyer for the purpose of preparing an appeal in cassation. However, the authorities did not provide *Jelcovas* with a legal aid lawyer. *Jelcovas* handed in his own brief, which he had already personally drafted, after the deadline had expired. He mentioned that he wanted to appeal in cassation precisely because there had been issues with his right to legal assistance at earlier stages such as during pre-trial custodial interrogations which took place in the absence of a lawyer. For the purpose of the appeal in cassation hearing, the court did appoint a legal aid lawyer to represent *Jelcovas*. However, he refused his services. His conviction was upheld during appeal in cassation.

Jelcovas complained before the Court that he had not had an effective defence during the appeal in cassation stage.

The Government admitted that *Jelcovas* had informed the authorities earlier in the proceedings that the legal aid lawyer appointed to assist him early on in the proceedings had not actually provided him with legal assistance in bringing his action. The Government “(...) observed that the State could not be held responsible for every shortcoming on the part of counsel appointed for legal-aid purposes”. The applicant’s appeal in cassation was found to be in compliance with procedural requirements and was accepted for examination by the Supreme Court, because domestic law permits an applicant to lodge such an appeal on points of law by himself. The Government thought that there had been neither “(...) manifest deficiencies of representation” nor that the Supreme Court had been “(...) expected to intervene”. *Jelcovas* refused to have a legal aid lawyer appointed on his behalf and to be represented by a lawyer at the Supreme Court hearing. Therefore, the Government stated that “(i)n sum, and given that the applicant by his actions deliberately caused the situation in which the State authorities were left in obscurity in respect of the omission of the applicant’s officially appointed legal aid lawyer, the applicant’s complaint of inadequate legal assistance in the context of criminal proceedings for robbery was not founded”.

The Court examined *Jelcovas*’s complaint about the quality of the legal assistance provided to him during the proceedings, in particular at the appeal in cassation stage.¹³³⁵ The Court held that *Jelcovas* had notified the domestic courts of his difficulties with his defence by means of a brief.¹³³⁶ The Court found that *Jelcovas*, who was a lay person, could not be held accountable in the

¹³³¹ See *mutatis mutandis Lerschegger v. Austria*, Judgment of 28 September 1999, HUDOC no. 26644/95 and as such *Pavlenko v. Russia*, Judgment of 1 April 2010, HUDOC no. 42371/02, para. 107.

¹³³² *Pavlenko v. Russia*, Judgment of 1 April 2010, HUDOC no. 42371/02, para. 33.

¹³³³ *Artico v. Italy*, Judgment of 13 May 1980, HUDOC no. 6694/74, para. 34.

¹³³⁴ *Jelcovas v. Lithuania*, Judgment of 19 July 2011, HUDOC no. 16913/04, para. 123.

¹³³⁵ *Jelcovas v. Lithuania*, Judgment of 19 July 2011, HUDOC no. 16913/04, para. 123.

¹³³⁶ *Jelcovas v. Lithuania*, Judgment of 19 July 2011, HUDOC no. 16913/04, para. 124.

circumstances of the case for having submitted an appeal in cassation after the deadline had expired. After having expressed his wish for legal aid for the preparation of the appeal in cassation, *Jelcovas* could reasonably have been waiting for a legal aid lawyer to appear who would assist him with the drafting of the brief. The Court “understood” that *Jelcovas*, who had explained to the highest domestic court in his brief regarding his appeal in cassation that he had drafted the submissions in person, must have experienced:

“(…) distress when he had to prepare his cassation appeal and his defence strategy without any legal aid. The fact that the applicant refused a lawyer’s presence at the hearing before the Supreme Court is of no significance. It is natural that the applicant perceived as a mere formality participation at the hearing of a lawyer who had not helped him with drafting the appeal on points of law. Taking into account that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective (...), the circumstances of the case required that the applicant would be provided with proper and genuine legal backing (...)”.¹³³⁷

Therefore, the Court concluded that *Jelcovas* had notified the competent authorities of the difficulties with his defence and held that the authorities had made insufficient arrangements to ensure that *Jelcovas* had effective assistance by a lawyer at the appeal in cassation. Adequate assistance by counsel also entails preparation for this stage regarding an appeal on points of law only. The Court found a violation of Article 6 (1) taken in conjunction with Article 6 (3) (c). In so doing, the Court explored the consequences for the lack of legal aid after no lawyer had been appointed for the accused, and held that the latter was deprived of a fair trial as a consequence thereof.

Another relevant case for this exploration of appointment of a legal aid lawyer is *Karadağ v. Turkey*.

Karadağ was suspected of having stabbed a shop owner who was found dead in his store. The authorities appointed a legal aid lawyer to assist *Karadağ* at the pre-trial stage during which witnesses were heard. The appointed legal aid lawyer later turned out not to be a lawyer at all due to a situation of mistaken identity. However, the person in question did not inform anyone that he was not a lawyer. The case needed to be retried due to the erroneous appointment of this fake lawyer. However, the witnesses who had been examined earlier in the presence of the bogus lawyer were not re-examined. The subsequent lawyer acting for *Karadağ* during the retrial did not call for those witnesses to be heard again. The court convicted *Karadağ*, amongst other evidence, on the witnesses’ statements. *Karadağ* complained before the Court that his trial was unfair. The Government disagreed, without giving any reasons. The Court considered that:

“En effet, elle estime que le défaut d’audition des témoins lors de la seule phase du procès pénal au cours de laquelle le requérant était assisté d’un conseil présentant les compétences et qualifications juridiques d’un avocat véritable, a privé le requérant de la possibilité de présenter sa cause dans des conditions satisfaisant aux exigences des principes d’égalité des armes et du contradictoire”.¹³³⁸

The Court held that Article 6 (3) (d) in conjunction with 6 (1) had been violated. Thus, the authorities were to blame for not having appointed a real legal aid lawyer who could be present at a critical stage of the adversarial trial hearing during which the accused’s right to witness examination required that counsel could play a role. Accordingly, the court retrying the case should have provided the accused with a procedure in which witnesses were heard in a situation of equality of arms and “in an adversarial setting”. Despite the lack of sufficient requests by the real lawyer, who acted for *Karadağ* during the retrial in this respect, the authorities in general and the court in particular were considered to have their own obligations to ensure that *Karadağ* received a fair trial. *Karadağ* should have had the assistance of a real legal aid lawyer at the critical stage of witness examination, either pre-trial or subsequently at the retrial. It follows from this case that the lack of activity by the real, trial lawyer did not come at the procedural risk of the accused, because of the deficient appointment of counsel.

¹³³⁷ *Jelcovas v. Lithuania*, Judgment of 19 July 2011, HUDOC no. 16913/04, para. 126.

¹³³⁸ *Karadağ v. Turkey*, Judgment of 29 June 2010, HUDOC no. 24036/05, para. 54.

A last case that will be explored in this context of appointment of legal aid counsel is *Sannino v. Italy*.¹³³⁹

Sannino was suspected of fraudulent bankruptcy. Two hearings were held in *Sannino*'s case during which two different retained lawyers acted on his behalf. At both hearings, witnesses whom *Sannino*'s lawyers had requested to be heard were indeed summoned to court. After the last hearing, a retained lawyer, Mr G., withdrew from the case. The court thereafter appointed a new and legal aid lawyer, Mr B., so that only the latter conducted *Sannino*'s defence. Legal aid lawyer B. was informed of the date of the next hearing, but not that he had been appointed to assist *Sannino* at this hearing. *Sannino* was personally neither notified about the date of the hearing nor of B.'s appointment. Thereafter, B. failed to attend at least four hearings. The court appointed replacement legal aid lawyers at the hearings at which B. was absent. During one such hearing, *Sannino* made a number of spontaneous statements and a prosecution witness was heard. Ultimately, *Sannino* was convicted after the final hearing during which both *Sannino* and B. were absent.

Sannino complained before the Court about the lack of a fair trial. The Government disputed this submission, without providing any reasons. The Court held that:

“Mr B., the lawyer appointed by the court to represent the applicant, was informed of the date of the next hearing, but not of his appointment (...). That omission on the part of the authorities partly explained Mr B.'s absence, which led to the situation complained of by the applicant, namely, the fact that at each hearing he was represented by a different replacement lawyer (...). There was nothing to suggest that the replacement lawyers had any knowledge of the case. However, they did not request an adjournment in order to acquaint themselves with their client's case. Nor did they ask to examine the defence witnesses whom the District Court had given the applicant's first two lawyers leave to summon (...).”

Sannino, who had attended many of the hearings, had never informed the authorities of the difficulties he had experienced with his defence lawyers, according to the Court. The Court also mentioned that *Sannino* had failed to get in touch with his court-appointed legal aid lawyers to seek clarification from them about the conduct of the proceedings and the strategy of the defence as well as to contact the court registry to ask about the outcome of his trial. Although *Sannino* could have performed all such activities to ensure that he had effective legal assistance by his appointed legal aid lawyer, the Court found that:

“(...) the applicant's conduct could not of itself relieve the authorities of their obligation to take steps to guarantee the effectiveness of the accused's defence. The above-mentioned shortcomings of the court-appointed lawyers were manifest, which put the onus on the domestic authorities to intervene. However, there is nothing to suggest that the latter took measures to guarantee the accused an effective defence and representation”.¹³⁴⁰

The Court argued that the authorities were to blame for the manifest shortcomings in *Sannino*'s defence by all the different legal aid lawyers that the authorities had appointed, including B. The Court concluded that the authorities, which had defectively appointed the legal aid lawyers to represent the accused at certain hearings, prohibited *Sannino* from obtaining an effective defence at his trial hearings and thus that Article 6 (3) (c) had been violated.¹³⁴¹ It is noteworthy that the Court did not find that the accused had to bear the consequences of the conduct of his lawyers even though the accused did not openly disagree with counsel and did not alert the authorities. Rather, the authorities were held responsible for not appointing counsel correctly, and found that the authorities therefore had an obligation “to intervene” in the criminal case. This particular aspect of the intervention in the case

¹³³⁹ *Sannino v Italy*, Judgment of 27 April 2006, HUDOC no. 30961/03, para. 50, including the citation below.

¹³⁴⁰ *Sannino v Italy*, Judgment of 27 April 2006, HUDOC no. 30961/03, para. 51.

¹³⁴¹ See *Prežec v. Croatia*, Judgment of 15 October 2009, HUDOC no. 48185/07, para. 31.

will also have to be revisited in the next substantive research chapter on the Convention that discusses obligations of the authorities to intervene in the case when confronted with ineffective legal assistance (chapter 11).

This section has dealt with a range of problems with appointments of a legal aid lawyer. That range included not just a case of a very late appointment and no appointment at all because the accused had allegedly not repeated this request for a legal aid lawyer. It also encompassed the appointment of a person who turned out not to be a real lawyer at all or several lawyers whose manifest shortcomings were noticeable. In all these cases, the Court found a violation of the right under Article 6 (3) (c).

The authorities, which neglect to appoint a (real) legal aid lawyer or did so defectively, almost always violate the Convention *per se*. Thus, the Court appears to hold that, by deficiently appointing counsel, the authorities interfere with counsel so that the accused is prevented from obtaining the best possible defence in his case. This conclusion regarding prohibited interference by the authorities is important. It prompts the question as to how the authorities can protect the personal rights of the accused. An answer to this question appears to lie in the conclusions of the Court in the first case of restrictions placed on counsel and the first cited case regarding a belated appointment of legal aid counsel (*Hüseyn and Others v. Azerbaijan*¹³⁴² and *Jelcovas v. Lithuania*¹³⁴³). In these cases, the Court held that the domestic authorities had to intervene in the case because, for effective legal assistance to be guaranteed, counsel had to meet at least a minimum of proficiency with the legal services provided to the accused. Only with such an intervention in the case do the authorities ensure a fair criminal procedure “as a whole”. Examples of interventions in the case will have to be reserved for the next substantive research question regarding redress for ineffective legal assistance within Convention-conforming criminal proceedings (chapter 11). It will suffice to be observed here that the Court appears to argue that the authorities cannot do much once appointments have gone wrong. Often, it seems, the means of an intervention in situations of deficient appointments might therefore have to be an adjournment for counsel to prepare properly or a retrial.

9.4. State interference in the lawyer-client relationship

The previous substantive research chapters regarding the right to counsel under the Convention have already demonstrated that the Court finds it “critical” for the fairness of the criminal procedure “as a whole” that counsel can provide the accused with effective legal assistance during the adversarial trial hearing (chapters 5 and 7).¹³⁴⁴ Usually, this means that the accused should be able to obtain legal assistance as from the first police interrogation because “(...) neither the assistance provided subsequently by a lawyer nor the adversarial nature of the proceedings could counteract the defects which had occurred during his initial questioning” in the absence of counsel.¹³⁴⁵ This section will therefore explore a first case, which helps to determine what can constitute a pre-trial State interference in the lawyer-client relationship, which makes it almost impossible for the accused to be provided such an effective defence at an adversarial trial hearing. This case is *Can v. Austria*.¹³⁴⁶

The complaint before the Commission entailed that *Can* had not had effective assistance by counsel because a court official had listened in on two pre-trial detention consultations between counsel and the detained accused, *Can*.¹³⁴⁷ The Commission concluded that, in principle, subjecting the defence consultations to supervision by the domestic court is incompatible with the right to effective legal assistance under Article 6 (3) (c).¹³⁴⁸ However, some restrictions can be placed on contact and communication between a lawyer and the accused. In this case, the authorities had done so because of a risk of collusion and of absconding. The Commission nonetheless considered that the

¹³⁴² See above in sub-section 9.2.

¹³⁴³ See above in section 9.3.

¹³⁴⁴ *Lanz v. Austria*, Judgment of 31 January 2002, HUDOC no. 24430/94, para. 52.

¹³⁴⁵ *Mader v. Croatia*, Judgment of 21 June 2011, HUDOC no. 56185/07, para. 154.

¹³⁴⁶ *Lanz v. Austria*, Judgment of 31 January 2002, HUDOC no. 24430/94, paras. 88 and 89 with reference to *Campbell v. the United Kingdom*, Judgment of 25 March 1992, HUDOC no. 13590/88, para. 46 and Recommendation Rec(2006)2. See *Sakhnovskiy v. Russia*, Judgment of 2 November 2010, HUDOC no. 21272/03, para. 89 for appeal.

¹³⁴⁷ *Can v. Austria* (dec.), Commission’s report of 12 July 1984, HUDOC no. 9300/81, para. 57.

¹³⁴⁸ *Ibid.* See also *Rybacki v. Poland*, Judgment of 13 January 2009, HUDOC no. 52479/99, para. 59 and *Georgi Yordanov v. Bulgaria*, Judgment of 24 December 2009, HUDOC no. 21480/03.

accused should have had privileged meetings and thus not experience State interference in the lawyer-client relationship, because:

“The accused will find it difficult to express himself freely vis-à-vis his lawyer on the basic facts underlying the criminal charges because he must fear that his statements might be used, or might be forwarded for use against him by the court officer who is listening. Under these circumstances it is e.g. difficult to discuss with the accused the question whether or not it is advisable in his case to make use of the right of silence, or to advise him to make a confession. The counsel will find it difficult to discuss the defence in general”¹³⁴⁹.

Therefore, for the fairness of the criminal procedure “as a whole” of which the right to effective legal assistance is an intrinsic part, pre-trial privileged contact and communication between the lawyer and the accused are essential. The Commission held the authorities in violation of the right to a fair trial for invading in the lawyer-client relationship.

Interestingly, the Commission concluded on Article 6 while the complainant referred instead to Article 5. Consequently, the Court considered that restrictions on privileged contact and communication resulted in ineffective legal assistance *per se*, meaning that the damage done to the rights of the accused pre-trial cannot be “cured”, even by perfect subsequent legal assistance at the adversarial trial hearing.

The pre-trial interference in the lawyer-client relationship was such that no “cure” was and could have been provided. In addition to case law of the Court under Articles 5 and 6 regarding limitations on privileged contact and communication in criminal cases, Article 8 regarding privacy¹³⁵⁰ is applicable to all lawyers, including criminal defence lawyers. Privileged contact and communication between counsel and the accused is therefore protected by these two Convention rights of the right to a fair trial and the right to a private life.

9.4.1. The right to effective legal assistance and State interference in the lawyer-client relationship

The Court has consistently held that, as a general principle, a right to communicate with one’s advocate at the stage of police interrogations “(...) out of earshot” of a third person is one of the basic requirements of fair criminal proceedings “as a whole”.¹³⁵¹ This right to private and privileged communication with one’s lawyer relates to the right to effective legal assistance under Article 6 (3) (c)¹³⁵² in the following manner:

“If a lawyer were unable to confer with his client and receive confidential instructions from him without surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective”¹³⁵³.

Moreover, the Court links privileged contact and communication for the accused with his lawyer to the right of the accused to effective legal assistance, as follows:

“Effective legal assistance is inconceivable without respect for lawyer-client confidentiality, which “encourages open and honest communication” between them (...). In the present case the applicant had every reason to believe that his conversation

¹³⁴⁹ *Can v. Austria* (dec.), Commission’s report of 12 July 1984, HUDOC no. 9300/81, para. 56.

¹³⁵⁰ E.g. *Niemietz v. Germany*, Judgment of 16 December 1992, HUDOC no. 13710/88, paras. 29-33, *Halford v. the United Kingdom*, Judgment of 25 June 1997, HUDOC no. 20605/92.

¹³⁵¹ E.g. *S. v. Switzerland*, Judgment of 28 November 1991, HUDOC nos. 12629/87 13965/88, para. 48, *Brennan v. the United Kingdom*, judgment of 16 October 2001, HUDOC no. 39846/98, para. 58, *Öcalan v. Turkey* [GC], Judgment of 12 May 2005, HUDOC no. 46221/99, para. 133.

¹³⁵² *Brennan v. the United Kingdom*, judgment of 16 October 2001, HUDOC no. 39846/98, paras. 58 and 62, with reference to *S. v. Switzerland*, Judgment of 28 November 1991, HUDOC nos. 12629/87 13965/88, paras. 48.

¹³⁵³ *Brennan v. the United Kingdom*, judgment of 16 October 2001, HUDOC no. 39846/98, para. 58.

with the lawyers might be overheard. Such arrangements represented a serious obstacle for effective legal assistance during the detention proceedings”.¹³⁵⁴

The Court adds that, during hearings, “(...) the relationship between the lawyer and his client should be based on mutual trust and understanding”.¹³⁵⁵ Consequently, the accused is entitled, in principle, to have privileged confidential contact and communication with his lawyer before and during hearings – from the early criminal investigation until the ultimate appeal hearings.¹³⁵⁶ This is not a once-only right; the Court considers that an interference in such consultations even after a week of so-called prior “(...) unfettered contacts with his legal representation”, violates the Convention.¹³⁵⁷ In principle, privileged contact and communication is required before and during hearings, so that the criminal defence lawyer and the accused can exchange information and instructions confidentially and mostly in real-time.¹³⁵⁸ The question of when State interferences in the lawyer-client relationship breach privileged contact and communication between the accused and his lawyer, depends on factors that will be examined below.

- *What types of contact and communication are privileged?*

The Court has held that privileged communication includes (the exchange of) documents.¹³⁵⁹ Written correspondence between the accused and his lawyer “(...), whatever its purpose, (...) is always privileged”, according to the Court.¹³⁶⁰ Protection has to be guaranteed where such materials are in the premises of the lawyer’s office¹³⁶¹ or in counsel’s house if used as an office.¹³⁶² If a lawyer is subjected to a body search and the authorities encounter a written note, it also falls under privileged communication, as the case of *Khodorkovskiy v. Russia* demonstrates. In this case, after her visit to the accused *Khodorkovskiy*, the lawyer was searched because an inspector had seen the lawyer and client exchange “(...) a notebook with some notes, and also made notes in it” during their meeting. The Government argued that Ms Artyukhova had violated the law and could therefore not invoke lawyer-client privilege. They claimed she would allegedly have taken instructions on how to exert pressure on prosecution witnesses. The Court held that:

“(...) Ms Artyukhova’s note was to all intents and purposes privileged material, that the authorities had no reasonable cause to believe that the lawyer-client privilege was being abused, and that the note was obtained from Ms Artyukhova deliberately and in an arbitrary fashion. Despite the fact that the seizure of the note constituted an encroachment on Ms Artyukhova’s professional secrecy and on the applicant’s right to effective legal assistance, the note was admitted in evidence and used by the court to substantiate the second detention order without any discussion as to its admissibility and reliability. Against this background, the question of whether the note objectively contained any unlawful instructions to the applicant’s lawyers is not so important”.¹³⁶³

The Court concluded that this search and its effect on the accused’s right to privileged contact and communication resulted in ineffective legal assistance *per se*. The legal assistance provided to

¹³⁵⁴ *Khodorkovskiy v. Russia*, Judgment of 25 November 2007, HUDOC no. 5829/04, para. 232.

¹³⁵⁵ *Sakhnovskiy v. Russia*, Judgment of 2 November 2010, HUDOC no. 21272/03, para. 102.

¹³⁵⁶ See *S. v. Switzerland*, Judgment of 28 November 1991, HUDOC nos. 12629/87 13965/88 and relevant international soft law such as the Havana principle 22.

¹³⁵⁷ *Rybacki v. Poland*, Judgment of 13 January 2009, HUDOC no. 52479/99, para. 59.

¹³⁵⁸ E.g. *Istratii and others v. Moldova*, Judgment of 27 March 2007, HUDOC nos. 8721/05 8705/05 8742/05. See also *Castravet v. Moldova*, Judgment of 13 March 2007, HUDOC no. 23393/05, para. 47 with reference to *Winterwerp v. the Netherlands*, Judgment of 24 October 1979, HUDOC no. 6301/73, para. 60 and *Bouamar v. Belgium*, Judgment of 29 February 1988, HUDOC no. 9106/80, para. 60 and *Ramishvili and Kokhleidze v. Georgia*, Judgment of 27 January 2009, HUDOC no.1704/06, para. 129. See *Grauzinis v. Lithuania*, Judgment of 10 October 2000, HUDOC no. 37975/97, para. 34.

¹³⁵⁹ *Moiseyev v. Russia*, Judgment of 9 October 2008, HUDOC no. 62936/00, para. 208.

¹³⁶⁰ *Golovan v. Ukraine*, Judgment of 5 July 2012, HUDOC no. 41716/06, para. 210.

¹³⁶¹ *Niemietz v. Germany*, Judgment of 16 December 1992, HUDOC no. 13710/88, paras. 29-33. See also *Coster van Voorhout* (2008a).

¹³⁶² *Golovan v. Ukraine*, Judgment of 5 July 2012, HUDOC no. 41716/06, paras. 60-62.

¹³⁶³ *Khodorkovskiy v. Russia*, Judgment of 25 November 2007, HUDOC no. 5829/04, para. 201.

Khodorkovskiy could not be, or become, effective. Therefore, the authorities did not afford *Khodorkovskiy* his right to effective legal assistance, which is necessary for fair remand proceedings. The State was therefore held in violation of Article 5 (4).

A routine reading of the prisoner's mail to and from a lawyer by the prosecuting authorities raises an issue with equality of arms.¹³⁶⁴ The Court held that it constitutes a "(...) flagrant breach of confidentiality of the accused-attorney relationship which could not but adversely affect the applicant's right to defence and deprive the legal assistance he received of much of its usefulness".¹³⁶⁵

A similar issue with equality of arms arises when the authorities make privileged consultations in person dependent on a defence request to the prosecution for permission.¹³⁶⁶ A request for prior permission from the prosecution puts the defence "(...) in a position of dependence on, and subordination to, the discretion of the prosecution and therefore destroyed the appearance of the equality of arms", according to the Court.¹³⁶⁷ Moreover, asking for permission in practice results in "(...) considerable practical difficulties in the exercise of the rights of the defence because it detracted time and effort from pursuing the defence team's substantive mission".¹³⁶⁸ Not only was the procedure for prior permission excessively onerous for the defence but it also lacked a legal basis in domestic law and was "(...) therefore arbitrary".¹³⁶⁹ The "(...) control exercised by the prosecution over access to the applicant by his counsel undermined the appearances of a fair trial and the principle of equality of arms".¹³⁷⁰

Oral communications by the accused by means of a video link in the courtroom to his lawyer are also privileged because the accused has to be able to give his instructions and the lawyer his advice in a confidential manner.¹³⁷¹ The Court moreover accepts that the accused "(...) might legitimately have felt ill at ease when he discussed his case" with his lawyer via a "(...) video-conferencing system installed and operated by the State".¹³⁷² In the absence of privileged video-conferencing communication between lawyer and the accused, the provided legal assistance could not be, or become, effective. Therefore, the authorities do not provide an accused, who has reason to believe that his communication through a video link with his lawyer is overheard, with his right to effective legal assistance which is necessary for fair hearings in terms of Article 6.

Finally, the Court does not seem to require an actual interference for there to be a violation of the accused's right to effective legal assistance. In addition, a *genuine belief on reasonable grounds* about such interference can be sufficient, as follows from the case of *Castravet v. Moldova*.¹³⁷³ The detained accused in that case had to, prior to a remand hearing, discuss his case with his lawyer through a glass partition. Consequently, they had to shout to hear each other in the vicinity of prison personnel. The Court established that, in fact, the obstacles to effective communication between the accused and his lawyer did not hinder *Castravet's* lawyer in providing effective legal assistance in practice at the remand hearing.¹³⁷⁴ Nonetheless, the Court concluded that the authorities with their glass partition created "(...) real impediments" to *Castravet's* right to effective legal assistance, and thereby violated the right under Article 6 (3) (c).¹³⁷⁵ Hence, the Court can conclude that "(...) a genuine belief held on reasonable grounds" that the discussion between the accused and his lawyer was being listened to is a sufficient obstacle to the important right to effective legal assistance within criminal proceedings.¹³⁷⁶ Such a State interference in the lawyer-client relationship amounts to ineffective legal assistance *per se* and thus can be qualified as State interference.

¹³⁶⁴ *Moiseyev v. Russia*, Judgment of 9 October 2008, HUDOC no. 62936/00, para. 210.

¹³⁶⁵ See *Domenichini v. Italy*, Judgment of 15 November 1996, HUDOC no. 15943/90, paras. 37 and 39.

¹³⁶⁶ *Moiseyev v. Russia*, Judgment of 9 October 2008, HUDOC no. 62936/00, para. 205.

¹³⁶⁷ *Moiseyev v. Russia*, Judgment of 9 October 2008, HUDOC no. 62936/00, para. 205.

¹³⁶⁸ *Moiseyev v. Russia*, Judgment of 9 October 2008, HUDOC no. 62936/00, para. 205.

¹³⁶⁹ *Moiseyev v. Russia*, Judgment of 9 October 2008, HUDOC no. 62936/00, para. 206.

¹³⁷⁰ *Moiseyev v. Russia*, Judgment of 9 October 2008, HUDOC no. 62936/00, para. 207.

¹³⁷¹ *Zagaria v. Italy*, Judgment of 27 November 2007, HUDOC no. 58295/00, paras. 33 and 36.

¹³⁷² *Sakhnovskiy v. Russia*, Judgment of 2 November 2010, HUDOC no. 21272/03, paras. 103 and 104.

¹³⁷³ *Castravet v. Moldova*, Judgment of 13 March 2007, HUDOC no. 23393/05, para. 51.

¹³⁷⁴ *Castravet v. Moldova*, Judgment of 13 March 2007, HUDOC no. 23393/05, para. 97.

¹³⁷⁵ *Castravet v. Moldova*, Judgment of 13 March 2007, HUDOC no. 23393/05, para. 97.

¹³⁷⁶ *Castravet v. Moldova*, Judgment of 13 March 2007, HUDOC no. 23393/05, para. 91.

9.4.2. *Exceptions to the rule against State interference in the lawyer-client relationship*

This sub-section will explore accepted exceptions to the rule that the lawyer-client privilege is very important for the protection of the accused's personal rights and therefore cannot be restricted because it would then amount to State interference in the lawyer-client relationship. The Court has held that privileged contact and communication between the lawyer and the accused can legitimately be restricted for "(...) good cause".¹³⁷⁷ This sub-section will examine what constitutes "good cause", knowing that in general, under Article 8, the Court hardly accepts any interference in the lawyer-client relationship in all proceedings including criminal cases, unless for reasons such as national security.¹³⁷⁸

In an early decision, the Commission had accepted that contacts between the accused persons and their lawyer were prohibited because they were believed to have committed extremely violent acts and were considered very dangerous.¹³⁷⁹ The Commission did not hold the State in violation of the Convention because, as an alternative, the accused persons and their lawyer were given an opportunity to communicate in writing under the supervision of the domestic court. The Commission took into consideration that the limitation on privileged contact and communication had been relaxed immediately after the detained person was released from isolation and the "(...) limitation of contacts between the applicant and his counsel" were only "(...) relative and temporary".¹³⁸⁰

Moreover, the Commission accepted in *Kempers v. Austria* the leaking of information to third persons who were at large as a ground for a restriction on the privileged contact and communication between the accused and counsel.¹³⁸¹ The executed surveillance of the meetings between counsel and the accused was strictly proportionate and only done to the extent necessary. In other words, the surveillance only lasted until the indictment was served on the accused. At the time several co-suspects were still at large and ceased after the co-suspects were arrested. After the limitation, counsel and the accused had more than six months before the trial to prepare freely and with privileged contact and communication. Moreover, the accused did not prove before the Commission that the surveillance exercised by the investigating judge in his case impaired his right to defence in any other way.

However, due to this particular reason in *Kempers v. Austria* for a restriction on meetings for the purpose of protecting the secrecy of the investigation from (potential) co-suspects or possibly more generally, the Court in later case law may have been stricter than the Commission.¹³⁸² To illustrate this, in the case of *Lanz v. Austria* the accused *Lanz* was believed to be a member of a criminal gang. The authorities therefore claimed that utmost secrecy was necessary in order to apprehend the other gang members. *Lanz*, who was placed in detention on remand, was not allowed to have contact with any third person. Therefore, *Lanz* could only have restricted visits with his lawyer. The Government argued before the Court that *Lanz* could not prove that his surveillance impaired his right to defence. The Court held that the authorities need to have "(...) further arguments" when restricting a suspect who is already placed in detention on remand from having contact with counsel. The Court requires "(...) very weighty reasons" for restrictions on privileged contact and communications between lawyer and client. Thus, the Court places the burden of proof on the authorities instead of on the suspect. Therefore, in this case the Court found that, because both the domestic courts and later the Government had failed to provide "(...) convincing arguments" for the need to restrict privileged contacts, the right under Article 8 had been violated.¹³⁸³ These weighty reasons lie in the lawyer-client relationship and the Court has shown this to be a general principle in a more recent case, as follows:

"(...) in exceptional circumstances the State may restrict confidential contacts with counsel for a person in detention (...). Nevertheless, any limitation on relations between clients and lawyers, whether inherent or express, should not thwart the

¹³⁷⁷ E.g. *S. v. Switzerland*, Judgment of 28 November 1991, HUDOC nos. 12629/87 13965/88, para. 49.

¹³⁷⁸ E.g. *Klass v. Germany*, Judgment of 6 September 1978, HUDOC no. 5029/71.

¹³⁷⁹ *Bonzi v. Switzerland* (dec.), Commission decision of 12 July 1978, HUDOC no. 7854/77, including the following two citations.

¹³⁸⁰ *Bonzi v. Switzerland* (dec.), Commission decision of 12 July 1978, HUDOC no. 7854/77.

¹³⁸¹ *Kempers v. Austria*, (dec.), Commission decision of 27 February 1997, HUDOC no. 21842/93.

¹³⁸² For surveillance by the investigating judge of the contacts of a detainee with his counsel, e.g. *Lanz v. Austria*, Judgment of 31 January 2002, HUDOC no. 24430/94, para. 52.

¹³⁸³ *Lanz v. Austria*, Judgment of 31 January 2002, HUDOC no. 24430/94, para. 52

effective legal assistance to which a defendant is entitled. Notwithstanding possible difficulties or restrictions, such is the importance attached to the rights of the defence that the right to effective legal assistance must be respected in all circumstances”.¹³⁸⁴

Moreover, the Court explained that a general risk of collusion between lawyers, who would thereby be able to jointly prepare the defence for co-suspects, is not a “good cause” for a restriction of the principle of privileged contact and communication because:

“There is nothing extraordinary in a number of counsel collaborating with a view to co-ordinating their defence strategy. Moreover, neither the professional ethics of Mr Garbade [the lawyer acting for the suspect], who had been designated as court-appointed counsel by the President of the Indictments Division of the Zürich Court of Appeal (...), nor the lawfulness of his conduct were at any time called into question in this case. Furthermore, the restriction in issue lasted for over seven months (...). [added by the author]”.¹³⁸⁵

In addition, the Court does not accept as a “(...) good cause” for interference in an exchange of letters not yet covered by legal privilege, the fact that there is no lawyer-client relationship. In the case of *Schönenberger and Durmaz v. Switzerland*, the lawyer *Schönenberger* and the accused *Durmaz* complained that the authorities did not forward the letter from “a” lawyer to its addressee *Durmaz*. Mr *Schönenberger* was not (yet) *Durmaz*’s lawyer. Interestingly, the applicant did not complain that the authorities had studied the contents of *Schönenberger*’s letter. The Government argued that counsel writing the letter was not (yet) the suspect’s own lawyer so that legal privilege did not attach to *Schönenberger*’s letter. The Court on the contrary held that the authorities should not have opened the letter from “a” lawyer (Mr *Schönenberger*) to a detained suspect (Mr *Durmaz*) as follows:

“To support their argument that the contested stopping of the letter was necessary the Government rely in the first place on the contents of the letter in issue: according to the Government, it gave Mr. Durmaz advice relating to pending criminal proceedings which was of such a nature as to jeopardise their proper conduct. The Court is not convinced by this argument. Mr. Schönenberger sought to inform the second applicant of his right “to refuse to make any statement”, advising him that to exercise it would be to his “advantage” (...). In that way, he was recommending that Mr. Durmaz adopt a certain tactic, lawful in itself since, under the Swiss Federal Court’s case-law – whose equivalent may be found in other Contracting States – it is open to an accused person to remain silent (...). Mr. Schönenberger could also properly regard it as his duty, pending a meeting with Mr. Durmaz, to advise him of his right and of the possible consequences of exercising it. In the Court’s view, advice given in these terms was not capable of creating a danger of connivance between the sender of the letter and its recipient and did not pose a threat to the normal conduct of the prosecution”.¹³⁸⁶

As a last example of what a “good cause” does not entail, the Court mentions that the authorities cannot restrict privileged contact and communication between counsel and the accused, whose life allegedly had to be protected where his lawyers would purportedly have posed a threat to his life.¹³⁸⁷ The Court especially does not accept security forces listening in on consultations during the pre-trial and the trial stage where the accused’s lawyers are not permitted to see the accused until after they had been subjected to a series of searches.

¹³⁸⁴ *Sakhnovskiy v. Russia*, Judgment of 2 November 2010, HUDOC no. 21272/03, para. 120.

¹³⁸⁵ Interesting are the concurring opinions of Judge Matscher and Judge de Meyer annexed to *Sakhnovskiy v. Russia*, Judgment of 2 November 2010, HUDOC no. 21272/03.

¹³⁸⁶ *Schönenberger and Durmaz v. Switzerland*, Judgment of 20 June 1988, HUDOC no. 11368/85, para. 28.

¹³⁸⁷ *Öcalan v. Turkey* [GC], Judgment of 12 May 2005, HUDOC no. 46221/99, para. 132 including the following reasoning on “good reason”.

With regard to permissible restrictions, it has to be noted that the Court considers that the authorities have to protect and respect privileged contact and communication between the accused and retained or appointed counsel, in order to guarantee the important lawyer-client relationship. The Court thereby seeks to protect the necessary freedom of the accused and his lawyer to determine how to conduct the defence through confidential contact and communication. The authorities thereby have their own obligation to ensure that the accused can avail himself of his personal right to effective legal assistance which is in principle contingent on privileged contact and communication. Moreover, the Court requires that the authorities are only allowed to place restrictions on privileged contact and communication proportionally (for the time that is strictly necessary) and without prejudicing the accused's personal rights.¹³⁸⁸ The Court finds that the authorities must not cause reasonable grounds to believe at least that the lawyer-client privilege will be abused. If they do (threaten to) restrict privileged contact and communication between the accused and counsel, they must have a "good cause". Such a "good cause" can exist for a very dangerous detained accused where this is "(...) relative and temporary".¹³⁸⁹ However, without a "good cause", there might be State interference that amounts *per se* to ineffective legal assistance which not event perfect subsequent legal assistance can "cure". The authorities cannot allege a breach of the law by counsel, to justify a breach with privileged contact and communication (*Khodorkovskiy v. Russia*). The authorities also cannot approach privileged contact and communication in an excessively formal manner, by arguing that the letter was not yet from *the* lawyer of the accused. Therefore, a "good cause" for limitations on the privileged contact and communication on the lawyer's side, requires a real and substantiated risk that counsel has abused or will abuse his position.¹³⁹⁰ Under the Convention the authorities, in principle, have to allow the accused and his counsel to decide which information is subject to legal privilege. Restrictions are only permissible in the aforementioned ways if there is reasonable cause to believe that the lawyer-client relationship is, or will be, abused.

9.4.3. Conclusion regarding State interference in the lawyer-client relationship

The Court is strict on domestic authorities because it does not require that the accused can show that, but for these State interferences, the outcome of the criminal case would have been different (prejudice). As demonstrated in this chapter, the Court does not seem to require an actual interference in the lawyer-client relationship by the authorities for there to be a violation of the accused's right to effective legal assistance either.¹³⁹¹ Rather, a genuine belief on reasonable grounds about such interference can be sufficient for the Court to conclude that there has been a violation of the right to a fair trial.

The Court holds that a State interference with counsel which is not done for "good cause" amounts to a violation of the right to a fair trial, regardless of whether or not the subsequent assistance by counsel at the adversarial trial was effective. This sub-section has explored several examples that amounted to a violation of Article 6 because of the harm suffered by the interference by the authorities in the lawyer-client relationship. Under such circumstances, it is unnecessary for the Court to assess whether that damage had been "cured" by a subsequent effective defence by counsel because it amounts to ineffective legal assistance *per se*.

The role expected of counsel during the critical stages of the criminal procedure has been explored in the previous substantive research chapter regarding the Convention in the context of the conditions for privileged contact and communication between the accused and his lawyer (chapter 7). It also explained that, thanks to privileged contact and communication, an accused can give his instructions confidentially to counsel and can be informed about, and choose to invoke, his rights (chapter 7). Similarly, its findings indicated that counsel can obtain the instructions of the accused and provide legal expert advice to the accused (chapter 7). Therefore, this last aspect of the lawyer-client relationship is an important remaining element to also help determine why State interference is a

¹³⁸⁸ Van Dijk et al (2006) at 640 do come to this conclusion and refer to *Campbell and Fell v. the United Kingdom*, Judgment of 28 June 1984, HUDOC nos. 7819/77 7878/77 and *Domenichini v. Italy*, Judgment of 15 November 1996, HUDOC no. 15943/90 in this regard.

¹³⁸⁹ *Bonzi v. Switzerland* (dec.), Commission decision of 12 July 1978, HUDOC no. 7854/77..

¹³⁹⁰ See cases in which a defence lawyer's office is searched, e.g. *Niemietz v. Germany*, Judgment of 16 December 1992, HUDOC no. 13710/88. See also *Coster van Voorhout* (2008a).

¹³⁹¹ *Castravet v. Moldova*, Judgment of 13 March 2007, HUDOC no. 23393/05, para. 51.

negative obligation owed by the authorities towards the accused under the accused's right to an effective defence (chapter 9).

9.5. Conclusion

This conclusion sets out to answer the leading question for this chapter: Which obligations do the authorities owe to the accused so that they do not hinder an effective defence by interfering with counsel under the Convention?

In order to answer this question, this chapter has taken what now is a second vertical perspective that concerns the relationship between the State and the accused. The central topic of State interference with counsel relates to what the Court has held to be "(...) the negative obligation of the State not to hinder effective assistance from lawyers" (sub-section 5.3.2.2.). The answer to this leading question can be given by referring to all three examples of State interference that were mentioned in this chapter, i.e. state-imposed restrictions on counsel, defective appointment of counsel and State interference in the lawyer-client relationship.

For example, the Court examines whether the restrictions imposed on counsel resulted in ineffective legal assistance *per se* because as a consequence the accused no longer had assistance by counsel during the important stage of the closing speech. Moreover, the Court explores whether defective or even no appointment of a real legal aid lawyer at all results in a failure of the authorities to live up to that aforementioned negative obligation of the State not to hinder effective assistance from lawyers. Finally, an interference in the lawyer-client relationship is being examined for its effect on the actual opportunity that counsel could provide the accused with an effective defence by means of equally effective legal assistance. This is because, as the Court phrases it, "(e)ffective legal assistance is inconceivable without respect for lawyer-client confidentiality, which "encourages open and honest communication" between the lawyer and the accused.

All three possible types of State interference make it unnecessary for the Court – and thus by extension the national authorities – to determine whether or not counsel was subsequently capable of giving the accused effective legal assistance at the adversarial trial hearing, because they amount to ineffective legal assistance *per se*. In other words, the authorities which hinder effective assistance by counsel can irreparably damage the rights of the accused, so that even perfect subsequent assistance by counsel cannot remedy the Convention violation. From these cases it appears that the Court does not even have to assess the *effectiveness* of the assistance by counsel at the adversarial trial to so conclude. This is because there is already a violation of the right to a fair trial by their failure to fulfil this negative obligation to not stand in the way of allowing the accused to have an effective defence by counsel.

This chapter could not yet explore situations in which national authorities *might* have to make such an assessment; these are reserved for the next substantive research chapter regarding the Convention (chapter 11). As explained in chapter 2, such cases can only be explored with what will then be a third vertical perspective (chapter 11). For this purpose, it is important to stress that State interferences with counsel that amount to ineffective legal assistance *per se* can thus principally be distinguished from interventions in the case. Compared to the earlier mentioned negative obligation in this chapter, those would be the rather "positive" obligations of the State to intervene in the case so that the accused does not have to bear the consequences of ineffective legal assistance which damages the accused's personal rights, rather than defence strategy (chapter 11). Before getting to that pertinent last component of an effective defence in a fair trial, the next chapter will first elaborate upon State interference with counsel in Dutch criminal proceedings (chapter 10).

CHAPTER 10. STATE INTERFERENCE WITH COUNSEL IN DUTCH CRIMINAL PROCEEDINGS

10.1. Introduction

This chapter builds on the previous chapters and continues with what is by now a second vertical perspective in order to explore how Dutch criminal procedure deals with State interference with counsel or, as it has been called above by the Court, “(...) the negative obligation of the State not to hinder effective assistance from lawyers” (see sub-section 5.3.2.2.). This topic is particularly relevant for this research into ineffective legal assistance and its redress in Dutch criminal proceedings, because scholars such as Prakken and Spronken argue that hardly any intervention in the case by the authorities is legitimate because they almost always and inevitably constitute State interference with counsel.¹³⁹² Consequently, they find that such actions violate the freedom of the defence, unless, for example, authorities prevent the disturbance of the order of the court or deal with the use of competences by counsel that reasonably cannot assist the accused in any legal interest that is worthy of protection.¹³⁹³ This particular interpretation that does not distinguish between State intervention and interference is important because it forms a significant basis for the related idea which normally appears to be followed in Dutch criminal proceedings: that the authorities are required to intervene “only” in the case when “(...) the lawyer is absent or otherwise does practically nothing at all for the accused”.¹³⁹⁴ Before this final central issue for this research into ineffective assistance by counsel can be dealt with, the question must be explored whether State interference with counsel in Dutch criminal proceedings, as under the Convention, amounts to ineffective legal assistance *per se*. Perhaps, if such actions are prohibited, then there are more situations that should be prevented and, where they have occurred, redressed unlike what Prakken and Spronken argue, that this would “only” be required where the lawyer is absent or is almost fully inactive.¹³⁹⁵ Therefore, the central question for this chapter, which is sought to be answered in the following sections, is: What obligations do the authorities owe to the accused so that they do not hinder an effective defence by interfering with counsel in Dutch criminal proceedings?

This chapter will draw on several findings of the previous chapter (chapter 9), including the three examples of State interference of state-imposed restrictions on counsel, defective appointment of a legal aid lawyer to the accused and State interferences in the lawyer-client relationship. Most importantly, the Court holds that it does not even have to assess the effectiveness of the performance of counsel during the adversarial hearing if State interference with counsel has occurred because it amounts to ineffective legal assistance *per se*. Because this chapter is descriptive in nature and does not yet seek to draw any normative conclusions, hardly any direct comparisons between the Convention and Dutch criminal proceedings will be made. One important exception will be the concluding section that will compare findings on examples of State interference with counsel that are presented in the previous and current chapter (section 10.6.).

Moreover, this chapter builds on the previous chapters on Dutch criminal procedure (chapters 6 and 8), in which two issues have been established. First, it has been determined that the authorities have to ensure a right to assistance by counsel to the accused at more stages of (and earlier during) the criminal procedure than before. Second, it has been found that Dutch law and deontology leave largely undefined what constitutes ineffective legal assistance.

One specific finding worth reiterating from chapter 6 is the conclusion of the AG, who refers to three domains in which the trial judge should “compensate” the unassisted accused for his lack of legal assistance: (i) a substantive defence has to be adequately laid down in the minutes of the hearing¹³⁹⁶; (ii) requests to hear witnesses in court have to be willingly considered¹³⁹⁷; and (iii)

¹³⁹² Prakken and Spronken (2009) at 15-16.

¹³⁹³ Prakken and Spronken (2009) at 16 and Spronken (2001) 330-333.

¹³⁹⁴ Spronken (2001) at 447 and 464. See also this same view reiterated in Prakken and Spronken, in: Prakken and Spronken (2009) at 15.

¹³⁹⁵ Prakken and Spronken, in: Prakken and Spronken (2009) at 15. Despite the fact that Prakken earlier explained that the Court does not just require a formal right to legal assistance but a substantive right to *effective* legal assistance in Prakken (1999), at 12-13.

¹³⁹⁶ HR 9 January 2007, ECLI:NL:HR:2007:AY9203, *NJ* 2007, 53.

¹³⁹⁷ HR 17 April 2007, ECLI:NL:HR:2007:AZ1720, *NJ* 2007, 251 about the authorities having to “willingly” construe the request to hear a witness in court by an unassisted accused.

demands on the grievances in an appeal brief should be less judged to lesser formal standards.¹³⁹⁸ Reasoned *a contrario*, the AG appears to imply that in relation to these three defence activities counsel can reasonably be said to have more responsibilities than an unassisted, lay accused (see further chapter 12).

The most relevant aspects of the conceptual framework of relevant rights, context and cross-cutting notions and perspectives will be addressed here in relation to the above-noted leading question. Most attention will be paid to the relevant rights under the horizontal perspective to the accused's right to an effective defence and thus also the conduct of counsel. The other aspects will be focused on more in the next substantive research chapter regarding Dutch criminal procedure (chapter 12).

Deliberately, this chapter revolves around the same topics as far as possible as the ones that have been discussed under the second vertical perspective towards the Convention in the previous chapter (see chapter 9). Ultimately, this structure will enable a comparison between these two chapters, so that an evaluation can follow in the last chapter of this book (chapter 13).

Outline

This chapter consists of five more sections. The first section will delve into State interference with counsel by means of state-imposed restrictions on counsel (section 10.2.). Subsequently, this chapter will turn to defective appointment of legal aid counsel (section 10.3.). Thereafter, an exploration regarding State interference in the lawyer-client relationship will follow (section 10.4.). In the penultimate section, a conclusion will be drawn on the basis of these sections (section 10.5.). Finally, an overall conclusion regarding Part V State interference with counsel will be provided (section 10.6.).

10.2. State-imposed restrictions on counsel

When examining possible responsibilities owed by the lawyer towards the accused under the lawyer-client relationship, it has already been highlighted that the authorities must avoid, as far as possible, interfering in the freedom of the defence of the assisted accused whose lawyer-client relationship is also worth protecting (e.g. Article 50 Sv). It further explained that where the defence consists of the accused and his lawyer, the authorities should accordingly also prevent imposing restrictions on counsel and thereby *interfering* in the lawyer-client relationship.

A first case, which will here be examined in light of the approach to state-imposed restrictions on counsel in Dutch criminal proceedings – also because of the comparison that can be made with the general principles underlying the Court's case of *Hüseyn and Others v. Azerbaijan* – is called *Counsel laying down the defence before prosecution's submission*-case.¹³⁹⁹

The accused was believed to have perpetrated manslaughter in close collaboration with another person and was suspected of a weapon and ammunition offence. During a session on 9 June 2010, the appointed legal aid lawyer who acted for the accused mentioned that she had assumed that this particular session would only deal with the requests of the defence for further investigation. She added that she had not prepared for anything else than explaining such requests, rather than for pleading the case. The presiding judge responded that neither counsel nor the accused could reasonably infer from the previous session of 26 May 2010 that this 9 June-session would only deal with such defence requests. Counsel responded that she had not had time to prepare the case substantively and had not been able to prepare her pleadings. She added that she had been on leave before the session. The presiding judge reiterated that there was no reason to believe that this 9 June-session would only deal with investigation requests. The judge remarked as well that it had already been noted during the earlier 26 May-session that Article 6 requires criminal proceedings to take place within reasonable time given that this case had already taken years. Moreover, counsel already took over the case from her colleague on 16 April; so according to the bench she had defended the accused not long ago. Finally, the presiding judge emphasised, *professional* counsel should be prepared to plead – especially given that the accused had been questioned about the facts during the previous session. Counsel thereupon requested to present further documents, which she did not bring. The judge stated it would come at the procedural risk of the accused that counsel had not brought these documents to court with her, which she had also failed to present earlier in the proceedings without

¹³⁹⁸ HR 19 June 2007, ECLI:NL:HR:2007:AZ1702., *NJB* 2007, 1552.

¹³⁹⁹ HR 12 June 2010, ECLI:NL:HR:2012:BU7644, *RvdW* 2012, 870.

good reason. Thereupon, the judge added that the session could be adjourned for a few hours, so that counsel could prepare her pleadings. Counsel argued that she would not be capable of pleading later that day and would be required to withdraw from the case, if the court were to decide to adjourn the remainder of the session until later that day. Counsel stated that she would not be against the prosecution bringing forward its case. Thereupon, the appeal court heard the submission of the prosecution, which requested a higher penalty of sixteen years' imprisonment. In response to that submission, counsel requested to see the videotapes of the first six interrogations of the accused and an adjournment of the case for at least a month. When the appeal court would not do so, counsel mentioned that she would have to lay down the case given that she would not be able to defend the accused adequately. The appeal court stated that it was about to continue with the case. Thereupon, the accused wanted to appeal the bench in proceedings to have the judges recanted (in Dutch: *wraking*). The accused did not attend those special proceedings and upon return during his regular criminal case session, he was told by the presiding judge that the bench had not been recanted. The accused thereupon asked to be given an opportunity to contact a lawyer, which he later repeated. The judge decided that appointed counsel, to whose renouncing of the defence the accused agreed directly, explicitly and unequivocally, did not result in the end of the lawyer's appointment. Therefore, the appeal court decided, proceedings could be continued supposedly with the appointed lawyer still acting in the case of the accused in her absence (referring to HR, 21 October 2008 *NJ* 2008, 563). The accused was given an opportunity to present his own defence, which he did reluctantly. He got convicted and sentenced to twelve years' imprisonment.

Before the Hoge Raad, the applicant complained about several issues, two of which will be highlighted here because these points were also the only two issues discussed by the AG. First, the appeal court had rejected the request of counsel to adjourn the case on grounds that were insufficient to be a basis for that rejection. Second, the appeal court had incorrectly continued with the case against the accused who had no assistance by counsel.

The AG, who cited the aforementioned Hoge Raad case referred to by the appeal court (HR 21 October 2008 *NJ* 2008, 563), as well as the *Hoogerheide*-case and *Artico*-cases, and thereupon advised the Hoge Raad to quash the case.¹⁴⁰⁰ He summarises that the State cannot be held responsible for every shortcoming by counsel, but should ensure that a lawyer has an opportunity to fulfil his obligations in the best possible conditions. If the State knows or is notified that the appointed counsel does not ensure "effective representation" owing to the lack of time and facilities to organise a proper defence, appropriate positive measures should be taken to remedy that situation, the AG considers on the basis of the Court's case law. The AG emphasises how, because of the appeal court's dealings with the proceedings, the accused did not have assistance by counsel at the most important moment of the criminal procedure. That moment is, when the defence can present its case and submit all that is important out of the interest of the accused given the prosecution's submission, which demanded a sentence of sixteen years' imprisonment moreover. The AG did not only cite the problem arising with equality of arms and adversariality, but also that legal assistance by appointed counsel who laid down the defence would risk resulting in a right to counsel that is "theoretical or illusory" rather than "practical and effective". The inadequacy of the legal assistance provided by counsel does not exempt the authorities from their obligations to adjudicate the case fairly, according to the AG, who argues: "On the contrary. The judge has to take measures to repair serious shortcomings in the defence". The reasonable time of the proceedings was no sufficient reason for the appeal court to remain passive when confronted with the "(...) shortcoming regarding the legal assistance of the accused", according to the AG, because the accused was detained and consequently could not escape the proceedings against him. Additionally, the right of the accused to "actual" assistance by counsel should not suffer for such reasons of duration of the proceedings. That right has not been waived by the accused who, rather, asked to contact a lawyer. A simple solution, according to the AG, would have been for the appeal court to allow the accused to prepare her pleadings. The AG argues that such action by the appeal court "(...) would have given the defence control over the procedural course". He finds that acceptable in the present case, because "(...) that cannot be a reason to have the consequences of the

¹⁴⁰⁰ Advice of AG Vellinga, ECLI:NL:PHR:2012:BU7644, to the Hoge Raad's case of HR 12 June 2010, ECLI:NL:HR:2012:BU7644, *RvdW* 2012, 870.

accused's counsel essentially lacking legal assistance to the accused come at his procedural risk. Disciplinary law regarding lawyers should be the solution to such issues", he concluded.

The Hoge Raad did not follow the advice of the AG and rather finds that the appeal court had rejected the request of the accused to contact a new lawyer and referred to HR LJN BD7809. Evidently, the appeal court had so found that appointed counsel, despite her statement together with the accused not to represent the accused any longer, still was appointed counsel for the accused who could in principle still have resorted to her legal assistance during the proceedings. This judgment is not an incorrect legal opinion regarding Article 41 Sv and is not incomprehensible, the Hoge Raad added. The appeal court's rejection of the request of the accused to get an opportunity to obtain a – new – lawyer is not an incorrect legal opinion and has been sufficiently reasoned in the verdict. The appeal court has apparently found that the circumstances of the case were very extraordinary and has judged the request to have been done with no other intention than to hinder the course of justice. The appeal court has come to this judgment on the basis of the very difficult and long procedural course that were the consequence of the behaviour of the accused and his lawyers. Hence, Article 6 (3) (b) and (c) were not violated.

On a final note, the AG and the Hoge Raad did not agree in this case.

While the AG does seem to refer to the negative obligation of the authorities not to hinder effective assistance by counsel, the Hoge Raad does not adopt that benchmark of effective legal assistance and leaves the case in-tact. Unlike the Court's case of *Hüseyn and Others v. Azerbaijan* in which this benchmark was expressed, the Hoge Raad did not refer to it in this case of *Counsel laying down the defence before prosecution's submission*-case while concluding that Article 6 (3) (b) and (c) were not violated.¹⁴⁰¹ A further normative, rather than descriptive, examination of this case will follow in the final chapter (chapter 13).

10.3. Defective appointment of legal aid counsel?

So far the rights to retained and appointed counsel have been dealt with largely in the same manner, but a specific issue which is only relevant for appointed legal aid lawyers has to be noted in the context of State interference with counsel. One case can illustrate how the Hoge Raad will deal with authorities, which under Dutch law are permitted not to appoint a lawyer when there is a conflict of interests, who do not appoint legal aid counsel at all – rather than deficient appointments. The following case concerns authorities which fully omitted to appoint legal aid counsel for the accused.

This case, which will be called *Lack of earlier appointment*, concerned an appellant who was believed to have committed seven offences.¹⁴⁰² In total, this case was adjudicated in four rounds of proceedings. After the first instance and an initial appeal phase, the case was remitted and tried once again by a first instance and an appeal court. During the fourth round, an appeal upon remittal, the defence argued that the first instance court acting in the third round had failed to appoint a lawyer for this accused who was entitled to legal aid. Consequently, counsel argued that the appeal court should deem the conviction by the first instance court to be null and void. The appeal court examined this complaint and agreed that the lower court had not appointed counsel, but did not nullify the earlier investigation. Instead, the appeal court reasoned that before the lower instance the indictment and the notification of the hearing had been sent to the lawyer, who had already been appointed for the two earlier occasions before the remittal. Therefore, the lawyer should have been aware that the first instance court after remittal had assumed that the same counsel had been reappointed. If he was no longer the lawyer representing the accused or he no longer wished to be in that position, the appeal court concluded that he should have taken the initiative to duly inform the court. Since counsel had not done so, the appeal court continued with the case and acquitted the appellant of four indictments while convicting him of three other offences.

The appellant appealed in cassation on the ground that the appeal court had invalidly confirmed most of the first instance verdict because at these earlier proceedings the accused was convicted in his absence without having been appointed a lawyer.

The Hoge Raad considered that the first instance court should have checked, of its own volition, whether a lawyer had been appointed, but concluded that the appeal court's decision was

¹⁴⁰¹ HR 12 June 2010, ECLI:NL:HR:2012:BU7644, *RvdW* 2012, 870.

¹⁴⁰² HR 14 June 2005, ECLI:NL:HR:2005:AS9238, *NJ* 2005, 329.

neither incorrect nor incomprehensible. The appeal court could legitimately take into consideration that, without the lawyer responding, the court acting at first instance after remittal had reasonably assumed that the same counsel would continue to assist the accused unless it was informed otherwise. The appointed lawyer had been informed in good time about the date, time, and place of the appeal hearing and he had assisted the accused at the two prior instances. Moreover, during the appeal phase this same counsel had been given an opportunity to plead the case, during which neither the defendant nor this lawyer had informed the court that they did not want counsel to assist the accused. As a result, the Hoge Raad left the case in-tact.

The PG offered comparable advice, pointing to the case law dealing with the “core role” of counsel.¹⁴⁰³ No check had been made as to whether counsel had been a participant with a core role in the criminal proceedings, i.e. whether counsel was absent during the first instance procedure.¹⁴⁰⁴ Given that in this case the lawyer had not brought this difficulty to the court’s attention¹⁴⁰⁵, the PG raised the question whether the lawyer or the first instance court was responsible. The PG considered that, literally, “from that side”, assuming that he meant the defence, “there had been no response to the lack of appointment at first instance”, while an appeal was lodged two days after the first instance verdict.¹⁴⁰⁶ He concluded that, demonstrably, the case had been followed by, or on behalf of, the defendant. Under such circumstances, the PG argued that there was no reason to have the appeal court nullify the criminal investigation of the first instance court’s omission to check the appointment of a lawyer. He concluded that the defence had received an opportunity to plead during the appeal hearing, upon which the appeal court had, after taking all the facts into consideration, confirmed parts of the first instance verdict.

At this stage of the research, it is important to highlight that the Hoge Raad did not quash the case of an appeal court that mentioned *inter alia* that counsel did not correct the court that evidently wrongly assumed that he had already been appointed.¹⁴⁰⁷ Accordingly, the counsel who was not appointed should have corrected the first instance court. Although the defence argued that there had been an incorrect appointment at the first available stage, it was the lawyer and not the court that the Hoge Raad ultimately held responsible for failing to raise the issue. Apparently, counsel had at least a shared responsibility in so far as the first instance court had neglected to appoint him.

Although the appointment of a lawyer is a legal obligation of the State under Dutch law and case law, in the case cited above the lawyer was held to blame for waiting for the appeal before complaining about an earlier failure to appoint. The Hoge Raad did not find that it had to quash the case of an appeal court’s decision, the effect of which was that the accused had to bear the consequences of his lawyer’s conduct.

It is difficult to see how it can be the responsibility of counsel to ensure that he is appointed, especially if that would entail a complaint of non-appointment by that same lawyer who then would not know about this lack. Although the appeal phase might have redressed the difficulties for the defence at the lower instance, an obligation to correctly appoint counsel should, it seems, rest independently with the authorities, regardless. That obligation should be seen separately from “rectifying” the case at the appeal stage, as the law requires. Even if the appeal phase repairs the damage resulting from the lack of legal assistance at first instance, it seems unreasonable that lower courts hold counsel responsible for failing to correct the trial judge’s error. In this respect, another relevant question remains. Should the appeal court not have checked whether this accused had indeed

¹⁴⁰³ HR 7 May 1996, ECLI:NL:HR:1996:ZD0442, *NJ* 1996, 557 m.nt. ‘t Hart.

¹⁴⁰⁴ HR 2 February 1999, ECLI:NL:HR:1999:ZD1417, *NJ* 1999, 296.

¹⁴⁰⁵ Fokkens in his Conclusion, ECLI:NL:PHR:2005:AS9238 as an advice to the Hoge Raad in its case of HR 14 June 2005, ECLI:NL:HR:2005:AS9238, *NJ* 2005, 329 compares this case with HR 17 January 1995, ECLI:NL:HR:1995:ZC9927, *NJ* 1995, 404 in which the lawyer had conditionally taken on the defence and it should have been clear to him that the authorities had incorrectly assumed that he had already accepted the case.

¹⁴⁰⁶ The author’s translation of para. 19: “Mede doordat van die zijde niet is gereageerd is de toevoeging achterwege gebleven.”

¹⁴⁰⁷ See, differently, HR 12 November 2013, ECLI:NL:HR:2013:1155, *NJB* 2013, 2518. The appeal court had appointed a lawyer at first instance and on appeal. However, the lawyer who had been appointed because the accused had been in pre-trial detention (Article 41 Sv) and gave assistance at first instance had already withdrawn. Moreover, at the appeal stage the court had not appointed another lawyer (Article 45 (1) Sv). Consequently, the accused had not had legal assistance at the appeal stage. The Hoge Raad quashed this case.

waived his personal right to assistance by counsel at first instance upon remittal, instead of examining whether the defence (pro)actively complained of a lack of legal assistance?

The case cited above can be contrasted with a case in which a lawyer who had withdrawn from the case had been appointed to an accused who was entitled to legal aid under Article 41 Sv, as he had undergone pre-trial detention.¹⁴⁰⁸ In this instance the Hoge Raad did quash the case, in a manner somewhat similar to the *Hoogerheide*-rule. Therefore, the Hoge Raad appears to consider that the lower court has to examine whether the accused has had actual legal assistance by appointed legal aid lawyer only if there is a basis under this Article 41 Sv. Nonetheless, the first *Lack of earlier appointment*-case appears to indicate that the lower courts can omit to appoint counsel and not be “sanctioned” by the Hoge Raad by concluding a violation of the right of the accused to a fair trial.

10.4. State interference in the lawyer-client relationship?

In principle, Dutch law does not accept an interference in the lawyer-client relationship, because of the importance attached to the accused sharing his instructions and obtaining information from his lawyers in Dutch criminal proceedings in a confidential and privileged manner.¹⁴⁰⁹ This principle is important, Spronken argues, because, out of public interest, the accused should be able to confidentially consult with his advocate.¹⁴¹⁰ At all criminal procedural stages, the accused should normally be able to speak with his lawyer without being afraid of being monitored or overheard by third persons, for instance. As with doctors and priests, for example, the authorities have to respect legal privilege as it is important for the constitutional and Convention right to privacy (Article 8 of the Convention). Also, the authorities have to ensure such conditions so that the accused feels free to discuss all the issues of the case, out of the fairness of the entire criminal procedure (Article 6 of the Convention). Moreover, the accused should be able in principle to confer with counsel without having to be afraid that counsel will (be compelled to) disclose that information.¹⁴¹¹

The Hoge Raad holds that the foundation of the professional right not to disclose confidential information lies in “(...) a generally applicable principle of law that prompts that with such persons of trust, the public interest that the truth comes to light legally, has to be set aside for the public interest that everyone can freely and without fear for disclosure of what is being discussed, should be able to turn to them for assistance and advice”.¹⁴¹² As explained in chapter 8, the right not to disclose information is an entitlement, not a duty (in Dutch: *verschoningsrecht*). The person of trust can therefore decide to invoke this right, but does not have to do so. This decision-making discretion by the person of trust underlines that the right not to disclose information is not granted out of individual interests, but is intended to protect the aforementioned public interest. Although the fairness of the criminal procedure is mentioned in relation to the right of the professional not to disclose information by the person of trust who holds legal privilege, no specific reference is being made to any right of the accused to effective legal assistance.

Moreover, the right to counsel is qualified under Article 28 (2) Sv, so that the accused is “only” entitled to have contact with his lawyer “as far as possible”.¹⁴¹³ This clause does not mean that, for example, the authorities can prohibit an accused, whose house is being searched, from calling his lawyer or that the authorities can neglect to give a phone call to this lawyer on the accused’s behalf (Article 99a Sv). However, it does mean that the authorities do not have to accept any “stalling of the investigation” by means of awaiting the arrival of the lawyer at this search, for instance.¹⁴¹⁴ This qualification of the right to counsel is important, because it indicates that the authorities can limit this right of the accused to contact and communicate with his lawyer if the interest of the investigation so requires. The degree to which the authorities indeed restrict this right will have to be revisited in the remainder of this section on State interference in the lawyer-client relationship.

¹⁴⁰⁸ HR 12 November 2013, ECLI:NL:HR:2013:1155, *NJB* 2013, 2518.

¹⁴⁰⁹ Coster van Voorhout and Franken (2008) at 364-374.

¹⁴¹⁰ Spronken (2001) at 335-381.

¹⁴¹¹ Röttgering (2005: 3.3 - Art 28), in: Melai/Groenhuijsen (2005).

¹⁴¹² HR 1 March 1985, *NJ* 1986, 173, para. 3.1.

¹⁴¹³ *TK* 1917/18, 77, nr. 1. See also sub-section 4.2.3.

¹⁴¹⁴ See also Blok and Besier (1925 I) at 118 and Noyon (1926) at 57-58.

10.4.1. Exceptions to the rule against State interference in the lawyer-client relationship

Potential difficulties with privileged contact and communication arise for the accused especially when he is placed in police custody or held in other detention facilities. For example, the authorities can suspect that the lawyer will inform the accused of certain circumstances which run counter to the interest of the investigation or truth finding. Under such circumstances, the authorities are allowed to set restrictions on privileged contact and communication during the pre-trial phase (Article 50 (2) Sv). Thereupon, the judge of instruction or prosecutor has to appoint replacement counsel. This lawyer can compensate as far as possible for the restrictions on contact and communication between the accused and his lawyer (Article 50a (1) Sv).

Another difficulty with privileged contact and communication between the accused and his lawyer can be caused by the rules of police stations¹⁴¹⁵ and detention centres.¹⁴¹⁶ The authorities can supervise detainees and make use of the regulations regarding order at police stations or in detention facilities. In this way, they can limit both the duration of, and the conditions for, privileged contact and communication between the accused and his lawyer.

As a last illustration, which has been explained in chapter 4 that discussed trends that impact the effectiveness of the legal assistance that counsel can provide, two rights have been provided exclusively to counsel, which he cannot share with the accused (see sub-section 4.3.2.). First, in 1993, a right to hear threatened witnesses was afforded exclusively to counsel so that the lawyer can, but the accused cannot, attend hearings of threatened witnesses pre-trial by the judge of instruction (e.g. Article 226d Sv). Second, in 1996, the Hoge Raad accepted in a case that is known as *Dev Sol* that a lawyer can be provided with items in the dossier that he cannot share with the accused. This exclusive right regarding access to items in the dossier which is being granted to counsel now appears to be codified in the Statute that was supposed to provide the accused with more possibilities to exert an influence over the composition of the dossier, which entered into force on 1 January 2013.¹⁴¹⁷ While it might be reasonable that the accused cannot personally conduct all investigative acts such as hearing of witnesses, the access to items in the dossier for counsel alone might raise issues of a State interference in the lawyer-client relationship. This is particularly true, it seems, if the authorities do not have to prove that those materials have to be withheld from the accused out of reasons such as national security, safekeeping of investigative practices or interests of the witnesses. This latter aspect will have to be revisited in the last sub-section (sub-section 10.4.3.).

10.4.2. Exclusive rights provision to counsel and breaches of legal privilege

The exclusive provision of rights to counsel, who cannot share them with the accused, can result in an interference in the lawyer-client relationship by the authorities. In 2006 Mevis had already argued that “(...) if there are so many cases in such a relatively short time period in which the protection of the right of counsel not to disclose privileged information – especially during the criminal investigation and when coercive measures – is at stake, then the protection of that right or its treatment is evidently no longer a quiet possession. Too much discussion calls for contemplation. And an arrangement of which elements are being disputed is unhelpful because its practical effectuation is limited”¹⁴¹⁸.

Some scholars contend that the legislator and the judge increasingly hinder the right of counsel to excuse himself as a witness and the accompanying right of counsel not to disclose privileged information.¹⁴¹⁹ They argue that the authorities have a tendency to use, or enable the use of, special investigative measures against lawyers who are not suspected of any crime.¹⁴²⁰ Moreover, they are

¹⁴¹⁵ See sub-section 3.3.1. including e.g. HR 30 June 2009, ECLI:NL:HR:2009:BH3079 (HR about *Salduz*). See also its annotation in *NJ* 2009, 349 m.nt. T.M. Schalken.

¹⁴¹⁶ Spronken (2001) at 335-340.

¹⁴¹⁷ See sub-section 4.3.2. Statute changing the rules regarding items in the dossier (in Dutch: *Wijziging van het Wetboek van Strafvordering in verband met de herziening van de regels inzake de processtukken, de verslaglegging door de opsporingsambtenaar en enkele andere onderwerpen (herziening regels betreffende de processtukken in strafzaken, TK 32 468, Stb. 2011, 601, entry into force on 1 January 2013, Stb. 2012, 408.*

¹⁴¹⁸ Mevis (2006b) at 230-257.

¹⁴¹⁹ Van der Meij (2013: Art 218 Sv), in: Cleiren and Nijboer (2013). See also sub-section 4.3.3. Spronken (2001) at 429-434 and Spronken and Prakken, in: Brants et al (2001) at 57-74. See also Brants et al (2006) at 1-168.

¹⁴²⁰ Franken and Spronken (2001) at 3.

concerned about the duty of counsel to report unusual financial transactions, because it would give away, directly or indirectly, privileged information.¹⁴²¹

Scholars argue that in Dutch criminal proceedings there is an underlying assumption of suspicion towards counsel in particular and towards the Bar in general, amounting to a portrayal of the lawyer as a mouthpiece for the accused. When special investigative measures such as systematic observation, direct eavesdropping, infiltration and the surveillance of buildings are deployed against counsel against whom no suspicion of a crime exists, “only” consultation with the head of the local Bar is required. Those measures, it is believed, can breach legal privilege much more than searches and seizures which are surrounded by additional guarantees. In other words, lawyers against whom a reasonable suspicion has arisen are being afforded the guarantee of the presence of the head of the Bar during searches and seizures. However, the competences of the head of the Bar during these aforementioned special investigative measures have not been regulated, so that the role this head can play to protect the rights, interests and wishes of both the lawyer and the accused can be doubted as well.¹⁴²²

As another example, scholars have serious doubts about the effect of the Hoge Raad’s case law that allows breaching legal privilege between counsel and the accused “under extraordinary circumstances”.¹⁴²³ For the determination as to whether there were “extraordinary circumstances”, the Hoge Raad takes into consideration, in addition to the suspicion that counsel – or any other persons who acts under legal privilege – is suspected of having committed a criminal offence, the following factors:

- a. The nature, scope and context of the requested information;
- b. The importance of the criminal case concerned;
- c. The question of whether interested parties have given permission for the disclosure of the requested information;
- d. The question of to what extent the information can concern the person who is entitled to the right not to disclose information;
- e. The question of to what extent the information could be obtained in another way;
- f. The importance of the information concerned.

In every individual case, the “extraordinary circumstances” will have to be determined, a subsidiary less interfering alternative would have to be unavailable and the decision will have to be reasoned in the verdict explicitly.¹⁴²⁴

A further issue which arose earlier, but has now significantly changed, is that of State control over privileged communication between the accused and his lawyer. The former Article 126aa Sv required that communication could be recorded, after which the prosecutor should retrospectively decide that taped communications between the lawyer and the accused have to be destroyed – unless the professional who holds the privilege is accused, as the Hoge Raad decided in April 2010.¹⁴²⁵ As of September 2010¹⁴²⁶, the legislator changed the primary responsibility of the prosecutor to protect privileged communications from being recorded, so that the listening to such taped communications by investigating and other authorities will be prevented.¹⁴²⁷ Nonetheless, the topic of privileged contact

¹⁴²¹ Spronken, in: Prakken and Spronken (2009) at 154.

¹⁴²² Mevis (2003) at 375-392.

¹⁴²³ As referred to in Franken and Spronken (2001) at 1-18, particularly at 3. HR 1 March 1985, *NJ* 1986, 173 and HR 14 October 1986, *NJ* 1987, 490

¹⁴²⁴ HR 26 May 2009, ECLI:NL:HR:2009:BG5979, *NJ* 2009, 263 and HR 28 February 2012, ECLI:NL:HR:2012:BU6088, *NJ* 2012, 537, m.nt. Legemaate.

¹⁴²⁵ HR 20 April 2010, ECLI:NL:HR:2010:BK3369, *NJ* 2011, 222, m.nt. Borgers.

¹⁴²⁶ Statute changing the rules regarding items in the dossier (in Dutch: *Wijziging van het Wetboek van Strafvordering in verband met de herziening van de regels inzake de processtukken, de verslaglegging door de opsporingsambtenaar en enkele andere onderwerpen (herziening regels betreffende de processtukken in strafzaken, TK 32 468, Stb. 2011, 601, entry into force on 1 January 2013, Stb. 2012, 408.*

¹⁴²⁷ Spronken (2006) at 450-452.

is still to be debated, for instance in relation to continuously tapping the phone calls of detained accused persons who could potentially be with their lawyers.¹⁴²⁸

10.4.3. Conclusion regarding State interference in the lawyer-client relationship

Privileged contact and communication will often require that the authorities allow the accused to have the possibility to confidentially discuss with his lawyer materials from the dossier, to which he should obtain access (Article 51 Sv in conjunction with Articles 30-34 Sv).¹⁴²⁹ Usually as of the indictment and thus at the latest ten days before the trial stage, the authorities have to provide the accused and his lawyer with access to the items in the dossier.¹⁴³⁰ Such access facilitates that the accused and counsel can jointly discuss the materials gathered and selected by the authorities, sharing their findings. It helps them to agree upon how to launch the best possible defence in court (Article 265 Sv).¹⁴³¹

Moreover, during the trial stage, the authorities usually have to allow the defendant and his lawyer to have contact and communication (Article 331 Sv). The accused should in principle be able to provide his lawyer with immediate feedback in court without any difficulties.¹⁴³² Likewise, the lawyer should be able to give the accused real-time advice.

This regulation of privileged contact and communication between the accused and his lawyer indicates how in Dutch criminal procedure the authorities must not only ensure adequate pre-trial preparation but also conditions for interactions between the accused and his lawyer at trial. The accused should be able to immediately share remarks, observations and instructions with his lawyer. In turn, counsel ought to be able to provide the accused with – as far as possible – immediate advice.

10.5. Conclusion

This conclusion intends to answer the leading question for this chapter: What obligations do the authorities owe to the accused so that they do not hinder an effective defence by interfering with counsel in Dutch criminal proceedings?

For an answer to this question, this chapter has taken what now is a second vertical perspective that concerns the relationship between the State and the accused. In order to answer this question, a reference will be made to all three issues of state-imposed restrictions on counsel, defective appointment of counsel and State interference in the lawyer-client relationship, which have been dealt with in this chapter. These are all examples of State interference with counsel, which entails – to use the terminology of the Court – the negative obligation of the authorities to not hinder effective assistance from lawyers.

One case that can exemplify the issue of state-imposed restrictions on counsel is a case of *Counsel laying down the defence before prosecution's submission*. While the AG advised the Hoge Raad to assess the *effect* for the *effective* legal assistance of the accused of the laying down of the defence by counsel and thus quash the case as the Court did in the case of *Hüseyn and Others v. Azerbaijan*, for example (section 9.2.), the case was left in-tact (section 10.2.). The emphasis by the Court of the *effect* for the *effective* legal assistance of the accused of conduct by the authorities has also been seen in the context of the cases of *Kyprianou and Panovits v. Cyprus* (sub-section 7.3.2.) and *Kononov v. Russia* (sub-section 7.3.2.). However, in this *Counsel laying down the defence before prosecution's submission*-case, the Hoge Raad did not assess whether the absence of counsel resulted in the absence of effective legal assistance or an obligation of the authorities to take the appropriate

¹⁴²⁸ Proposal, currently with Parliament (in Dutch: Wet positie en toezicht advocatuur, TK 7 May 2010, 32.382. See as a more recent development, also the proposal by the MP Van der Steur who seeks to have the disciplined lawyer pay for - part of - the proceedings that got them convicted (in Dutch: nr 16, 32.382, *Wet positie en toezicht advocatuur, Amendement van het lid Van der Steur over de mogelijkheid advocaten tegen wie een veroordeling wordt uitgesproken, tevens te veroordelen tot het dragen van de kosten van het geding*, 13 september 2013).

¹⁴²⁹ For the most noticeable discussion about the degree to which this right is an independent right of counsel, see HR 7 May 1996, ECLI:NL:HR:1996:AB9820, NJ 1996, 687 m.nt. Schalken and Franken (2010: 1.4), in: Mevis et al (2010). Earlier about the right itself: Franken (2010) at 403-418. See also Jebbink (2010: 24.6), in: Mevis et al (2010). About the complaint about this case to the European Commission of Human Rights and Fundamental Freedoms, see: Franken, in: Klip et al (2004) at 19-28, stating that the lawyer in the case of *Dev Sol* did the right thing to refuse to look at the photo books at 28; and Myjer (1998) at 1064-1067.

¹⁴³⁰ See Borgers (2014) at 1-18; Van Kampen (2013) at 198-209 and Van Kampen and Hein (2013) at 72-78.

¹⁴³¹ See differently, three days *unus* judge (Article 370 Sv).

¹⁴³² Article 265 in conjunction with 33 Sv.

positive measures to remedy this situation. Rather, the Hoge Raad held the case in-tact without a reference to State interference such as the Court did in the aforementioned case of *Hüseyn and Others v. Azerbaijan*.

A case that helps to illustrate how the second topic of defective appointment of counsel is being dealt with by the Hoge Raad, is its decision in the case in which the first instance court after remittal did not at all appoint counsel. In its judgment, the Hoge Raad appears to hold counsel at least jointly responsible with the authorities for his correct appointment. In other words, by alleging it was “negligence” of counsel to not alert the appeal court to its own factual error of failing to appoint counsel, the defence lawyer rather than the authorities was ultimately responsible for the absence of the appointed legal aid lawyer at this instance. As explained with regard to state-imposed restrictions on counsel, the Hoge Raad does not appear to require from the lower court that it *checks* whether the accused had renounced his right to be assisted by appointed counsel in this case. Rather, the Hoge Raad makes the accused bear the consequences of the resulting absent legal assistance. This is yet another example of how the Hoge Raad does not seem to determine how the rights of the accused might have been harmed, here, because of the lacking appointment of counsel for an accused who was entitled to legal aid counsel’s assistance.

As a final issue regarding State interference in the lawyer-client relationship, several examples have been mentioned, including *Dev Sol* case law and the use of special investigative measures against lawyers who are not suspected of any crime, which can result in driving a wedge between the accused and his lawyer. The exclusive provision of items in the dossier to counsel which he cannot share with the accused appears to perpetuate under a new statute that, according to its memorandum, was rather intended to solve such problems. Finally, as explained, scholars have serious doubts about the effect of the Hoge Raad’s case law that allows interference with legal privilege “under extraordinary circumstances” because of the corresponding suspicion placed on counsel. No reference to the possible impact on the rights of the accused have been encountered in this context, regarding first the authorities’ potential failure to abide by a negative obligation of the authorities not to hinder effective assistance from lawyers or second and even more explicitly, how authorities should not harm the right of the accused to *effective* legal assistance.

All three examples appear to indicate that Dutch law and case law do not consider State interference with counsel in Dutch criminal proceedings as situations that can amount to ineffective legal assistance *per se*. The Hoge Raad does not seem to examine what the effects are on the rights of the accused, or require from lower courts that they check whether the accused can reasonably be said to have waived his personal right to be legally assisted by counsel in possible instances of State interference with counsel. In relation to all three examples mentioned that could have potentially indicated an instance of State interference with counsel, Dutch law and case law do not appear to refer to the right of the accused to *effective* legal assistance. Also this chapter did not encounter any instances where Dutch law and case law pointed out that the authorities might owe a negative obligation towards the accused to not hinder said effective assistance by counsel.

Both inferences are important for the next chapter on Dutch criminal proceedings, which will seek to determine whether or not such an assessment about the performance of counsel has to be made in order to assess whether the right to effective legal assistance has been guaranteed (chapter 12). As explained in chapter 2, such cases can only be explored with what will then be a third vertical perspective (section 2.4.). For this purpose, it is important to emphasise here that Dutch law and case law might not provide a basis for a principal distinction between the “negative” and “positive” obligations of the authorities. The “negative” obligation of the authorities would entail non-interference with counsel as ineffective legal assistance *per se*. The “positive” obligation of the authorities could possibly encompass an intervention in the case when confronted with ineffective legal assistance which damages the accused’s personal rights, rather than defence strategy. Before this theme of intervention in the case due to ineffective legal assistance is considered, an overall conclusion will be provided regarding this Part.

10.6. Overall conclusion Part V: State interference with counsel

This overall conclusion seeks to answer the leading question that was posed for both the chapter on the Convention and Dutch criminal proceedings: What obligations do the authorities owe to the accused so that they do not hinder an effective defence by interfering with counsel?

For that question to be answered, a second vertical perspective had to be taken with regard to what the Court would call a negative obligation of the State not to hinder effective assistance by counsel. In conformity with chapter 2 regarding the conceptual framework that has determined aspects such as the relevant rights, context and cross-cutting notions and perspectives, this overall conclusion will not enter into an evaluation but would rather answer the descriptive question in that manner. It has to be noted that any answer sought to the aforementioned central question for this Part V State interference with counsel takes into consideration the factors that affect conclusions that can be drawn on the basis of the case law of the Court and the contextual background information provided about Dutch criminal proceedings (chapters 3 and 4). A comparison will be made here between the topic of State interferences with counsel, while following the outline of the respective chapters and especially their concluding sections (sections 10.5 and 10.6). Three examples of State interferences that have been discussed in both the previous and this chapter are: state-imposed restrictions on counsel, defective appointment of counsel and State interference in the lawyer-client relationship. All three examples will ultimately also be important for the answer to the central evaluative research question, because of their bearing on the central issue of ineffective assistance by counsel and its redress within Convention-conform Dutch criminal proceedings (chapter 13).

While the Court examines whether the restrictions imposed on counsel that led to the absence of assistance by counsel during closing speech resulted in ineffective legal assistance *per se*, the Hoge Raad does not seem to do so. Moreover, the Hoge Raad does not appear to deal with restrictions on the defence out of court order in the same way for unassisted and (earlier) assisted accused. A resulting lack of equal protection for either assisted or unassisted accused is caused because of this difference in approach, especially because the verdicts provide no further explanation on the content of the cases. In other words, why did the accused have to bear the consequences of the conduct of counsel while the unassisted accused appears to have been approached “more willingly”?

Furthermore, for appointments of counsel the Hoge Raad does not seem to take the same view as the Court. In a range of cases regarding defective appointment, the Court holds the authorities to their obligation to appoint legal aid counsel in a timely and correct manner. On the other hand, the Hoge Raad appears to make proper appointment a shared responsibility of counsel and the authorities. That is, the lawyer is held responsible out of negligence for not pointing out to the appeal court that he had not been appointed in a timely and correct manner. Not only is an appointed legal aid lawyer being held accountable for an error of his appointment in principle, but the accused also has to bear the consequences because he has not been appointed counsel while he was entitled thereto. As a final related point, the Hoge Raad does not appear to “sanction” lower courts which have not checked whether the accused, who was entitled to an appointed legal aid lawyer, waived his right to counsel.

With regard to the third topic of State interferences in the lawyer-client relationship, the Court holds that the right to “(e)ffective legal assistance is inconceivable without respect for lawyer-client confidentiality, which “encourages open and honest communication” between them”. Consequently, the authorities are not allowed to invade in the lawyer-client relationship because that amounts to ineffective legal assistance *per se*. The Hoge Raad does not seem to use the right to effective legal assistance as a benchmark for deciding that conduct of the authorities is impermissible as an interference in the lawyer-client relationship, if it acknowledges this right at all. Rather, the Hoge Raad does not refer to a right to effective legal assistance and consequently does not seem to hold there to be a negative obligation of the authorities to not hinder effective assistance by counsel. This last consideration might, reasonably speaking, also affect a positive obligation of the authorities to intervene in the case when confronted with ineffective legal assistance. This is because there appears to be no benchmark of the right to effective legal assistance in Dutch criminal proceedings.

Overall, it appears that the Court does appear to recognise State interference with counsel that amounts to ineffective legal assistance *per se* while Dutch law and case law do not seem to do so. The reasoning of the Court appears to be that, under these circumstances of State interference with counsel, there is irreparable damage to the rights of the accused, so that even perfect subsequent assistance by counsel cannot remedy the Convention violation. Consequently, the Court does not even have to assess the *effectiveness* of the assistance by counsel at the adversarial trial, because there is already a violation of the right to a fair trial; while Dutch law and case law might not even set the benchmark of a right to *effective* assistance by counsel at all. However, if the Convention would require that benchmark of the right to *effective* assistance by counsel, then it would be directly binding on Dutch

criminal proceedings. Therefore, it will be very important to continue with what will be a third vertical perspective in order to examine the central research topic of ineffective assistance by counsel within Convention-conforming Dutch criminal procedure (chapters 11 and 12).

PART VI INTERVENTION DUE TO INEFFECTIVE LEGAL ASSISTANCE

CHAPTER 11. INTERVENTION DUE TO INEFFECTIVE LEGAL ASSISTANCE UNDER THE CONVENTION

11.1. Introduction

This chapter builds on the previous chapters, and continues with what will be a third vertical perspective in order to explore how the Court deals with the obligation of the authorities to intervene in the case when confronted with effective legal assistance. The previous chapter has indicated how the authorities have the obligation to offer redress when the authorities interfere with counsel because it amounts to ineffective legal assistance *per se*. This chapter will continue with what the Court has labelled an obligation of the authorities “(...) to intervene if a failure by counsel to provide effective legal assistance is manifest or sufficiently brought to their attention in some other way”.¹⁴³³ This topic is particularly relevant for this research into ineffective legal assistance and its redress in Dutch criminal proceedings, because this general principle is being interpreted to require that “(...) the lawyer is absent or otherwise does practically nothing at all for the accused”.¹⁴³⁴ For this final central issue for this research into ineffective assistance by counsel to be dealt with, this chapter seeks to answer the following central question: What obligations do the authorities owe to the accused when confronted with ineffective legal assistance so that they protect his right to an effective defence and by what means of redress within criminal proceedings under the Convention? The right of the accused to an effective defence under Article 6 (3) (c) will be explored from the remaining third vertical perspective. In this way, this chapter will try to determine whether the accused, in addition to being entitled to the preconditions for an effective defence, should be protected by the authorities when confronted with ineffective assistance by counsel.¹⁴³⁵

Particular attention will be paid to the question of whether the authorities are obliged under the Convention to intervene in the case, as elaborated upon in chapter 2. Such an intervention in the case has to be distinguished from the yet discussed interference in the lawyer-client relationship (positive obligation, for this latter issue see chapter 9).¹⁴³⁶ The focus in this exploration will be on with what exact means the authorities are required to intervene in the case when counsel’s ineffective legal assistance amounts to harm to the rights of the accused, rather than the strategy of the defence (negative obligation, for this latter issue see chapter 7).

This chapter deliberately mirrors the topics that will be elaborated upon under the second vertical perspective towards Dutch criminal procedure (see chapter 12). Ultimately, this structure will enable a comparison between these two chapters, so that an evaluation can follow in the last chapter of this book (chapter 13).

Outline

This chapter is divided into three more sections. First, whether the authorities are obliged to intervene in the case will be explored, and if so under what circumstances (section 11.2.). Thereafter, the next section will study possible exceptions to the rule of intervention in the case (section 11.3.). Finally, a conclusion will be drawn on the basis of the previous sections (section 11.4.).

11.2. An intervention in the case when confronted with ineffective legal assistance

This section will elaborate upon the Court’s case of *Artico v. Italy* and its successors regarding this rule for an intervention in the case by the authorities under a third vertical perspective as explained in the conceptual framework (see chapter 2).

¹⁴³³ E.g. *Kamasinski v. Austria*, Judgment of 19 December 1989, HUDOC no. 9783/82, para. 65.

¹⁴³⁴ Spronken (2001) at 447 and 464. See also this same view reiterated in Prakken and Spronken, in: Prakken and Spronken (2009) at 15.

¹⁴³⁵ See for the first vertical perspective above in chapter 6 dealing with preconditions for the right to effective legal assistance that the authorities have to ensure.

¹⁴³⁶ See for the interpretation of the term ‘to intervene’ above in chapter 5.

11.2.1. Ineffective legal assistance (*Artico*-case)

The Court has long recognised that the right to counsel of the accused is not respected if counsel fails to provide effective legal assistance to the accused.¹⁴³⁷ Both the right to counsel under Article 6 (3) (c) and the right to a fair trial “as a whole” (especially out of equality of arms and adversariality) require “that, although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial”.¹⁴³⁸ Legal assistance has to be effective, primarily at the “adversarial hearing”. This will normally be at first instance and at a *de novo* appeal, but, as examples in this sub-section and the subsequent sub-sections will illustrate, this right can also be required at earlier and later “critical” stages such as at police interrogations and cassation.

A first case that is worth exploring in detail in the context of ineffective legal assistance, is the case that has been mentioned often in this research, the case of *Artico v. Italy* from 1980.¹⁴³⁹ The relevant facts of that case are that *Artico* was suspected of various offences, including fraud. During the appeal in cassation stage, an appointed legal aid lawyer assisted him. According to *Artico*, this court-appointed legal aid lawyer did not provide him with adequate services. The lawyer had allegedly failed to plead the statute of limitations for the indicted offence of fraud *inter alia*.

Artico complained before the Court that he had received ineffective legal assistance that resulted in his Convention right to an effective defence with counsel being violated.

The Government countered *Artico*'s complaint by holding that the authorities could have done no more than to appoint a legal aid lawyer. If they would have done more than guaranteeing that there was a lawyer present who could freely assist and advise the accused, then they would have supposedly acted contrary to the freedom of the defence and accordingly would have purportedly interfered with counsel, causing harm to the lawyer-client relationship.

The Court held that:

“(…) The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective; this is particularly so of the rights of the defence in view of the prominent place held in a democratic society by the right to a fair trial, from which they derive (...). As the Commission’s Delegates correctly emphasised, Article 6 par. 3 (c) (...) speaks of “assistance” and not of “nomination”. Again, mere nomination does not ensure effective assistance since the lawyer appointed for legal aid purposes may die, fall seriously ill, be prevented for a protracted period from acting or shirk his duties. If they are notified of the situation, the authorities must either replace him or cause him to fulfil his obligations”.

The Court concluded that, because the authorities had failed to guarantee that *Artico* was ensured his Convention right to “(...) practical and effective” assistance by counsel, Article 6 (3) (c) in conjunction with 6 (1) had been violated. The authorities ought to have intervened in the case because the appellant had suffered harm in terms of his personal right to effective assistance by counsel who had “(...) shirked his duties”. The Court added that for the complaint to be worthy of consideration under the Convention, the accused should not be required to prove that he has been prejudiced due to a lack of effective legal assistance¹⁴⁴⁰, nor that damages have arisen.¹⁴⁴¹ The accused should not be asked to prove “beyond reasonable doubt” that counsel did not meet at least a minimum of effectiveness with his services, nor that, for instance, an acquittal would have followed if not for counsel – because that would be an unrealistic burden of proof. The types of interventions in the case that were suggested are: replacement of the criminal defence lawyer or making counsel “fulfil his obligations”; while of course respecting the principle of the freedom of the defence, which applies to both unassisted and assisted accused, and for the assisted accused respecting the privileged lawyer-client relationship. Therefore, the Court holds in this *Artico*-case that the authorities can have an obligation to intervene in the case. When confronted with ineffective legal assistance that amounts to harm to the accused’s right to an

¹⁴³⁷ E.g. *Artico v. Italy*, Judgment of 13 May 1980, HUDOC no. 6694/74, para. 33. See also section 5.3.

¹⁴³⁸ *Nalbandyan v. Armenia*, Judgment of 31 March 2015, HUDOC nos. 9935/06 23339/06, para. 140.

¹⁴³⁹ E.g. *Artico v. Italy*, Judgment of 13 May 1980, HUDOC no. 6694/74, para. 33. See also section 5.3.

¹⁴⁴⁰ *Artico v. Italy*, Judgment of 13 May 1980, HUDOC no. 6694/74.

¹⁴⁴¹ *Alimena v. Italy*, Judgment of 19 February 1991, HUDOC no. 11910/85.

effective defence, they are required to intervene in the case out of protection of the right to a fair trial under Article 6 (3) (c) in conjunction with 6 (1). This obligation distinguishes between harm to the accused in terms of his rights, rather than defence strategy. From the *Artico*-rule that refers to counsel shirking his duties, it does not seem to follow that the Court requires that the authorities only intervene when “(...) the lawyer is absent or otherwise does practically nothing at all for the accused”¹⁴⁴².

The standard for intervention under this *Artico*-rule is thus that ineffective legal assistance has to be manifest or brought to the attention of the court or other authorities. While the first component of this rule means that the judge could and ought to have intervened because ineffective legal assistance was manifest, the second component relies on notification by other participants such as the accused, (another) lawyer, or perhaps even the prosecutor.

11.2.2. Ineffective legal assistance (the *Artico*-rule)

The *Artico*-case has been followed by important newer cases that appear useful for a further explanation of the problem discussed of ineffective legal assistance as well as its redress required within Convention-conforming criminal proceedings.

- *Does the Artico-rule apply equally for appointed and retained lawyer?*

The Court has held explicitly that, with regard to requiring an intervention in the case in order to redress ineffective legal assistance, it does not matter “(...) whether that counsel be appointed under a legal-aid scheme or be privately financed”¹⁴⁴³. This equal protection of accused who has an appointed counsel and who can retain counsel has already been settled in an early case of *Goddi v. Italy* from 1984.¹⁴⁴⁴

- *What constitutes ineffective legal assistance?*

The case of *Ebanks v. the United Kingdom* has to be reiterated here because of its important explanation as to the standard required for the Court to conclude there has been ineffective legal assistance. Counsel’s assistance has to be “defective in a fundamental respect” (sub-section 7.4.1.1.).¹⁴⁴⁵ If this qualification applies, the accused’s right to assistance by counsel under Article 6 (3) (c) has been denied. The Convention right thus requires that there is not just a lawyer on the accused’s side, but that this counsel provides effective legal assistance that cannot fall below the aforementioned standard. The resulting harm to the accused is sufficient: under this *Artico*-rule the accused does not have to prove “prejudice” before the Court – or thus, by extension, before the domestic authorities.¹⁴⁴⁶

The way in which the authorities dealt with this complaint of *Ebanks* about the alleged ineffective legal assistance by his lawyer will be considered at a later stage of this research because a separate appeal was used that is not familiar to all jurisdictions (particularly not to civil law countries). Therefore, it will be dealt with in another sub-section (see sub-section 11.2.3.2.), while this overview will reiterate that the Court has also critically assessed the effectiveness of the assistance given by an appointed legal aid lawyer to the accused in custodial police interrogations. The effectiveness, that is, of preventing a breach of the right to remain silent and right not to incriminate himself and in facilitating the effective exercise of the right to remain silent in *Pavlenko v. Russia* (see sub-section 5.3.1.3.). The Court held that the police had a responsibility for keeping a close eye on the “(...) effectiveness of the lawyer”. The Court came to this conclusion in this case in which the accused had rejected the legal aid lawyer appointed to assist him, preferring the lawyer who had been appointed by his mother and had been subjected to informal “talks” with the police in the absence of a lawyer. Given that this *Pavlenko*-case has already been dealt with in the first substantive chapter on the Convention, this overview will continue with a further examination of whether passive conduct of the accused can potentially exempt authorities from their intervention obligation.

¹⁴⁴² Spronken (2001) at 447 and 464. See also this same view reiterated in Prakken and Spronken, in: Prakken and Spronken (2009) at 15.

¹⁴⁴³ See *Cuscani v. the United Kingdom*, Judgment of 24 September 2002, HUDOC no. 32771/96, para. 39, and *Iglin v. Ukraine*, Judgment of 12 January 2012, HUDOC no. 39908/05, paras. 51-52.

¹⁴⁴⁴ *Goddi v. Italy*, Judgment of 9 April 1984, HUDOC no. 8966/80, para. 27 including the following citation.

¹⁴⁴⁵ *Ebanks v. the United Kingdom*, Judgment of 26 January 2010, HUDOC no. 36822/06, para. 79.

¹⁴⁴⁶ E.g. *Artico v. Italy*, Judgment of 13 May 1980, HUDOC no. 6694/74, para. 35.

- *Can the passivity of counsel and the accused exempt the intervention obligation?*

The question of whether the passivity of the accused and counsel can exempt the intervention obligation of the authorities – because both the lack of active and assertive conduct of counsel and the accused himself can supposedly come at the procedural risk of the accused – can be examined by means of the case of *Sakhnovskiy v. Russia*.

At first instance *Sakhnovskiy* had been convicted of the murder of his father and uncle.¹⁴⁴⁷ The domestic court had to deal with the case after issues with the accused's lack of a right to effective legal assistance had arisen during earlier instances. Prior to the appeal hearing, *Sakhnovskiy* had made a request to be provided with a legal aid lawyer. He was appointed legal aid counsel Ms A. who had studied the case file in advance. During the appeal hearing, *Sakhnovskiy* was not brought to the courtroom. Counsel Ms A., of whose appointment *Sakhnovskiy* had only learned some time before the hearing, was present, however. After meeting her for approximately 15 minutes through a video link, *Sakhnovskiy* refused her services. For her part, legal aid counsel Ms A. did not ask to be replaced or for the appeal hearing to be adjourned. The appeal court then proceeded with the case during a hearing. *Sakhnovskiy*, representing himself without any lawyer, participated from outside the courtroom via a video link. His conviction was upheld on appeal in cassation.

Sakhnovskiy complained before the Court about violations of both his right to a lawyer and his right to effective legal assistance at the appeal stage.

The Government argued that the accused, who did not accept Ms A.'s services, "(...) should bear the consequences of the conduct of Ms. A. (the court-appointed lawyer) in the proceedings, namely her failure to ask in writing for a replacement or for an adjournment". Additionally, *Sakhnovskiy* had not requested a personal meeting with his lawyer, had not asked the court to replace his lawyer or mentioned that he wanted to proceed on his own. Also, Ms A. "(...) had taken her task quite seriously; she had studied the case file in advance and she had consulted with the applicant in private before the start of the hearing. She had not asked for a face-to-face meeting with the applicant; however, the authorities could not tell lawyers how to defend their clients, and whether or not a personal meeting was necessary" for an effective defence.

The Court considered the following about *Sakhnovskiy*'s refusal to be assisted by Ms A.:

"The Court notes that the applicant is a lay person and has no legal training (...). He was unaware of Ms A.'s appointment and eventually refused her services for the very reason that he perceived her participation in the proceedings as a mere formality. He made his position known to the Supreme Court as best he could. The applicant should not be required to suffer the consequences of Ms A.'s passive attitude when one of the key elements of his complaint is precisely her passivity. Accordingly, the inaction of Ms A. cannot be regarded as a waiver".¹⁴⁴⁸

The Court thus examined whether *Sakhnovskiy*'s refusal to accept the services of counsel Ms A. or that lawyer's conduct constituted a waiver of the right to assistance by a lawyer. The Court found that it did not because of two reasons. First, the accused, who was a lay person, could not have done more than decline the services of the lawyer. Second, counsel's "inaction" or "passivity", as the Court called it, did not constitute a waiver of *Sakhnovskiy*'s personal right to obtain a lawyer. The Court considers this important because it is up to the accused to renounce his right to assistance by counsel, and that is not a right his lawyer can waive. The Court concluded that neither *Sakhnovskiy* nor his lawyer had renounced the right to assistance by a lawyer.

Under the second complaint by *Sakhnovskiy*, and seeing that the accused's right to effective legal assistance had not been guaranteed, the Court also added what interventions the authorities should have done. For example, ensured better conditions for contact between counsel and the accused

¹⁴⁴⁷ *Sakhnovskiy v. Russia*, Judgment of 2 November 2010, HUDOC no. 21272/03.

¹⁴⁴⁸ *Sakhnovskiy v. Russia*, Judgment of 2 November 2010, HUDOC no. 21272/03, para. 91.

prior to the hearing and an effective defence during the appeal court proceedings.¹⁴⁴⁹ Regarding the conditions for contact, the Court mentioned that¹⁴⁵⁰:

“(…) the relationship between the lawyer and his client should be based on mutual trust and understanding. Of course, it is not always possible for the State to facilitate such a relationship: there are inherent time and place constraints for the meetings between the detained person and his lawyer. Moreover, in exceptional circumstances the State may restrict confidential contacts with counsel for a person in detention (…). Nevertheless, any limitation on relations between clients and lawyers, whether inherent or express, should not thwart the effective legal assistance to which a defendant is entitled. Notwithstanding possible difficulties or restrictions, such is the importance attached to the rights of the defence that the right to effective legal assistance must be respected in all circumstances”.¹⁴⁵¹

In relation to the second issue of an intervention by the authorities in the case before and at the hearing, the Court mentioned that:

“(…) nothing prevented the authorities from organising at least a telephone conversation between the applicant and Ms A. more in advance of the hearing. Nothing prevented them from appointing a lawyer from Novosibirsk who could have visited the applicant in the detention centre and have been with him during the hearing. Furthermore, it is unclear why the Supreme Court did not confer the representation of the applicant to the lawyer who had already defended him before the first-instance court and prepared the original statement of appeal. Finally, the Supreme Court could have adjourned the hearing on its own motion so as to give the applicant sufficient time to discuss the case with Ms A.”¹⁴⁵²

This unanimous decision of the Grand Chamber shows the importance of an obligation of the authorities to intervene in the case under Article 6 (1) in conjunction with 6 (3) (c).¹⁴⁵³ This case is important because the Court did not just hold that the accused did not waive his right to counsel but also that his right to effective legal assistance had not been respected. While the Government construed the right to counsel as only a formal right, the Court maintained again that the accused is entitled to a substantive right to *effective* legal assistance, as explained throughout this research (chapters 5, 7 and 9).

- *Under what circumstances has there been manifest ineffective legal assistance?*

The cases cited above have shown important aspects of ineffective assistance by counsel within criminal proceedings, but not yet touched upon a claim of manifest ineffective legal assistance. Therefore, this section will address the case of *Shekhov v. Russia* in this light.¹⁴⁵⁴

Shekhov was believed to have committed a double murder and attempted murder and therefore risked a term of imprisonment exceeding fifteen years. During the trial *Shekhov* was represented by legal aid counsel Mr A., who did not, however, appeal against the applicant’s conviction or attend the appeal hearing. The Government contended before the Court that the applicant had not asked for the appeal hearing to be adjourned or for replacement counsel to be appointed by the appellate court. The applicant claimed that he had.

The Court, which repeated its *Artico*-rule, found that “there is no need for the Court to establish whether the applicant” “asked for the appeal hearing to be adjourned or for replacement counsel to be appointed by the appellate court”. It added that “(t)he Court considers that the applicant’s conduct could not of itself relieve the authorities of their obligation to take steps to

¹⁴⁴⁹ *Sakhnovskiy v. Russia*, Judgment of 2 November 2010, HUDOC no. 21272/03, para. 101.

¹⁴⁵⁰ *Sakhnovskiy v. Russia*, Judgment of 2 November 2010, HUDOC no. 21272/03, para. 102.

¹⁴⁵¹ *Sakhnovskiy v. Russia*, Judgment of 2 November 2010, HUDOC no. 21272/03, para. 102.

¹⁴⁵² *Sakhnovskiy v. Russia*, Judgment of 2 November 2010, HUDOC no. 21272/03, para. 106.

¹⁴⁵³ *Sakhnovskiy v. Russia*, Judgment of 2 November 2010, HUDOC no. 21272/03, paras. 107 and 109.

¹⁴⁵⁴ *Shekhov v. Russia*, Judgment of 19 June 2014, HUDOC no. 12440/04.

guarantee him an effective defence. The above-mentioned shortcomings on the part of the court-appointed lawyer were manifest, which put the onus on the domestic authorities to intervene”. While assistance by counsel is mandatory for accused who face criminal charges of that gravity, the authorities did not appoint a legal aid lawyer to the accused. The Court notes that “(...) the applicant never unequivocally waived his defence rights and yet no attempt was made to appoint a lawyer or to adjourn the appeal hearing in order to ensure that a lawyer was present”. The “interests of justice” required assistance by counsel of this accused on appeal because of “(...) three factors – (a) the wide powers of the appellate courts in Russia, (b) the seriousness of the charges against the applicants and (c) the severity of the sentence which they faced – the Court considered that the interests of justice demanded that, in order to receive a fair hearing, the applicants should have had legal representation at the appeal hearing.” While this stage of the proceedings only dealt with the law and not with factual issues, the “(...) legal issues in the applicant’s case were particularly complex”, because the appeal submissions by the accused “(...) sought re-characterisation of the criminal offence and relied on the defence of self-defence”. As a conclusion, it was held that:

“The Court is therefore of the view that, without the services of a legal practitioner, he was not in a position to articulate the arguments raised in the appeal statement and could not competently address the court on the legal issues involved, meaning that he was unable to defend himself effectively.”¹⁴⁵⁵

The actions that the authorities should have undertaken, included “(...) appoint a lawyer for the applicant or to adjourn the appeal hearing in order to ensure that a lawyer was present”, because without it “(...) the domestic judicial authorities failed to secure effective legal assistance to the applicant during the appeal proceedings”. Therefore, the Court held that there had been a violation of Article 6 (1) in conjunction with Article 6 (3) (c) of the Convention. While this case concerned a situation of manifest ineffective legal assistance, as the Court literally held, it is also important to finish this section with a case in which the other condition of due notification of the authorities about the accused’s ineffective legal assistance might have occurred.

- *Under what circumstances has there been due notification of the authorities of ineffective legal assistance?*

The cases cited above have shown important aspects of ineffective assistance by counsel within criminal proceedings, but not yet touched upon a claim that the lawyer was passive in relation to requesting a stay for more preparation time which according to the Government should have come at the procedural risk of the accused. The last case which will be explored, in light of the issue of due notification of the authorities of ineffective legal assistance, is *Daud v. Portugal*.¹⁴⁵⁶

Daud was an Argentinian and thus a Spanish-speaking accused, who had been tried in Portugal for possession of a large quantity of cocaine. Upon his arrest, the Portuguese authorities immediately appointed a legal aid lawyer to assist him. However, this lawyer did not communicate with *Daud* for some months. When counsel did make contact, he only asked to be withdrawn from the case on health grounds. *Daud* himself wrote several letters to the authorities to obtain investigative measures and to arrange for contact with his lawyer. However, the authorities did not respond because these letters were written in a non-court language (in Spanish, not Portuguese). Three days before *Daud*’s trial hearing, the domestic court appointed a new lawyer to assist him. This new counsel provided services to *Daud* such as, amongst other issues, lodging an appeal against his conviction with the domestic Supreme Court on the same day as the conviction was pronounced. The Supreme Court dismissed this appeal in cassation, holding that the grounds had been inadequately presented.

Daud complained before the Court that the lawyers assigned to him by the Portuguese authorities, particularly the first one, did not provide him with effective legal assistance in preparing and conducting his defence. Consequently, he had been obliged to apply in person, but did so unsuccessfully to the investigating judge and subsequently to the criminal court. The refusal to initiate

¹⁴⁵⁵ *Shekhov v. Russia*, Judgment of 19 June 2014, HUDOC no. 12440/04, para. 45.

¹⁴⁵⁶ *Daud v. Portugal*, Judgment of 21 April 1998, HUDOC no. 22600/93.

judicial investigation proceedings had seriously infringed his rights. Seeing that he was a foreigner, he should have been given appropriate assistance.

The Court held that:

“In the instant case the starting-point must be that, regard being had to the preparation and conduct of the case by the officially assigned lawyers, the intended outcome of Article 6 § 3 was not achieved. The Court notes that the first officially assigned lawyer, before reporting sick, had not taken any steps as counsel for Mr Daud, who tried unsuccessfully to conduct his own defence. As to the second lawyer, whose appointment the applicant learned of only three days before the beginning of the trial at the Criminal Court, the Court considers that she did not have the time she needed to study the file, visit her client in prison if necessary and prepare his defence. The time between notification of the replacement of the lawyer (...) was too short for a serious, complex case in which there had been no judicial investigation and which led to a heavy sentence. The Supreme Court did not remedy the situation, since (...) it declared the appeal inadmissible on account of an *inadequate presentation of the grounds* (...). Mr Daud consequently did not have the benefit of a practical and effective defence as required by Article 6 § 3 (c) (...) [emphasis added by the author]”¹⁴⁵⁷.

The Court reasoned that the type of intervention in the case should have been an adjournment. The domestic court should have resorted to this intervention after the significant inactivity by counsel who presented appeal grounds that were inadequate. The Court’s reasoning entails:

“(...) after appointing a replacement, the Lisbon Criminal Court, which must have known that the applicant had not had any proper legal assistance until then, could have adjourned the trial on its own initiative. The fact that the second officially assigned lawyer did not make such an application is of no consequence. The circumstances of the case required that the court should not remain passive”¹⁴⁵⁸.

The Dutch Judge at the Court, Myjer, has repeatedly used the case of *Daud v. Portugal* to demonstrate that “(...) there is one ultimate sanction as far as “genuinely inadequate” legal assistance is concerned: ultimately the national court should intervene in the case to protect the interests of the defendant”¹⁴⁵⁹. It is interesting to note that his interpretation does not appear to have been followed in scholarly work¹⁴⁶⁰ and only in some conclusions by AGs who advise the Hoge Raad.¹⁴⁶¹ Also in a more recent case, the Court refers to the Portuguese Court of Cassation having “(...) acted with excessive formalism and lack of due diligence in refusing to admit the appeal filed by a lawyer” whom the accused had allegedly fired his lawyer, but whose cassation appeal submission this highest domestic court received after a meeting between counsel and client only a few days after that supposed dismissal.¹⁴⁶² Also in that case, the Court held that there had been a violation of both the right of effective legal assistance and access to court.

Concluding remarks

¹⁴⁵⁷ *Daud v. Portugal*, Judgment of 21 April 1998, HUDOC no. 22600/93, para. 39.

¹⁴⁵⁸ *Daud v. Portugal*, Judgment of 21 April 1998, HUDOC no. 22600/93, para. 42.

¹⁴⁵⁹ B.E.P. Myjer, *In toga venenum? The limits of freedom of expression in and around the courtroom in the case-law of the European Court of Human Rights*. Available at www.coehelp.org/mod/resource/view.php?inpopup=true&id=1420. See also B.E.P. Myjer, *The European Court of Human Rights General information, misconceptions and venomous remarks Discourse* by Egbert Myjer, judge at the Court, held at the Netherlands Council for the Judiciary on the 16th of November 2007, available at <http://www.rechtspraak.nl/English/Publications/Documents/european-court-of-human-rights.pdf>.

¹⁴⁶⁰ Spronken (2001) at 447 and 464. See also this same view reiterated in Prakken and Spronken, in: Prakken and Spronken (2009) at 15.

¹⁴⁶¹ AG Jörg, Conclusion, ECLI:NL:PHR:2004:AO6270, as an advice to the Hoge Raad’s case of HR 23 March 2004, ECLI:NL:HR:2004:AO6270, para 10. He refers in para. 5 to the case of HR 26 May 1998, ECLI:NL:HR:1998:ZD1048, NJ 1998, 677 and under para. 6 to Spronken (2001) at 447-449 and 463-469.

¹⁴⁶² *Nalbandyan v. Armenia*, Judgment of 31 March 2015, HUDOC nos. 9935/06 23339/06, para. 145-150.

Important for the current analysis is the assumption that the best possible defence can be provided by a lawyer of “one’s own choosing”¹⁴⁶³, but that legal assistance, which is essentially a matter between the lawyer and the accused¹⁴⁶⁴, does not have to be perfect for the right to counsel to be respected. Legal assistance that is “(...) defective in a fundamental respect”, in that the personal rights of the accused are being damaged by counsel’s conduct, is not Convention-conforming because it reduces the right to counsel to a “(...) mere formality” and violates the obligation of the authorities to intervene in the case.

The *Artico*-rule, which requires intervention when (i) ineffective legal assistance is manifest or (ii) brought to the attention of the authorities, makes no distinction between appointed¹⁴⁶⁵ and retained¹⁴⁶⁶ lawyers.¹⁴⁶⁷ In this way, the Court ensures equal protection for accused who have legal assistance by either a legal aid appointed lawyer or a retained lawyer.

Repeated judgments indicate that ineffective legal assistance by the accused’s lawyer is present in a case in which any right personally held by the accused is harmed (see also chapter 7 for counsel’s control over defence strategy). In this way, the Court appears to recognise the independence of the lawyer and the freedom of the defence of the assisted accused on the one hand. But it also appears to acknowledge on the other hand the significance of relieving the accused’s possible burden of – even the risk of – ineffective legal assistance by retained¹⁴⁶⁸ or appointed¹⁴⁶⁹ lawyer. Moreover, the Court in so doing appears to reinforce the two separate roles played by counsel and the accused. The cases appear to stress that counsel is an advisor and has to zealously protect the rights, interests and wishes of the accused as strategist, while the accused ought to be able to take the decisions in his case about rights that he holds personally at least. That is, some Convention rights are required for the accused’s effective defence in the criminal proceedings against him, so that it is only fair that he can be supposed to give instructions about these “personal rights” to his lawyer who has to follow such instructions.

It seems that not only when counsel is completely absent or does practically nothing for the accused do the authorities have to intervene in the case. Also when materially the assistance by the lawyer at the trial hearing is fundamentally defective or the right to counsel a “mere formality” reduced, the authorities appear to be required to (pro)actively ensure the accused’s personal right to an effective defence.

When confronted with counsel who does not meet at least a minimum of proficiency with his services, the authorities should intervene in the case under what might be best labelled as the *Artico*-rule. The cited cases indicate that the types of interventions by the authorities include making arrangements for contact between counsel and the accused before the hearing and an adjournment to enable consultation between counsel and the accused during the trial appeal phase when the hearing takes place. Therefore, the Court appears to take into consideration what can be labelled more intrinsic elements of effective legal assistance than the more formal issues of absence of counsel and doing practically nothing for the defence. For example, the Court explores whether counsel gave incorrect legal advice about the accused’s right to remain silent.

11.2.3. Exceptions to the Artico-rule regarding intervention out of ineffective legal assistance

The *Artico*-case explicitly rejected the standard of “(...) any actual prejudice to the defence case”, which has, however, been used in the exceptional case of *Mader*.¹⁴⁷⁰ Before turning to this case, it is important to reiterate that, as explained in the previous sub-section (sub-section 11.2.2.), the accused has a right to proceed *pro se*, but if the accused proceeds with counsel, in principle his complaint before the Court would not be accepted even if counsel makes a strategic decision contrary to the accused’s wishes (e.g. *Stanford v. the United Kingdom* as explained in chapter 7). The case law suggests that the Court will come to another conclusion in this respect, however, if certain decisions,

¹⁴⁶³ *Hanževački v. Croatia*, Judgment of 16 April 2009, HUDOC no. 17182/07, para. 25 including the following citation.

¹⁴⁶⁴ *Pavlenko v. Russia*, Judgment of 1 April 2010, HUDOC no. 42371/02, para. 107.

¹⁴⁶⁵ E.g. *Croissant v. Germany*, Judgment of 25 September 1992, HUDOC no. 13611/88.

¹⁴⁶⁶ E.g. *Orlov v. Russia*, Judgment of 21 June 2011, HUDOC no. 29652/04.

¹⁴⁶⁷ *Ovey and White* (2006) at 205.

¹⁴⁶⁸ E.g. *Goddi v. Italy*, Judgment of 9 April 1984, HUDOC no. 8966/80.

¹⁴⁶⁹ E.g. *Artico v. Italy*, Judgment of 13 May 1980, HUDOC no. 6694/74.

¹⁴⁷⁰ E.g. *Artico v. Italy*, Judgment of 13 May 1980, HUDOC no. 6694/74, para. 35.

though they have a strategic element, are so “personal” that counsel must abide by the accused’s wishes (e.g. *Ebanks v. the United Kingdom* as explained in sub-section 11.2.2.). These include decisions that concern the right to remain silent and the right not to incriminate oneself, the right to attend the hearing and the right to appeal or lodge another legal remedy such as an appeal in cassation. Where counsel fails to follow the instructions of the accused whose personal decision is at stake, the cited cases of the Court indicate that such conduct of counsel will amount to ineffective legal assistance *per se*. Under such circumstances, the Court does not have to examine whether the subsequent legal assistance at the adversarial trial hearing was effective or not for a violation of the right to a fair trial to be found. Where, however, the lawyer has *never* consulted with the accused and the accused has not given any instructions about the decisions that fall within his control, the following case can demonstrate how the Court appears to use a two-pronged test to determine whether or not ineffective legal assistance occurred: (i) incompetence of counsel and (ii) prejudice (which resembles the *Strickland*-test used in the United States). For this reason, the case that will be examined is *Mađer v. Croatia*.¹⁴⁷¹

Mađer was believed to have committed a murder. The authorities had appointed a lawyer to assist him. This counsel only visited *Mađer* after he had already been detained for 332 days after the police interrogation had already been conducted. When they were in touch, the lawyer only asked to be paid.

Mađer complained before the Court on two accounts. First, the authorities had not provided him with access to a lawyer at the stage of the police interrogations. Second, the lawyer, who had only visited the accused after he had already been detained for 332 days, came “only” to ask for money. Consequently, *Mađer* complained of not having had effective legal assistance at the trial hearing.

The Court concluded regarding the first complaint that *Mađer*’s right to a fair criminal procedure and thus Article 6 (3) (c) in conjunction with Article 6 (1) had been violated.¹⁴⁷² In doing so, the Court confirmed that it was clear that “(...) neither the assistance provided subsequently by a lawyer nor the adversarial nature of the proceedings could counteract the defects which had occurred during his initial questioning”¹⁴⁷³.

With regard to the second complaint, the Court noted that *Mađer*’s lawyer had attended all the trial hearings and had actively participated in these sessions by making relevant proposals and putting questions to witnesses. Moreover, *Mađer*’s lawyer had requested that the police report containing *Mađer*’s confession be excluded from the case file and had lodged an appeal against the decision refusing that request. *Mađer*’s lawyer had also lodged an appeal against the first instance judgment. The case file contained *Mađer*’s confession to the police, so that his lawyer had had an opportunity, even without consulting him in person, to study the case file and to prepare his defence on that basis. At the appeal stage, another lawyer of his choosing had assisted *Mađer*. His successor had not advanced any new arguments which had not been previously submitted by the officially appointed first instance lawyer. According to the Court, neither in his appeal in cassation nor in his constitutional complaint did *Mađer* advance any new arguments which had not been previously submitted by his first instance lawyer. Having come to these conclusions, the Court examined whether *Mađer* had suffered “(...) any actual prejudice” in the court proceedings against him because of his lawyer’s conduct.¹⁴⁷⁴ The Court considered that the trial hearing did not amount to any prejudice to *Mađer*’s defence rights to a degree which was incompatible with the requirements of a fair trial. Therefore, the Court concluded under this second complaint that Article 6 (3) (c), taken together with 6 (1), had been respected.¹⁴⁷⁵ The Court thus concludes that in this *Mađer*-case it was not the situation that, but for the conduct of counsel, *Mađer* would have been acquitted rather than convicted, so that there was no prejudice and thus a violation of the right to a fair trial.

¹⁴⁷¹ See regarding the right to remain silent, *Gäfgen v. Germany*, Judgment of 1 June 2010, HUDOC no. 22978/05, paras. 179-183.

¹⁴⁷² *Mađer v. Croatia*, Judgment of 21 June 2011, HUDOC no. 56185/07, para. 153.

¹⁴⁷³ *Mađer v. Croatia*, Judgment of 21 June 2011, HUDOC no. 56185/07, para. 154.

¹⁴⁷⁴ *Mađer v. Croatia*, Judgment of 21 June 2011, HUDOC no. 56185/07, para. 163.

¹⁴⁷⁵ See *Sofri and others v. Italy* (dec.), Commission decision of 27 May 2003, HUDOC no. 37235/97 in which the Court held that evidence that had become missing and could not be adequately tested by the defence lawyer had resulted in the applicants being put at a disadvantage compared to the prosecution.

Under circumstances such as in the *Mađer*-case in which counsel did not get any instructions regarding decisions that are personal and thus fall within the realm of decision-making by the accused, the Court appears to thus assess both counsel's incompetence and prejudice.

For counsel's conduct, the Court appears to have judged that in light of all the circumstances of the case, the acts or omissions of counsel identified by the accused were not outside of the realm of the range of professionally competent assistance by counsel. The Court thus respects a wide latitude to counsel's discretion to make strategic decisions falling within his control, in keeping with the importance attached to the independence of the Bar in general and of services of counsel within Convention-conforming criminal proceedings. This might be read to mean that the Court does not want domestic courts or itself to second-guess counsel's performance. Judgements of the courts in this respect must be highly deferential to counsel's expertise. A fair assessment of counsel's performance requires that the Court evaluates the conduct of counsel at the time of the criminal case, without the distorting effects of the benefit of hindsight after the case is over and with respect of the assumption that counsel's conduct falls within the wide range of reasonable professional legal assistance. For this same reason, it is the applicant who must overcome that assumption when he challenges by means of a complaint to the Court that counsel conducted a sound trial strategy.

Nonetheless, this *Mađer*-case can be criticized because of the approach used by the Court that Ashworth and Redmayne refer to as the separation thesis, whereby the Court separated the complaint of a lack of assistance by counsel at the stage of police interrogations and at trial.¹⁴⁷⁶ These scholars consider that the Court in some cases compartmentalises aspects of a criminal procedure, rather than take the process for what it is: an organic whole.

In the *Mađer*-case, the Court indeed appears to assess the trial phase as an isolated stage under the one right to assistance by counsel under Article 6 (3) (c). This will probably mean that the Court will assess the effectiveness of assistance by counsel at both stages, but this approach to the two complaints do point out another position than the often-cited general rule. That rule is that neither effective assistance provided subsequently by a lawyer nor the adversarial nature of the ensuing proceedings can "cure" the damage which has been done if there was no assistance by counsel at the "critical" stage of police interrogations.

For example, the approach chosen in this *Mađer*-case departs from an earlier case of *Pishchalnikov v. Russia* in which the Court argued that it did not have to examine the complaint of ineffective assistance by counsel at the trial stage after it had already determined that the lack of access to a lawyer as from the first police interrogation contravened Article 6 (3) (c) in conjunction with 6 (1).¹⁴⁷⁷ Thus, the Court, in this case, expressly held that the nature of the detriment that the accused had suffered, because of the breach of due process at the pre-trial stage of the proceedings, could not be repaired by an effective defence at the adversarial trial hearing. Therefore, the Court normally appears to explore the criminal procedure as an organic whole.¹⁴⁷⁸ It follows that the *Mađer*-case represents a real exception to the many related rules of both *Salduz* and *Artico*, for example. The reason for this digression from this general rule will probably lie in the two-prong test applied in the *Mađer*-case, which only appears to apply when the lawyer has *never* consulted with the accused and the accused has not given any instructions about the decisions that fall within his control to counsel.

This leads to the question as to whether there have been any other important exceptions to the *Artico*-rule in earlier case law, which followed after *Artico* but was rendered before the *Mađer*-case.

- *Are there additional exceptions to the Artico-rule?*

Two other early cases that help to interpret exceptions to the *Artico*-rule are *Kamasinski v. Austria* and *Imbrioscia v. Switzerland*. Both cases will be described here, and an overview will follow after both case overviews. These cases are often being used in order to substantiate the fact that counsel has to be "(...) absent or perform practically no activity for the accused"¹⁴⁷⁹, for the authorities to be obliged to intervene in the case.

¹⁴⁷⁶ Ashworth and Redmayne (2005) at 330-331.

¹⁴⁷⁷ *Pishchalnikov v. Russia*, Judgment of 24 September 2009, HUDOC no. 7025/04, para. 93. See also Coster van Voorhout (2009c).

¹⁴⁷⁸ E.g. *Salduz v. Turkey* [GC], Judgment of 27 November 2008, HUDOC no. 36391/02, para. 58.

¹⁴⁷⁹ See also section 2.4.2.1. which already cited Spronken (2001) at 464 and Prakken and Spronken, in: Prakken and Spronken (2009) at 15.

The first case is *Kamasinski v. Austria*.¹⁴⁸⁰ *Kamasinski* was an American applicant who had been tried by the Austrian courts.¹⁴⁸¹ He was suspected of fraud and misappropriation. Before the investigating authorities *Kamasinski* complained about his first lawyer's lack of proficiency in the English language. Consequently, to replace the first lawyer, the authorities appointed Dr Steidl, a lawyer who was also a certified English translator. During the pre-trial stage Dr Steidl had failed, according to *Kamasinski*, to attend the indictment hearing; he only visited him briefly in prison and had not examined the prosecution evidence. At the trial hearing, Dr Steidl and *Kamasinski* had a disagreement about the submission of written statements given by out-of-court witnesses. In *Kamasinski's* view, Dr Steidl had also omitted to make certain motions for the preservation of the right to lodge a plea of nullity and in his concluding speech he had requested a "lenient judgment". The dispute between Dr Steidl and *Kamasinski* at the trial stage resulted in a request by Dr Steidl to be withdrawn from the case, which the domestic court refused. The domestic court convicted *Kamasinski*.

The Court held, with a reference to *Artico v. Italy* that "(...) within the ambit of criminal proceedings, the competent national authorities are required under Article 6 to intervene only if a failure by counsel to provide effective legal assistance is manifest or sufficiently brought to their attention in some other way".¹⁴⁸²

As a response to the first specific complaint by *Kamasinski*, who argued that he had been "(...) without the benefit of any legal assistance at all", which to his mind was demonstrated by the incomplete file that Dr Steidl had handed over to the subsequent lawyer acting during the appeal phase. Concerning this complaint regarding the presupposed ineffective legal assistance by Dr Steidl during the pre-trial stage, the Court held that:

"Unlike the lawyer in the *Artico* case, who, "from the very outset, ... stated that he was unable to act" (...), Dr Steidl took a number of steps prior to the trial in his capacity as Mr *Kamasinski's* counsel. Thus, he visited Mr *Kamasinski* in prison on nine occasions, he lodged a complaint against the decision to remand in custody and he filed written and telephone motions for the attendance of witnesses (...). These actions were clearly not such as to put the competent authorities on notice of ineffective legal representation".¹⁴⁸³

Taking into account how the pre-trial work of counsel translated into the services of Dr Steidl during the subsequent trial phase, the Court concluded that:

"At the trial itself a dispute occurred between the applicant and Dr Steidl, as a result of which Dr Steidl asked the trial court to discharge him from his functions as counsel; his request was however refused (...). Although the record does not state that Mr *Kamasinski* himself asked for his counsel to be replaced (...), the Austrian judicial authorities were thus put on notice that, in Mr *Kamasinski's* opinion, the conditions for the conduct of the defence were not ideal. However, the material before the Court does not warrant a finding that the decision at the trial not to discharge Dr Steidl in itself had the consequence of thereafter depriving Mr *Kamasinski* of the effective assistance of counsel".

The Court mentioned that it may also be correct that the defence at the trial phase could have been conducted in another way, or even that Dr Steidl in some respects had acted contrary to what *Kamasinski* at the time or subsequently considered to be in his own best interests. Nevertheless, the Court concluded that, despite *Kamasinski's* criticism, the circumstances of his defence at the trial stage did not reveal a failure to provide legal assistance as required by paragraph 3 (c) (...) or a denial of a

¹⁴⁸⁰ Prakken and Spronken, in: Prakken and Spronken (2009) at 15.

¹⁴⁸¹ *Kamasinski v. Austria*, Judgment of 19 December 1989, HUDOC no. 9783/82.

¹⁴⁸² See above in chapter 6 which already referred *inter alia* to *Kamasinski v. Austria*, Judgment of 19 December 1989, HUDOC no. 9783/82, para. 65.

¹⁴⁸³ *Kamasinski v. Austria*, Judgment of 19 December 1989, HUDOC no. 9783/82, para. 66.

fair hearing under paragraph 1 (...).¹⁴⁸⁴ A comment about this case will be provided after the second case of *Imbrioscia v. Switzerland* has been elaborated upon.

The second case that will be discussed here is *Imbrioscia v. Switzerland*.¹⁴⁸⁵ *Imbrioscia* was an Italian national who had been tried in the Swiss courts, together with a co-defendant, on suspicion of drug trafficking. His lawyer, Ms B.G., did not attend the police interrogations and she withdrew from the case immediately when the police interrogations were over. He obtained a new lawyer when the interrogations by the district prosecutors started. This new lawyer, Mr Fischer, came to meet *Imbrioscia* before the last interrogation by the district prosecutors and had been present at this ultimate questioning round. Mr Fischer provided assistance until the trial hearing.

Imbrioscia complained before the Court that he had not had effective legal assistance by Ms B.G., resulting in the situation where he only had legal assistance which was too late and too little: too late because he only received assistance after the custodial police interrogations were already over and too little because the services of Ms B.G. did not guarantee him a fair criminal procedure as a whole. The damage was supposedly irreparable, regardless of the good services later provided by Mr Fischer.

The Court noted that *Imbrioscia* and the Government held each other responsible for the inactivity of counsel during the period of custodial police interrogations. Ms B.G. should have acted and *Imbrioscia* should have complained according to the Government while *Imbrioscia* submitted that the authorities ought to have ensured effective legal assistance at the custodial police interrogations. The Court concluded in this case that:

“(…) Since the period in question was so short and the applicant had not complained about Ms B.G.’s inactivity, the relevant authorities could scarcely be expected to intervene. When she informed them of her withdrawal (...), they at once officially assigned a lawyer for his defence (...). Mr Fischer received the case file on 27 February 1985 and went to see his client in prison on 1 March. When he returned it to the district prosecutor on 4 March, he did not raise the issue of the non-attendance by a lawyer at the earlier interrogations of which he had inspected the transcripts (...). Thereupon the district prosecutor allowed him to attend the last interview, which concluded the investigation; the lawyer did not then put any questions, nor did he challenge the findings of the investigation (...), which he was aware of as he had received the relevant transcripts. Furthermore, the hearings in the Bülach District Court and the Zürich Court of Appeal were attended by adequate safeguards: on 26 June 1985 and 17 January 1986 the judges heard the applicant in the presence of his lawyer, who had every opportunity to examine him and his co-defendant (...) and to challenge the prosecution’s submissions in his address. A scrutiny of the proceedings as a whole therefore leads the Court to hold that the applicant was not denied a fair trial. There has thus been no breach of paragraphs 1 and 3 (c) of Article 6 (art. 6-1, art. 6-3-c) taken together”¹⁴⁸⁶.

A discussion of these two cases has to revisit the claim of some scholars that the authorities should not intervene in the case “(...) unless the lawyer is absent or performs practically no activity for the accused”¹⁴⁸⁷. In order to protect the principle of the freedom of the defence of the assisted accused as far as possible, they conclude that the Court has reached this high threshold for the obligation of the authorities to intervene in the case to arise under the Convention.¹⁴⁸⁸

An alternative explanation for the *Imbrioscia*-case has been given by Trechsel who argues that the Court had been misinformed.¹⁴⁸⁹ The Court, in his opinion, could not have sufficiently taken into

¹⁴⁸⁴ *Kamasinski v. Austria*, Judgment of 19 December 1989, HUDOC no. 9783/82, para. 70.

¹⁴⁸⁵ *Imbrioscia v. Switzerland*, Judgment of 24 November 1993, HUDOC no. 13972/88.

¹⁴⁸⁶ *Imbrioscia v. Switzerland*, Judgment of 24 November 1993, HUDOC no. 13972/88, paras. 42-44.

¹⁴⁸⁷ See also section 2.4.2.1. which already cited Spronken (2001) at 464 and T. Prakken and T.B.N.M. Spronken, in: Prakken and Spronken (2009) at 15.

¹⁴⁸⁸ E.g. Spronken (2001) at 464. Interights, Right to a Fair Trial under the Convention on Human Rights (Article 6), Manual for Lawyers, Current as of September 2007, available at www.interights.org.

¹⁴⁸⁹ Trechsel (2005) at 289. E.g. Soyer and De Salvia, in: Pettiti, and Imbert (1999) at 275 and 277 with reference to *Delta v. France*, Judgment of 19 December 1990, HUDOC no. 11444/85, for instance. Frowein and Peukert (1996) nos. 75 and 198 but the latter only for appointed lawyers.

account the negative effect for the accused when early stages of a criminal procedure are without assistance by a lawyer. Trechsel draws the conclusion that the Court did not know that *Imbrioscia* could not request assistance by counsel at police interrogations, concluding that “(t)his case is highly unsatisfactory in that the Court was not made aware of the fact that, as far as the police interrogations were concerned, there was, from the outset no right for counsel to assist the accused. Therefore, according to the Court’s own criteria, it can only be concluded that this constituted a violation of the Convention”.¹⁴⁹⁰ Thus, Trechsel infers that no blame could be attached to counsel or the accused for the alleged inactivity of Ms B.G. because, unlike the evident assumption of the Court, *Imbrioscia* had no legal right whatsoever to have the lawyer be present during the first police interrogations.

In addition to Trechsel’s explanation, it appears to emerge from all the cases cited above that the Court concluded that the period during preliminary investigation when he had no effective legal assistance was too short for the applicant not to have had a fair trial in the proceedings “as a whole”. However, it is good to note that the Grand Chamber in 1996 applied the *Imbrioscia*-case in the case cited above of *John Murray v. United Kingdom* and did find a violation of Article 6 (1) in conjunction with Article 6 (3) (c).¹⁴⁹¹ More recently, the Grand Chamber also confirmed that decision in *Salduz v. Turkey*.¹⁴⁹² Therefore, the *Imbrioscia*-case might have been overhauled by the *Salduz*-case now the accused does have a right to counsel at the “critical” stage of police interrogations under the Convention.

The case of *Kamasinski* is seen here as a case that demonstrates that, because of the difficulties inherent in making an assessment of counsel’s conduct, there is a strong presumption that the conduct of the lawyer falls within the wide range of reasonable professional legal assistance. After all, the Court does not require perfect legal assistance, but does require that the accused does not end up being harmed by counsel in terms of his rights, rather than defence strategy. When reasonably speaking the conduct of counsel could have fallen within the realm over which he has control of defence strategy, three questions regarding the quality of the services at the trial phase appear relevant.¹⁴⁹³ Did the accused object to the services of the lawyer or did he question the performance of his lawyer? Did it appear that there was any explicit disagreement between the accused and the lawyer on the substance or strategy of the defence? Lastly, did the time spent by the lawyer or any other facts and circumstances of the case reasonably lead to the conclusion that counsel was *a priori* unprepared to assist the accused? The Court appears to take these factors into account, if counsel’s work could be part of a defence strategy and the accused’s “personal” rights did not end up being damaged in the proceedings “as a whole”.

11.3. The means of interventions in the case by the authorities under the Convention

An obligation of the authorities to intervene in the case, as described above, can be fulfilled procedurally by means of ongoing judicial supervision and a separate appeal procedure. For example, ongoing judicial supervision can be exercised in several ways and can range from pertinent remarks and enquiries with a lawyer to the replacement of counsel. Some examples will be studied here, up to and including the ability of the trial judge to remove an incompetent counsel from the case.

Before continuing with the case law analysis, it must be highlighted that, obviously, ongoing judicial supervision runs a greater risk of interference with counsel (and thus interference with both the freedom of the defence and the privileged lawyer-client relationship) than an *ex post* review of counsel’s conduct (in a separate appeal). This risk is higher for both the defence by the accused alone and for the accused together with his lawyer. If the authorities exercise ongoing judicial supervision, they might negatively impact the rights, wishes and interests of the accused. After all, what the authorities might deem an ineffective defence might have been instead a strategy of the defence. Either the accused alone or the accused and his lawyer might have come up with that strategy which the court can deem to be an ineffective defence. This risk is less prevalent when the authorities explore an instance of ineffective legal assistance after the case has already been adjudicated on the facts.

There is an additional risk when ongoing judicial supervision results in an intervention in the case in order to protect the accused when confronted with ineffective legal assistance – rather than out

¹⁴⁹⁰ *Ibid.*

¹⁴⁹¹ *John Murray v. the United Kingdom* [GC], Judgment of 8 February 1996, HUDOC no. 18731/91, para. 54.

¹⁴⁹² and *Salduz v. Turkey*, [GC], Judgment of 27 November 2008, para. 53.

¹⁴⁹³ *Jelcovas v. Lithuania*, Judgment of 19 July 2011, HUDOC no. 16913/04, para. 123.

of inadequate self-representation. The authorities which have to protect the independence of the Bar from the State may consequently drive a wedge between the accused and his lawyer. The authorities will therefore have to be careful that they do not just mistake a strategy for ineffective legal assistance but also that they use interventions that do not amount to State interference (see for the latter chapter 7).

The combination of both issues lead to an important inference. The judge might already face difficulties when he intervenes in the case where an unassisted accused is being protected from inadequate self-representation. Such difficulties will increase if he intervenes in the case for an assisted accused. The reason for this is that the judge will usually be unfamiliar with the advice given by the lawyer to the accused, whose instructions are, moreover, unknown to the judge.

Therefore, it will be explored here *what type* of intervention in the case is expected of the trial judge under the Convention, so that the assisted accused is ensured that he has a right to an effective defence with his counsel in a way that prevents, as far as possible, any State interference (see subsection 11.3.1.). Finally, an examination will follow as to distinct proceedings for complaints about ineffective legal assistance in which counsel's conduct is examined after the case is over, i.e. in a separate appeal stage (see section 11.3.2.).

11.3.1. Judicial supervision for ineffective legal assistance; the judge as ultimate guardian

The authorities can be confronted with ineffective legal assistance that harms the accused's rights because the assistance provided to the accused by counsel was "fundamentally defective". Under such circumstances, they can be required under the Convention to intervene in the case by means of judicial supervision¹⁴⁹⁴ as, for example, the case cited above of *Sakhnovskiy* has indicated. Consequently, additional case law will be studied that might help to determine whether the judge is obliged to (pro)actively protect the accused's rights, interests and wishes *during* the adjudication of the case in which the accused suffers from ineffective legal assistance through an active role, a role which has already been labelled above "the ultimate guardian of the fairness of the proceedings"¹⁴⁹⁵ (see subsection 7.3.2.).

Ananyev v. Russia is a first case that can give insights in judicial supervision as an intervention in the case by authorities which are being confronted with ineffective legal assistance.¹⁴⁹⁶

Ananyev was believed to have committed a murder. At first instance *Ananyev* decided to plead his own defence because he was dissatisfied with his legal aid lawyer. After an altercation with a witness, *Ananyev* was removed from the courtroom. He was convicted. When the appeal hearing was held some four years later, *Ananyev* refused to participate. The appeal court appointed a lawyer for *Ananyev* who represented him in his absence. The appointed lawyer, Ms D., pleaded the case without having actually met *Ananyev* while using his pleadings from some four years previously. *Ananyev* informed the appeal court of his difficulties with his defence lawyer, but the judge took no measures to remedy the situation. The appeal court upheld his conviction.

Ananyev complained before the Court about ineffective legal assistance. Relying on Article 6 (1), 6 (3) (c) and 6 (3) (d), he contended that the criminal proceedings against him were unfair due to three reasons. First, he had been absent at the appeal hearing. Second, he had not been assisted or represented at his first instance trial. As a final point, on appeal he had suffered from inadequate representation by his lawyer in his absence.

The Government contended that *Ananyev* had failed to ask the appeal court to replace his lawyer, so that the authorities could have done no more in relation to the protection of *Ananyev*'s right to an effective defence.

The Court noted that the appointed lawyer, Ms D., had taken certain steps to prepare *Ananyev*'s defence pending the appeal hearing. For instance, counsel Ms D. had studied the case file and had attended the appeal hearing, at which she made oral submissions to the appeal court on *Ananyev*'s behalf while making use of the grounds of appeal lodged by *Ananyev* himself during the first instance hearing some four years earlier. However, even though counsel Ms D. had ample opportunity to do so, she had never met or otherwise communicated with *Ananyev* about the defence before the appeal hearings. The Court determined "(...) the said shortcoming" of counsel Ms D. to be

¹⁴⁹⁴ Term borrowed from *Nikula v. Finland*, Judgment of 21 March 2002, HUDOC no. 31611/96, para. 54.

¹⁴⁹⁵ *Kononov v. Russia*, Judgment of 27 January 2011, HUDOC no. 36376/04, para. 43.

¹⁴⁹⁶ *Ananyev v. Russia*, Judgment of 30 July 2009, HUDOC no. 20292/04, para. 52.

“(…) manifest” so that “(…) the onus was on the domestic authorities to intervene”.¹⁴⁹⁷ The Court held that:

“(…) the lack of personal contact with the applicant and the absence of any discussion with him in advance of the hearing, combined with the fact that the State-appointed lawyer did not prepare any grounds of appeal of her own and pleaded the case on the basis of grounds of appeal lodged some four years earlier by the applicant [that] irreparably impaired the effectiveness of the legal assistance provided by Ms D”.¹⁴⁹⁸

The appeal judge failed to intervene in the case when confronted with a legal aid lawyer who had done some, but not all of the requisite preparations to reach at least the minimum level of adequacy expected of the services of counsel. The removal of the accused at first instance, leading to *Ananyev*'s inability to confront the witness, was not “cured” during the appeal stage where his lawyer “shirked her duties”.¹⁴⁹⁹ The Court thus used the same words as in the aforementioned case of *Artico v. Italy*.¹⁵⁰⁰ This conclusion is important because the Court held not only Article 6 (1) and 6 (3) (c) to have been violated, but also Article 6 (3) (d).

Ananyev was not the only case in which the Court came to this conclusion. It was also reached in a largely comparable case on the issue of ineffective legal assistance, *Orlov v. Russia*.¹⁵⁰¹ The Court deemed that, for the lack of personal contact between counsel and the accused, weight should be attached to the accused's argument that he had no communication with his lawyer before the appeal hearing in the absence of any appropriate evidence to the contrary. Such a lack of personal contact between counsel and the accused contributes to a reasonable assumption that ineffective legal assistance followed. In this way, the Court emphasises how preparation before the hearing is crucial for adequate services at the hearing. That the Court also requires that the authorities intervene in the case when a retained lawyer shirks her duties follows from the case of *Güveç v. Turkey*.¹⁵⁰² The type of intervention in this case that the Court suggested is the appointment of a lawyer by the court of its own motion.¹⁵⁰³

- *What type of intervention is required by the court that deals with points of law only?*

The case cited above gave an important indication as to how the Court would require judicial supervision as an intervention in the case by authorities which are being confronted with ineffective legal assistance. However, that case concerned the appeal stage. It is therefore important to explore whether cassation courts can also be required to exercise such supervision, and if so, with what means. For this purpose, this section will explore the case of *Czekalla v. Portugal*.¹⁵⁰⁴

Czekalla was suspected of aggravated drug trafficking and conspiracy. After his conviction he was appointed a lawyer for the purpose of his appeal in cassation. Because his lawyer had not submitted any grounds in the brief, the highest court rejected the request for an appeal in cassation.

Czekalla complained before the Court that he had been given ineffective legal assistance, considering that counsel had neglected to include these appeal grounds in the brief and the authorities had made him bear the consequences thereof.

The Government contended that the authorities could not intervene in the case out of respect for the freedom of the defence of the assisted accused whose privileged lawyer-client relationship is also worth protecting.

The Court considered the following:

¹⁴⁹⁷ *Ananyev v. Russia*, Judgment of 30 July 2009, HUDOC no. 20292/04, para. 54.

¹⁴⁹⁸ *Ananyev v. Russia*, Judgment of 30 July 2009, HUDOC no. 20292/04, para. 55.

¹⁴⁹⁹ See also *Kemal Kahraman and Ali Kahraman v. Turkey*, Judgment of 26 April 2007, HUDOC no. 42104/02, paras. 36 and 37.

¹⁵⁰⁰ E.g. *Artico v. Italy*, Judgment of 13 May 1980, HUDOC no. 6694/74, para. 33.

¹⁵⁰¹ *Orlov v. Russia*, Judgment of 21 June 2011, HUDOC no. 29652/04, paras. 106-109 including the following citation.

¹⁵⁰² *Güveç v. Turkey*, Judgment of 20 January 2009, HUDOC no. 70337/01.

¹⁵⁰³ *Güveç v. Turkey*, Judgment of 20 January 2009, HUDOC no. 70337/01, paras. 130-132.

¹⁵⁰⁴ *Czekalla v. Portugal*, Judgment of 10 October 2002, HUDOC no. 38830/97. See Trechsel (2005) at 289-290.

“In the present case the Court is required to determine the issue. It notes in the first place, like the Government, that the State cannot be held responsible for any inadequacy or mistake in the conduct of the applicant’s defence attributable to his officially appointed lawyer. It considers, however, that in certain circumstances negligent failure to comply with a purely formal condition cannot be equated with an injudicious line of defence or a mere defect of argumentation. That is so when as a result of such negligence a defendant is deprived of a remedy without the situation being put right by a higher court. It should be pointed out in that connection that the applicant was a foreigner who did not know the language in which the proceedings were being conducted and who was facing charges which made him liable to – and indeed led to – a lengthy prison sentence”.¹⁵⁰⁵

The Court found a violation of Article 6 (3) (c) in conjunction with (1), holding that a trial judge can thus be required to correct “(...) a formal mistake by counsel” of neglecting to submit grounds in the brief for an appeal in cassation. The Court holds that the judge has to intervene in the case, in order to prevent the accused from having to bear the consequences of counsel’s conduct. The accused did not have to bear the costs of no longer being able to make use of his personal right to effective legal assistance and to a legal remedy. It appears the authorities cannot claim that they are prohibited from inviting a lawyer to rectify a purely formal mistake because of – the threat of – interference with counsel and thus with both the freedom of the defence and the privileged lawyer-client relationship. They could not argue either that it was a strategic decision of counsel. Instead, the authorities have to intervene in the case by inviting the lawyer to correct the formal mistake of neglecting to submit grounds in the brief for an appeal in cassation.

- *What type of role does the judge have to play when confronted with an ineffective defence of the accused?*

The cases cited above give an important indication as to how the Court would require judicial supervision as an intervention in the case by both an appeal and cassation in appeal court. However, it is important to explore additional cases that can give even more insights in how the Court requires the judge to act when confronted with an ineffective defence at the adversarial trial hearing. A first case that will be explored is *Timergaliyev v. Russia*.¹⁵⁰⁶

Timergaliyev was appointed legal aid lawyers for the purpose of the appeal hearing because he could not “(...) hear and follow” the proceedings due to hearing problems. At the appeal hearing, however, *Timergaliyev*’s lawyers did not attend. Consequently, he was alone in court.

Timergaliyev complained before the Court that his right to an effective defence had been violated. The Government argued that the authorities could not have intervened in the case because the lawyers failed to appear.

The Court concluded under Article 6 (3) (c) that:

“(...) the ultimate guardian of the fairness of the proceedings was the judge, who, when confronted with the lawyers’ failure to appear, was required under domestic law to appoint counsel for an accused who was incapable of defending himself on account of a physical impairment”.

Therefore, the Court found that Article 6 (3) (c) had been violated by the authorities. The authorities had earlier found it necessary to appoint a lawyer, but had remained passive when confronted by the absence of these legal aid lawyers on appeal. The Court found this to be inconsistent and explained that the trial judge should have intervened in the case.

This ultimate guardian-role of the judge also arises where a witness refuses to answer questions without giving reasons in relation to the minimum defence right under Article 6 (3) (d).¹⁵⁰⁷

¹⁵⁰⁵ *Czekalla v. Portugal*, Judgment of 10 October 2002, HUDOC no. 38830/97, para. 65.

¹⁵⁰⁶ *Timergaliyev v. Russia*, Judgment of 14 October 2008, HUDOC no. 40631/02, para. 59.

¹⁵⁰⁷ *Pichugin v. Russia*, Judgment of 23 October 2012, HUDOC no. 38623/03, paras. 203-204.

Rather, this witness stated that he did not wish to reply to the questions. The Court stated that it found the reaction of the judge “peculiar”, because, “as the ultimate guardian of the fairness of the proceedings, she was required under domestic law to take all necessary measures to ensure observance of the principles of adversarial proceedings and equality of arms (...)” In this case, counsel reminded the witness of his statutory duty to answer questions and his possible criminal liability for refusing to do so. However, the presiding judge replied that the witness was entitled to not answer. The judge gave no explanation as to why the witness could be exempted from his duty to answer questions. The judge also did not refer to any legal provision authorising such an exemption.

The trial judge should also be “the ultimate guardian of the fairness of the proceedings” in light of the other minimum defence right under Article 6 (3) (e).¹⁵⁰⁸ This active protective role of the judge was required when counsel of the accused had not argued that the accused was in need of an interpreter. According to the Court, the authorities should have guaranteed this personal right of the accused of their own accord. The Court held that, contrary to a situation in which the accused had alerted the authorities to any difficulties encountered in preparing his defence, “(...) the trial court should have addressed itself to the applicant’s situation of its own motion as the ultimate guardian of the fairness of the proceedings”.¹⁵⁰⁹ Ineffective legal assistance demands from the trial judge that he intervenes in the case to protect the fairness of the criminal procedure “as a whole”, whether counsel harms the right to an effective defence or another minimum defence right to an interpreter.

This ultimate guardian-role of the judge is also present when the right of the accused to lodge an appeal is at stake under Article 6 (1). In the case of *Aleksandr Dementyev v. Russia*, the accused had been assisted by counsel and therefore the government found that counsel was to blame for not advising the accused as to how he could lodge the appeal on time.¹⁵¹⁰ Before the Court the applicant alleged that he had been prevented from lodging an appeal because of the authorities’ belated service of process on him. According to the complainant, he could only have lodged an appeal against the decision of the first instance court within ten days of the date of the decision. However, he received his copy of the decision only three days after that deadline had passed and could not comply with the statutory time-limit. Moreover, according to the text of the decision, the only option open to the applicant would have been to lodge a request for supervisory review. The Court held the trial judge responsible under this ultimate guardian-role for the due explanation to the accused about the process regarding the possibility of appealing against the decision of the court that imposed a prison sentence on him. Under the circumstances of the case, it cannot be said that the applicant received clear and comprehensible instructions as to the proper avenue for exhausting remedies.¹⁵¹¹

As a last example of the judge as “ultimate guardian”, the Court also repeated the obligation of the judge when the personal right of the accused to attend the hearing on appeal under Article 6 (1) was at stake.¹⁵¹² The authorities could not shift the blame towards the lawyer who supposedly had not given the appellant the requisite advice about how to request leave to attend the appeal hearing himself. Rather, the judge should have ensured that the accused could attend his appeal hearing.

Concluding remarks

The Court has referred to the following types of intervention: ordering an adjournment to allow the lawyer to carry out his functions effectively (e.g. *Artico v. Italy* and *Sakhnovskiy v. Russia*¹⁵¹³) and ordering an adjournment to allow a newly appointed lawyer to acquaint himself with the case-file (e.g. *Bogumil v. Portugal*¹⁵¹⁴). The Court also refers to making arrangements for contact between counsel and the accused (e.g. *Sakhnovskiy v. Russia*¹⁵¹⁵), correct the formal mistake of counsel (e.g. *Czekalla v. Portugal*) and ensuring replacement counsel (e.g. *Güveç v. Turkey*¹⁵¹⁶). The Court can also be less explicit and use “intervention” as a term (e.g. *Ananyev v. Russia*¹⁵¹⁷), require authorities not to remain

¹⁵⁰⁸ *Cuscani v. the United Kingdom*, Judgment of 24 September 2002, HUDOC no. 32771/96, para. 39.

¹⁵⁰⁹ E.g. *mutatis mutandi*, *Caka v. Albania*, Judgment of 8 December 2009, HUDOC no. 44023/02.

¹⁵¹⁰ *Aleksandr Dementyev v. Russia*, Judgment of 28 November 2013, HUDOC no. 43095/05, paras. 32-33.

¹⁵¹¹ *Aleksandr Dementyev v. Russia*, Judgment of 28 November 2013, HUDOC no. 43095/05, paras. 32-33.

¹⁵¹² *Kononov v. Russia*, Judgment of 27 January 2011, HUDOC no. 36376/04, para. 43.

¹⁵¹³ See above in section 7.3.

¹⁵¹⁴ *Bogumil v. Portugal*, Judgment of 7 October 2008, HUDOC no. 35228/03, paras. 47-50.

¹⁵¹⁵ See above in section 7.3.

¹⁵¹⁶ See above in this section 11.3.2.

¹⁵¹⁷ *Ananyev v. Russia*, Judgment of 30 July 2009, HUDOC no. 20292/04.

passive (e.g. *Goddi v. Italy* and *Daud v. Portugal*) and require that the judge acts “(...) as ultimate guardian of the fairness of the criminal procedure” without further explanations about how the judge should act (e.g. *Timergaliyev v. Russia*¹⁵¹⁸). At least, examinations of an alleged lack of contact between the accused and his lawyer might entail such pertinent remarks and enquiries with counsel as well as, possibly, with the accused. So far no instances have been encountered of the removal of incompetent counsel from the proceedings, possibly because a mere removal would result in more difficulties than advantages for an effective defence for the accused. Moreover, it remains largely unclear as to whether the interventions include pertinent remarks and enquiries with a lawyer. Perhaps the undefined terms (e.g. “not to remain passive”) cover such possible interventions. The authorities have to carry out judicial supervision in order to prevent the accused from having to bear the consequences of ineffective legal assistance.¹⁵¹⁹

11.3.2. *Ex post separate appeal procedure for ineffective legal assistance*

The authorities intervened in the case in a rather unique way in the aforementioned case of *Ebanks v. the United Kingdom* (see sub-section 11.2.2.). They used a specific type of intervention for a complaint regarding supposed ineffective legal assistance by way of *ex post* judicial review. This is a separate appeal procedure regarding ineffective legal assistance by two instances of domestic courts, which does not exist in all jurisdictions.

The Court in the *Ebanks* case examined whether the domestic courts which had earlier dealt with legal assistance that the accused alleged to have been “defective in a fundamental respect” had acted in accordance with Article 6 (3) (c).¹⁵²⁰ The Court therefore took into consideration that under domestic law *Ebanks* was entitled to a separate appeal procedure taking place within the domestic criminal procedure with a potential effect on its outcome. This appeal procedure with two instances does not, in other words, take place entirely outside of the criminal procedure such as a disciplinary or a civil procedure. Instead, after the judgment becomes final, an accused can complain about alleged ineffective legal assistance in a separate procedure.¹⁵²¹ *Ebanks* had lodged such a complaint, because he alleged that counsel had given him incorrect advice about how to plead in court in relation to police statements. The Court held that if the lawyer had given *Ebanks* such advice, the legal assistance would indeed have been “(...) defective in a fundamental respect”. The complaint had been examined by two instances (respectively the Court of Appeal of the Cayman Islands and the Privy Council), concerning which the Court held:

“(...) the Court of Appeal had the benefit of affidavits from the applicant and his trial counsel. The clear picture which emerged from the affidavits of counsel was a denial of the allegation contained in the applicant’s affidavit that he had failed to understand the implications of not giving evidence. The Court of Appeal also considered it significant that the applicant’s lawyers were experienced and had met with him regularly before the trial to discuss his case (...). Further, the Court observes that Lord Rodger, on behalf of the majority in the Privy Council, examined the applicant’s complaint afresh. With the benefit of a full transcript of the trial proceedings, he noted that the applicant had not raised this complaint at any time during trial and that it was first made some nine months after the conclusion of the trial (...). He further emphasised that the record of the trial showed the time and care taken by Mr St John Stevens to ensure that the applicant understood the proceedings and agreed to the steps taken on his behalf, citing specific examples (...). Finally, he pointed out that, given the difficulties that the applicant’s refusal to give evidence was likely to create for counsel’s presentation of his defence, it was hard to see why counsel would have “deliberately flouted” the applicant’s wish to give evidence (...).”¹⁵²¹

The Court concluded that the procedure, in which two courts determined that *Ebanks* had not had legal assistance that “(...) was defective in a fundamental respect”, ensured him a fair criminal procedure

¹⁵¹⁸ *Timergaliyev v. Russia*, Judgment of 14 October 2008, HUDOC no. 40631/02.

¹⁵¹⁹ *Sabirov v. Russia*, Judgment of 11 February 2010, HUDOC no. 13465/04, para. 45 including the citation below.

¹⁵²⁰ *Ebanks v. the United Kingdom*, Judgment of 26 January 2010, HUDOC no. 36822/06, para. 82.

¹⁵²¹ *Ebanks v. the United Kingdom*, Judgment of 26 January 2010, HUDOC no. 36822/06, para. 77.

under Article 6 (3) (c) in conjunction with 6 (1). The courts had, at both separate instances, checked and guaranteed that *Ebanks*' lawyers had not given the presupposed incorrect advice. In addition, the remainder of the procedure had been fair thanks to the trial judge's questions (Mr St John Stevens) that were designed to ask *Ebanks* whether he understood that complaining about the unfairness of his police declaration would require him to testify under oath at the hearing but not to explain the instructions given to his counsel. The Court thereby demonstrated that this type of redress afforded to the accused, who claimed to have suffered from ineffective assistance by counsel, complied with the Convention obligation under Article 6 (3) (c).¹⁵²²

11.4. Conclusion

This conclusion intends to answer the leading question for this chapter: What obligations do the authorities owe to the accused when confronted with ineffective legal assistance and what means of intervention should they employ in order to redress possible harm to an effective defence within criminal proceedings under the Convention?

To begin to answer the question, it must be noted that repeated case law appears to have demonstrated that the Court holds that the authorities owe an obligation to the accused to intervene in the case "(...) if a failure by counsel to provide effective assistance is manifest or sufficiently brought to their attention in some other way" (*Artico*-rule). An example of such ineffective legal assistance is wrong pre-trial advice by the lawyer about the right of the accused to remain silent and his right not to incriminate himself which was "(...) defective in a fundamental respect" (*Ebanks v. the United Kingdom*; section 11.2.1.). Redress for the accused for such and other instances of ineffective legal assistance is important out of a positive and substantive right to *effective* legal assistance, because the right to counsel should not be "(...) reduced to a mere formality", as the Court puts it (*Sakhnovskiy v. Russia*; section 11.2.1.). Therefore, this chapter does not appear to conform to the scholarly opinion held by Spronken that the Court "only" assesses whether counsel was absent or did practically nothing for the accused. Rather, the Court appears to inquire into the performance of counsel on both its form and substance as well as the effects of sub-par assistance by counsel as to the personal rights of the accused, rather than defence strategy, as can be exemplified with the instance of wrong pre-trial advice (comparing *Ebanks v. the United Kingdom*; section 11.2.1. and *Stanford v. the United Kingdom*; section 7.3.).

In addition to the more intrinsic elements of legal services such as giving proper legal advice that concerns the personal rights of the accused, the Court also refers in repeated judgments to the time spent by counsel on the preparation of the trial hearing, the contact sought by counsel with the accused, and whether counsel demonstrably studied the case file. It appears to follow from these considerations that the Court will not accept that a domestic court *alleges* that counsel has made a strategic decision as a consequence of which the accused thereby no longer has a say concerning a personal right, such as the right to remain silent and the right not to incriminate oneself, the right to attend the hearing, and the right to forego an appeal. Rather, the Court will conclude there has been a violation of the right to a fair trial if allegations of ineffective legal assistance damage the rights of the accused about which he has the ultimate say. Under such circumstances, the court will have to intervene in the case, by having the judge act as "ultimate guardian of the fairness of the proceedings" and not be passive. Such protection is afforded so that counsel cannot waive, or deemed to have waived, these personal rights on the accused's behalf, unless the accused has apparently requested the lawyer to do so. Instead, under the Convention, counsel is required to follow the accused's instructions in relation to these decisions of the accused regarding his personal rights, *even if* the lawyer believes these rights are better protected by not opting for the defence that the accused wants to rely upon. This approach to alleged, rather than actual ineffective legal assistance, ensures that the Court can respect that the accused, who is subjected to criminal proceedings after all, has his individual right to an effective defence respected. This right is important for the individual accused, but by extension also for the right to a fair trial "as a whole".

While counsel can reasonably be held responsible for decisions that fall within the realm of his control because they concern defence strategy (chapter 7), the Court also examines in such cases

¹⁵²² See also, but in relation to the pre-trial stage, *McKeown v. the United Kingdom*, Judgment of 11 January 2010, HUDOC no. 6684/05, para. 53 including the following three citations.

whether the accused objects to the services of counsel or questions the performance of the lawyer (*Stanford v. the United Kingdom*; section 7.3.). The more recent case law of the Court clearly shows the scrutiny of whether the accused explicitly disagrees with the substance or strategy of the defence lodged by counsel, especially – but not only – where personal rights of the accused are at stake, as the Court refers to such situations (*Stanford v. the United Kingdom*; section 7.3.).

The means are varied by which an intervention by the authorities takes place in the case in order to prevent the accused from having to bear the consequences of ineffective assistance by counsel, that harms the accused in terms of his rights instead of defence strategy. For example, under the Convention the court should either appoint a substitute lawyer or oblige counsel to “(...) perform his duties”, where “shirked” (*Artico v. Italy*; section 11.2.). Further available options where the lawyer is present so that he can in principle provide the accused with an effective defence in court are: interventions by means of adjournments or a suspension of the court session. Other such options are arrangements for contact and communication between the accused and his lawyer who otherwise cannot be reasonably said to exchange instructions and advice, and an invitation by the court to the lawyer to correct his “formal mistake” such as omitting to include grounds in the brief for the appeal in cassation. When faced with a relatively new lawyer, who has with good reason not been able to prepare for the hearing, the authorities can appoint the lawyer who acted earlier for the accused. Or, where the accused takes part in the hearing from outside of the courtroom, the authorities can appoint a second lawyer who stays with the accused in addition to the lawyer acting in court.

For many more interventions, the Court leaves the means of interventions in the case largely undefined, but considers that the trial judge, as said above, should have been “(...) the ultimate guardian of the fairness of the proceedings” or “not passive”. The Court’s cases that refer to such a role of the trial judge seem to show that, in its interactions with the defence, the bench should ensure related minimum defence rights such as the right to translation and witness confrontation, which can be damaged by ineffective legal assistance by the lawyer. Similarly, the authorities cannot assume that there must have been effective legal assistance at the trial hearing, where already during the pre-trial phase the investigative authorities did not “(...) keep a close eye on the effectiveness of the defence” so that pre-trial legal assistance was nothing but a mere formality. Accordingly, the Court for its assessment of the performance and its effects on the rights of the accused emphasises the adversarial hearing, mostly at first instance or during *de novo* appeal proceedings. However, it also certainly takes into consideration earlier and later stages because the proceedings “as a whole” have to be fair for the Convention rights to be respected.

From the earlier preliminary conclusions, inferences can be drawn about the Convention obligations of the authorities to intervene in the case when confronted with ineffective assistance by counsel who does not appear to be based on an “objectified” effective defence that supposedly furthers an error-free process or an accurate outcome to the criminal procedure. Rather, the Court appears to require an intervention in the case based on a *subjective* effective defence, ensuring the best possible defence for the accused, without interfering with counsel and thus in the freedom of the defence of the assisted accused whose privileged lawyer-client relationship is also worthy of protection. Accordingly, where the defence consists not only of the accused but of the accused together with his lawyer, the authorities, which cannot interfere in the lawyer-client relationship, also cannot go against the accused’s own subjective position. Thus, the Court does not usually take a consequentialist view of this requirement of an intervention in the case that bases the effectiveness of counsel on the reasoning that, but for counsel’s conduct, the accused would be acquitted (prejudice). Rather, the Court wants to ensure that the accused is indeed having an effective defence in terms of his rights, wishes and interests and therefore explores what the impact of counsel’s conduct is on the accused’s personal rights, rather than defence strategy.

Many of the aforementioned examples considered interventions by the authorities in the case in terms of judicial supervision, but also encountered was an *ex post* review as a solution for ineffective legal assistance under the Convention. The Court appears to accept this type of redress for the accused because it can equally affect the course and outcome of the criminal case against the accused as the trying court can determine a remittal. After a complaint by the accused, the appeal proceedings that deal with issues of law only can result in the annulment of the judgment of the lower court on grounds of ineffective assistance by counsel. Consequently, redress is afforded to the accused

thanks to the possibility of new criminal proceedings for the accused. Underlying all that, the Court is in possession of, as Judge Myjer called it, the ultimate sanction, and (sub-section 11.2.2.).

To end with a concluding remark, judicial supervision and an *ex post* separate appeal both appear to be Convention-conforming solutions for providing redress to the accused for ineffective assistance by counsel. Both solutions can exist in one jurisdiction moreover (*Cuscani and Ebanks v. the United Kingdom*). Consequently, there is nothing in the Court's case law to infer that the one solution is exclusive to a single jurisdiction. For both solutions, domestic courts have to act as careful equilibrists. On the one hand, they have to prevent abuses by accused persons "(...) who are aggrieved merely because of the outcome of or the decisions taken in their defence" (sub-section 11.2.2.). On the other hand, they have to ensure that the right to legal assistance actually amounts to an effective defence for the accused and thus to a fair trial under the Convention. If courts intervene in the case, while ensuring the freedom of the defence and the privileged lawyer-client relationship, this will prevent the accused from having to bear the consequences of ineffective legal assistance that harm the accused's right to an effective defence and thus to a fair trial. Moreover, as another effect, lawyers might consequently be (increasingly) encouraged to provide adequate services to the accused. All of the earlier sections in this chapter and the previous ones on the Convention lead to the following final conclusion. As explained in this research, the Court appears to consider the right to an effective defence by equally effective legal assistance from counsel to be not only an individual right of the accused but also a procedural guarantee for the overall fairness of the entire criminal proceedings, which references to equality of arms and adversariality often make explicit.

CHAPTER 12. INTERVENTION DUE TO INEFFECTIVE LEGAL ASSISTANCE IN DUTCH CRIMINAL PROCEDURE

12.1. Introduction

This chapter builds on the previous chapters, and pays particular attention to interventions in the case due to ineffective legal assistance out of redress in Dutch criminal proceedings like the corresponding chapter on the Convention minimum guarantees (chapter 11). This chapter sets out to follow through on the positive obligation of the authorities regarding the right to effective legal assistance under the Convention. Therefore, it is important to explore how Dutch criminal proceedings abide by the *Artico*-rule, because this helps the assessment as to what constitutes ineffective legal assistance and applicable means for redress within the criminal process. In a similar manner to the previous chapter, but now for the Dutch criminal process, the examination will seek to establish whether the authorities are required to intervene in the case “(...) if a failure by counsel to provide effective legal assistance is manifest or sufficiently brought to their attention in some other way”, as the Court puts it.¹⁵²³ In particular attention, this chapter will seek to determine whether the Hoge Raad interprets this *Artico*-rule to mean that the authorities are required to intervene in the case “only” when “(...) the lawyer is absent or otherwise does practically nothing at all for the accused”¹⁵²⁴ or whether a less minimal approach is taken. All these aspects are relevant, because this chapter sets out to answer the following leading question: What obligations do the authorities owe to the accused when confronted with ineffective legal assistance so that they protect his right to an effective defence and by what means of redress in Dutch criminal proceedings?

From the remaining, third vertical perspective, this chapter explores not only what can be expected of the authorities, who are confronted with ineffective legal assistance, but also what the problem discussed actually entails and who determines this. In this way, this chapter will try to determine whether the accused, in addition to being entitled to the preconditions for an effective defence, should be protected by the authorities when confronted with ineffective assistance by counsel. If this should be so, it will also be explored what means of intervention the authorities have at their disposal in order to ensure that the accused’s right to an effective defence – which it held essential for the unassisted accused at least – has been guaranteed (*Hoogerheide*-rule, see section 6.4.).

This chapter will take into consideration the findings that were presented in the previous chapters on Dutch criminal proceedings (chapters 6, 8 and 10). In summary, the previous chapter regarding the Netherlands has indicated how the Hoge Raad does not seem to hold that the authorities have an obligation to offer redress when the authorities interfere with counsel because it amounts to ineffective legal assistance *per se* (chapter 10). Therefore, there might be a risk that the negative obligation not to interfere with counsel is not being distinguished from the positive obligation to intervene in the case when confronted with ineffective legal assistance – the distinction that the Court uses. This possible lack of a distinction between a negative and positive obligation in light of the right of the accused to an effective defence could correspond with the findings that have been elaborated upon in the earlier chapters regarding Dutch criminal proceedings (chapters 6, 8 and 10). Chapter 6 explained how the Hoge Raad did not seem to establish a right of the accused to an effective defence by means of equally effective legal assistance – contrary to the apparent requirement of effective self-representation in Dutch criminal proceedings (section 6.4. especially). Chapter 8 came to the preliminary conclusion that Dutch law and deontology leave largely *undefined* what ineffective assistance by counsel actually entails, so that both actual and alleged ineffective legal assistance almost inevitably come, as the former Minister of Security and Justice would formulate it, “at the procedural risk of the accused”. Chapter 10 gave a clear indication as to how there appears to be no distinction between a negative and positive obligation in light of the right of the accused to an effective defence (chapter 10).

Continuing with the penultimate point that Dutch law and deontology leave largely undefined what ineffective assistance by counsel actually entails and who determines when either instance occurs, its exceptions have to be noted (chapter 8 mostly). Starkly put, those exceptions include clear

¹⁵²³ E.g. *Kamasinski v. Austria*, Judgment of 19 December 1989, HUDOC no. 9783/82, para. 65.

¹⁵²⁴ Spronken (2001) at 447 and 464. See also this same view reiterated in Prakken and Spronken, in: Prakken and Spronken (2009) at 15.

prohibitions under criminal law, such as counsel cannot make evidence disappear, or help in the disappearance thereof. Other responsibilities of counsel seem to depend on the facts of the case, and there appears to be a lack of a more general distinction between decisions under the control of counsel and the accused, for example. Therefore, the following examination of, mostly, the Hoge Raad's case law is vital in order to draw inferences as to what (negative) conduct of counsel, according to this highest court, can amount to ineffective legal assistance in Dutch criminal procedure, if at all. Particular attention will be paid to the consequences for the accused if counsel does not live up to what is expected of him. As indicated above, other forms or redress outside of Dutch criminal proceedings have no effect on the potentially negatively affected course or outcome and therefore do not "cure" the possible resulting damage to the accused's rights, as the Court would describe it.

Before getting to this exploration of the Hoge Raad's case law as seen from the perspective of ineffective assistance by counsel in Dutch criminal proceedings, an important finding of chapter 6 must be reiterated as well (see sub-section 6.2.2.). Reasoned *a contrario*, at least one AG ascribes more responsibilities to counsel than an unassisted, lay accused for the following three defence activities: (i) requests to hear witnesses in court¹⁵²⁵; (ii) substantive defences¹⁵²⁶; and (iii) demands on the grievances in an appeal brief.¹⁵²⁷ It will therefore be examined below whether the authorities have obligations to intervene in the case when counsel provides ineffective legal assistance in the context of supposedly increased responsibilities for all three – and perhaps more – defence activities.

As another important aspect for the upcoming examination, the direct connection between this chapter and the previous chapter regarding the Convention has to be noted (chapter 11). Even if Dutch law does not contain a substantive right to effective assistance by counsel, the Court can hold the Netherlands in breach of the right to a fair trial right if an entitlement thereto exists under the Convention. As a monist country, the Netherlands is required to make such a right directly applicable. In this context, there is no reason to believe that the Netherlands is not bound by the case of *Artico v. Italy* from 1980. Consequently, this chapter will explore whether Dutch authorities intervene in the case as required under this ruling. With regard to an effective defence, three important elements have already been mentioned in the introduction to this research (see chapter 1). An effective defence is assumed to benefit from the free choice of the accused and, where the accused does not choose to proceed *pro se*, assistance by counsel who has knowledge and training in law which an often lay accused person will usually lack. Also, seen in conjunction, counsel of the accused's choosing is deemed best capable of guaranteeing an effective defence.¹⁵²⁸

Moreover, this chapter will explore whether one or both of the two trends indeed occur of increased responsibilities of the defence – and *de facto* of counsel in Dutch criminal proceedings¹⁵²⁹ – and of the appeal court which can have its role depend on the defence – and the prosecutor, for that matter.¹⁵³⁰

Intentionally, this chapter mirrors the issues which have been discussed under the second vertical perspective regarding the Convention (see chapter 11). Ultimately, this structure will enable a comparison between these two chapters, so that an evaluation can follow in the last chapter of this book (chapter 13).

Outline

This chapter is divided into five more sections. The first section opens with the discussion of two cases that might concern ineffective legal assistance, as alleged at least by the accused and the prosecutor (the first case) and the lawyer (second case) (section 12.2.). The second section will provide an overview of a first possible defence activity – defence requests to hear witnesses in court – that can amount to ineffective legal assistance (section 12.3.). Thereafter, this overview will continue with a discussion of several defence activities that, in sum, concern the right to appeal and issues regarding appeal in cassation (section 12.4.). The penultimate section will address substantive defences and other

¹⁵²⁵ HR 17 April 2007, ECLI:NL:HR:2007:AZ1720, *NJ* 2007, 251 about the authorities having to "willingly" construe the request to hear a witness in court by an unassisted accused.

¹⁵²⁶ HR 9 January 2007, ECLI:NL:HR:2007:AY9203, *NJ* 2007, 53.

¹⁵²⁷ HR 19 June 2007, ECLI:NL:HR:2007:AZ1702., *NJB* 2007, 1552.

¹⁵²⁸ See e.g. HR 17 November 2009, ECLI:NL:HR:2009:BI2315, *NJ* 2010, 143 m.nt. T.M. Schalken.

¹⁵²⁹ E.g. Groenhuijsen (2001) at 254 and Groenhuijsen and Knigge (2001).

¹⁵³⁰ Groenhuijsen and Knigge (2001) at 1-52, particularly on p. 31.

standpoints of the defence (section 12.5.). Finally, a conclusion will be drawn on the basis of all previous sections (section 12.6.).

12.2. Ineffective legal assistance?

This section will explore two cases in the light of the main research themes of ineffective legal assistance and its redress in Dutch criminal proceedings. These two cases have been selected because they are most directly linked to questions of what constitutes ineffective legal assistance in the Netherlands and whether or not the court actively intervenes in the case in order to offer redress for the accused when confronted with a possible instance of ineffective legal assistance. Also, these cases help to explain the approach regarding the legal issues involved during cassation by the Hoge Raad to cases in which counsel or other participants than counsel (in this instance, possibly both the accused and prosecutor) allege that the lawyer has not provided the accused with effective assistance.

12.2.1. Accused-alleged ineffective legal assistance

A first case that will be examined here will be referred to as *Counsel dismissed during last word*.¹⁵³¹ This case concerns an accused who was suspected of having committed several drug offences and being a member of a criminal organisation. From the police interrogations onwards the accused had consistently denied that he had committed these offences. At the appeal stage, counsel for the accused pleaded that the accused could not be considered to be the leader of a criminal organisation, but that the other offences could be legally proven if the bench would obtain the requisite personal conviction thereto under Articles 348 and 350 Sv. Counsel suggested a lesser penalty than the prosecution's demand of sixteen years of imprisonment, proposing nine years of imprisonment.

After hearing counsel's pleadings, the apparently surprised prosecutor immediately responded that nothing had been done by defence counsel to refute any of the facts underlying the offences, which the accused had consistently denied. The court allowed counsel to respond.

Counsel indicated that he wanted to make no further remarks. Thereupon, the accused immediately asked the bench for an opportunity to speak. The appeal court responded to this request by telling the accused that he would get that opportunity the next day when he would be allowed to utter his last word.

The following day, during his last word, the appellant who attended in the absence of his lawyer, argued that he had fired his advocate. The accused had not done so factually yet, he added, because he still had to meet with his lawyer. However, he informed the court that he completely disagreed with his lawyer's pleadings, which, moreover, had allegedly damaged him. He further mentioned that his lawyer had not contacted him prior to the pleadings and had not conferred with him at all about how to plead his defence. The accused submitted that he had only met with his lawyer twice throughout his case preparations.

After the last word of the accused, the appeal court stated that, as long as there is no proof to the contrary, it had to assume that counsel must have pleaded in accordance with the accused's interests and wishes. Under the law, no special procedure is available by which an accused can remedy *ex post* the actions or remarks of his lawyer during the hearing. Therefore, the appeal court itself had to determine on the basis of the available facts and circumstances of the case whether at any point in time there had been a breach in the lawyer-client relationship. Upon this consideration, the appeal court concluded that it had found no facts and circumstances were presented during or immediately after the lawyer's pleadings that would indicate such a breach. For this determination, the appeal court took into consideration "(t)hat the appellant had listened without any apparent interruption during the lawyer's pleadings, which were not in all respects unusual", and this conduct of the accused had "(...) not made it apparent in any way that he held a view which was different to that of his lawyer". Moreover, the appeal court held that the accused had not asked for an opportunity to confer with his lawyer or to stay the proceedings. As a further issue, the appeal court added that "(t)he fact that the appellant requested that he be allowed to address the court, after the prosecutor's remarks, without, by the way, giving any indication as to what he wanted to speak about, does not negate this conclusion". Additionally, the appeal court took into account that the appellant's "(...) attitude and behaviour had not been timid or reserved". Therefore, the appeal court came to the conclusion that it had reached the

¹⁵³¹ HR 5 June 2007, ECLI:NL:HR:2007:AZ8413, NJ 2007, 424 m.nt. Schalken.

end of the proceedings at the last word, and decided that it could proceed with the adjudication of the case. Ultimately, the appeal court convicted the accused.

The accused complained before the Hoge Raad that his rights under Article 6 of the Convention and under Article 14 of the ICCPR had been violated. After the lawyer's pleadings, the accused had informed the appeal court during his last word that he had fired his counsel. The appeal court proceeded with the case despite the fact that during his pleadings counsel completely digressed from what the accused had asked of his lawyer. As a result, the accused considered himself to have been damaged by his lawyer, as he had claimed before the appeal court as well. Therefore, the accused argued before the Hoge Raad, the decision of the court was based on an incorrect legal ground and was incomprehensible at least. In his opinion the appeal court's investigation should therefore be nullified and its verdict overturned on cassation.

The AG advised the Hoge Raad to leave the case in-tact, holding that the appeal court had made a factual judgment. During the appeal phase, up until the last word, no facts and circumstances occurred that indicated a disturbed relationship between the accused and his lawyer. Given that such a factual decision can only be examined on its comprehensibility on cassation, the AG decided it was "not incomprehensible". The AG based this advice on the following explanation that, amongst other issues, includes an overview of cases that in this research have been referred to as comprising the *Artico*-rule:

"3.3. (...) The complaint by the applicant that the conduct of counsel was so meagre that it amounted to negligence, should be borne by the applicant, I argue. Counsel was present, except for during the first *pro forma* session on 13 January 2005 and 14 June 2005, the day of the last word, during all court sessions, made requests to hear and have heard witnesses, and pleaded the case. That counsel did not present a brief to the court nor pleaded a certain substantive defence, does not make him so negligent that the accused's right to 'legal assistance' would have been at stake, in principle, unless there are indications to the contrary. The judge has to be fiercely reticent in his appreciation of the relationship between the accused and his lawyer, because this is a relationship of confidence that is privileged. Only under extraordinary circumstances, can the judge be concerned with that relationship in the interest of the accused's right to an adequate defence. (1) The [Hoge Raad] is required, because of his distance towards the facts, to stay even further from an intervention.

I cite from the case law of the Court: (2) (...) [citing *inter alia* Kamasinski, Daud, Artico and Goddi.]

It has to be incredibly bad for there to be ineffective legal assistance. (...) In the scarce cases in which the Court found there to have been a violation of the right to an effective defence due to ineffective legal assistance, there was, if I see it correctly, not a dispute of opinions between the accused and his lawyer about how the defence should have been lodged, but lawyers who completely left their client on their own (Daud, Artico (6)) or who had failed to abide by simple formal requirements when lodging a legal remedy (Czekalla). Moreover, the Court evidently gives lawyers in criminal cases a certain autonomous competence to guarantee the manner in which they work for their clients in criminal cases. (7) It is not up to the judge to check whether the lawyer has listened well enough to his client and has complacently brought forward the standpoint of his client. If the State would be responsible for the manner in which the defence has been pleaded, then the State should also interfere in the manner in which the lawyer represents the interests of the accused. And that does not abide by the freedom of the defence. As a consequence, the accused has to bear the potential negative consequences of either the negligence of the lawyer or of a chosen defence strategy. (8) Also, the judge cannot be obliged either to appoint another lawyer every time the accused tells him that the lawyer and he do not agree about the manner in which the defence can best be pleaded. Only when the lawyer is fully absent so that the accused does not even get the opportunity to bring across his opinion, there is room for an intervention. (9) (...)

3.5. This issue does not merit cassation [added by the author].¹⁵³²

Contrary to the AG's non-binding advice to leave the case in-tact, the Hoge Raad considered that the appeal court had held that it could proceed with the adjudication of the case, despite the fact that the accused no longer had assistance by counsel at this stage during which he could utter his last word. The reason for the appeal court to continue with the case was that the accused had in no way made it apparent that he had a different view about the content of the lawyer's pleadings. Moreover, the appellant had neither asked for an opportunity to confer with his lawyer nor for a stay in the proceedings. According to the Hoge Raad, the appeal court's decision was incomprehensible, given that the prosecutor had highlighted the difference between the lawyer's pleadings and the position which the appellant had taken during the proceedings. Therefore, the Hoge Raad found that the appeal court should have given the accused an immediate opportunity to address the court when he requested this. Seeing that the appeal court had declined to allow the accused to address the bench on that occasion, the Hoge Raad concluded that the case should be overturned.

Hence, the Hoge Raad and the AG disagreed in this case.

According to annotator Schalken in this case, the appeal court should immediately halt the case when confronted with an accused who stated that he has dismissed his lawyer and provided reasons for this decision. According to Schalken, under such circumstances, there are reasons not to proceed with the case any longer because of the assumption that counsel translates the rights, interests and wishes of the accused into the procedural context. Schalken argues that the court should not examine the lawyer-client relationship because the accused is, and remains, *dominus litis*, irrespective of counsel's own responsibility and independence.¹⁵³³ Therefore, the appeal court ought to have stayed the proceedings, instead of closing the investigation as if nothing were untoward, and have either given the accused an opportunity to proceed *pro se* or to have him seek another lawyer. In this case, Schalken pointed out, the detained accused would even have been entitled to a newly appointed lawyer, because the accused had been detained under Article 41 Sv. However, the annotator concluded that the authorities must have been persuaded by efficiency considerations, making "(...) the case fit the court schedule, rather than having the schedule helping to guarantee a fair criminal procedure".¹⁵³⁴

¹⁵³² The footnotes in the AG's advice are: 1 EHRM 19 December 1989, NJ 1994, 26 (Kamasinski) § 65; EHRM 23 February 1994, NJ 1994, 483 (Stanford) § 27 e.v.; 2 EHRM 14 January 2003, nr. 26891/95; NJB 2003, p. 572, nr. 11 (Lagerblom); 3 EHRM 14 February 2006, no. 74454/01 (Wozniak); 4 EHRM 21 April 1998, NJB 1998, p. 1076, nr. 22; 5 See also EHRM 10 October 2002, nr. 38830/97 (Czekalla); 6 EHRM 13 May 1980, nr. 6694/74, A37. Another case that can be added is EHRM 13 September 2006, nr. 30961/03 (Sannino), in which the government itself had been negligent in appointing the replacement counsel, after retained counsel had withdrawn from the case. Consequently, lawyers acted for the accused who had no knowledge of the case. I understand the considerations of the Court to entail that this negligence had contributed to the fact that Sannino had not been defended effectively, regardless of the absence of the activity of Sannino himself to improved that situation; 7 EHRM 19 October 2000, nr. 45995/99 (Rutkowski): "The Court further observes that it is not for a domestic court to oblige a lawyer, whether appointed under the legal scheme or not, to lodge any remedy contrary to his or her opinion as to the prospects of success of such remedy, the more so as in the present case conclusion was clearly preceded by the lawyer's analysis of the case-file."; 8 Spronken (2001) at 464. That such conduct of counsel can have disciplinary law consequences, I do not rule out; 9 Spronken (2001) at 448, 468; 10 The right to legal assistance is not absolute. The right can be trumped by other interests, such as those of involved bereaved parties or co-accused, or the right to try the case within reasonable time. If the accused would have stated during his last word that he wanted legal assistance (quod non) this interest would have most likely had less weight than the interest to try the case within reasonable time; cf. the advice to HR 9 September 2003, LJN AN7932 (nr. 01775/02, unpublished) and HR 31 mei 2005, NJ 2005, 416; 11 Vgl. EHRM 18 October 2006, nr. 18114/02 (Herme) § 97: "In the present case, the applicant at no point alerted the authorities to any difficulties encountered in preparing his defence."; 12 Spronken (2001) at 292.

¹⁵³³ Prakken and Spronken, in: Prakken and Spronken (2009) at 17-18. See also Guensberg (20020) at 147.

¹⁵³⁴ See also HR 15 April 2014, ECLI:NL:HR:2014:911, NJB 2014, 941 for an accused who defended himself and repeatedly started to talk about his cortex, so that the judge stopped him under Article 311 (2) Sv. The AG advised the Hoge Raad to quash the case because of the freedom of the defence (Conclusion, ECLI:NL:HPR:2014:273 as an advice to the Hoge Raad's case of HR 15 April 2014, ECLI:NL:HR:2014:911, NJB 2014, 941). However, the Hoge Raad left the case in-tact because there is no right to appeal in cassation open to the accused for this right of the accused to speak in relation to his defence under Article 311 (2) Sv. I understand it that the judge should be able to keep the accused within the bounds of court order when he conducts his defence, as much as the lawyer should keep to these bounds because the right to self-representation is not absolute and together with being bound by the law, the accused will have to abide by court order. This is a careful balancing act, because the judge should not interfere with the right of the accused to an effective defence, whether done by the accused himself or the accused in unity with his lawyer. Another interesting case is HR 19 November 2013, ECLI:NL:HR:2013:1360, NJ 2014, 147 m.nt. Schalken. in which the Hoge Raad held a case intact in

Therefore, it is noteworthy that this single case has resulted in three different opinions, while the annotator's opinion comes closer to the Hoge Raad than the AG.

For the purposes of this research into ineffective legal assistance and its redress in Dutch criminal proceedings, this case is important for several reasons, not in the least because the accused had his case overturned. While the Hoge Raad did not base this decision to quash the case on ineffective legal assistance on the *Artico*-rule, the accused did not have to bear the consequences of the (potentially negative) conduct of counsel at least. From the perspective of the two related issues that are central to this study, it is curious why the Hoge Raad did not examine this case from the perspective of that *Artico*-rule. This question is noteworthy in particular, because the accused does not seem to have a legal right to be heard immediately when he requests to address the bench under Dutch law. Rather, the court determines issues of court order and can decide when an accused is allowed to speak in court. While the Hoge Raad does not directly refer to Article 6 either, it does seem to consider the issue of adversariality of the appeal proceedings by noting the position of the prosecution on appeal. However, as explained, the Hoge Raad links the observation of the prosecutor to allowing the accused to speak immediately when requested, rather than to an indication that this might have been a case in which ineffective legal assistance took place. Although this decision is important for the accused who hereby saw his case remitted, appeal courts *cannot* infer from this case that the Hoge Raad will overturn cases when an appeal court omitted to inquire into the performance of counsel conforming to the *Artico*-rule. From the perspective of the previous chapter on the Convention, this appeal court might have had to determine whether the accused wanted to be appointed a new legal aid lawyer¹⁵³⁵ or waived his right to counsel after firing this lawyer in order to proceed *pro se*.¹⁵³⁶ Therefore, it can be concluded that this case raises several issues that are relevant for this research, including why the Hoge Raad did not refer to the *Artico*-rule (even if only to render it inapplicable); why it sought to introduce a right of the accused to address the appeal court; why it did not consider that the prosecutor on appeal hinted at a difference of opinion between counsel and the accused as a possible indication of ineffective legal assistance, at least; and why the Hoge Raad did not quash the case because the appeal court had not checked whether the accused had waived his right to a (new) lawyer so as to proceed *pro se* on appeal. These questions – in particular the last one – will be taken into account in the next sub-section which will address a case in which the Hoge Raad had to deal with an accused – and possibly the prosecutor – who appear to have alleged ineffective assistance of counsel on appeal.

12.2.2. A duty to inquire of the court regarding the waiver of the right to counsel?

As in previous chapters on Dutch criminal proceedings, it has been helpful to derive internal benchmarks from comparisons between cases that concern assisted and unassisted accused persons (chapters 6, 8 and 10). The case that will be examined in this sub-section, which involves an unassisted accused, will in summary be called *Court's duty to inquire into the waiver of the right to counsel?-case*.¹⁵³⁷

The accused was summoned to be present at a session before the *unus* judge on 21 June 2001. During this session, he argued that he had received that summons on the day of the session, and had contacted his lawyer, who advised him to attend during the session. Thereupon, the *unus* judge dealt with the case and convicted the accused of a minor offence and an offence in relation to the law on the regulation of car traffic statute.

which counsel who acted under Article 279 Sv but did not put forward that the case should have been tried before a child judge and this court proceeded because the accused was an adult.

¹⁵³⁵ See, differently, where a civil law court which normally is passive, rather than the active criminal court, which inquired into whether the persons concerned who could be submitted to a psychiatric hospital would have wanted to be appointed a new legal aid lawyer, in HR 17 October 2014, ECLI:NL:HR:2014:2998, following the AG's advice in ECLI:NL:PHR:2014:1853, and also reaffirming the precedent of HR 1 July 1994, ECLI:NL:HR:1994:ZC1422, *NJ* 1994, 720.

¹⁵³⁶ See, differently, where the accused maintained he wanted to proceed *pro se* on numerous inquiries by the appeal court, whose case got quashed in HR 17 November 2009, ECLI:NL:HR:2009:BI2315 (*Hoogerheide*). See also its annotation in *NJ* 2010, 143 m.nt. Schalken. Also central to Franken (2011); see section 5.4..

¹⁵³⁷ HR 11 May 2004, ECLI:NL:HR:2004:AO5716 with a corresponding advice by PG Fokkens, ECLI:NL:PHR:2004:AO5716.

The accused complained that Article 6 and Article 372 Sv were violated, because during the session of 21 June 2001 the *unus* judge had incorrectly started with the proceedings in so far as the offence was concerned. The reason for this complaint was that the *unus* judge could not examine the case during the session because he could not reasonably have inferred that the accused and his lawyer had agreed with the examination of the case in the absence of counsel. Rather, the *unus* judge should have interpreted the remark by the accused as a request for a stay of the proceedings. The *unus* judge should have asked the accused whether he would have wanted legal assistance by his lawyer. As a secondary issue, the *unus* judge should have inquired with the accused whether he needed preparation time. Given that the *unus* judge had started to deal with the case without establishing that the accused had unequivocally waived these rights, the *unus* judge – according to the cassation brief – had violated Article 6 EVRM.

PG Fokkens, who advised in this case, stated that a summons has to be provided at least three days before the court session (Art 370 (1) Sv); that the judge has to stay the proceedings in case the summons has not been delivered in accordance with that stipulation, unless it reasons in its verdict how the court could proceed with the case without any damage to the defence (Art. 265 (3) Sv); and that the *unus* judge has to stay the proceedings upon the request by an accused during his first appearance, if this request is substantiated in his opinion (Art. 372 Sv).¹⁵³⁸ More importantly for this research, the PG adds that:

“10. In addition, it can be inferred from (...) (Daud) that the court cannot remain passive under all circumstances. If it appears that an accused does not benefit from effective legal assistance, then the court must – when the circumstances of the case require it – stay the proceedings on its own initiative (Daud, § 42).”

The PG also takes into consideration the fact that the accused has to be believed when he claimed that he had only received the summons on the day of the session and had attended upon the advice of his lawyer. The case file did not contain proof of the day of the summons and it was reasonable that he would have turned to a lawyer because he could lose his job if his driving license was repelled. The PG therefore submitted that the remark of the accused should have been understood as a serious suspicion that he would have wanted to be legally assisted and that he could not have informed his lawyer of the time of the session earlier because of the late receipt of the summons. Therefore, the *unus* judge should have inquired with the accused whether he would have wanted a stay of the proceedings and should have decided about that stay (Art. 372 Sv). The PG adds an important sentence that will be cited here:

“Without a further explanation by the accused, it is incomprehensible that the accused would not have wanted a stay of the proceedings so that he could be legally assisted. The interest of the accused is of that importance, that it cannot depend on the assertiveness of the accused whether or not he obtains legal assistance. In this connection, I refer to the strong words with which the Court has in the Lala-case found it irrelevant that the lawyer of the absent accused had not asked to be allowed to plead on behalf of the accused (NJ 1994, 773, par. 34).”

Therefore, the PG advised the Hoge Raad to quash this case. The Hoge Raad overturned the case, evidently using the same reasoning as the PG in relation to the requirement of the court to inquire into the waiver of the right to legal assistance and possible stay due to lacking preparation time. However, the Hoge Raad did not refer to the *Daud*-case and reversed the order by referring to the lack of preparation time first and only second to the waiver of the right to counsel as an issue.

This second case, the *Court's duty to inquire into the waiver of the right to counsel?*-case, in which the Hoge Raad held there to be a duty of the court to inquire into the waiver of the right to counsel by the accused, was cited after the *Counsel dismissed during last word*-case. The contrast is apparent, since the question arises why the Hoge Raad did not require that the appeal court had inquired into the waiver of the right to counsel by the accused who fired his counsel, allegedly because

¹⁵³⁸ Advice by PG Fokkens, ECLI:NL:PHR:2004:AO5716 to HR 11 May 2004, ECLI:NL:HR:2004:AO5716.

of ineffective legal assistance. Of course, there may be good reasons why the firing of a lawyer can be believed to be a waiver of the right to counsel, in particular if there is no reason to believe that the lawyer in question gave adequate legal services (e.g. the *Kamasinski*-case). However, in the *Counsel dismissed during last word*-case, was there a reasonable suspicion that the defence was inadequate – as the PG calls it in the *Court's duty to inquire into the waiver of the right to counsel?*-case – when counsel argued in favour of a lower sentence for the accused who denied the charges? The prosecutor and the accused seemed to think so.

At this stage of the research, it is also important to reiterate the earlier case of *Counsel laying down the defence before prosecution's submission*-case (section 10.2).¹⁵³⁹ That case had been elaborated upon in context of the negative obligation of the authorities regarding the right of the accused to effective legal assistance, which in summary considers their obligation not to hinder that right. This case also has relevance for this chapter on the obligation of the authorities to respect the right of the accused to effective legal assistance by way of intervening in the case when the accused is not afforded this right due to the (negative) conduct of counsel. In this case, the Hoge Raad left the case in-tact and thereby did not follow the advice of AG Vellinga, who argued that the accused is entitled to “practical and effective” legal assistance and that the appeal court failed to take the “measures to repair serious shortcomings in the defence”. In the *Counsel dismissed during last word*-case, AG Machielse did not give such advice but the Hoge Raad did overturn the case because the appeal court had not given the accused an opportunity to address the appeal court immediately after he had fired his lawyer.

To draw a conclusion that combines aspects of all three cases, they raise several interesting issues about ineffective legal assistance and its redress in Dutch criminal proceedings, which will be addressed in more detail at the end of this chapter. At this point of the research, it is worth emphasising the resulting different opinions between the Dutch lawyers. The Hoge Raad decided to quash the case in *Counsel dismissed during last word*-case, but, it seems, for another reason than ineffective legal assistance. The Hoge Raad also overturned the *Court's duty to inquire into the waiver of the right to counsel?*-case for the apparent reason of an unassisted accused whose case was dealt with without any legal assistance. The Hoge Raad left the case in-tact in *Counsel laying down the defence before prosecution's submission*-case, while the lawyer alleged effective legal assistance was impossible. Rather, AG Machielse appears to follow the interpretation of the *Artico*-rule given by Spronken of absence of counsel or his almost full inactivity, though he does refer to an effective defence. In a different way, AG Vellinga construes the right to counsel materially by requiring that the right is *effective* and requiring an intervention in the case by the authorities where “effective representation” is not being provided (as does PG Fokkens but for an unassisted accused).

This difference of opinions between the different Dutch lawyers indicates the relevance of a further exploration about possible obligations of the authorities to intervene in the case when confronted with ineffective assistance by counsel. This further exploration will be done in the next sub-sections that will deal with three different defence activities that were mentioned already in the introduction (section 12.1.), starting below with an exploration of witness requests (section 12.3.).

12.3. Witness requests

This section considers responsibilities of the defence of an assisted accused – and thus *de facto* counsel – regarding requests to hear witnesses in court. Before turning to the case law of the Hoge Raad, Dutch law regarding requests that give the defence an opportunity to hear witnesses prior to court proceedings will be explained. This overview will provide the necessary context for the subsequent case law analysis, especially because it helps to stress the importance of hearing witnesses in court for the defence. As will be explained, sometimes such witness requests will be the only opportunity for the defence to hear witnesses at *any* stage of the proceedings.

Dutch law does not always provide the defence with an opportunity to confront witnesses earlier in the proceedings than the trial.¹⁵⁴⁰ That is, pre-trial, the police usually hear witnesses in the absence of the accused and his lawyer.¹⁵⁴¹ Also pre-trial, the judge of instruction does not have to

¹⁵³⁹ HR 12 June 2010, ECLI:NL:HR:2012:BU7644, *RvdW* 2012, 870.

¹⁵⁴⁰ See, for a more elaborate explanation of the hearing of witnesses in Dutch criminal procedure, section 4.2.

¹⁵⁴¹ Mols, in: Prakken and Spronken (2009) at 298 and at 302-306.

honour each request by the defence to the pre-trial hearing of witnesses. The influence of the pre-trial stage is significant in this respect, because a witness who is heard by the police or judge of instruction is often not heard again at trial, unless the defence so requests (Article 263 Sv).

Before turning to requests by the defence to hear witness in court in more detail, it is important to note that the possible obligations for the authorities in relation to such requests are shaped not only by their own procedural obligations. This means that they might also be impacted by the role and conduct expected of counsel in this regard, both at the pre-trial and the trial stage.

For example, the defence can be active in relation to hearing witnesses pre-trial because it can request the judge of instruction to detain a witness when that witness refuses to either answer questions or to take the oath without a legitimate reason.¹⁵⁴² Also, if a witness does not appear, the judge of instruction can summon a witness to give testimony before him. This latter provision is important, because under domestic law, there is no regulation – but also no prohibition – for the defence to request the judge of instruction to summon such a witness. Additionally, counsel can for instance request the court to have a witness heard by the judge of instruction upon remittal.¹⁵⁴³ Moreover, the defence can request witnesses to be confronted with each other at first instance.¹⁵⁴⁴ The defence can also accuse a witness of perjury when he has provided an allegedly false statement.¹⁵⁴⁵ When the witness has made an unreliable statement or has made a statement that evidently contains untruths, the defence can object to its use as evidence as well.

Thus, the defence can actively ensure that witnesses are being heard during the criminal procedure, so that their credibility but also the relevance and reliability of their testimonies can be tested. Therefore, the defence can actively ensure the hearing of witnesses as well as critically examine their testimony itself.

However, Rule 16 (2) Code of Conduct prohibits counsel from posing questions to witnesses whom the prosecution has summoned or requested to be heard in court, before they are actually heard in court. Therefore, under this Rule counsel has to keep a distance from prosecution witnesses before they are heard in court.

The interrelationship between the defence and the authorities as far as the hearing of witnesses is concerned is also shaped by the obligation of the defence. First, the defence can ask the prosecutor to call the witness for the purpose of the court session (263 (1) Sv) - the accused must present the available information about the identity of the witness.¹⁵⁴⁶ If the prosecutor refuses the defence request, the defence can reiterate its request to the presiding judge (Article 263 (4) Sv), so that he – a right at his own discretion – can order the prosecutor to summon the witness for the court session. The defence can also do so up to the court proceedings (Article 287 (3) Sv). Witnesses who are not brought to court by the defence can, according to the law, first be questioned by the presiding judge (Article 292 Sv). Thereafter, the prosecutor can pose questions, while finally it is the defence's turn. However, when the defence requests witnesses – not earlier heard – to be called, the defence is entitled to pose the first questions (Article 292 (4) Sv).

There are two criteria of the defence requests to hear a witness on appeal¹⁵⁴⁷, which are both relevant for this section.¹⁵⁴⁸ First, up to ten days before the hearings in court, the defence can request to hear a witness at the trial phase (Articles 287 and 288 Sv).¹⁵⁴⁹ When the appeal court rejects this request because it deems it not to be “in the interest of the defence”, it has to provide reasons in its verdict in this respect.¹⁵⁵⁰ Second, every request after the said ten days up to the appeal court hearing

¹⁵⁴² Article 221 (1) Sv.

¹⁵⁴³ Article 316 Sv or for a required further investigation by the prosecutor, Article 258 Sv, and during the appeal stage to the examining magistrate 420 Sv in conjunction with 60 (3) RO.

¹⁵⁴⁴ Under Article 297(1) Sv.

¹⁵⁴⁵ Under Article 295 Sv.

¹⁵⁴⁶ To the prosecutor via Article 263 (1) Sv, upon his refusal 264 Sv from the court to the judge of instruction Article 226a (1) or 226n (1) Sv.

¹⁵⁴⁷ For a discussion about the complicatedness of this arrangement for the defence for witness requests, see Jebbink (2013b) at 2561 and see particularly Mevis in his annotation to HR 22 April 2008, ECLI:NL:HR:2008:BC5977, *NJ* 2008, 313, m.nt Mevis.

¹⁵⁴⁸ See section 3.4.1.

¹⁵⁴⁹ See for this timing requirement, e.g. HR 2 March 2010, ECLI:NL:HR:2010:BK5516, *NJB* 2010, 606.

¹⁵⁵⁰ Article 263 (2) Sv, unless the indictment is served later, at the latest 3 days before the hearing. 263 (2) Sv is also applicable to appeals. In more detail: prior to and during the adjudication of the case at first instance, the *pro forma* court

should be granted provided that it is “necessary for the court” to hear the requested witness (Article 328 in conjunction with 315 Sv, for an appeal see also Article 415 Sv).¹⁵⁵¹ Again, if it rejects the request, the court has to provide reasons in its verdict as to why it was not “necessary” to hear the witness in court.

The necessity criterion originates from the Code since 1926 (Article 315 Sv) and primarily relates to the task of the active judge to conduct truth finding, while the criterion of “in the interest of the defence” has been adopted in 1998 when the case law of the Court prompted more attention to the right of the defence to hear or have heard witnesses and to create opportunities for adversariality.¹⁵⁵²

This sub-section starts with an exploration of a case in which the Hoge Raad had to decide on an appeal court’s evidently erroneous refusal to hear a witness in court as the defence requested (sub-section 12.2.1). Thereafter, the subsequent section explores two cases in which an unassisted or assisted accused utter almost the same words about hearing witnesses in court (sub-section 12.2.2.). The last sub-section turns to an overview judgment and its successors in order to determine whether the Hoge Raad sets strict – perhaps *stricter*, as a Dutch scholar argues – demands on witness requests made by an assisted accused and thus *de facto* counsel (sub-section 12.2.3.).

12.3.1. “Negligence” of counsel regarding a witness request

This sub-section explores a case in which an assisted accused, who was tried on suspicion of a joint commission of murder, requested to hear a witness together with his lawyer.¹⁵⁵³ The appellant was assisted by the same advocate who had also assisted two co-defendants, the accused’s brothers. At the appeal hearing the accused’s lawyer asked to hear twelve witnesses in court. This list included witness S., who had only been heard by the police in the absence of both the accused and his lawyer. Witness S. allegedly had personally witnessed the conflict which ultimately had resulted in the indicted offence of the alleged murder. In an intermediate decision the court rejected the defence request to hear all witnesses including witness S., alleging that the judge of instruction had supposedly heard witness S., so that the accused and his lawyer had already made use of their opportunity to hear S. pre-trial. Therefore, the appeal court rejected the request to hear witness S. in court, proceeded with the case, and ultimately convicted the appellant also on the basis of S.’s witness evidence.

The applicant complained before the Hoge Raad that the appeal court had rejected the request to hear witness S. on erroneous grounds or otherwise did not sufficiently reason its rejection of the witness request in the verdict. Although witness S. had been heard in the cases of the accused’s two brothers and co-defendants, S. had never been heard in the accused’s case. By its decision to deny the appellant the possibility to hear witness S. in court, the appellant contended, the appeal court had deprived the accused of his only opportunity to hear S. at any stage of the proceedings.

The Hoge Raad found that the appeal court had indeed refused to hear witness S., on the basis of a “(...) wrong argument of a factual nature”. Nonetheless, the Hoge Raad did not quash the present case, because:

session, the continued adjudication of the case with the same bench, the continued adjudication of the case with a changed bench, and during the appeal phase. See also Schalken, in: Schalken and Hofstee (1989) at 3-15.

¹⁵⁵¹ See for this substantive requirement, e.g. HR 19 June 2007, ECLI:NL:HR:2007:AZ1702, *NJ* 2007, 626, m.nt. P.A.M. Mevis.

¹⁵⁵² Act of 15 January 1998 that sought to change the Criminal Procedural Code regarding the laying of case before a court and the arrangement about the investigation at trial, *Stb.* 1998, 33 (entry into force 1 February 1998). Also Parliamentary Paper dossier number 24 692. In Dutch: Bij Wet van 15 januari 1998 tot wijziging van het Wetboek van Strafvordering betreffende het aanhangig maken van de zaak en de regeling van het onderzoek ter terechtzitting (Wet herziening onderzoek ter terechtzitting), *Stb.* 1998, 33 (i.w.tr. 1 februari 1998). Zie ook de kamerstukken onder dossiernummer 24 692. See also Dubelaar (2014), at 291.

¹⁵⁵³ HR 18 March 2008, ECLI:NL:HR:2008:BC3553, *NJ* 2008, 452 m.nt. Reijntjes. The criminal cases against the two co-accused persons resulted in: HR 18 March 2008, ECLI:NL:HR:2008:BC3555, *RvdW* 2008, 347 and HR 18 March 2008, ECLI:NL:HR:2008:BC3557, *RvdW* 2008, 348. See also the cases referred to by Kooijmans (2011a) who argues that the aforementioned case is not the only one that demonstrates that more weight is attached to the positions of the two sides of the defence and prosecution in the current criminal procedure than on an active role of the judge: HR 16 November 2004, ECLI:NL:HR:2004:AR1960, *NJ* 2005, 153 m.nt. Reijntjes; HR 18 December 2007, ECLI:NL:HR:2007:BB5386, *NJ* 2008, 398 m.nt. Buruma; HR 11 March 2008, ECLI:NL:HR:2008:BC4460, *NJ* 2008, 174; HR 16 November 2010, ECLI:NL:HR:2010:BN0008, *NJ* 2011, 355 m.nt. Buruma; and HR 7 December 2010, ECLI:NL:HR:2010:BO1281, *NJ* 2011, 295 m.nt. Mevis in: Kooijmans (2011) at 2.

“The criminal defence lawyer must have immediately known that the appeal court used a wrong argument of a factual nature. After the defence read the intermediate verdict that in principle witness S. would not be heard in court, it ought to have pointed out the error to the court if it wanted to pursue hearing witness S. The defence *neglected* to do so, even though it could have done so during the pleadings. Special circumstances as to why the defence could not have alerted the appeal court to its error were neither presented nor otherwise found. Therefore, in this specific case, the complaint regarding insufficient reasoning in the rejection of the defence request for the hearing of witness S. in court cannot for the first time be lodged before the Hoge Raad. Consequently, the ground cannot result in quashing the case [emphasis added by the author]”.¹⁵⁵⁴

The Hoge Raad thus left the case intact, which resulted in the following criticism by the annotator, Reijntjes. He argues that the Hoge Raad came to a “tricky decision” that, moreover, has the potential to further impact the development of criminal procedure.¹⁵⁵⁵ Reijntjes argues that, because of this decision, counsel is now required to direct the appeal court to *its* factual error when rejecting a defence request to hear a witness. Consequently, appeal courts may be exempted from their own autonomous obligation to make correct decisions regarding witness requests, while the Hoge Raad additionally does not define what a factually erroneous argument entails and who determines it so.¹⁵⁵⁶ If the Hoge Raad is to broadly construe the notion of a “wrong argument of a factual nature”, criminal defence lawyers may be prompted to point out all sorts of errors to appeal courts whose responsibility it is to make proper decisions in the cases that they adjudicate.

In addition to Reijntjes important observations, this case is relevant in this research for three more reasons.

First, this judgment has consequences for the division of responsibilities between counsel and the court. The court has to answer the questions of Articles 348 and 350 Sv, while witness S., who saw the incidence, appears to have held information that could be relevant for that task. It has to be noted that the AG argues that S. has said nothing that was different from what had been said by two other witnesses (who had been heard by the judge of instruction in the presence of both counsel and the accused). However, it seems inappropriate that the AG – and the lower courts for that matter – second-guess whether *this* accused would not have been able to pose different questions to S. and hear something different in witness S.’s testimony than the co-accused. *This* accused might have responded differently to S.’s declaration than his brothers. For example, he might have heard exonerating issues in S.’s testimony, which the court consequently has not under the present circumstances been able to take into consideration regarding the possible direction of the defence. Therefore, the question arises whether the Hoge Raad has required from this court that it abides by its own responsibility of conducting truth finding and ensuring the fairness of the proceedings.

A second aspect of this case that is relevant for this study is connected to the focus of this research on ineffective legal assistance. The above-cited *Court’s factual error*-case is relevant because the Hoge Raad holds that counsel was “*negligent*” without explaining what norm counsel violated. At least the Hoge Raad did not explain where this responsibility of the lawyer arose from, and how it relates to the responsibilities of the other participants. For example, the Hoge Raad does not relate counsel’s responsibility to that of the appeal court itself which has its own responsibility to reject defence witnesses requests correctly at least. This particular aspect of the case is significant because this supposed “negligence” of counsel to point out the court’s error had consequences for the accused, which he had to bear. In addition, this negligence might have harmed the accused in his rights because he had never had an opportunity to hear witness S. against him at any stage of the procedure.¹⁵⁵⁷

¹⁵⁵⁴ The author’s translation of Reijntjes’ annotation, particularly para. 5, to the Hoge Raad’s case of HR 18 March 2008, ECLI:NL:HR:2008:BC3553, *NJ* 2008, 452 m.nt. Reijntjes.

¹⁵⁵⁵ See also Mevis (2010) at 1081.

¹⁵⁵⁶ See, more generally about difficulties with the hearing of witnesses in Dutch criminal proceedings, HR 12 October 1999, ECLI:NL:HR:1999:ZD1559, *NJ* 1999, 827, which is the *Bocos Cuesta* case that subsequently went to Strasbourg and resulted in Court, Judgment of 10 November 2005, *Bocos Cuesta v. the Netherlands*, HUDOC no. 54789/00, *NJ* 2006, 239 m.nt. Schalken.

¹⁵⁵⁷ See above in chapter 6.

Therefore, from a rights-based perspective, this case raises issues because it can hardly be deemed a strategy of the defence not to hear witness S. Also, this supposed negligence stemming from passivity of counsel in the face of a factual error by the appeal court resulted in the aforementioned harm to the accused's defence right to hear a witness who incriminates him in the case against him. Therefore, it might not be fair to allow this supposed "negligence" of counsel to come at the procedural risk of the accused – which it did in this case.

A third and last point that is worth mentioning in addition to Reijntjes's annotation links to what has been mentioned in the context of the earlier cited case: the *Counsel dismissed at last word*-case (sub-section 12.2.1.). The Hoge Raad appears, in the *Court's factual error*-case, to clearly stay away from the phenomenon of ineffective legal assistance under the *Artico*-rule. However, the fact that the Hoge Raad blames counsel for "neglecting" to alert the appeal court to its factual error, can hardly be seen as anything else than a form of, at least, alleged ineffective legal assistance. Consequently, an issue with legal certainty arises. By not defining what constitutes actual ineffective legal assistance, the Hoge Raad also appears to create room to "cure" unfulfilled responsibilities of authorities which wrongly reject a witness request by alleging that *counsel* supposedly neglected to fulfil that responsibility. Accordingly, counsel – whose conduct did not seem to have been regulated by a norm of correcting wrongly rejected witness requests by appeal courts in the first place – is being held responsible for negligence thereof, which harms the accused in his rights. The damage to the accused in this case in relation to his rights, rather than defence strategy, is that he is being convicted from evidence of a witness who he has not heard at any stage of the proceedings.

These are all important points that can be raised on this limited basis of only one case. Therefore, the remainder of this section on witness requests will explore further cases (sub-sections 12.3.2. and 12.3.3.). The following cases will not be as explicit as the *Court's factual error*-case in that the Hoge Raad refers to supposed "negligence" of counsel. Nonetheless, this overview will also address other cases that can help to explore whether or not too much is currently demanded from counsel in relation to witness requests in Dutch criminal proceedings and to assess whether or not it is fair that the accused has to bear the consequences of (negative) conduct of his lawyer.

12.3.2. Witness requests by counsel rather than an unassisted accused

The previous sub-section has demonstrated how counsel is being ascribed a responsibility of pointing out a factual error to the court, at the expense of requiring this same court to correctly deal with a witness request. The question arises whether or not the Hoge Raad would approach a case in which an unassisted accused would be confronted with a wrongly rejected witness request "more willingly". While no case has been encountered that can answer that particular question, this sub-section will compare a witness request by an assisted and an unassisted accused. In this way, this study seeks to determine whether the appeal has to be just as "willing" when approaching a rather similar uttering about hearing a witness in court by an accused alone, on the one hand, and an accused who has assistance by counsel, on the other.¹⁵⁵⁸ Potentially, this comparison between a witness request by an unassisted and assisted accused can provide an internal benchmark for conduct that can be reasonably expected of counsel. A similar benchmark has already been established in relation to an active court which is confronted with a lack of "an effective defence" by an unassisted accused (see the *Hoogerheide*-case; chapter 6).

The first case regards an *unassisted* accused who was suspected of having driven a car whilst intoxicated.¹⁵⁵⁹ The police had stopped him to take a breath test, which this accused had refused to take. After the trial phase, the accused, who had opted for self-representation, was convicted of neglecting to follow a police order. During the appeal hearing, the appellant, who again defended himself, stated that he had informed the police that he did not want to take the breath test because he first had to visit the bathroom. He alleged that the police had neglected to note this particular reason in the record, the appellant added in court that, if the judges would not believe him, "*You should hear the*

¹⁵⁵⁸ See the demands of Article 330 in conjunction with 415 Sv and e.g. HR 24 November 2009, ECLI:NL:HR:2009:BJ9346, *NJ* 2009, 607.

¹⁵⁵⁹ HR 17 April 2007, ECLI:NL:HR:2007:AZ7120, *NJ* 2007, 251, with a contradictory conclusion by AG Knigge, ECLI:NL:PHR:2007:AZ7120.

police officers". The appeal court, which did not hear the police officers in court, convicted the accused of the same offence as the lower court had done earlier.

The complainant argued before the Hoge Raad that the appeal court had failed to take a decision on his request to confront the witnesses in court, or at least had failed to give sufficient reasons in its verdict for its rejection.

The AG advised the Hoge Raad to leave this case intact. He concluded that the remark by the appellant could be given many interpretations (in Dutch: *multi-interpretabel*). He submitted that this remark in court could thus not be deemed to be a request to hear witnesses in court in accordance with the "necessity" standard.

The Hoge Raad did not follow the AG's advice and, rather, held that the appeal court should have reasonably concluded that the remark cited above by the unassisted accused entailed a witness request. Since the appeal court did not respond to this request, or at least did not give sufficient reasons in its verdict for its rejection, the Hoge Raad quashed the case. The case will henceforth be referred to as *Police witnesses*-case and will be compared with another case that will be addressed below.

A second case, which will from now on be called *Chinese witnesses*-case, concerned an *assisted* accused who was believed to have provided illegal access to the Netherlands to four individuals of Chinese origin.¹⁵⁶⁰ Neither the accused nor his lawyer had had an opportunity to hear these four Chinese persons at any stage of the proceedings. During the appeal hearing the accused remarked, in the presence of his lawyer: "*Can the four Chinese be heard? I took them with me in order to help them and I would like to know why they declared differently to the police*". After having heard this remark by the accused, counsel pleaded that the court had no convincing evidence to convict the accused of the said offence because the four Chinese witnesses had stated to the police that they had paid money to persons other than the accused for their journey from China to the Netherlands. She added that the four Chinese had, moreover, testified that the accused was not a member of the illegal organisation that arranged for their travel to the Netherlands. In addition, she stated, the evidence of the four Chinese witnesses corresponded with the accused's statements. Consequently, she concluded that the appeal court could draw "(...) no other conclusion than that there is no legal and sufficient proof that my client, for profit, has ensured persons' illegal access to the Netherlands". Having heard the defence position, the court did not hear the four Chinese witnesses at any of its sessions. It convicted the accused of jointly giving assistance to and the provision of access to the Netherlands to foreign persons for profit. Listed as evidence were *inter alia* the statements of these four Chinese witnesses to the police.

The applicant appealed in cassation on the ground that the appeal court had neglected to give the defence an opportunity to hear the four Chinese witnesses in court, or at least had failed to give sufficient reasons in the verdict for rejecting these witness requests. The appellant added that his right to confront witnesses had been violated, because the defence had received no earlier opportunity to examine these witnesses. The accused had not heard them when they were heard by the police or later during the procedure by other authorities.

The AG advised the Hoge Raad to leave the case intact, arguing *inter alia* that because of counsel's pleadings, which used the witness statements as point of reference without refuting their content, the defence must not have had questions to these witnesses and therefore did not request to hear the Chinese witnesses in court.¹⁵⁶¹ The appeal court did not have to hear these witnesses out of Article 6 either because the judge cannot, figuratively speaking, "coerce" the defence into using the right to hear witnesses. The defence might have had good reasons here not to exercise this right, because the hearing of the witnesses might, in the view of the defence, have strengthened the idea of the appeal court that the accused had acted out of financial gain, rather than not for profit. The latter, the AG added, was the lawyer's argument. Thus, the AG concluded, not hearing the witnesses could have been a defence strategy, seeing the content of the pleadings of counsel.

The Hoge Raad examined the complaint by holding that the appellant's *lawyer* had not pointed out that she wanted to have the four Chinese witnesses heard in court. According to the Hoge Raad,

¹⁵⁶⁰ HR 29 March 2005, ECLI:NL:HR:2005:AS6009, *JOL* 2005, 189.

¹⁵⁶¹ AG Vellinga, ECLI:NL:PHR:2005:AS6009,

counsel – who had heard the remark cited above by the accused – apparently did not find it important to request to hear the witnesses in court. Moreover, counsel had asserted the truthfulness of their statements to the police. Therefore, the Hoge Raad ruled that the decision of the appeal court, which moreover found that the appellant had not requested to hear the four Chinese witnesses in court, was “not incomprehensible”. The Hoge Raad concluded that the defence had no legal basis to argue that it had been denied its right to confront the witnesses since there had been no request to hear them in court or previously.¹⁵⁶² The appeal court could legitimately use the police record without substantiating other evidence, thereby leaving no grounds to quash the case. The ground lodged on appeal in cassation thus lacked a “factual foundation”.¹⁵⁶³ The Hoge Raad left the case intact.

- *Comparison between the Police and Chinese witnesses-cases.*

These two cases are strikingly similar in so far as the remark of the accused is concerned.¹⁵⁶⁴ Although the first case concerned a statement (*Police witnesses-case*) and the second a question (*Chinese witnesses-case*), both accused used almost the same words. Another striking similarity lies in the approach of the Hoge Raad. The Hoge Raad also approaches the utterings by the accused similarly by not exploring *on their content* how they constituted a request to hear witnesses in court or not. To put it differently, the Hoge Raad does not explain why the remark that the court should hear the police officers was, and the question as to whether the Chinese witnesses could be heard was not, a witness request. These two similarities have an important effect. The Hoge Raad provides no explanation as to why the utterings of the unassisted accused was a witness request (*Police witnesses-case*) while the quite similar remark by the assisted accused was not (*Chinese witnesses-case*). Therefore, lower courts might infer that it was not what the accused said that resulted in the decision by the Hoge Raad. Rather, they may infer that it was the absence or presence of *counsel* that was determining for the cassation decision. Such an inference is reasonable because the Hoge Raad has earlier held that the defence has to meet *higher* standards for a request to hear *police officers* as witnesses in court than regular witnesses.¹⁵⁶⁵ If the question regarding the hearing of the police officers can be deemed a witness request up to a *higher* standard than the request to hear the Chinese witnesses, even more questions arise. After all, the assisted accused made almost the same remark as the assisted accused in the *Chinese witnesses-case*. Nonetheless, the Hoge Raad held that the remark in the *Police witnesses-case* was, but in the *Chinese witnesses-case* was not, a witness request. The Hoge Raad does not explain why. There is also an important difference of opinion in the *Police witnesses-case* between the Hoge Raad and the AG. The AG holds in the case of the unassisted accused who wanted to hear the police witnesses, that this remark could be interpreted in so many ways and does not appear to amount to a higher threshold than the assisted accused who, after all, said almost the same. Nonetheless, the Hoge Raad must have concluded that this remark even met a higher standard than for usual witnesses, and does not explain why.

Before this overview will highlight further the possible effect of the Hoge Raad’s approach to these quite similar utterings by the accused, a difference between the two cases has to be noted. In the *Chinese witnesses-case*, the defence has assumed the truthfulness of the witness statements, while in the *Police witnesses-case*, the defence aimed at refuting the assertion that the police officers had made an accurate report.¹⁵⁶⁶ Moreover, it could certainly be the case that the Hoge Raad considered that it was relevant for its decision that the lawyer in the *Chinese witnesses-case* did not decide to request the hearing of the witnesses, upon whose statements the argument that the accused had not acted out of financial gain depended. It could indeed be that the lawyer made a strategic decision. Moreover, it might therefore also be right, as the AG suggests, that the appeal court might have deemed the unity of the defence to be so important that it did not want to go against counsel’s pleadings. Those pleadings did not explain the accused’s utterings as, or added herself, a witness request. However, it is also noticeable that the verdict of the appeal court does not show that the bench had *assumed* that it could

¹⁵⁶² See also HR 11 April 2000, ECLI:NL:HR:2000:AA5442, *JOL* 200, 236 and HR 1 February 1994, ECLI:NL:HR:1994:AB7528, particularly in para. 6.3.3 sub. (ii), *NJ* 1994, 427, m.nt. Corstens.

¹⁵⁶³ HR 29 March 2005, ECLI:NL:HR:2005:AS6009, para. 3.5, *JOL* 2005, 189.

¹⁵⁶⁴ “You should hear the police officers” and “Can the four Chinese be heard? I took them with me in order to help them and would like to know why they declared differently to the police”.

¹⁵⁶⁵ HR 10 February 2004, *NJ* 2004, 452 m.nt. Knigge.

¹⁵⁶⁶ See also HR 10 February 2004, ECLI:NL:HR:2004:AL8446, *NJ* 2004, 452, m.nt. Knigge.

not intervene in the case *because* of counsel's *strategy*. Therefore, lower courts might rather assume that the difference between these two cases lies in the presence or absence of counsel, rather than the protection of any interference with the strategy of the defence that counsel may have pursued. One issue can be noted with a bit more certainty. The Hoge Raad did not overturn the *Chinese witnesses*-case because the appeal court omitted to reason in its verdict that it did not hear the witnesses in court because of this respect for the unity of the defence with counsel acting out of strategy. Instead, the Hoge Raad referred to the pleadings of the *lawyer* as if it was self-evident that the appeal court did not have to hear the witnesses in court because *no* request to hear witnesses had been made by the defence *at all*. That last conclusion does not seem to be fully accurate, considering that the quite similar utterings by the unassisted accused did constitute a witness request in court up to the "necessity"-standard. As explained above, this standard is not only stricter than the "in the interests of the defence"-threshold but must have been even stricter because, as explained above, it concerned hearing police officers as witnesses in court (*Police witnesses*-case),

From these two aforementioned cases of the Hoge Raad, lower courts may infer that they have to approach witness requests by *unassisted* accused more "willingly" than by assisted accused. Although it might be understandable that lower courts deal "willingly" with an unassisted accused while "more" can be expected of professional counsel than of a lay accused, this inference poses a risk. That risk is that an unassisted accused will be "better off" than assisted accused if they utter almost the same about hearing witnesses in court. The most important point here is that the consequences of the condoned passivity by the appeal court have to be borne by the accused, in whose case the witnesses were not heard.

From a rights-based perspective, a comparison has to be made. Is it fair that an assisted accused is "worse off" than an unassisted accused because of not being approached so "willingly"? Taking that question further, is it fair that witnesses were not heard in court while their testimonies, which were used for the accused's conviction, could have exonerated the assisted accused?¹⁵⁶⁷ Moreover, without supposing in any way that this lawyer was negligent (as the Hoge Raad would call it) an assisted accused who suffers from ineffective assistance by counsel might have to be dealt with just as "willingly" as an unassisted accused. That is, if seen from the perspective of the consequences that had to be borne by the accused, is it fair that in cases like those cited above appeal courts can infer that they have to approach an unassisted accused more willingly than an assisted accused? There might not have been an issue with the – comparison between – these two cases if it were established by the appeal court, with reasons in its verdict, that it could not intervene in the case out of counsel's control over strategy (*Chinese witnesses*-case). However, this dissimilar approach to these two cases, in which the accused utter almost the same about hearing witnesses in court, may have resulted in harm to the rights of the assisted accused to hear witnesses in the case against him and does raise questions as to the fairness of the criminal proceedings (*Chinese witnesses*-case). No conclusions will be drawn at this stage of the research about these issues of fairness. Rather, this overview will continue with a further exploration of case law regarding witness requests in order to lay a broader foundation for the analysis of how the Hoge Raad deals with this defence activity.

12.3.3. Witness requests by counsel (overview judgment by the Hoge Raad)

The two previous sub-sections have indicated two important issues. First, how counsel can be held responsible for "neglecting" to point out an error of the appeal court which rejected a witness request incorrectly (*Court's factual error*-case). Second, how the unassisted accused appears to have been approached more "willingly" than an assisted accused whose utterings regarding the hearing of witnesses in court was quite similar (*Police* and *Chinese witnesses*-cases). Consequently, it seems that strict requirements are being set for an assisted accused and his lawyer, at least seemingly stricter than for an unassisted accused. This sub-section will explore, as Dutch scholar Robroek submits, whether the Hoge Raad's overview judgment of 1 July 2014 sets "stricter" requirements on the lawyer for witness requests.¹⁵⁶⁸ This sub-section will first discuss this overview judgment and will thereupon elaborate upon six subsequent cases in order to determine the clarity of the standards set for witness

¹⁵⁶⁷ See also sub-section 3.2.2.2.

¹⁵⁶⁸ See similarly Robroek (2014) at 2304-2308.

requests and the possibility that currently too much is demanded of counsel in relation to this defence activity of a witness request.

- *What standards for defence witness requests does the Hoge Raad set?*

The Hoge Raad explained that it had to render an overview judgment, which it did on 1 July 2014, regarding “the calling for and hearing of witnesses” during the first instance and appeal stages as requested by the defence.¹⁵⁶⁹ It appears that the Hoge Raad did not find there to be reasons to “explain” requests to hear witnesses by the prosecution or any other criminal procedural participants (the judge of instruction, appeal judge instruction of the judge and/or the appeal judge (in Dutch: rechter(-) of raadsheer(-)commissaris), but did address the “complicatedness” and “a lack of clarity” with regard to *defence* witness requests¹⁵⁷⁰ in “regular criminal proceedings”.¹⁵⁷¹

The judgment gives “(...) an overview per procedural phase about the explanation in the case law of the legal provisions regarding the calling for or not and hearing of witnesses who are requested by the defence”.¹⁵⁷² The Hoge Raad mentions it deliberately focuses on “(...) the major points, with special attention paid to some difficulties arising in the case law”.¹⁵⁷³ This sub-section discusses this overview judgment on four of those major points in so far as they place demands on the defence regarding witness requests on appeal. Particular attention will be paid to cases that can explain whether or not demands are stricter when counsel makes the request.¹⁵⁷⁴

Turning to the substance of the overview judgment, two important points have to be made. First, the Hoge Raad sets demands on appeal briefs that have to be submitted on time and specified. This means that these briefs have to correspond with the time limits on witness requests and not use a catch-all phrase such as “(...) all persons, amongst whom the ones though not only those, whose statements the court will use in its following evidence construction” (Article 414 (2) in conjunction with Article 263 Sv). The Hoge Raad adds that, with regard to that example of an unspecified witness request, lower courts can reject them because they do not meet the requirements *per se* (explained in Article 410 (3) Sv).¹⁵⁷⁵

Second, the Hoge Raad also refers to the two criteria of the “interest of the defence” and “necessity”. The Hoge Raad considers for the first “interest of the defence”-criterion, that both “(...) case law and scholarly interpretations require the court to examine the request to hear witnesses *from the perspective of the defence* and with a view to the interest of the defence when the request would be accepted [emphasis added by the author]”.¹⁵⁷⁶ Consequently, the accused can only be deemed to be harmed in his defence by a rejection of the request “(...) if, reasonably speaking, the issues about which the witness can declare are not of interest for any decision that will have to be taken in his case or that the possibility that the accused can testify about any such points can be excluded”.¹⁵⁷⁷ The Hoge Raad concludes that “(...) this arrangement implies that the prosecutor and the court have to be *reticent* in using their competency to reject the request, but also that the defence has to reason the request properly [emphasis added by the author]”.¹⁵⁷⁸ This is an interesting conclusion, because apparently the Hoge Raad finds it important to lay down a standard that the *defence* has to abide by. The Hoge Raad makes that responsibility of the defence explicit, by adding that “(...) rejection of the request is understandable if the request is reasoned so minimally that the court is not positioned to assess the request on the basis of the standard of the interest of the defence”.¹⁵⁷⁹ The Hoge Raad explains that “(...) it can be expected of the defence that a reason is given for each and every witness called for on why that witness is of interest for decisions in the case under Articles 348 and 350

¹⁵⁶⁹ HR 1 July 2014, ECLI:NL:HR:2014:1496, *NJ* 2014, 441, m.nt. Borgers.

¹⁵⁷⁰ HR 1 July 2014, ECLI:NL:HR:2014:1496, para. 2.1, *NJ* 2014, 441, m.nt. Borgers.

¹⁵⁷¹ The verdict explains that this applies to regular criminal proceedings and thus not to proceedings regarding illegal proceeds or extradition for instance.

¹⁵⁷² HR 1 July 2014, ECLI:NL:HR:2014:1496, para. 2.2, *NJ* 2014, 441, m.nt. Borgers.

¹⁵⁷³ HR 1 July 2014, ECLI:NL:HR:2014:1496, para. 2.2., *NJ* 2014, 441, m.nt. Borgers.

¹⁵⁷⁴ See similarly Robroek (2014) at 2304-2308.

¹⁵⁷⁵ HR 1 July 2014, ECLI:NL:HR:2014:1496 (overview verdict), para. 2.41, *NJ* 2014, 441, m.nt. Borgers.

¹⁵⁷⁶ HR 1 July 2014, ECLI:NL:HR:2014:1496 (overview verdict), para. 2.5, *NJ* 2014, 441, m.nt. Borgers.

¹⁵⁷⁷ HR 1 July 2014, ECLI:NL:HR:2014:1496 (overview verdict), para. 2.5, *NJ* 2014, 441, m.nt. Borgers.

¹⁵⁷⁸ HR 1 July 2014, ECLI:NL:HR:2014:1496 (overview verdict), para. 2.6, *NJ* 2014, 441, m.nt. Borgers.

¹⁵⁷⁹ HR 1 July 2014, ECLI:NL:HR:2014:1496 (overview verdict), para. 2.6, *NJ* 2014, 441, m.nt. Borgers

Sv”¹⁵⁸⁰ For example, the Hoge Raad continues by stating that those could be “(...) reasons for the hearing of à décharge witnesses whose testimonies can be used to refute the indictment or for the hearing of à charge witnesses who have been heard during the pre-trial stage, in order to test the credibility and reliability of these testimonies”¹⁵⁸¹.

Third, for the legal consequence attached to a witness request for the purpose of establishing a procedural omission of abuse of process (Article 359a Sv), the Hoge Raad adds an additional requirement. For example, if the defence wants to argue that the legitimacy of the pre-trial stage was questionable, it will have to explain that this is the reason why witnesses should be heard.¹⁵⁸² The defence has to specify what legal consequence should be attached by the court to the supposed procedural omission under Article 359a Sv. Consequently, a court can reject a defence witness request if it cannot lead to such a legal consequence under Article 359a Sv.

Fourth and final, the Hoge Raad relates the criterion of “necessity” to *the perspective of the judge*, rather than to the perspective of the defence (which applies to “interest of the defence”). The Hoge Raad holds that the *court* should assess the completeness of the investigation of the case. This means, in more detail, that “(...) for the assessment of a reasoned, clear and firm request of the defence to the judge to effectuate his *ex officio* competency to hear witnesses, it [is] only of importance that he deems it to be necessary in the light of the completeness of the investigation to hear the witnesses”¹⁵⁸³. Thus, the Hoge Raad means that the judge can reject the witness request by the defence “(...) on the ground that the judge has been informed sufficiently on the basis of all that has come to trial and therefore does not have to conduct the requested witness hearing”. The judge in this way “(...) does not pre-judge the case in an impermissible way” because he “(...) assesses what the witnesses could potentially testify to”. The Hoge Raad determines that more detailed rules cannot be laid down. In any case, the Hoge Raad does consider two issues important: first, “(...) the nature of the subject about which the witness can potentially testify” and second, the “(...) acuity with which the defence presents the arguments in favour of hearing the witnesses”¹⁵⁸⁴.

Having seen how the Hoge Raad has dealt with the first issue of the demands on defence witness requests in the context of the two criteria of “interest of the defence” and “necessity”, the other point of the assessment at the appeal in cassation must be highlighted. It is important to determine here what additional requirements are set for the reasoning of rejections by appeal courts of witness requests. In this regard, the Hoge Raad explains that it cannot assess the “accuracy” of the rejection of a witness request, but merely whether the “right standard” has been applied and whether the decision was “comprehensible” in that light.¹⁵⁸⁵ A test of comprehensibility is limited because the lower courts hold the prerogative of making factual decisions.¹⁵⁸⁶ It entails “(...) the question of whether it was comprehensible in the light of – as if those were communicating vessels – the basis of the witness request, on the one hand, and the grounds for rejection, on the other”¹⁵⁸⁷. The Hoge Raad mentions that two issues can be “(...) important for this comprehensibility assessment during the course of the procedure”. First, the Hoge Raad refers to “(i) the stage at which the request has been submitted, seen from the perspective of whether the request could have been done and reasonably should have been done sooner”. Second, the Hoge Raad includes “(ii) the circumstance that the witnesses who have been requested – or have been ordered by the prosecutor who acts on appeal – are (in the end) being heard on the basis of Article 411a Sv or Article 420 Sv by the pre-trial judge acting at the request of the first instance or appeal court”. Both issues have, as a consequence, that the hearing of the witness or witnesses “(...) at the court phase will no longer be required”.

It follows from this overview judgment that the Hoge Raad permits the lower courts large discretion with their assessments of witness requests and reticence in accepting defence witness requests, both

¹⁵⁸⁰ HR 1 July 2014, ECLI:NL:HR:2014:1496 (overview verdict), para. 2.6, *NJ* 2014, 441, m.nt. Borgers

¹⁵⁸¹ HR 1 July 2014, ECLI:NL:HR:2014:1496 (overview verdict), para. 2.6, *NJ* 2014, 441, m.nt. Borgers.

¹⁵⁸² HR 1 July 2014, ECLI:NL:HR:2014:1496 (overview verdict), para. 2.7, *NJ* 2014, 441, m.nt. Borgers.

¹⁵⁸³ HR 1 July 2014, ECLI:NL:HR:2014:1496 (overview verdict), para. 2.8, *NJ* 2014, 441, m.nt. Borgers.

¹⁵⁸⁴ HR 1 July 2014, ECLI:NL:HR:2014:1496 (overview verdict), para. 2.9, *NJ* 2014, 441, m.nt. Borgers.

¹⁵⁸⁵ HR 1 July 2014, ECLI:NL:HR:2014:1496 (overview verdict), para. 2.74, *NJ* 2014, 441, m.nt. Borgers.

¹⁵⁸⁶ HR 1 July 2014, ECLI:NL:HR:2014:1496 (overview verdict), para. 2.77, *NJ* 2014, 441, m.nt. Borgers.

¹⁵⁸⁷ HR 1 July 2014, ECLI:NL:HR:2014:1496 (overview verdict), para. 2.76, *NJ* 2014, 441, m.nt. Borgers.

under formal and substantive law. Considering this inference about the discretion of the lower courts to assess the witness requests, six cases that the Hoge Raad has adjudicated between 1 and 8 July 2014 will also be explored. These cases will be examined in order to assess whether, as a corollary, several demands have been set on the defence on how such witness requests have to be formulated *so that* the lower courts are permitted to decide that their reasoning *depend* on whether the *defence* also gives limited reasoning.¹⁵⁸⁸ Seeing that these cases will only be cited for this particular purpose, the facts of the case will be elaborated upon only in so far as is necessary to understand the Hoge Raad's decision in this respect. That means that attention will be paid "only" to the witness requests by the defence and their assessment by both the appeal courts on factual and legal grounds and the Hoge Raad on points of law only. All six cases will be described first as far as possible with an emphasis on the Hoge Raad's reasoning and thereafter an interim conclusion will be drawn.

- *What if the defence received the witness statements the day before the hearing?*

A first relevant case has been adjudicated by the Hoge Raad on the same day as the overview judgment cited above: 1 July 2014.¹⁵⁸⁹ The facts of the case are that the defence only received the written statements of the witnesses the evening before the appeal court session.¹⁵⁹⁰ This late receipt was caused by the pre-trial judge. The pre-trial judge had heard the witnesses in the case against the co-accused which was still being tried at first instance. In court, the lawyer asked for a stay of the proceedings because of the lack of proper defence preparations. The prosecution requested the appeal court not to stay the proceedings. The prosecutor argued that in the case against the co-accused the defence had been able to hear the witnesses at first instance. Whilst the case against the accused was being adjudicated together with this case against the co-accused, the (lawyer of) the accused had not supported these investigation requests of the co-accused. Also, the witnesses had been heard extensively. Therefore, the prosecution submitted that the witnesses need not be heard again because a rejection would not violate the "interests of the defence". Thereupon, the lawyer stated that the defence wanted to hear a witness because he could attest to the accused being present on another location than where the alleged theft occurred. He referred to wanting to hear the witnesses, in plural, for this reason. Moreover, the defence lawyer submitted that he wanted to confront another witness with a weather report, because that witness might have erased the marks in the snow with his own car. The lawyer pointed out that more questions might arise but that it was not possible to pinpoint such questions in more detail because of the belated submission of the statements. Thereupon, both the defence and the prosecution requested to leave out the witness statements in the dossier of this case, whilst counsel reiterated its request for a stay.

The appeal court rejected the witness request on the basis of the "necessity"-standard as well as on the "interest of the defence"-standard because the defence had received the witness statements the evening before the hearing due to the pre-trial judge's late submission. Ultimately, these witness statements were used for the accused's conviction.

AG Spronken advised the Hoge Raad to leave the case intact. The AG added regarding the appeal court's judgment that the defence had not made clear what other questions would have to be posed to the witnesses than at first instance. The defence had not agreed to the further investigation requests as done by the defence of the co-accused at first instance. Moreover, the (length of the) court records in the dossier, as well as its evidence, made her conclude that the appeal court's rejection was not incomprehensible.

The Hoge Raad left the case intact, on the basis of the following three reasons. First, the appeal court had taken into consideration that the defence had received the witness statements the evening before the trial from the pre-trial judge.¹⁵⁹¹ Second, the appeal court had established that the defence lawyer had not indicated with sufficient specificity on what points the defence wanted to

¹⁵⁸⁸ Earlier case law mentioned by AG Machielse in his advice to HR 1 July 2014, ECLI:NL:HR:2014:1496: HR 19 June 2007, ECLI:NL:PHR:2007:AZ1702, *NJ* 2007, 626 m.nt. Mevis; HR 16 September 2008, ECLI:NL:HR:2008:BD3654, *NJ* 2008, 514; HR 24 January 2012, ECLI:NL:HR:2012:BT6467, *RvdW* 2012, 225.

¹⁵⁸⁹ HR 1 July 2014, ECLI:NL:HR:2014:1567 (application overview verdict of case that follows, HR 1 July 2014, ECLI:NL:HR:2014:1496), para. 2.3, *NJ* 2014, 443 m.nt. Borgers.

¹⁵⁹⁰ HR 1 July 2014, ECLI:NL:HR:2014:1567 (application overview verdict of case that follows, HR 1 July 2014, ECLI:NL:HR:2014:1496), para. 2.3, *NJ* 2014, 443 m.nt. Borgers.

¹⁵⁹¹ HR 1 July 2014, ECLI:NL:HR:2014:1496 (overview verdict), para. 2.4, *NJ* 2014, 441, m.nt. Borgers.

question the witness, which had not been dealt with earlier. Third and last, the defence had not reasoned the request for three out of five witnesses and had not mentioned any issues about which the two remaining witnesses had not testified already. According to the Hoge Raad, their written statements would demonstrate that these issues had already been subject of investigation at first instance. Therefore, the Hoge Raad left the case intact with a reference to the aforementioned overview judgment and without giving reasons for its decision (Article 81 (1) RO).

It is noteworthy that the Hoge Raad mentioned in this case that “the request to hear the five persons as witnesses from the *defence lawyer* was not rejected by the court in a reasoned verdict that was either incomprehensible or insufficient [emphasis added by the author]”. The three aforementioned reasons, which correspond with the aforementioned framework as laid down in the overview judgment cited above¹⁵⁹², emphasise how *counsel*, rather than the defence, should specify relevant questions per witness, even if the statements have been received shortly before the appeal court hearing from the pre-trial judge.¹⁵⁹³

AG Spronken and the Hoge Raad agreed in this case.

- *What if the request concerns police officers whose statements constituted the sole evidence against the accused while they had never been heard in the case against the accused?*

Yet another case from 1 July 2014 concerns a request by the defence to hear six police officers regarding their observations about robberies from trucks which the accused was believed to have committed.¹⁵⁹⁴ The defence alleged that there had been gaps and lack of clarities in the records made of these police observations. The appeal court rejected the defence request on the basis of the “interest of the defence”-standard and made three findings. First, the police officers had recorded their observations in records under oath. Second, the gaps and uncertainties mentioned by the defence had resulted in additional records made during the first instance proceedings. Third, the defence had not given more concrete reasons what questions would have to be posed to the witnesses.

AG Vellinga advised the Hoge Raad to quash the case because he found these reasons of the appeal court to be an insufficient basis for a rejection of the witness request submitted by the lawyer of the accused.¹⁵⁹⁵ The first two reasons, according to the AG, do not exclude the police officers from being mistaken or that the observations are not as unequivocal as laid down in the records. With regard to the third ground, the AG considered that the lawyer has indicated that he wanted to hear the witnesses about observations that were crucial for the evidence used against the accused. The AG also assesses two further issues in the light of the case law of the Court. First, the evidence for the commission of the offence by the accused rests exclusively on the observations by the police officers. Second, the witnesses have not been heard before in the proceedings in the presence of the accused and/or his lawyer. These were all reasons that made the AG conclude that the Hoge Raad should overturn this case.

Differently than what the AG advised, the Hoge Raad, with a reference to the overview judgment, leaves the case intact. The Hoge Raad does not give any further reasons as to why it decided not to overturn the case (Article 81 (1) RO).

AG Vellinga and the Hoge Raad disagreed in this case. It becomes apparent that the Hoge Raad – in a different manner to the AG – does not take into consideration the difficulties with the fairness of the proceedings arising from the police officers’ statements. The AG stressed that it constituted the *sole* evidence against the accused while they had never been heard in the case against the accused.¹⁵⁹⁶ This chapter will not yet make a comparison with case law of the Court, but overall it

¹⁵⁹² See for the requirement that the defence uses the right standard of necessity, rather than “in the interests of the defence”, if the request is being done during the appeal court session, HR 14 March 2006, *NJ* 2006, 208. See also, for a case in which the request to hear witnesses was not examined at all, HR 12 June 2012, ECLI:NLHR:2012:BW7960, *RvdW* 2012, 879.

¹⁵⁹³ See for this necessity standard also HR 2 March 2010, ECLI:NL:HR:2010:BK5516, *NJ* 2010, 145.

¹⁵⁹⁴ HR 1 July 2014, ECLI:NL:HR:2014:1570 (application overview verdict of HR 1 July 2014, ECLI:NL:HR:2014:1496), *NJB* 2014, 1356.

¹⁵⁹⁵ AG Vellinga, Conclusion, ECLI:NL:PHR:2014:629, as an advice to the Hoge Raad’s case of HR 1 July 2014, ECLI:NL:HR:2014:1570 (application overview verdict of HR 1 July 2014, ECLI:NL:HR:2014:1496), *NJB* 2014, 1356.

¹⁵⁹⁶ *Al-Khawaja and Tahery v. the United Kingdom*, Judgment of 20 January 2009, HUDOC nos 26766/05 and 22228/06, *NJ* 2012, 283, m.nt. T.M. Schalken and A.E. Alkema, EHRC 2012, 65, m.nt. Spronken (*Al-Khawaja and Tahery v. the United Kingdom*), para. 144.

has been explained in the previous chapters on the Convention that such an evidentiary basis often results in a finding of a violation of Article 6 by the Court (chapters 5, 7, 9 and 11; see also the end of this sub-section). Out of fairness, the Court often finds it important that an accused has been able to hear witnesses against him, particularly if the evidence of those witnesses constitutes the *sole* basis of the conviction of the accused. Before turning to these issues, this overview will continue with the remaining cases that followed after the Hoge Raad's overview judgment.

- *What if the request is conditional and supportive of an alternative scenario that exonerates the accused?*

Once more on 1 July 2014, the Hoge Raad delivered a judgment in a case in which a witness request was made conditionally.¹⁵⁹⁷ The condition was that, *if* the appeal court were to conclude that the accused had committed the offence, the defence wanted to hear witnesses who could support the statements of the accused and the other involved person.¹⁵⁹⁸ The accused and the other involved person had testified that the finances found in the bag that the accused carried on the public road were not earned by the commission of a crime (in total some 4.7 million euros in different currencies). The appeal court concluded that the money originated in a crime. The appeal court explained that it did not believe the statements of the accused and the other involved person as pertaining to their alternative scenario that would explain the finances in the bag. Moreover, the appeal court rejected the witness request. The reason for the appeal court's rejection was that the defence only gave the necessary identifying details about the witness during the pleadings.¹⁵⁹⁹ Before that time, the accused had repeatedly neglected to provide such data.¹⁶⁰⁰ The appeal court decided that there were insufficient reasons "(...) to believe that the person mentioned exists and existed at the time of the scenario presented by the defence and that this person is that person in that scenario". The appeal court also did not conclude that the statements of the accused and the other involved person "(...) offered sufficient grounds to believe that the defence gave sufficient information to the police and prosecutor to discover the additional information about the identity of the witness".

AG Machielse advised the Hoge Raad to quash the case because the reasoning of the appeal court with regard to the timing of the request *per se* cannot be a ground for its rejection.¹⁶⁰¹ According to the AG, although the timing can be important for the assessment of the necessity of the request, the way in which the court used that ground in this assessment has been insufficiently reasoned. The AG found that the court did not reason its rejection of the request sufficiently because the defence provided the court with precise data about the witness. The information provided had resulted in "(...) information available that can be tested and thereby examined as to whether or not the person existed", according to the AG.¹⁶⁰² Therefore, the AG advised the Hoge Raad to overturn this case.

Different than the AG's advice, the Hoge Raad held that "(a)t the core, the request made by the *lawyer* in the present case was intended to support the statements by the accused and the other involved person [emphasis added by the author]".¹⁶⁰³ According to the Hoge Raad, the witness statement could have potentially substantiated the scenario painted by the accused and the other involved person. However, considering the appeal court's judgment about the statements of the accused and the involved person as well as the scenario depicted therein, the Hoge Raad understands that the appeal court had judged that there was "no necessity to hear the witness". As such, "(...) the appeal court had used the right standard". The rejection of the request was, considering the relevant paragraphs of the framework laid down in the overview judgment, not incomprehensible and not insufficiently reasoned. Therefore, the Hoge Raad left the case intact.

AG Machielse and the Hoge Raad disagreed in this case. The AG examines the obligation of the appeal court *per se*, apparently finding that this witness should have been heard – or at least

¹⁵⁹⁷ HR 1 July 2014, ECLI:NL:HR:2014:1559, *NJ* 2014, 442, m.nt. Borgers.

¹⁵⁹⁸ HR 1 July 2014, ECLI:NL:HR:2014:1559, *NJ* 2014, 442, m.nt. Borgers.

¹⁵⁹⁹ HR 1 July 2014, ECLI:NL:HR:2014:1559, particularly in para. 2.3.2, *NJ* 2014, 442, m.nt. Borgers.

¹⁶⁰⁰ HR 1 July 2014, ECLI:NL:HR:2014:1559, particularly in para. 2.3.2, *NJ* 2014, 442, m.nt. Borgers.

¹⁶⁰¹ AG Machielse, Conclusion, ECLI:NL:PHR:2014:620, as an advice to the case of HR 1 July 2014, ECLI:NL:HR:2014:1559, *NJ* 2014, 442, m.nt. Borgers.

¹⁶⁰² AG Machielse, Conclusion, ECLI:NL:PHR:2014:620, particularly in para. 3.5., as an advice to the case of HR 1 July 2014, ECLI:NL:HR:2014:1559, *NJ* 2014, 442, m.nt. Borgers.

¹⁶⁰³ HR 1 July 2014, ECLI:NL:HR:2014:1559, particularly in para. 2.6, *NJ* 2014, 442, m.nt. Borgers.

activities should be undertaken to find the witness – in order to ensure truth finding and the fairness of the appeal court. However, the Hoge Raad views the obligation of the authorities in conjunction with how the *lawyer* – rather than the defence – has formulated the request and its basis. This case indicates another difference of opinion between the AG and the Hoge Raad, and shall be explored further after another case has been elaborated upon.

- *What if the request is conditional and made to support an exonerating condition for the accused?*

In the penultimate case of the same date, 1 July 2014, the defence requested to hear four witnesses. Those witnesses lived in Switzerland, Liechtenstein, Japan and Germany. The request was made on the condition that if the appeal court were to conclude that the indicted facts could be proven: that money-laundering would amount to 192.334,83 and 184.400 euros.¹⁶⁰⁴ These witnesses would supposedly be able to testify to the legal origin of the money, so that the accused could not have been found to have laundered any money for the co-accused.

However, the appeal court did not consider it reasonable that the money could have a legal origin. Its reasons were that the co-accused did not have a legal income but only received income from hashish and hemp trade. The co-accused had been convicted several times for these facts. In that context, the co-accused owed a debt to the Dutch State of millions of euros. Large amounts of money were involved and reached the co-accused in suspicious ways and had been handed to him. That is, the appeal court mentioned, *inter alia*, the way in which the money could not be traced to the person who gave it and its legal ground. Moreover, the appeal court established that some of that money has been given to the co-accused by the accused in large sums of considerable amounts in a parked car near a restaurant, or a car dealer. Therefore, the appeal court rejected the witness request. The appeal court explained that it did “(...) not consider it necessary to hear the persons referred to as witnesses, because there is not even a first beginning of likeliness that the income of the co-accused originated from the legitimate activities mentioned by the defence lawyer”¹⁶⁰⁵.

AG Machielse finds that the accused might have had a good reason to hide that large amount of money from the Dutch State – even if it had been obtained legally. The fact that the funding came from the co-accused does not equate to the fact that the money was obtained through a crime. The AG adds that “(t)he version of events as depicted by the defence might well be improbable, but cannot be set aside without an investigation”. Therefore, the AG advised the Hoge Raad to quash the case.

The Hoge Raad left the case intact. The Hoge Raad referred to the framework as laid down in the overview judgment mentioned above and took into consideration: “(...) what the defence used as reasons for its requests and what the appeal court has established regarding the lack of likeliness of the thesis of the defence that the money could have been obtained through legal activities by the co-accused”¹⁶⁰⁶.

AG Machielse and the Hoge Raad disagreed in this case (again). The AG examines the obligation regarding truth finding and fairness of the appeal court *per se*. Differently, the Hoge Raad explores, at least, this obligation of the appeal court in conjunction with the defence. This case demonstrates yet another difference of opinion between the AG and the Hoge Raad regarding a witness request, which will be revisited after the two last cases have been elaborated upon.

- *What if the request is done for a witness who can support an alternative scenario that exonerates the accused?*

Two final relevant cases, decided on 8 July 2014, concern a defence request to hear a person whose name they thought was “Boyke”.¹⁶⁰⁷ This “Boyke” was mentioned by the accused and the co-accused during the interrogations as the person who would have been responsible for the import of containers in which drugs had been found. The accused and the co-accused denied any involvement with the containers.

¹⁶⁰⁴ HR 1 July 2014, ECLI:NL:HR:2014:1568, *NJ* 2014, 444, m.nt. Borgers.

¹⁶⁰⁵ HR 1 July 2014, ECLI:NL:HR:2014:1568, particularly in para. 2.3.2., *NJ* 2014, 444, m.nt. Borgers.

¹⁶⁰⁶ HR 1 July 2014, ECLI:NL:HR:2014:1568, particularly in para. 2.6., *NJ* 2014, 444, m.nt. Borgers.

¹⁶⁰⁷ HR 8 July 2014, ECLI:NL:HR:2014:1688, *NJ* 2014, 448, m.nt. Borgers and HR 8 July 2014, ECLI:NL:2014:1615 *NJ* 2014, 447, m.nt. Borgers respectively.

In the first case, the court had accepted the witness request on the condition that the prosecution would investigate an address in Belgium that was given by the lawyer to see if this person was indeed there. The investigation did not amount to anything. Just before the next court hearing, the lawyer announced that he had received a new address of where the person named “Boyke” was supposedly living. Counsel also mentioned the name of a woman with whom he would be residing at this address, the school of their children and the licence of his car. The lawyer requested to hear this witness, considering all the concrete identifying data. However, the appeal court rejected the request because it was not “necessary” to hear the witness.

In the second case, the lawyer agreed with the lawyer of the co-accused on this witness request. The appeal court also rejected this request because of a lack of “necessity”.

AG Machiels advised the Hoge Raad to overturn both cases.

The Hoge Raad left both cases intact. With regard to the first case, the Hoge Raad referred to the framework laid down in the overview judgment. It used as its basis, *inter alia*, “(...) the stage in which the request has been made” and that “(...) counsel could not show in all reasonableness that he could not have given the court the data about this person earlier”. The reasons in the first case included the fact that the lawyer only pleaded during the proceedings during the third hearing. Only then had counsel stated that the person he wanted to hear was the person named “Boyke” who had been referred to in several statements. Moreover, the lawyer had insufficiently reasoned that this person was “Boyke”. A third reason that the Hoge Raad put forward in this case was that there was insufficient reason to establish the “necessity” of hearing “Boyke”. In other words, the mere fact that this person was involved in the facts as well and had been present during conversations about business was an insufficient reason to hear him.

The reasons behind the second case are that the lawyer only agreed and co-requested to hear the person during the fifth session. The Hoge Raad also mentioned that the lawyer had stated that there existed a person named “Boyke” without giving any information to sustain this claim. Moreover, the lawyer of this accused has not reasoned that and why the witness was the person referred to as “Boyke”.

AG Machiels and the Hoge Raad disagreed in both cases (again). The AG examines the obligation of the appeal court *per se*, while the Hoge Raad explores this obligation of the appeal court in conjunction at least with the request of *counsel*, rather than the defence. This last case will also be adopted in the section on the preliminary conclusion which will also refer to the other four above-cited cases.

- *Preliminary conclusion regarding the overview judgment and the subsequent six cases*

To conclude by making a comparison between all six above-cited cases, it is important to highlight two issues. First, in its overview judgment the Hoge Raad provides updated information as to what the “interest of the defence” and “necessity”-criteria entail. Second, the Hoge Raad does so for the defence and not in relation to the responsibilities of the *other* participants. While these are two noteworthy points about the overview judgment and might even explain how helpful it could be for the defence, this overview will now turn to difficulties.

First, it is important to stress that the overview judgment, which was intended to clarify what criterion should be applied at what moment, still appears to invoke different opinions. The AGs and the Hoge Raad often do not agree on whether or not the applicable standard was met or not (five out of six cases). Moreover, this overview judgment does not appear to have given more clarity about what can be expected from the *defence* in relation to witness requests. Rather, it has been succeeded by cases that explicitly set requirements on *counsel*, rather than the defence as a unity between the accused and his lawyer (e.g. in the first and third case). This last point also alludes to the significance of exploring whether stricter requirements are being placed on counsel than on unassisted accused. If stricter requirements are being placed on counsel, it can mean that an assisted accused would have to bear the consequences of (negative) conduct of counsel who does not meet it. Potentially, an unassisted accused would be “better off”, the argument could be. This possibility had already been raised tentatively in the previous preliminary conclusion that was based on the two cases in which the unassisted and assisted accused uttered almost the same words about hearing witnesses in court (*Chinese and Police witnesses*-cases, sub-section 12.3.2.).

Turning again to the cases cited in this overview, three more observations can be made. A first, and possibly stricter requirement, in relation to witness requests on counsel than before the rendering of the overview judgment, can lie in the *timeliness* of the witness request. In the first cited case, the Hoge Raad appears to hold that, when the request had been submitted the evening before the session, the defence can (still) be expected to indicate with precision what questions should be posed to the witness, which have not been posed earlier in the proceedings.¹⁶⁰⁸ In relation to that inference, it shows in the last two cited cases that the Hoge Raad can permit the lower court to have the defence be jointly responsible for a request that has been submitted late in the proceedings.¹⁶⁰⁹ In one of these cases the Hoge Raad emphasises the role of *counsel* who has not made it likely why he had not been able to provide the court with more identifying data about the witnesses that the defence wanted to hear. Therefore, it seems a reasonable inference that the Hoge Raad finds that the lower courts can use – for their assessment about the defence request to hear witnesses – the fact that the defence has not requested to hear the witness during the pre-trial phase, to give additional reasons for such a request or to provide the requisite data that help to identify the *à décharge* witness earlier in the proceedings. Thus, the defence can be required to be active and alert regarding the hearing of witnesses. To indicate different opinions of Dutch lawyers, the AG agreed in the case in which an *à charge* witness had been heard earlier, but disagreed when an *à décharge* witness had not been heard at all in the proceedings against the accused.

Turning to the “interest of the defence”-criterion, it is important to note that the Hoge Raad appears to require from the defence that it explains why an *à charge* witness has to be heard as an examination of his credibility, as demonstrated by the second cited case about the police officers. The Hoge Raad appears to demand that the defence explains *what* the witness will be heard about, and the interest to hear the witness about these points has to be explicitly reasoned, rather than there being a general right to hear the witness in court. Also in the context of witnesses who are not police officers, the Hoge Raad appears to require that – as transpires from the first cited case – the specific reasons for hearing the witnesses has to be given. However, this latter case only prompted the appeal court to take into consideration this criterion while it decided the case upon the second, “necessity”-criterion. Therefore, it might not be a sufficient basis for drawing conclusions about this first “interest of the defence”-criterion, which has therefore been approached here carefully and with reservations. It remains to be seen how the Hoge Raad will deal with such defence witness requests that would have to be judged from the perspective of the defence, according to the Hoge Raad’s overview judgment.

With regard to the second “necessity”-criterion, the case law appears to demonstrate that the Hoge Raad can agree with a lower court that assesses the reasonableness of an alternative scenario on the basis of all the materials in its possession. Both the third and fourth cited cases indicate such discretion of the courts, which decided on conditional requests. However, there is no reason to believe that the same discretion would not be available for lower courts which can decide on requests that are unconditional. That is, under such circumstances the court can also determine whether it has sufficient materials in its possession to find itself fully informed.¹⁶¹⁰ The Hoge Raad has also held this rule in its overview judgment, which the appeal court can examine from the perspective of the trial bench. This means that even if the defence has brought up a defence request in accordance with the guidelines, an appeal court can find that it has already been sufficiently informed. It can decide that it has done its investigation in court, so that it does not have to hear the requested witness. With regard to the cases that concerned the “necessity”-standard, it seems that the Hoge Raad does not “sanction” an appeal court which rejected hearing a witness in court. This is true even when their evidence could have substantiated the alternative scenario, which according to the AG could not be dismissed without the

¹⁶⁰⁸ See, e.g. HR 1 July 2014, ECLI:NL:HR:2014:1567 (also application overview verdict of HR 1 July 2014, ECLI:NL:HR:2014:1496), para. 2.3, *NJ* 2014, 443 m.nt. Borgers.

¹⁶⁰⁹ HR 8 July 2014, ECLI:NL:HR:2014:1688, *NJ* 2014, 448, m.nt. Borgers and HR 8 July 2014, ECLI:NL:2014:1615 *NJ* 2014, 447, m.nt. Borgers respectively.

¹⁶¹⁰ See also *mutatis mutandi* a duty that an incriminating witness who has not been heard during an earlier hearing is confronted in court, unless the witness need not necessarily be heard, in HR 1 February 1994 ECLI:NL:HR:1994:AB7528, *NJ* 1994, 427 m.nt. Corstens; a substantive defence: it was not the accused but another person who had factual command in HR 15 December 2009, ECLI:NL:HR:2009:BJ9783, *NJ* 2010, 21; and a substantive defence: it was not the accused person but his ex-girlfriend who had committed the stalking offence in HR 6 July 2010, ECLI:NL:HR:2010:BM5077, *NJ* 2010, 511 m.nt. Schalken. Also relevant is HR 19 April 2011, ECLI:NL:HR:2011:BP3820, particularly in para. 3.3, *NJ* 2011, 297, m.nt. Schalken.

requisite investigation in court because it could have proven the accused's innocence. However, the Hoge Raad allows the appeal court to be reticent, even though the witness evidence had the potential to exonerate the accused.

Seen in conjunction, the Hoge Raad thus appears to accept – if not promote – that the lower courts can decide to have their acceptance or rejection of defence witness requests *depend* on the acuity of the reasoning of the requests and the stage at which the request has been done. The findings of this section on witness requests also show that the court can consider the earlier phases of the proceedings and the overall procedural course when deciding on whether or not to hear the witness in court. Given these considerations, this sub-section will explore three aspects of criticism about the overview judgment as well as the six cited cases from the perspective of this research into ineffective legal assistance and its redress in Dutch criminal proceedings.

First, as Robroek states, the Hoge Raad appears to want to make the lower courts more reticent about agreeing to defence requests to hear witnesses, whether made up to the “in the interest of the defence” or “necessity” standard.¹⁶¹¹ As it appears from the six subsequent cases, such dependence of the lower courts on especially *counsel's* (negative) conduct¹⁶¹² is relevant for this study because the requirements regarding reasoning and timeliness of witness requests appear to be stricter at least than the AG holds. The higher the norms on witness requests by counsel, the higher the risk that the lawyer does not live up to these norms.¹⁶¹³ This risk can be problematic because, as the last example of the police officers' statements indicates, the violation of these norms can result in consequences for the accused's effective defence with potential harm for the accused's rights that are not redressed.¹⁶¹⁴ That case might raise an issue with the right to a fair trial because the police officers' statements constituted the sole evidence against the accused while they had never been heard in the case against the accused. Usually, the Court does not accept that basis of mere unheard witness evidence against the accused for this conviction, as explained in the previous chapters on the Convention (chapters 5, 7, 9 and 11).

Second, this latter issue of harm caused by the rejected witness request to the rights of the accused – combined with the absence of an examination of the conduct of counsel in relation to a witness request – leads to the risk that the Hoge Raad might reduce assistance by counsel to a “mere formality”. Appeal courts can namely allege that there was a lawyer who supposedly had sole responsibility for adequately formulating a witness request, and therefore neglect to hear a witness either on the request of the accused who uttered a remark about hearing witnesses (*Police and Chinese witnesses*-case) or on its own initiative (several of the six cited cases). The risk is that the mere presence of counsel would be sufficient for the court to assume that an appellant has had an effective defence, because the Hoge Raad does not appear to assess the effectiveness of legal assistance (as opposed to an effective defence by self-representation, in the *Hoogerheide*-case). Even if the lawyer did meet the standard for requesting to hear witnesses in court, whether “in the interest of the defence” or “necessity”, the appeal court appears to be able to *allege* that the defence has not requested to hear witnesses in court at all without consequences on cassation. Therefore, a preliminary conclusion could be that for witness requests counsel risks being responsible, while potential negligence in relation to this defence activity will normally come at the procedural risk of the accused. While the accused can resort to redress outside of criminal proceedings, there does not appear to be a remedy to the potentially negatively affected course or outcome of the process when the lawyer has not lodged a witness request in accordance with the new standards. However, these *extra-criminal* procedural

¹⁶¹¹ While the AG understood the questions that the lawyer wanted to pose to the requested witness, the Hoge Raad did not. For instance, one of the questions about the refusal to allow the accused entry into the clubhouse was relevant for the statement of witness 3. Additionally, the testimony of witness 13 was relevant in order to determine whether the persons in question had pushed each other in the clubhouse. HR 19 April 2011, ECLI:NL:HR:2011:BP3820, *NJ* 2011, 297, m.nt. Schalken.

¹⁶¹² See also *mutatis mutandi* for the in-court repetition of an earlier requested witness by means of a brief that applies equally to unassisted and assisted accused, in HR 29 March 2005, ECLI:NL:HR:2005:AS6009, *JOL* 2005, 189. See also HR 24 November 2009, ECLI:NL:HR:2009:BJ9346, *NJ* 2009, 607. See also Borgers and Kristen (2005) at 568-588.

¹⁶¹³ See also Brouwer (2005) at 288-292. See also Sjöcrona (1999) at 81-86.

¹⁶¹⁴ See for this position also Borgers, who cites Schalken in his annotation in the case of HR 17 April 2001, *NJ* 2002, 107 and Reijntjes in his annotations in the cases of HR 2 November 2010, *NJ* 2011, 451 and HR 5 July 2011, *NJ* 2011, 452, in his annotation, available at: <http://dare.uvu.nl/bitstream/handle/1871/38109/noot.NJ.2012.413.pdf?sequence=2>.

means for redress do not remedy the course or outcome of the criminal process, as explained in the earlier chapters about the Netherlands (chapter 4).

To conclude, all three sub-sections regarding witness requests have indicated that the Hoge Raad has emphasised demands as to how counsel in particular has to make a witness request, without making a clear relation to the activities of the other participants (sub-sections 12.3.1. to 12.3.3.).¹⁶¹⁵ At least in several of the above-cited cases the Hoge Raad, the AG, annotators and scholars all held different views about the scope and content of the said standards. Even after the Hoge Raad rendered its overview judgment, those differences of opinion remained (five out of six cited cases). If all these lawyers disagree about the standards, how can counsel know how to meet it? As a corollary of this difficulty to meet the standard, there is a real risk that the accused will have to bear the consequences if his counsel does not live up to the requirements. In other words, where allegedly or actually the standard has not been met, because the defence – and thus *de facto* counsel – did not reason the request according to the standards, the accused usually appears to have to bear the consequences. However, if counsel does not formulate a defence request up to the standard, is it not an instance of ineffective legal assistance by his lawyer? Is it fair, under such circumstances, that the accused has to bear the consequences if an omitted defence witness request could not reasonably be held to have been defence strategy while the accused's right to an effective defence – and perhaps other fundamental rights such as the right to confrontation – might end up being harmed? Should the appeal court not examine whether the *accused* renounced his right to hear the witnesses in the case against him, rather than expect his lawyer to have not exercised the right of the accused by not meeting the standard? After all, the proceedings are being directed against the accused and not against his lawyer.

From a rights perspective, this approach to witness requests might raise several issues that so far have been mostly implied. For there to be ineffective legal assistance, the lawyer has to violate a specific norm. One such norm appears to be that counsel has to act in conformity with the rights, interests and wishes of the accused, who can only renounce rights according to the standard of “unequivocally, deliberately and freely” (see chapter 6).¹⁶¹⁶ In cases cited above (in this section 12.3.), it can be questioned whether counsel had violated this norm, as has been explained per case. The issue of a norm violation is particularly relevant because Dutch law guarantees the accused a right to hear witnesses and also the Article 6 (3) (d) of the Convention entails a right to the confrontation of witnesses, as a minimum defence right of the accused as well as a fair trial guarantee (see chapter 5). Consequently, it is important to explore the fairness of this non-interventionist approach to ineffective assistance by counsel who harms the accused in terms of his rights rather than the defence strategy and results in difficulties with the accused's effective defence and fair trial. Such an examination will follow, after two defence activities other than witness requests have been explored, beginning with issues related to appeal and appeal in cassation.

12.4. Appeal and grounds for appeal in cassation

This section will first discuss the right to lodge an appeal¹⁶¹⁷ and the right to attendance of the accused at the appeal hearing (sub-section 12.4.1.).¹⁶¹⁸ Thereafter, the grounds in a brief regarding appeal in cassation will be elaborated upon (sub-section 12.4.2.).

12.4.1. The judge as ultimate guardian regarding the rights to appeal and attend?

This sub-section studies the right of the accused to make use of the legal remedy of appeal in Dutch criminal proceedings in two further ways. First, an examination will follow of the right of the appellant to lodge an appeal submission and thus make use of his recourse of a legal remedy when granted leave to appeal (sub-section 12.4.1.1.). Second, this sub-section will address the right of the appellant to attend the appeal hearing or hearings. For both rights, a comparison will be made between cases involving unassisted or assisted accused persons, in order to determine whether counsel *de facto* has to meet higher standards (sub-section 12.4.1.2.). As a related issue, this overview examines

¹⁶¹⁵ HR 1 July 2014, ECLI:NL:HR:2014:1496 (overview verdict), *NJ* 2014, 441, m.nt. Borgers

¹⁶¹⁶ Standard cited in section 4.2.

¹⁶¹⁷ This does not preclude an accused from withdrawing a lodged appeal submission during the court session, e.g. HR 24 September 2013, ECLI:NL:HR:2013:769, *RvdW* 2013, 1128.

¹⁶¹⁸ Article 410 (3) Sv.

whether or not those standards are, moreover, reasonable given the facts of the case also in the light of standards applicable to unassisted accused. On a final note, it has to be remarked that the title of this sub-section was chosen because of the Court's standard sentence when referring to these obligations of the judge (e.g. sub-section 7.3.2. and section 7.4.).

12.4.1.1. The right to lodge an appeal

This sub-section compares the court's response to a belated appeal submission by either assisted or unassisted accused persons. For these comparisons, it is important to note that the court will usually render the appeal submission inadmissible when submitted to the registry after the deadline of fourteen days after the first instance verdict. *Unless* there are extraordinary circumstances that make the belated submission excusable, this shall mean that the accused will not be granted leave to appeal. The general rule for making excusable the appeal that has been lodged after the deadline of fourteen days out of the aforementioned extraordinary circumstances which should, moreover, not be attributable to the accused.¹⁶¹⁹

This sub-section will compare four cases that have in common the fact that the defence has submitted the appeal *after* the fourteen days' deadline. The first two cases concern an assisted accused; the other two cases an unassisted accused. This sub-section compares the two cases involving unassisted accused persons with the two cases of assisted accused persons, in order to explore how much more can reasonably be expected of the assisted accused – and thus *de facto* counsel – than of the unassisted accused. Underlying this question is the broader issue that underpins this chapter of whether too much is currently demanded of counsel in Dutch criminal proceedings and whether it is fair for the accused to bear the consequences of (negative) conduct of counsel.

All four cases are important for this study into ineffective legal assistance and its redress in Dutch criminal proceedings, but especially the last case which has been rendered by the Hoge Raad after the deadline of this research (31 October 2015) had passed is relevant (this case is of 1 December 2015). In this case, the respective (previous) appeal lawyer admits to having made a professional error by lodging the appeal submission after the fourteen days' deadline. Therefore, the (new) appeal counsel and the accused request the Hoge Raad to overturn the appeal court's decision to not grant the accused leave to appeal so that he can have recourse to this legal remedy (an issue that is not open for cassation, as will be explained below). This case can indicate how the appeal court deals with an instance of a belated appeal submission that, by counsel's own admission, has been caused by a professional error. It is possible that this example of (negative) conduct of counsel may constitute ineffective legal assistance. Therefore, this section will pay particular attention to how the (new) appeal lawyer argued on the basis of Dutch cases that had already been adopted in this overview as well as case law of the Court. This case will be examined as an important addition to the three yet adopted cases in this research, which will be elaborated upon first.

- *What if an assisted accused's belated appeal submission has to be examined on whether or not it was excusable?*

The relevant facts of the first case are that, at first instance, the accused, a Somalian national, was convicted *in absentia* and sentenced to 90 hours of community service on 19 January 2004.¹⁶²⁰ The police arrested the accused on 14 April 2005, apparently in order to execute the sentence imposed at first instance. The accused neither understood the Dutch language nor what had happened in relation to the case or the sentence. Immediately after his arrest, the accused retained a lawyer. That lawyer wrote a letter to the prosecution service on 15 April 2005. This letter explained that the accused knew nothing about the case or about the sentence imposed on him. It also requested the prosecutor to offer more information. On 26 April 2005, the lawyer wrote another letter to the prosecutor, reiterating that earlier request for more information. On 3 May 2005, the prosecutor responded to the two letters. On that same day, the accused, together with his lawyer, appealed. Before the appeal court, the appellant's lawyer argued that he had submitted the appeal on time, considering that it was done within the deadline of fourteen days that started to run on 3 May 2005. The appeal court rendered the appeal inadmissible because the lawyer had used the case number as well as the reference to the imposed

¹⁶¹⁹ E.g. HR 1 December 2015, ECLI:NL:HR:2015:3428, and conclusion of the AG, ECLI:NL:PHR:2015:2318.

¹⁶²⁰ HR 11 December 2007, ECLI:NL:HR:2007:BB3055, NJ 2008, 22.

sentence as suggested by the prosecution. Accordingly, the defence had been sufficiently informed by the authorities on 15 April 2005. Therefore, the appeal court concluded that the appeal had been lodged after the 14-day deadline and was issued inexcusably late. It did not consider that the communication between the lawyer and the prosecution, concerning the question of whether or not the first instance verdict was final, should conclude otherwise.

The applicant complained before the Hoge Raad that the appeal court had invalidly determined that his appeal was inadmissible because it had been lodged too late. Or, at the very least, it had insufficiently reasoned its decision not to accept the appeal submission in its verdict.

The AG advised the Hoge Raad to quash this case, upon three reasons. First, the AG contended that the appeal court should have examined whether the accused *knew* that an appeal had been open to him. He assumed it to have been unlikely that, upon arrest, the accused had been told by the arresting authorities that the verdict was not yet final and thus open to appeal. After all, these authorities had arrested the accused for the apparent reason of executing his sentence. Second, the AG posed the question of what action other than the immediate retention of a lawyer could reasonably have been expected from the detained accused. Third, the AG submitted, in this case counsel could not be deemed to have been negligent, given that he had immediately requested the prosecution for clarification. On the basis of all three arguments, the AG concluded that the prosecution, who is the responsible authority for the police who had arrested the accused, had failed to do what can reasonably be expected. The prosecution only gave counsel a very late response, whilst the accused was being held in detention and was thus in a “disadvantageous” position.

The Hoge Raad, which evidently did not follow the AG’s advice, held the case intact on the basis of three reasons. On 15 April 2005 the accused had had sufficient information to decide whether or not to lodge an appeal. The letter by the lawyer on that same date had included the prosecution’s case number as well as a reference to the sentence imposed. Accordingly, the appeal term started to run on 15 April 2005. According to the Hoge Raad, the fact that the lawyer and the prosecution had exchanged letters concerning the finality of the first instance verdict was not a sufficient reason to consider that the belated appeal was excusable. As the Hoge Raad explained, the decision of the appeal court did not entail an erroneous legal opinion nor was it incomprehensible.

The Hoge Raad and AG thus disagreed. This makes it interesting to compare this case, which will henceforth be referred to as the *Inexcusably belated appeal by an assisted accused*-case, with two cases regarding unassisted accused (*Inexcusably* and *Excusably belated appeal by an unassisted accused*-cases respectively). This overview will now turn to those two cases in which the appeal had been submitted too late by the *unassisted* accused.

- *What if an unassisted accused’s belated appeal submission is inexcusable?*

The second case that will be examined in this overview, concerns an unassisted accused who was believed to have ignored a traffic sign.¹⁶²¹ At first instance he was convicted *in absentia* on 6 September 2005. On 4 October 2005 he appealed. The second instance court asked for the prosecutor’s opinion, who deemed the appeal submission to be inadmissible because it had been requested after the fourteen-day deadline. The second instance court, which gave the appellant the opportunity to utter his last word, closed the investigation at the hearing and rendered the appeal submission inadmissible.

The applicant complained before the Hoge Raad that the second instance court had wrongly considered his appeal to be inadmissible because it had failed to examine whether he had a good excuse for lodging the appeal after the deadline. Or, he submitted, at the very least the appeal court had not provided sufficient reasons in its verdict for its decision.

The Hoge Raad left the case intact. It held that in so far as the accused assumed that the appeal court had to show that it had examined whether there was a good excuse for the belated appeal, there is no basis for this in the law. No exceptional circumstances had arisen for it to conclude differently in this particular case, adding that “(...) it did not have to come to another conclusion because the appellant on appeal did not have the assistance of a lawyer”.

This case will henceforth be referred to as *Inexcusably belated appeal by an unassisted accused*-case. The Hoge Raad’s reference to the absence of legal assistance of the accused as an

¹⁶²¹ HR 26 June 2007, ECLI:NL:HR:2007:BA3628, *RvdW* 2007, 679.

immaterial issue will be revisited in the remainder of this sub-section but not before another case regarding an unassisted accused has been addressed.

- *What if an unassisted accused's belated appeal submission is excusable?*

The third case adopted in this overview concerns an unassisted accused who had attended his first instance hearing before a *unus* judge.¹⁶²² The defendant, who had explained that he wanted to appeal, heard the judge say: “(t)hat is okay”. The judge had neither clarified to the accused that he had not yet appealed nor that he had to register an appeal with the registry of the court. The accused, who subsequently sought a lawyer, appealed 19 days after the 14-day deadline. During the appeal session, the accused's lawyer put forward that the lower court had given the accused a reasonable expectation that he had already appealed. He added that, because of that expectation, at the very least the appeal submission was excusably late. The appeal court ruled that the appeal submission was inadmissible. The appeal verdict mentioned that, even if the *unus* judge had indeed uttered the words cited above, the present appeal would not have been either on time or excusably late. All information on the appeal procedure is available on the back cover of the notification for the first instance hearing, which the defendant had evidently received because he had been present during that court session.

The applicant complained before the Hoge Raad that the appeal court had invalidly ruled his appeal submission inadmissible, because he had given notice of an appeal at the first instance hearing and thus within the deadline. As a secondary complaint, he argued that the court had failed to reason why the appeal submission was not excusably late because of the *unus* judge's response.

The AG advised the Hoge Raad to quash the case. As a rule, an appellant should not bear the consequences of a misunderstanding caused by a *unus* judge. Contrary to the law, this judge had given the accused information on how to appeal, so the AG submitted. An appellant who has defended himself in person “(...) should get the benefit of the doubt”, the AG suggested.

The Hoge Raad overturned the case. It held that the appeal court ought to have considered that the accused “(...) *did not have the assistance of a lawyer during the first instance proceedings* [emphasis added by the author]”. In addition, so the Hoge Raad found, under domestic law the *unus* judge is not allowed to give the defendant information on the manner in which to make use of this legal remedy.¹⁶²³ Given that in the present case the *unus* judge did provide such information, the Hoge Raad considered that the appeal court's decision that no appeal had been lodged (or at least not on time) was insufficiently reasoned. The information provided on the back cover of the notification did not cause the Hoge Raad to come to a different conclusion.

This case will henceforth be referred to as *Excusably belated appeal by an unassisted accused*-case. This case is important because it indicates how conduct of the authorities can constitute extraordinary circumstances that are not attributable to the accused. This case is also important if compared to the above-cited *Inexcusably belated appeal by an unassisted accused*-case. In both aforementioned cited cases regarding *unassisted* accused the Hoge Raad referred to a lack of assistance by counsel as either non-consequential or important for the appeal court's dealings with the unassisted accused. Therefore, the next section will explore a fourth and last case in which the *assisted* accused submitted his appeal belatedly. At the end of this overview, all four cases will be compared, with special attention to similarities and especially the differences between belated appeal submissions by *unassisted* and *assisted* accused persons.

- *What if a professional error of counsel supposedly caused an assisted accused's belated appeal submission?*

The facts of the fourth case included in this overview are that the accused had been convicted at first instance for a simple assault, was sentenced to a conditional fine of 750 euros, and lodged an appeal after the fourteen days' deadline.¹⁶²⁴

The defence argued that the accused had done all that could reasonably be expected of her in relation to her appeal submission. Both the (new) lawyer and the accused pleaded in court. First, the (new) lawyer said that the accused had asked the secretary of her (old) lawyer to lodge an appeal

¹⁶²² HR 22 February 2011, ECLI:NL:HR:2011:BO6742, *NJB* 2011, 587.

¹⁶²³ See also HR 12 October 2010, ECLI:NL:HR:2010:BL7694, para. 2.6, *NJ* 2010, 585 m.nt. Buruma.

¹⁶²⁴ HR 1 December 2015, ECLI:NL:HR:2015:3428, and conclusion of the AG, ECLI:NL:PHR:2015:2318.

submission and had heard only after the appeal term had already passed that this (old) lawyer had not done so on time. The (new) lawyer argued that this professional error of counsel should not be attributed to the accused, and this sub-section will address the relatively detailed pleadings to this effect after the Hoge Raad's verdict. After counsel had spoken, the accused added that she was innocent and that she had expected that her (old) lawyer would lodge the appeal submission on time. The prosecution responded by arguing that this defence submission which was lodged after the fourteen days' deadline, was inexcusably late. The accused had asked the secretary of her lawyer to lodge an appeal submission, without speaking to her (old) lawyer directly – rather than to the secretary – or lodging an appeal submission herself. No extraordinary circumstances that constitute reasons that cannot be attributed to the accused - that would render the belatedly submitted appeal excusable - were present in this case. Therefore, the prosecution submitted that the appeal court should render the accused's submission for appeal inadmissible and not grant the accused leave to appeal. The appeal court agreed, ruling the appeal submission inadmissible, considering the accused had opted to express her desire to lodge an appeal to the secretary of her (old) lawyer. The appeal court added that "(i)t would have been for the accused to make sure that the secretary of the lawyer had passed on the message and whether or not the appeal had indeed been lodged on time. She has omitted to do so. The omission of counsel to lodge the appeal submission on time, seen also in the light of the aforementioned circumstances, did not result in special facts and circumstances that would have the appeal court come to another conclusion." Hence, this accused did not get an appeal in her case.

The applicant complained before the Hoge Raad that the appeal court had invalidly determined that his appeal was inadmissible because it had been lodged too late. Or, at the very least, it had insufficiently reasoned its decision not to accept the appeal submission in its verdict.

The AG advised the Hoge Raad to leave the case in-tact.

The Hoge Raad, which left the case in-tact, cited extraordinary circumstances that make a belated appeal submission excusable and held that:

"2.4. The appeal court has ruled that the circumstances to which counsel of the accused appeals, cannot be explained as extraordinary circumstances as noted previously [in para. 2.3., see its explanation below]. This decision does not indicate a judgment that encompasses an incorrect legal consideration and is also not incomprehensible. The Hoge Raad takes into consideration that – as concluded by the appeal court – that the accused has not done anything but mentioning to the secretary of her lawyer that she wanted to lodge an appeal, without ensuring that her lawyer indeed effectuated her wish. The fact that the lawyer has *neglected* to lodge the appeal submission on time, as noted under para. 2.3., *comes at the procedural risk of the accused*. The case law of the Court – as explained in the advice of the AG under points 20 and 21 – does not require that the Hoge Raad has to come to another conclusion [citation and emphasis added by the author]".

The aforementioned extraordinary circumstances and the reference to "negligence" of counsel call for a further exploration of the AG's advice (especially because the Hoge Raad mentions its points 20 and 21 in its verdict). An examination of the AG's advice is also interesting because it entails an extensive response to the (new) lawyer's pleadings, which entail the question: Is it, can it be or should it be that the accused's appeal submission should be rendered inadmissible because it was only the professional error of her lawyer that made it late?

First, this overview will highlight the different interpretations regarding the aforementioned extraordinary circumstances, which the (new) lawyer and the AG construe differently (the AG in the aforementioned para. 2.3.). The (new) lawyer in essence argues an appeal submission after the fourteen days' deadline, which has been included for reasons of public order, can only be rendered excusable if extraordinary circumstances are present that are not attributable to the accused.¹⁶²⁵ In the lawyer's opinion, extraordinary circumstances are present when the authorities provide information that could reasonably have given the accused the expectation that the deadline foreseen by statute

¹⁶²⁵ HR13 June 2013, HR:2013:CA2539.

would start later than it had.¹⁶²⁶ The lawyer further submits that related limited case law explains that such authorities include registry personnel, public prosecution staff and even rehabilitation officers. Moreover, the conduct of these authorities should not occur *after* the accused knew about the deadline, for a belated appeal submission to be excusable.¹⁶²⁷ Consequently, the (new) lawyer argues that errors of counsel have not yet been considered by the Hoge Raad as extraordinary circumstances that could make a belated appeal submission excusable and refers to two cases mentioned previously in this overview. First, with a reference to the AG's position in the first cited case, the (new) lawyer submits that (negative) conduct of a lawyer who did not immediately lodge an appeal submission should not come at the procedural risk of the accused (*Inexcusably belated appeal by an assisted accused-case*).¹⁶²⁸ Second, with a reference to the third cited case, the (new) lawyer noted how this unassisted accused had mentioned he would appeal to the court and had only hired a lawyer after the appeal deadline had passed (*Excusably belated appeal by an unassisted accused-case*).¹⁶²⁹ On the basis of this second case, the (new) lawyer submits that the Hoge Raad overturned the verdict of the appeal court that had not granted leave to appeal to this *unassisted* accused because of two reasons. First, the appeal court had not explained *why* the appeal of this accused, who had before the passing of the deadline assumed he had lodged an appeal but had not actually lodged the appeal on time before the deadline, was held inadmissible. Second, if the accused had done all that could reasonably be expected of him after he got to know the deadline, it is only reasonable that the Hoge Raad examines whether rendering the belated appeal is inadmissible. Therefore, the (new) lawyer added:

“This is exactly the position of the accused: she assumed – and could reasonably assume – that her lawyer would submit the appeal on time. With her order to her lawyer to lodge an appeal the accused had done all that can reasonably be expected to get a chance to appeal the first instance verdict. Therefore, the central question is whether it is acceptable, or fair, that due to a professional error of counsel, which the accused only got to know *after* the appeal deadline had passed, can be attributed to the accused. The defence considers that it is not. The error of the lawyer has to be deemed to be the circumstances that are extraordinary and not attributable to the accused, which make the belated appeal submission excusable. Differently put: the circumstance that the client has done everything that can be expected of her to be able to lodge an appeal, make that [the Hoge Raad] should hold it to be unacceptable that this appeal has not been examined by the appeal court, on the only basis that the lawyer made a professional error of not submitting the appeal on time [emphasis added by the author]”.

The AG does agree with the points made by the (new) lawyer about the aforementioned extraordinary circumstances¹⁶³⁰, though he adds another category than the one mentioned by the (new) lawyer, which includes a mental illness of the accused (in the aforementioned para. 2.3.).¹⁶³¹ In addition to the first category of information provided by the authorities, a second category entails a mental condition of the accused whose belated appeal submission could, therefore, not be attributed to him.¹⁶³² The AG considers these aforementioned extraordinary circumstances and concludes that, if the defence has clearly and with reasons submitted that the appeal deadline has not been met for such reasons, the judge has to explain the decision with reasons in the verdict if it does not grant the accused leave to appeal (referring to the yet mentioned *Excusably belated appeal by an unassisted accused-case*).¹⁶³³ However, according to the AG, in this case, the appeal court had considered “(...) the substantive defence on appeal as an appeal regarding an excusably belated appeal submission, but that this defence

¹⁶²⁶ HR 21 April 2009, HR:2009:BH1439.

¹⁶²⁷ HR 28 March 1995, HR:1995:ZC9983 and HR 11 December 2001, HR:2001:AD5268.

¹⁶²⁸ HR 11 December 2007, HR:2007:BB3055

¹⁶²⁹ HR 12 October 2010, HR:2010:BL7694

¹⁶³⁰ HR 7 September 2010, ECLI:NL:HR:2010:BM6671 and recently HR 11 June 2013, ECLI:NL:HR:2013:CA2539.

¹⁶³¹ The AG refers, for a comparison, to C.P.M. Cleiren, J.H. Crijns & M.J.M. Verpalen (red.), *Tekst & Commentaar Strafvordering*, Deventer: Kluwer 2013, artikel 408 Sv, aantekening 7, p. 1612.

¹⁶³² The AG refers to AG Knigge who gave an advice in the case of HR 11 december 2007, ECLI:NL:HR:2007:BB3055, which can be found under the number ECLI:NL:PHR:2007:BB3055, NJ 2008/22.

¹⁶³³ The AG refers to HR 12 October 2010, ECLI:NL:HR:2010:BL7694, NJ 2010, 585.

has not been submitted by the defence. Rather, the defence that had been submitted was based on the case law of the *Court*. Seeing that the appeal court has not responded with reasons in its verdict to this defence, the defence argues that this appeal court verdict should be overturned.” Therefore, the AG considers this argument of the defence incorrect, because the appeal court has responded to this appeal that has been submitted.

Second, the reference to “negligence” of counsel is especially important for the external benchmarks explored in this study and in particular for an answer to the central research question that explores compliance with case law of the Court. With regard to case law of the Court, the (new) lawyer submitted that, in instances of ineffective legal assistance, the State can be held responsible and stressed that the appointment of counsel is not a guarantee that the assistance provided by this appointed lawyer is indeed effective (citing *Czekalla v. Portugal* and *Daud v. Portugal*). More specifically, the (new) lawyer added an important consideration of the Court in *Andrejev v. Estonia*, in which the lawyer appealed too late, which reads as follows:

“(…) although the applicant was given State legal aid for filing an appeal with the Supreme Court, and despite the fact that he did everything that could have been expected for his part, the failure of his legal-aid lawyer to duly perform his duties and the lack of any subsequent measures to adequately remedy the situation deprived the applicant of his right of access to the Supreme Court. (..) There has therefore been a violation of Article 6 § 1 of the Convention.”

Like *Andrejev* in the Court’s case, the (new) lawyer’s client had done everything that could be expected of her to lodge an appeal submission. The (old) lawyer of the accused – just as the lawyer of *Andrejev* – had ineffectively assisted the accused. Therefore, the Hoge Raad should – as required by the Court – take “subsequent measures to adequately remedy the situation” as required under the Convention. The (new) lawyer finished his pleadings with the argument that, if the Hoge Raad would not remedy this situation by allowing the accused to have her case heard on appeal, Article 6 would be violated.

The AG interprets the pleadings of the (new) lawyer to entail two issues. First, “(…) the defence, which is based on Dutch case law and case law of the Court, should result in the Hoge Raad determining that in this instance there is “manifest failure” of counsel who legally assisted the accused at first instance. Second, the Hoge Raad should consider the requisite “adequate remedy”, which would be to overturn the appeal court’s verdict and allow the accused leave to appeal. These two issues will be revisited but not after the AG’s points have been addressed about the fact that the cassation process does not allow the Hoge Raad to ensure an appeal process. Of course, the AG is right that, even if the Hoge Raad quashes the case, it is for the appeal court to decide whether or not the belated appeal submission was excusable, as this is a factual decision. Although this might have been an important point raised for consideration of the (new) lawyer, the AG himself also notes: “(…) now it is time to turn to the question that is really at issue. Is the rejection of the appeal court comprehensible in light of the defence pleaded during the appeal court session? Could the issues raised on behalf of the accused on appeal about making the deadline passage excusable and give cause to grant her leave to appeal?” As a response to these questions, the AG raises eight points, two of which have been mentioned specifically by the Hoge Raad in its verdict, as mentioned above (points 16 to 23; points 20 and 21 respectively).

First, the AG considers that “(…) the pleadings on appeal did not entail that the accused had trusted (excusably) that the deadline for the appeal submission had not passed (yet) or that the accused had a mental illness that made the submission after this deadline excusable (point 16). Rather, the defence argued something else, i.e. that the professional error of counsel constituted an extraordinary circumstance that made the belated appeal submission excusable. This professional error, including the resulting belated passing of the deadline, is not attributable to the accused.”¹⁶³⁴

¹⁶³⁴ The AG refers to Spronken (2001) at 540-545; J.B.M.H. Simmelink, ‘Kanttekeningen bij het gesloten stelsel van rechtsmiddelen’, in: *Systeem in ontwikkeling* (Kniggebundel), Nijmegen 2005, p. 461-481; and Franken (2005) at 161-169.

Second, this argument is based on case law of the Court that supposedly would mean that professional errors of counsel should, under specific circumstances, not come at the procedural risk of the accused. The defence argues that these specific circumstances were present in this case (point 17). Therefore, the appeal court was required to conclude on a “manifest failure” and should have ensured an “adequate remedy” for the accused by granting the accused leave to appeal. If the appeal court would not do so, it would violate Article 6.¹⁶³⁵

Third, the AG considers that the appeal court which has rejected the appeal has not addressed (especially) the Court’s case law that the defence noted (point 18). Evidently, the appeal court did not consider this its (legal) duty. The question is whether this is comprehensible.

Fourth, considering the manner in which the defence has been submitted on appeal, the AG considers that one can have some understanding for the fact that the appeal court had not considered it its task to deal separately with the “European” arguments (point 19). After all, the appeal court clearly referred to the shortcoming of the accused herself, and that makes a rejection of the “European” arguments superfluous. Contrary to the defence on appeal and to the cassation brief, the cited cases of the Court regarding an “evident failure” and “adequate remedy” are not comparable to the present case. The AG adds that he will explain this further and cites the cases that have often been included in this study in order to demonstrate the *Artico*-rule. The AG notes:

“From the cases *Artico v. Italy*, *Goddi v. Italy*, *Rutkowski v. Poland and Giivec v. Turkey*, one can only infer the relevant consistent line of the Court that – briefly put – the substance of legal assistance, whether or not provided by an appointed lawyer, except in special circumstances, falls in the realm of the accused and the (appointed) counsel, so that possible errors of counsel come at the procedural risk of the accused. The facts and the circumstances of the aforementioned cited cases are in no way comparable to the present case [meaning *Czekalla v. Portugal* and *Andrejev v. Estonia*]. (...) In *Czekalla v. Portugal*, the lawyer had lodged an appeal but had not met certain formal requirements (...) and in *Andrejev v. Estonia*, the lawyer had not lodged the appeal submission on time but the accused had done so. (...) The last issue made the Court consider that the accused (himself) had done everything that could be reasonably expected of the accused in order to obtain an appeal (para. 77), and therefore the Court concluded that the State was required to respond to the “evident failure” of counsel by providing an “effective remedy”, which meant to grant leave of appeal to the accused [points 20 and 21, added by the author].”

After these two points, the penultimate seventh point raised by the AG considers an assessment of the appeal court’s decision in the present case (point 22). The AG explains that “(...) the appeal court has correctly considered that, in the present case, it cannot be concluded that the accused has done everything that reasonably could be expected in order for her case to be dealt with on appeal. Determining is – as I understand the appeal court – that the accused has in no way checked whether counsel had lodged the appeal submission on her behalf. Neither did she – contrary to *Andrejev* – contact the court itself in order to note that she did not agree with the first instance judgment. Under these circumstances, the professional error of the lawyer has to come at the procedural risk of the accused.”

The final, eighth point of the AG is a concluding observation that, if the appeal court has omitted to reason its verdict at all, this should not lead to cassation because the defence has simply not given any cause for granting the accused leave to appeal (point 23).

This case is important for this overview of cases regarding belated appeal submissions and helps to answer the central research question. Specifically, this central question looks into compliance with the Court’s case law when authorities are confronted with ineffective legal assistance. In this case, both the Hoge Raad and the AG refer to how the fact that the lawyer has *neglected* to lodge the appeal

¹⁶³⁵ The AG also refers to the conclusions by AGs Machielse and Vellinga, in ECLI:NL:PHR 2007:AZ8413 (see sub-section 12.2.1., *Counsel dismissed during last word*-case) and ECLI:NL:PHR 2012:BU7644 (see sub-section 12.2.2., *Court’s duty to inquire into the waiver of the right to counsel?*-case) respectively.

submission on time comes at the procedural risk of the accused. Even though this lawyer has admitted to having made a professional error, the Hoge Raad and the AG submit that the accused should bear the consequences of this (negative) conduct of counsel. From a rights-based perspective, this case is interesting because it does not appear from the case that the appeal court has examined whether the accused had waived her right to appeal, considering, at least, the admission of counsel that he made a professional error. Rather, the accused claimed she was innocent and was present when her new lawyer asked for an appeal. This case, which henceforth will be called *Counsel's professional error relating to an appeal submission*-case, will be revisited in the remainder of this chapter, but not before this overview draws comparisons between all four cases.

- *Comparison between these four cases about belated appeal submissions*

This overview has addressed four cases: two cases in which the appeal court held the appeal submission after the fourteen days' deadline by an *assisted* accused inexcusably late and two cases in which the appeal court held the belated submission by an *unassisted* accused either inexcusable or excusably (*Inexcusably belated appeal by an assisted accused*-case; *Inexcusably* and *Excusably belated appeal by an unassisted accused*-cases and *Counsel's professional error relating to an appeal submission*-case respectively). Comparing these four cases, it is noteworthy that the Hoge Raad in the cases regarding an *unassisted* accused refers to the absence of a *lawyer*, without and with an effect on how the appeal court needed to approach the belated submitted appeal. Also, the first case regarding the *assisted* accused resulted in a difference of opinion between the Hoge Raad and the AG.¹⁶³⁶ Finally, the fourth case in which counsel himself admitted to having made a professional error relating to an appeal submission nonetheless resulted in the accused having to bear the consequences of (negative) conduct of her (new) lawyer (the fourth case after the 1 December PhD deadline).

In the third cited case, essentially, the aforementioned difference of opinion between the Hoge Raad and the AG appears to lie in what both the accused and counsel could reasonably have done in order to lodge the appeal submission on time. The Hoge Raad's decision appears to highlight the conduct of the *lawyer*, who awaited the response of the prosecution without simultaneously lodging an appeal, which had a deleterious effect on the accused who had to bear the consequences.¹⁶³⁷ The Hoge Raad did not "sanction" the appeal court which did not examine with reasons in its verdict whether the *accused* in fact knew about his right to appeal and that he, on an informed basis, had subsequently dispensed with this right. Should the Hoge Raad not have made sure that the appeal court had examined whether the (Somalian) accused, who had immediately retained counsel after his arrest, had indeed waived his personal right to appeal and have his case examined with his knowledge for the first time? Moreover, is it fair that a lawyer, who evidently wanted to know more about the case from the prosecution, had to decide to appeal without obtaining a response to his two letters?

Of course, even out of precaution, the accused's lawyer could have lodged an appeal on 15 April 2005 and only thereafter decided whether the defence would have gone on with the appeal or withdraw it upon the information requested from the prosecution. However, it cannot reasonably be stated that this lawyer had been fully passive either. Counsel had tried to obtain more information from the prosecution in order to decide whether or not he should lodge an appeal, which was not met by a response from the prosecution. Finally, as the AG also appears to argue, even if counsel would have been completely passive in this case, is it fair that that should come at the expense of the accused who could not reasonably have done anything else than retain counsel?

Similar questions can be raised about the fourth case (*Counsel's professional error relating to an appeal submission*-case). Of course, even out of precaution, the accused could have lodged an appeal, but can the appeal court reasonably hold that the accused has not wanted to appeal the first instance verdict concerning an offence of which she claimed to have been innocent? Can it reasonably be expected of the accused that she had to do more than inform her law firm that she wanted to appeal? If an assisted accused who does not lodge an appeal and only hires a lawyer after the appeal

¹⁶³⁶ See for another case regarding a belated appeal because the fax had not arrived at the registry on time, i.e. during opening hours of the registry, e.g. HR 4 February 2014, ECLI:NL:HR:2014:231, *NJB* 2014, 431.

¹⁶³⁷ Counsel also has to declare that he authorised to lodge an appeal, according to the Hoge Raad, Judgment of 1 November 2011, ECLI:NL:HR:2011:BT6444, while AG Machielse found that too formalistic in ECLI:NL:PHR:2011:BT6444, in his non-binding advice to the Hoge Raad in the above-cited case. Borgers in his annotation about this case in *NJ* 2012, 25.

deadline passes is met by the Hoge Raad which overturns the case, should an assisted accused - who can potentially suffer harm to her personal right to have an appeal in her case - not get the same cassation?

It can hardly be understood why the Hoge Raad in the second cited case refers in particular to the absence of a *lawyer* in order to require a more willing approach of the appeal court, whilst in the third cited case it did not indicate why the *assisted accused* was not so approached. By not overturning the two cases involving assisted accused, the Hoge Raad allows the lower courts to decide that a belated submission of appeal can be attributed to counsel, with the consequence that the lawyer does not have to be active in the case and the accused paying the price.¹⁶³⁸ Therefore, it is important to examine whether a related right of attendance of the accused during an appeal hearing – for which the appeal submission has to be rendered admissible – is being dealt with differently. This right of the appellant to attend the appeal hearing will be the subject of the next sub-section (sub-section 12.4.1.2.).

12.4.1.2. *The right to attend the appeal hearing*

This sub-section will focus on the potential obligations of the authorities in relation to the right of the accused to attend the appeal hearing. In general, the Hoge Raad usually holds that a convicted person who opts to lodge an appeal can be expected to perform some activity related to obtaining a notification of the hearing¹⁶³⁹ and to understand its content.¹⁶⁴⁰ A comparison will be made here between an appeal court's response to an unauthorised or authorised counsel's request for a stay so that the accused can attend the appeal hearing (Article 279 Sv).¹⁶⁴¹ The first case concerns an accused who intentionally did *not* authorise his lawyer to represent him in his absence in order to ensure he could attend the hearing together with his lawyer. The second case revolves around an accused who *authorised* his lawyer for *in absentia* representation, while, according to his lawyer, the accused had expressed his intention of joining his lawyer during the appeal court session. Both accused persons thus wanted to attend the hearing, but one accused person did and the other accused person did not authorise his lawyer to act in his absence.

- *What if the accused did not authorise counsel in order to attend the hearing?*

During the appeal hearing, the accused's counsel informed the bench that she did not know why the accused had not turned up.¹⁶⁴² She explained that the accused had not authorised her to represent him in his absence because he wanted to be present at the hearing together with her. The lawyer requested the court to stay the proceedings, so that her client could be given an opportunity to accompany her. The appeal court rendered the appeal inadmissible.

The applicant complained before the Hoge Raad that the appeal court had wrongly refused the request for a stay by his lawyer. He had wanted to attend the appeal court session, as his lawyer had rightly explained on his behalf. At least the appeal court, in the appellant's view, had rejected the request to stay the proceedings without providing the requisite sufficient reasons.

The Hoge Raad considered the fact that the appellant did not attend the hearing and that his lawyer, who was present on his behalf, was unauthorised. Therefore, the appeal court could reasonably consider that the unauthorised lawyer had made no submission that would have to be met by a

¹⁶³⁸ See for what the Hoge Raad calls "a sharp and strict limit" for the admissibility of an appeal on time on Articles 449-451 Sv, i.e. before closure of the registry on the last day of the term, HR 4 February 2014, *ECLI:NL:HR:2014:231*, NJ 2014, 108 (17:00 instead of 17:06pm), reinforcing the relevant considerations of HR 6 January 2004, *ECLI:NL:HR:2004:AN8587*, NJ 2004, 181.

¹⁶³⁹ The notice has to rest on proper data, e.g. HR 27 August 2007, *ECLI:NL:HR:2013:495*, *RvdW* 2013, 1047 and on time in accordance with Articles 411.2, 413.1, 588a.1, 588a.4 and 590.3 Sv, HR 27 August 2013, *ECLI:NL:HR:2013:496*. NJ 2013, 428.

¹⁶⁴⁰ HR 12 March 2002, *ECLI:NL:HR:2002:AD5163* (overview verdict notice), NJ 2002, 317 m.nt. Schalken. The author's translation of para. 3.37.

¹⁶⁴¹ If the lawyer has not been authorised under Article 279 Sv, but nonetheless lodged the appeal up to the standards, the appeal is not null and void, e.g. HR 19 March 2013, *ECLI:NL:HR:2013:BZ3924*, NJ 2013, 416 m.nt. Borgers. The court is not allowed to examine whether or not the lawyer has been authorized *ex officio*, e.g. HR 25 June 2013, *ECLI:NL:HR:2013:70*, NJ 2013, 385.

¹⁶⁴² HR 8 December 2009, *ECLI:NL:HR:2009:BK5617*, NJ 2010, 175 m.nt. Schalken.

reasoning in the verdict. Therefore, the Hoge Raad left the case, which will be labelled *Stay without authorization*, intact.

- *What if the accused authorised counsel in order to attend the hearing jointly?*

The second case concerns an appellant who was absent during the appeal hearing, while his authorised lawyer who was confronted with his absent client requested the appeal court “(...) to stay the procedure, also because his client lives abroad”.¹⁶⁴³ Counsel added that the accused, with whom he had spoken on the phone the day before the session, “(...) had been unable to familiarise himself with the indictment and to prepare for the appeal hearing”. The prosecutor explained that the notification had been correctly served on the accused and found the lawyer’s remark to be an insufficient reason to justify a stay of the proceedings. He therefore suggested that the appeal court should reject the request for a stay and ought to hear the lawyer who was authorized to plead the case in the accused’s absence. After deliberation, the appeal court rejected the lawyer’s request to stay the proceedings, arguing that the notification had been properly served on the appellant, well in advance and without any postal problems that the defence had mentioned. Therefore, the appeal court continued with the proceedings in the presence of the authorised lawyer and, ultimately, convicted the accused in his absence.

The applicant complained before the Hoge Raad that the appeal court had wrongly refused the request of his lawyer to stay the proceedings because he had wanted to attend the hearing, as his lawyer had explained. At the very least, the appeal court, in the view of the appellant, had failed to give sufficient reasons in its verdict when it rejected the stay requested by his lawyer.

The Hoge Raad held that the appeal court, which had weighed several interests, had given priority to the interest of a trial within a reasonable time and the interest of a well-organised and efficient court order over the appellant’s interest of attending the appeal hearing.¹⁶⁴⁴ The authorised lawyer, who was present, requested a stay of the proceedings because “(...) his client had not been able to prepare properly”. The Hoge Raad concluded that being unable to prepare properly is not a ground to stay proceedings in the absence of expressly mentioning that the appellant wanted to attend the session or of a reference to the right of the accused to attend the hearing. Therefore, the Hoge Raad did not conclude that this decision by the appeal court had been taken on an erroneous legal ground or was incomprehensible and left the case intact.

This last case will be referred to as *Stay with authorization*. Given the emphasis on counsel’s alleged omission to refer to the right of the appellant to attend the hearing, it is interesting to compare this one with the first *Stay without authorisation*-case.

- *Comparison between the Stay with and without authorization-cases*

When comparing these two cases¹⁶⁴⁵ it is striking that, whether or not the accused authorised his lawyer, counsel’s request to stay the proceedings in order to ensure the attendance of the appellant at the hearing was rejected by the appeal court. Whatever the action of the accused, his resulting absence was the same.

The annotator of these two cases, Schalken, shows how the comparison between these two cases indicates a fundamental problem with the authorisation system for lawyers and the right of the accused to attend the appeal hearing in more general terms.¹⁶⁴⁶ He argues that this system under which the accused authorises counsel may not raise any issues where a lawyer is only exceptionally allowed to assist the accused in *in absentia* cases concerning issues that are the subject of *a priori* agreement between the accused and his lawyer.¹⁶⁴⁷ However, according to Schalken a problem does arise under the Convention where the right to assistance by a lawyer applies to an accused who is absent at his

¹⁶⁴³ HR 5 January 2010, *LJN*: BK2145, *NJ* 2010, 176 m.nt. Schalken.

¹⁶⁴⁴ HR 26 January 1999, *ECLI:NL:HR:1999:ZD1314*, *NJ* 1999, 294.

¹⁶⁴⁵ HR 8 December 2009, *ECLI:NL:HR:2009:BK5617*, *NJ* 2010, 175 m.nt. Schalken and HR 5 January 2010, *LJN*: BK2145, *NJ* 2010, 176 m.nt. Schalken.

¹⁶⁴⁶ See also HR 8 January 2002, *LJN*: AD5594 *ECLI:NL:PHR:2002:AD5594*, *NJ* 2002, 340 m.nt. Schalken in which the words of the authorized lawyer were not considered to be those of his client. Also, see HR 8 December 2008, *ECLI:NL:HR:2009:BK0949*, *NJ* 2010, 174 m.nt. Schalken in which the only offences inserted *ad informandum* which are accepted and not objected to by the authorized lawyer can be dealt with in the case.

¹⁶⁴⁷ Schalken refers to Court, Judgment of 22 September 2009, *Kari-Pekka Pietiläinen v. Finland*, HUDOC no. 13566/06 as well as *DD*, Vol. 10, 2009, p. 1109; HR 23 April 2002 *ECLI:NL:HR:2002:AD8860*, *NJ* 2002, 338 m.nt. Schalken; and HR 30 September 2003, *NJ* 2004, 44 about expressly authorized lawyers.

hearing and this has an effect on his right to attend the session.¹⁶⁴⁸ As the case law analysis in this research also appears to indicate, the Court does not normally accept that the accused is being deprived of his right to attend the hearing because of a supposed omission by his lawyer which harms the accused in terms of his rights, rather than defence strategy. The right to attend the hearing is a “personal” right of the accused under the Convention. Schalken’s evaluation of current Dutch practice and analysis of its lack of compliance with the case law of the Court, also appears to follow from the substantive research chapters regarding the Convention (chapters 5, 7, 9 and 11). Schalken’s perspective appears to correspond with the reasoning of PG Fokkens who had reiterated in the above-cited conclusion cited in this chapter that the Netherlands should be well aware thanks to the Court’s *Lala*-case that authorities cannot ascribe a lack of assertiveness to the lawyer and/or the accused in order to avoid responsibility for not ensure an effective defence by counsel (section 12.2.2). However, an evaluation of the compliance of this authorisation system with the Convention itself will have to be left to the concluding chapter of this research (chapter 13).

At this stage of the research, it must be noted already that the accused was not enabled to make use of his personal right to attend the hearing, whether he authorised his lawyer or not. In addition to the aforementioned problem with the right to effective legal representation of the accused in his absence, it is relevant for this research into ineffective assistance by counsel that the Hoge Raad appears to hold that counsel, who said “(...) his client had not been able to prepare properly”, should have *literally* referred to the right of the accused to attend the hearing for his remark to be seen as a request for a stay of the proceedings. This appears to be quite formalistic and, even more problematic, results in having the accused bear the consequences of this supposed error by the lawyer meaning he could not exercise his personal right to attend the appeal hearing.

12.4.2. The Hoge Raad correcting “a formal mistake”?

This sub-section concerns the appeal in cassation stage. It will seek to determine whether counsel has gained (increased) responsibilities in relation to the accused’s right to appeal in cassation and how the court has to respond when counsel might fall short from what is being expected of him in relation to the formulation of the grounds in the brief for the appeal in cassation. One last case will be explored in detail for that purpose. The title of this sub-section was chosen because of the Court’s standard sentence when referring to these obligations of the authorities (e.g. 11.3.1.).

The case, which will be referred to as *Omitted ground for appeal in cassation*, concerned a minor accused who had allegedly not followed the order of the police to leave a certain location in a particular direction.¹⁶⁴⁹ Thereafter the police arrested him during which they allegedly grabbed the accused and took him with them with some force. During the appeal stage, counsel pleaded that the police had used excessive force, thereby acting contrary to the principles of proportionality and subsidiarity. She added that if the appeal court would not agree with a violation of these principles, then she requested a lenient penalty because the police had not acted with legal competence. The appeal court convicted the accused, arguing that he could resort to a civil court if he wanted to complain about the alleged illegitimate behaviour of the police during his arrest.

The appellant reiterated before the Hoge Raad that the police had used excessive force and that consequently they had acted without legal competence.

The AG advised the Hoge Raad to quash the case on its own initiative on the ground that the police officers had not acted with legal competence. The AG concluded that there was no basis for them to order the accused to leave this location. Additionally, the AG considered that the Hoge Raad should read the other ground for the appeal in cassation to entail a basis for quashing the case due to the police having a lack of legal competence.

The Hoge Raad took two decisions. First, the Hoge Raad dismissed the argument of the appellant in cassation regarding the supposed excessive use of force and considered there to be no ground for an appeal in cassation to quash the case *ex officio* regarding the issue of the police having acted without legal competence when they ordered the accused to leave the vicinity. Second, the Hoge Raad agreed with the defence that the violation of the principles in question had negated the

¹⁶⁴⁸ See also cassation if the notice of the appeal hearing has not been sent to the lawyer of the accused in accordance with Article 51 Sv, e.g. HR 19 February 2013, ECLI:NL:HR:2013:BZ1453, *RvdW* 2013, 361.

¹⁶⁴⁹ HR 9 October 2012, ECLI:NL:HR:2012:BX5513, *NJ* 2013, 53, m.nt. Mevis

legitimacy of the police. The Hoge Raad therefore quashed the case but only as far as the second ground for the appeal in cassation was concerned.

It appears that, in this case, the Hoge Raad concluded that the lawyer in his brief for an appeal in cassation had neglected to object to a wrongful conviction, so that the issue did not have to be examined on its own initiative.¹⁶⁵⁰ Jebbink has complained that the Hoge Raad thereby made its own decision to quash a case *dependent* on the complaint by (professional) counsel.¹⁶⁵¹ This case made the newspapers in which Jebbink argued that the Hoge Raad, which is responsible for offering legal protection, does not protect the accused where counsel neglects to provide the accused with effective legal assistance.¹⁶⁵² Thereupon, a former Hoge Raad civil chamber judge responded that the Hoge Raad was aware of both sides of the case and must have decided not to quash the case on its own initiative without a complaint by the defence.¹⁶⁵³ He added that the accused and his lawyer must have made a good decision to formulate the defence in the way they did. This research need only add that – using the language that the Court has used in this context – the Hoge Raad did not invite the lawyer to correct the mistake or add the ground to the brief.

This last case, as well as the earlier cases mentioned in section 12.4, are all relevant for the question of whether the authorities, which are confronted with ineffective assistance by counsel, are obliged to intervene in the case in order to protect the accused’s personal right to an effective defence and related rights. In order to answer that question, this section has explored cases regarding three rights: the right to lodge an appeal, the right of attendance during appeal sessions, and the right to lodge an appeal in cassation. On the basis of these cases, it is difficult to answer this question. However, what does become clear is that the Hoge Raad does seem to distinguish between the demands placed on the defence by either assisted or unassisted appellants (again). In other words, the cases of the Hoge Raad seem to point in the direction of counsel having gained increased responsibilities in relation to the rights of the accused. It also seems that the appeal courts when falling short, allegedly at least, from what is being expected in relation to these rights can have their position depend on the defence – and *de facto* counsel. Consequently, issues might arise with the minimum guarantees set in the case law of the Court regarding decisions of defence strategy that counsel controls and “personal” rights that the accused controls (see chapter 7). It will therefore have to be examined whether Dutch criminal proceedings are Convention-conforming in this respect (see chapter 13). Before this research can turn to these issues regarding the three rights of the right to lodge an appeal, the right of attendance during appeal sessions, and the right to lodge an appeal in cassation, this chapter will deal with yet another defence activity: substantive defences (section 12.5.).

12.5. Substantive defences

This section turns to the last defence activity that this overview will address: the substantive defence. The substantive defence will be explored with a view to determining whether the court has to be active when counsel actually or allegedly falls short from what is being expected of him in Dutch criminal proceedings. A substantive defence can concern all the questions posed under Articles 348 to 350 Sv.¹⁶⁵⁴ For instance, such a substantive defence can regard a submission that there is no legal proof of a crime having been committed under substantive law; that the liability of the accused is mitigated; or that the accused should be given a lenient sentence.

This section will pay particular attention to how the Hoge Raad deals with appeal courts that do, or do not, reject these substantive defences from the defence with reasons in their verdicts. That perspective is important because the Code regulates under what circumstances the court has to respond with reasons in its verdict to these substantive defences. This is without a distinction between the

¹⁶⁵⁰ See about the increasing reticence *per se* of the Hoge Raad to quash a case on appeal in cassation *ex officio*, HR 17 September 2013, ECLI:NL:HR:2013:708 *NJ* 2014, 288 m.nt. Van Kempen and ECLI:NL:HR:2013:704 *NJ* 2014, 287 m.nt. Van Kempen.

¹⁶⁵¹ Jebbink (2013) at 1201-1205 with a reference to Mevis (2013) regarding the yet mentioned “alert”-system.

¹⁶⁵² Jebbink (2013) at 1201-1205 and W. Jebbink, ‘Hoge Raad handhaaft rechtsmissers’, *NRC Handelsblad* 3 May 2013, at 20.

¹⁶⁵³ P.C. Kop, Hoge Raad kent de twee kanten van ieder oordeel, *NRC Handelsblad*, p. 10, 13 May 2013.

¹⁶⁵⁴ See also section 3.2.1 and 3.5.2.

composition of the defence as either the accused alone or with counsel. Therefore, it is interesting to see whether the Hoge Raad deals similarly with the obligations of the authorities towards a range of substantive defences lodged by either *unassisted* or *assisted* accused persons.

Before this section will engage in an exploration of the case law, a first indication of the relevant provisions of the Code will be provided so that the subsequent cited cases can be studied in their context.

A first relevant provision is incorporated in Article 358 (3) Sv under which the court is obliged to respond with reasons to substantive defences concerning Article 349 (1) Sv. For example, when the defence alleges that the authorities have not sent the indictment to the accused in conformity with the time limit, the court is required to give reasons for its standpoint in its verdict.

A second relevant provision is Article 359 (2) Sv, which calls for an “explicitly formulated standpoint” for issues regulated under 358 (2) Sv.¹⁶⁵⁵ For example, this can entail a substantive defence that it cannot be proven legally and beyond a reasonable doubt that a criminal offence has been committed, or that the sentence should be mitigated (in Dutch: *uitdrukkelijk onderbouwd standpunt*, now known also under its abbreviation *uos*). This Statute, which originally only applied to the prosecutor, was later extended to the defence. The aim of the Statute was to establish a further guarantee for the fairness of the criminal procedure “(...) by way of an obligation of the judge who reasons the verdict in general and responds to an explicitly formulated standpoint where it is an answer to an explicit contradiction in particular”.¹⁶⁵⁶ An additional question is what standard the prosecutor and the defence will have to meet in order for the Hoge Raad to require that the lower courts respond to an explicitly formulated standpoint with reasons in its verdict. In the case law, the requirement is set that an explicitly reasoned standpoint has to be “(...) clear, presented with arguments, and ending in an unequivocal conclusion”.¹⁶⁵⁷

Another relevant provision is Article 359 (3) Sv, which does not require any specific reasoning by the court in its verdict where the accused has *confessed* to the facts proven.¹⁶⁵⁸ However, this provision does indicate an exception where the accused who had initially confessed withdraws that statement or his counsel argues that there ought to be an acquittal. Under both circumstances, the court has to provide reasons for its decision to hold the accused guilty of the specific offence.

Finally, another relevant provision is Article 359a Sv, which deals with substantive defences concerning procedural norms that are allegedly violated during the pre-trial stage, which a judge can possibly restore – even during the appeal phase. An example is a claim by an accused that during police interrogations he did not have a lawyer present while he provided answers or a full statement under pressure and therefore the evidence was, supposedly, illegally obtained. Such a defence, which has now become known as a *Salduz* defence¹⁶⁵⁹, can be used, for instance, by an arrested accused who has not received legal assistance as from the first police interrogation. The Hoge Raad has set a rule that such a lack of legal assistance at the stage of police interrogations has to be followed by the exclusion of such police records from the evidence that can be used for a conviction. Unless the accused has waived his right or there were urgent reasons to limit the right to legal assistance at the stage of police interrogations, it is thus imperative that the evidence is excluded. It is questionable whether substantive defences under Article 359a Sv also have to meet the standard of an explicitly

¹⁶⁵⁵ E.g. HR 11 April 2011, ECLI:NL:HR:2006:AU9130, *NJ* 2006, 393, m.nt. Buruma. See also Fokkens, in: Harteveld et al (2005) at 139-149; Borgers (2006) at 745-754. With regard to a confessing statement and its rejection, e.g. HR 22 April 2014, ECLI:NL:HR:2014:953 *NJ* 2015, 60, m.nt. Keulen.

¹⁶⁵⁶ See Fokkens, in: Harteveld et al (2005) particularly at 142. For an examination of the requirements for a substantive defence, see Borgers and Kristen (2005) at 568-588.

¹⁶⁵⁷ HR 30 March 2004, ECLI:NL:HR:2004:AM2533, *NJ* 2004, 376 m.nt. Buruma. See also HR 5 April 2005, ECLI:NL:HR:2005:AS8856, *NJ* 2005, 301.

¹⁶⁵⁸ E.g. HR 17 December 2013, ECLI:NL:HR:2013:1970, *NJ* 2014, 79. In this case, the Hoge Raad who held the rule of “the accused has confessed clearly and unequivocally to the indicted facts”. However, AG Spronken found the remark of the accused, i.e. “The actions of which I have been accused, I confess to having committed” did not amount to a “clear and unequivocal confession”. She comes to this conclusion because the accused had not been confronted with the documents that were supposed proof of the offence, did not give any details about the acts for which he was indicted while it remained unclear to what actions the accused actually confessed and whether those were not alternative actions than the indicted and proven offence. See AG Spronken, Conclusion, ECLI:NL:PHR:2013:1952, to the Hoge Raad case of HR 17 December 2013, ECLI:NL:HR:2013:1970, *NJ* 2014, 79.

¹⁶⁵⁹ HR 13 September 2011, ECLI:NL:HR:2011:BQ8907, *NJ* 2011, 556, m.nt. Schalken.

reasoned standpoint, i.e. having to be “(...) clear, presented with arguments, and ending in an unequivocal conclusion”.¹⁶⁶⁰ Article 359a Sv does not require this standard to be met.

This section will first examine a case regarding a substantive defence that was lodged by the first instance, but not by the appeal lawyer, while the accused at least implied the same substantive defence on appeal (sub-section 12.5.1.). Thereafter, the second sub-section will explore a case from which it can be inferred that at least the AG finds that more can be expected of an *assisted* accused and thus counsel than from an *unassisted* accused who lodges a substantive defence (sub-section 12.5.2.). Finally, this sub-section will further explore what expectations are being placed on counsel, rather than the defence, regarding a substantive defence (sub-section 12.5.3.).

12.5.1. Possible ineffective assistance by counsel regarding a substantive defence?

This sub-section examines a case, which will be called *Knife tip*, which concerned an accused who was believed to have attempted to commit manslaughter against a person named M., according to the accused as a response to a threat to his life.¹⁶⁶¹ At the first instance hearing, the accused, who was assisted by a first lawyer, had described how two days before the indicted offence he had been tracked down and threatened by M. and his friends. On the day of the indicted offence itself, the accused claimed that he had followed a person into a building, who later turned out to be M., who had then allegedly stabbed the accused with a knife. After the stabbing the accused felt disorientated and in pain, possibly because the tip of that knife remained lodged in his head. The accused, who could not remember what happened in the building, recalled that after the struggle he saw his own knife in his hands. He contended that M. might have tried to grab his knife whereby he injured his hand. The defence claimed that the accused had acted out of self-defence, possibly with excessive violence, as a response to an immediate attack against his life or person. It is unknown what the first instance court did with this substantive defence. On appeal, the accused, who by then had another lawyer, showed a picture of a hole in a cap that the accused had allegedly worn during the incident, seeking to prove that the knife tip had become lodged in his head. Upon questions by the appeal bench, the accused stated that he had been admitted to hospital for the head wound, and had gone for treatment on several occasions. The accused stressed that the appeal court could only understand the reason why he had been chased and shot at by his assailants if it would take into account the aforementioned incident that took place two days earlier. The accused’s appeal lawyer added that the accused had ended his relationship with a certain girlfriend, so that the reason for these incidents no longer existed. Additionally, he stated “(t)here are numerous statements in the dossier. There is however no statement that confirms the story of my client”.¹⁶⁶² Counsel requested the appeal court to take into consideration the circumstances of the case, so that the earlier shooting incident could be considered as a mitigating factor. The court convicted the appellant of attempted manslaughter on account of the evidence in four police records including the statement that the accused had made during the first instance trial, which had been included therein.

The applicant, with yet another lawyer, complained before the Hoge Raad that the appeal court had failed to respond to the implicit substantive defence of acting out of self-defence, possibly with excessive violence, as claimed during the court proceedings. At the very least, the accused argued that the appeal court had neglected to take into account the substantive defence in its factual description of the events.

The Hoge Raad finds that, given what has been said by and on behalf of the accused as the intended explanation regarding the indicted offence, the appeal court has, apparently, not considered it as a defence of self-defence. The Hoge Raad considered this decision by the appeal court to be “(...) not incomprehensible”, given that “(...) on appeal the accused was *legally assisted by counsel* who, seeing the records of the proceedings on appeal, *differently than the lawyer at first instance, did not lodge an appeal regarding self-defence* [emphasis added by the author]”. The Hoge Raad therefore left the case intact.

Interestingly, the AG considered that the appeal court had not neglected to respond to the implicit substantive defence at all. Apparently, the AG considered that there had been a substantive

¹⁶⁶⁰ HR 30 March 2004, NJ 2004, 376 m.nt. YB.

¹⁶⁶¹ HR 6 September 2005, ECLI:NL:HR:2005:AT7553, NJ 2006, 85. See also HR 25 March 2003, ECLI:NL:RBROE:2002:AD9383, NJ 2003, 264. See also Reijntjes/Minkenhof (2009) at 82-83.

¹⁶⁶² My summary and translation of HR 6 September 2005, ECLI:NL:HR:2005:AT7553, para. 5., NJ 2006, 85.

defence, where the Hoge Raad saw none, and concluded that the appeal court had sufficiently responded with reasons in its verdict to that substantive defence.¹⁶⁶³

This case has been cited because this chapter seeks to answer the question of whether the authorities, which are confronted with ineffective assistance by counsel, are obliged to intervene in the case so as to protect the accused's personal right to an effective defence or related rights. The Hoge Raad left this case in-tact while the appeal court did not give reasons in its verdict that it did not follow or dismiss the substantive defence, while stressing that the appeal counsel, unlike his predecessor, did not lodge this substantive defence. The question arises whether this was an instance of ineffective legal assistance by appeal counsel that did not require an intervention in the case by the authorities.

The appeal court must have noticed that the lawyer did not launch the substantive defence for the appellant which his predecessor had submitted at first instance, and "only" requested the court to mitigate the sentence. Moreover, the appeal court knew that counsel added to the description of events by the accused that "(t)here are numerous statements in the dossier. There is however no statement that confirms the story of my client". It can be wondered whether such circumstances should have prompted activity by the appeal court that was confronted with an assisted appellant who, perhaps, ought to have been deserving of being met by an active trial judge who intervened in the case where counsel might possibly not have provided the accused with an effective defence. It is hard to imagine that the appeal court did not lodge the substantive defence out of strategy, and the absence of the consideration of this substantive defence can be said to have harmed the accused in terms of his rights.

It is relevant to explore this possibility further because the accused had to carry the consequence of appeal counsel's conduct. This is because the Hoge Raad did not quash the case because the appeal court had not examined this substantive defence of self-defence on its own accord or because the accused, rather than his lawyer, had raised it implicitly on appeal at least. What else could the accused have done than lodge this substantive defence during the first instance proceedings and repeat it again on appeal, at least impliedly? Would this accused not have been better off without assistance by counsel? Given that the Hoge Raad *ex officio* has the task of protecting the rights of the accused that are inherent in points of law (in addition to ensuring legal unity and legal development), should the case – regarding this accused who on appeal does not appear to have had the benefit of the consideration of this substantive defence by the bench – not have been overturned? Moreover, should the Hoge Raad not have anticipated that lower courts will infer from this judgment (that refers to the condition that the accused has legal assistance – not "also legal assistance" as will be shown in the next sub-section) that they do not have to consider a substantive defence that the lawyer does not lodge, even though the assisted accused did so at first instance and repeated it at least implicitly in the appeal case against him? Given the Hoge Raad's emphasis placed on appeal counsel's lack of lodging this substantive defence, it will be important to examine further whether in relation to a substantive defence higher demands are being placed on an assisted accused – and thus *de facto* on counsel – than on an unassisted accused, which will be done in the next sub-section (sub-section 12.5.2.).

12.5.2. Higher demands on a substantive defence by counsel than an unassisted accused?

This sub-section will examine a case that concerns an assisted accused who was suspected of having assaulted his parents.¹⁶⁶⁴ During the appeal stage, he mentioned that his mother had provoked him into assaulting his parents. He alleged that, after he had heard his mother say to him that she would die as a result of his actions, "(...) he had totally lost it" and thereupon had (repeatedly) kicked his parents. His lawyer requested a contra-expertise of the prosecution-ordered psychological and psychiatric report that had been made about the accused. Counsel explained that this contra-expertise could provide sufficient reason for the appellant to potentially plead that he had so acted due to external pressure being placed on him so that he could no longer resist his actions. According to the appeal court, the

¹⁶⁶³ The author's translation of "12. Mede tegen de achtergrond van hetgeen verzoekers raadsman ter terechtzitting heeft aangevoerd - te weten dat het verzoeker was die werd aangevallen en met een mes werd gestoken - diende het hof het door verzoeker aangevoerde op te vatten als een beroep op noodweer, niettegenstaande de omstandigheid dat enerzijds verzoeker stelt zich niet te herinneren wat er precies is gebeurd en anderzijds verzoeker noch zijn raadsman zich expliciet op de strafuitsluitingsgrond noodweer hebben beroepen (vgl. Borgers en Kristen, Verweren en responderen, DD 2005, p. 577, 582 en 588). Gelet op het bepaalde in (art. 415 j°) art. 359, tweede lid, j° art. 358, derde lid, Sv was het hof gehouden hieromtrent een met redenen omklede beslissing te nemen."

¹⁶⁶⁴ HR 20 February 2007, ECLI:NL:HR:2007:AZ5717, *NJ* 2007, 146.

psychological and psychiatric report (by the Pieter Baan centre) already included all possible relevant factors that would have pressurised the accused into assaulting his parents. Therefore, the bench refused the request, indicating that counsel had failed to indicate sufficient reasons as to why a contra expertise would be necessary. The appeal court convicted the accused of manslaughter without providing any reasoning concerning any substantive defence that could potentially mitigate the accused's liability or any related ground.

The applicant complained before the Hoge Raad that the appeal court had failed to respond in its verdict to the accused's substantive defence that he had, at the time of the commission of the indicted offence, suffered from external pressure that he could no longer resist (in Dutch: *psychische overmacht*). In the appellant's view, the court had neglected to take into account that he had suffered from the aforementioned condition that has the potential to mitigate his liability. Or, at the very least, the court of second instance had not given sufficient reasons in its verdict as to why the accused had not acted out of such irresistible external pressure placed on him which made his behaviour at least partly excusable.

The Hoge Raad found the appeal court's decision, which did not construe the remark of the accused "(...) that he had totally lost it" as a substantive defence that he had acted out of irresistible external pressure placed on him, "(...) not incomprehensible, *also because the accused was assisted by a lawyer on appeal* [emphasis added by the author]"¹⁶⁶⁵ The Hoge Raad took into consideration the fact that the appellant's lawyer had not contended, either in his oral or his written pleadings, that the accused's condition described above would have (partly) justified the assault against his parents. Therefore, the Hoge Raad concluded that the appeal court had not failed to give a reason in its verdict as to that substantive defence requiring a response, because there had been none.¹⁶⁶⁶ Considering that there was also no other obligation for the court to give a reason for its verdict, the Hoge Raad left the case in-tact.

The AG had advised the Hoge Raad that the appeal court could possibly have interpreted the accused's remark as a justification for his actions, but did not have to do so *because* a lawyer had assisted him. The AG expressed the view that, alongside "merely" requesting a contra expertise, any court could have reasonably expected the following from professional counsel:

"(...) Where the accused person has assistance by counsel, the appeal court can expect counsel to use his expertise in order to concentrate on what the accused mentions as being relevant for the adjudication of the case. If the accused brings to the fore a substantive defence that might hint at a plea mitigating criminal liability, but counsel fails to agree therewith and mentions this as such, the Hoge Raad will not readily conclude that the appeal court's failure to consider this is incomprehensible. (...) By way of logic, *the appeal court has to meet a higher standard when the accused represents himself, (...), but that was not the case in the present situation. (...)* According to the minutes of the appeal hearing (...), *the accused was legally assisted. That lawyer did request a contra-expertise (...). Thereby he only mentioned the possibility of the said substantive defence in the context of the desirability of a contra expertise as laid down in the report by the Pieter Baan centre. The lawyer did not raise the issue of irresistible external pressure, which could have excused the accused's assault against his parents, in any other way. Apparently the lawyer made this choice on the basis of legal knowledge which could have reinforced the appeal court's conclusion that the accused's statement should not be understood as a substantive defence mitigating his guilt for the indicted offence* [emphasis added by the author]"¹⁶⁶⁷.

Thus, the Hoge Raad and the AG appear to agree on the decision to quash this case in which the accused was assisted by counsel, though the Hoge Raad did not explain the degree to which legal assistance was the reason for not overturning the case. It does, though, appear to have been an

¹⁶⁶⁵ The author's translation of *Ibid.*, para. 3.4. "(...) *niet onbegrijpelijk, ook omdat de verdachte werd bijgestaan door een advocaat*".

¹⁶⁶⁶ I.e. Article 359 (2) Sv in conjunction with Article 358 (3) Sv.

¹⁶⁶⁷ The author's translation of HR 20 February 2007, ECLI:NL:HR:2007:AZ5717, paras. 9-10, *NJ* 2007, 146.

additional reason given the consideration of “(...) *also because* the accused was assisted by a lawyer on appeal [emphasis added by the author]”.¹⁶⁶⁸ This case will henceforth be called the *Mitigation of liability*-case.

The accused had to bear the consequences of the conduct of counsel, while neither the Hoge Raad nor the lower courts explain why the remark of the accused that he had totally lost it – possibly together with the requested contra-expertise in order to examine whether the accused acted out of irresistible pressure – did not amount to a substantive defence that was “clear, accompanied by arguments, and ending in an unequivocal conclusion”.¹⁶⁶⁹ The “only” consideration by the Hoge Raad that the appeal court’s decision that no such substantive defence had been lodged appears to be that the accused was “also” assisted by a lawyer on appeal.¹⁶⁷⁰ This is causing a risk to be run, given that the Hoge Raad does not relate both aspects of the substantive defence on their content to the requisite standard. Lower courts might also infer from the AG’s advice that they can hold an assisted accused – and thus *de facto* counsel – to higher standards when formulating a substantive defence than an unassisted accused.¹⁶⁷¹ However, such a distinction between assisted and unassisted accused can result in unequal protection, while the assisted accused ends up being harmed in terms of his rights, rather than defence strategy.¹⁶⁷² After all, in this case, the accused has to pay the price at least for his lawyer’s conduct while this unconsidered substantive defence could have mitigated the liability of the accused. It will therefore be important to explore possible demands regarding a substantive defence on counsel further, which will be done in the next sub-section (sub-section 12.5.3.).

12.5.3. Counsel’s lack of a substantive defence that harms the accused’s defence?

This sub-section will explore two more cases in which the defence complains on appeal in cassation that the appeal court had omitted to respond to the substantive defence uttered with reasons in its verdict and should therefore be quashed.¹⁶⁷³

The facts of the first case are that the assisted accused was believed to have received stolen goods with intent.¹⁶⁷⁴ At first instance the accused had a lawyer who contended that the statements of a certain co-accused person, Z., were contradictory and untrue or at least unreliable concerning essential aspects, so that the court could not conclude that the accused had € 135,000 of illegally obtained proceeds in his possession. On appeal, a second, appeal lawyer requested the bench to have the pleadings of his predecessor deemed to have been reiterated and inserted in the appeal proceedings. The appeal court annexed the brief of the first instance lawyer to the minutes of the appeal procedure and convicted the appellant, ordering him to repay the illegally obtained proceeds of € 135,000 to the state.

The applicant complained before the Hoge Raad that the appeal court had neglected to respond with specific reasons to its departure from the defence’s substantive defence about the untruthfulness or unreliability of the witness statement by Z. He denied that he had the aforementioned criminal gains in his possession, as the substantive defence at first and second instance demonstrated in his view.

The Hoge Raad held that, according to the minutes of the appeal hearing, counsel spoke for the defence and had remarked that he agreed with his predecessor’s pleadings. The lawyer had asked

¹⁶⁶⁸ The author’s translation of *Ibid.*, para. 3.4. “(...) *niet onbegrijpelijk, ook omdat de verdachte werd bijgestaan door een advocaat*”.

¹⁶⁶⁹ HR 30 March 2004, ECLI:NL:HR:2004:AM2533, *NJ* 2004, 376, m.nt. Buruma.

¹⁶⁷⁰ See *supra* note 824. The author’s translation of para. 3.4. “(...) *niet onbegrijpelijk, ook omdat de verdachte werd bijgestaan door een advocaat*”.

¹⁶⁷¹ See also *mututatis mutandi* where the Hoge Raad did not consider that the court should “willingly” deal with an unassisted accused because he had no legal assistance, although this was contrary to the views of the AG, HR 25 January 2005, ECLI:NL:HR:2005:AR7175, *Jol* 2005, 64.

¹⁶⁷² HR 30 March 2004, ECLI:NL:HR:2004:AM2533, *NJ* 2004, 376, m.nt. Buruma.

¹⁶⁷³ See for cases in which the Hoge Raad concluded that the case had to be quashed because the appeal court indeed had not reasoned its verdict with regard to the ‘explicitly formulated standpoint’, e.g. HR 1 November 2011, ECLI:NL:HR:2011:BT1780, para. 2, *RvdW* 2011, 1363; HR 12 July 2011, ECLI:NL:HR:2011:BQ6573, para. 2, *RvdW* 2011, 1006; HR 5 July 2011, ECLI:NL:HR:2011:BN8383, para. 2., *NJ* 2011, 415 m.nt. Schalken; HR 28 September 2010, ECLI:NL:HR:2010:BN0035, para. 2, *RvdW* 2011, 1155; HR 13 July 2010, ECLI:NL:HR:2010:BM3637, para. 3, *NJ* 2010, 455; HR 29 September 2009, ECLI:NL:HR:2009:BJ2725, para. 2; HR 13 January 2009, ECLI:NL:HR:2009:BG3533, para. 2, *RvdW* 2009, 203; HR 15 May 2007, ECLI:NL:HR:2007:AZ9353, para. 3, *NJ* 2007, 374 m.nt. Mevis; and HR 28 November 2006, ECLI:NL:HR:2006:AY8961, para. 3, *NJ* 2007, 122.

¹⁶⁷⁴ HR 7 April 2009, ECLI:NL:HR:2009:BH2687, *NJ* 2009, 185.

the appeal court to have these pleadings reiterated and inserted in the proceedings. The appeal court had attached the brief of the lawyer acting at first instance to the appeal court minutes. However, according to “(...) the minutes of the appeal hearing, the lawyer had not *pleaded* according to the brief of the first instance lawyer [emphasis added by the author]”. The Hoge Raad finds that the appeal court had thus not *consented* to the request to have the contents of the brief of the first instance lawyer repeated and inserted in the proceedings. Consequently, according to the Hoge Raad, the appeal lawyer had entered no plea with regard to the amount of the criminal proceeds on the basis of the brief of the first instance lawyer, while the appeal court, moreover, could not be said to have accepted the argument as to its contents. For these reasons, the Hoge Raad considers that the defence had *not* lodged this substantive defence regarding the absence of criminal proceeds during the appeal phase at all. Therefore, the Hoge Raad left the case intact, which will henceforth be called the *Reiterated and inserted* case.

This case can be contrasted with the relevant paragraph of the overview judgment of the Hoge Raad on a substantive defence that meets the standard of an explicitly reasoned standpoint.¹⁶⁷⁵ In paragraph 3.7.2. of this overview judgment, the Hoge Raad holds that Article 359 (2) Sv requires that the explicitly reasoned standpoint has to be laid down in writing for the court to respond with reasons in its verdict. This criterion of being laid down in writing can be fulfilled by presenting the brief to the court or requesting ex Article 326 (4) Sv to note the explicitly reasoned standpoint and its grounds in the minutes of the session.¹⁶⁷⁶ In this *Reiterated and inserted*-case, the appeal lawyer submitted the brief, which admittedly had been written by his predecessor – so that this formal requirement of having been laid down in writing has been met. Nonetheless, the accused had to carry the consequences of the conduct of this appeal lawyer in the case against him, alleging that he failed to meet the condition, while referring to the “other” condition of pleading about the substantive defence in court. Of course, this appeal counsel could also have pleaded this substantive defence again, but the Hoge Raad does seem to introduce another condition to add to its overview judgment in the *Reiterated and inserted*-case cited above.

This leads to a second case which concerns an assisted accused who was believed to have made a continued threat to the life of a girl with a knife and by way of an indecent assault during a train journey to Schiphol Airport.¹⁶⁷⁷ At the appeal hearing, the appellant’s lawyer made at least ten remarks about the evidence against her client. For example, she contended that the victim had initially not wanted to report the supposed crime, but was later urged to do so by her mother and friend. Counsel substantiated this claim by emphasising that the girl had told the police that she had not been urged by her mother and friend but when asked by counsel before the judge of instruction, she had declared that “(...) she did not think she had pressed charges because of the influence of her mother and friend”. Counsel concluded that this part of the girl’s statement proved that no offence had been committed at all, or at least that the remark would have to amount to a reasonable doubt about the existence of any offence. On the more specific offence of a threat to life, the lawyer pointed out that the girl had made contradictory statements. Before the police, the girl had said that her assailant pressed a knife against her while saying that she and no one else would notice anything. Before the judge of instruction, when questions were put to her by counsel, the girl stated that the assailant might have uttered these particular words not about a knife but about putting his tongue in her mouth. Counsel made the same contention about the contradictory statements concerning the second, sexual offence. Before the police, the girl had stated that her assailant had opened her jeans and penetrated her with his finger. Before the judge of instruction, again after counsel questioned her, she said that she could not be certain as to who had opened her jeans and whether her jeans had in fact been opened during the train journey at all. On the basis of these arguments the lawyer contended that the appeal court should acquit her client of both offences, submitting that “(...) the evidence concerning the first offence [a threat to life] only consisted of the complaint and the statements of the girl, and not of any other evidence at all. With regard to the second offence [of sexual assault], objective supportive evidence was completely lacking and that the indicted offences were not supported by, or at least were

¹⁶⁷⁵ HR 11 April 2006, ECLI:NL:HR:2006:AU9130, *NJ* 2006, 393 m.nt. Buruma.

¹⁶⁷⁶ See for a case in which the same paragraph 3.7.2. of this standard judgment was quoted and it was fully unknown whether the defence regarding an expert report had been raised, HR 27 June 2006, ECLI:NL:HR:2006:AW2473, *RvdW* 2006, 704.

¹⁶⁷⁷ HR 29 June 2010, ECLI:NL:HR:2010:BL1493, *NJ* 2010, 514 m.nt. Borgers.

insufficiently backed up by, other evidence in the dossier than merely the girl's statements [added by the author]". The appeal court convicted the accused of both offences, without responding in its verdict to the pleadings of the lawyer. The appeal court listed as evidence, the statements of the girl to the police and a police record containing the statement of the accused who had admitted to being on the train on the day of the offence and to giving his e-mail address to "a girl". Additionally, the appeal court used the testimony of the girl's mother who had spoken to her daughter on the phone on the day of the alleged offences during which the girl supposedly told her mother that "(...) a man in the train with a knife tried to touch me".

The applicant complained on appeal in cassation that the appeal court had neglected to indicate the specific reasons for its departure from the substantive defence that the statements of the girl did not constitute credible evidence against the accused. In the defence's opinion, the appeal court had wrongly failed to take into account the arguments regarding the sufficient and convincing legal evidence against the accused or had at least neglected to give sufficient reasons why it had rejected it in its verdict.

The AG advised the Hoge Raad to consider the pleadings of counsel as *both* the absence of objective supportive evidence *and* an attack on the credibility of the girl, her statements, and on the hearsay evidence by the girl's mother. The AG stated that the appeal court ought to have understood counsel's pleadings as an explicitly formulated standpoint, because the defence had made it "(...) underpinned by arguments and focusing on an unequivocal conclusion, which entailed an acquittal on both charges".¹⁶⁷⁸ According to the AG, the Hoge Raad should have quashed the case of the appeal court, which had failed to give specific reasons in its verdict when rejecting the substantive defence.

The Hoge Raad, which did not follow the AG's advice, held that counsel in her pleadings had pointed out that there was no supportive legal evidence that could help to prove the two indicted offences. In the absence of explicit pleadings by counsel to question the credibility of the girl as a witness and her statements, the Hoge Raad saw no reason for the appeal court to be obliged to provide sufficient reasoning on the use of the girl's statements as legal and convincing evidence of the offence. Moreover, the Hoge Raad held that the appeal court was not erroneous in concluding that counsel had only pleaded that there was no supportive legal evidence in this case. Finally, the Hoge Raad ruled that the verdict of the appeal court, which had convicted the accused upon the statements of the girl and two other persons, demonstrated that there was sufficient legal evidence to prove the two offences. Therefore, the Hoge Raad concluded that the appeal court, by convicting the accused on the basis of the three pieces of evidence, did not have to provide separate reasons in its verdict concerning legal and convincing evidence of the two indicted offences. Therefore, the Hoge Raad left the case, which will from now on be referred to as *Too limited a conclusion?*-case, intact.

The annotator Borgers held yet another view. He assumed that the Hoge Raad has similarly "salvaged" comparable cases.¹⁶⁷⁹ However, he added that in this case the Hoge Raad should not have done so because the appellant's statement – the third piece of evidence, in addition to the statement from the girl and the hearsay statement by her mother – contained "only" that the accused had been on a train to Schiphol. In Borgers' opinion, the third piece of evidence could in no way prove that he had made a continued threat to the life of, and indecently assaulted, the girl.

Considering the difference of opinion between the Hoge Raad and the AG¹⁶⁸⁰, the question arises as to what else could have been expected of the appeal lawyer regarding the substantive defence about the reliability of the evidence in this case in this *Too limited a conclusion?*-case. Perhaps the lawyer could have *concluded* explicitly that the defence also argued that there had been not only

¹⁶⁷⁸ AG Hofstee referred to three cases in his Conclusion, ECLI:NL:PHR:2010:BL1493, para. 7 as an advice to the Hoge Raad's case of HR 29 June 2010, ECLI:NL:HR:2010:BL1493, *NJ* 2010, 514 m.nt. Borgers; HR 11 April 2006, ECLI:NL:HR:2006:AU9130, *NJ* 2006, 393 m.nt. Buruma; HR 28 November 2006, ECLI:NL:HR:2006:AY8961, *NJ* 2007, 122; and HR 28 November 2006, ECLI:NL:HR:2006:AZ0265, *NJ* 2007, 123 m.nt. Reijntjes.

¹⁶⁷⁹ Borgers referred to HR 11 April 2006, ECLI:NL:HR:2006:AU91306, *NJ* 2006, 393 m.nt. Buruma.

¹⁶⁸⁰ HR 30 March 2004, ECLI:NL:HR:2004:AM2533, *NJ* 2004, 376, m.nt. Buruma. See, differently, a case in which PG Knigge and the Hoge Raad both agree on an 'explicitly reasoned standpoint' where the defence argued that the accused could not have been at the crime scene, despite a reference in the brief of the appeal in cassation by the cassation lawyer to this Article 359 (2) Sv, HR 12 September 2006, ECLI:NL:HR:2006:AX3862, *NJ* 2007, 121. See also HR 16 May 2006, ECLI:NL:HR:2006:AV2368, *NJ* 2007, 120, where AG Vellinga and the Hoge Raad agree that there was an 'explicitly reasoned standpoint', because the substantive defence met the requirements that Vellinga literally describes as "comprehensive and reasoned on the basis of the applicable case law and (even) sustained by an expert report".

insufficient but also incredible evidence to convict the accused. However, it also appears that the AG does not think that such a formalistic requirement was needed in this case, because the defence could reasonably have been seen to have argued that second argument, despite a specific conclusion at the end of the pleadings.

After this *Too limited a conclusion?*-case has been rendered, there were five recent cases that similarly concerned a refutation of the reliability of a witness, that can help to investigate the demands on counsel further and are therefore being noted here.¹⁶⁸¹

In March 2014, there were two cases in which the Hoge Raad did not overturn the cases in which the appeal court had rejected the explicitly reasoned standpoint on correct grounds under Article 359 (2) Sv. Although the AG advised the Hoge Raad to quash both cases, the Hoge Raad left the case intact of the appeal court that came to a conviction by using the general formula “(...) that the substantive defence is refuted by the pieces of evidence used and that it has no reason to doubt the correctness and reliability of the content of those pieces of evidence”. As in the last mentioned *Too limited a conclusion?*-case, the Hoge Raad did not thus require the appeal court to provide *separate* reasons in its verdict concerning legal and convincing evidence to convict the accused for the indicted offences. In other words, according to the Hoge Raad, the refutation of a substantive defence in these two cases lay in the legal and convincing evidence used against the accused itself,

In April 2014, however, the Hoge Raad does quash two cases in which the appeal courts used the exact same general formula as in the two earlier cases. The annotator of all five cases, Schalken, explains the apparent change of position of the Hoge Raad by pointing out the literal consideration that “(...) it is not evident on the basis of the pieces of evidence that were used why the substantive defence was invalid”.¹⁶⁸² Like AG Machielse in that same case, the Hoge Raad appears to imply, according to the annotator, that the appeal court has to “(...) reason its verdict better on the issue of why the acceptance of the substantive defence would contravene with the pieces of evidence used for the appellant’s conviction”. The annotator therefore comes to the conclusion that “The Hoge Raad is sometimes more generous than the defence expects it to be”.¹⁶⁸³

Therefore, it could be the case that the Hoge Raad is no longer as strict as in the *Too limited a conclusion?*-case, which however resulted in the accused having to bear the consequences of a lawyer who did raise several issues with the credibility of the evidence against the accused but who arguably did not draw a conclusion on that second point. It remains to be seen how the Hoge Raad will continue to deal with appeal courts that do not give a reason in their verdict regarding a rejected substantive defence concerning the (un-)reliability of a witness ex Article 359 (2) Sv.

Nonetheless, even if the Hoge Raad might have come to require from the appeal courts less reliance on the degree to which counsel formulates the substantive defence with such a specific conclusion, the questions raised about the non-interventionist approach in the first cited *Knife tip*-case remain (sub-section 12.5.1.). In that case, in which the accused could potentially have been subject to an instance of ineffective assistance by counsel, the accused had to bear the consequences of the harm caused to the accused in terms of his rights rather than the defence strategy. This particular issue will have to be revisited in the final section of this chapter because difficulties with the accused’s effective defence and fair trial could be caused (see section 12.6.). In the next section, a conclusion will be drawn based upon all previous sections, in order to combine the inferences drawn above (see section 12.6.).

¹⁶⁸¹ HR 8 April 2014, ECLI:NL:HR:2014:848, *NJ* 2014, 390, m.nt. Schalken and 13 May 2014, ECLI:NL:HR:2014:1094 *NJ* 2014, 391, m.nt. Schalken by contrast with the other three cases mentioned by the annotator Schalken: HR 4 February 2014, ECLI:NL:HR:2014:238, *NJ* 2014, 279, m.nt. Schalken; HR 18 February 2014, ECLI:NL:HR:2014:350, *NJ* 2014, 280, m.nt. Schalken; and 4 March 2014, ECLI:NL:HR:2014:476, *NJ* 2014, 281, m.nt. Schalken.

¹⁶⁸² HR 8 April 2014, ECLI:NL:HR:2014:848, *NJ* 2014, 390, m.nt. Schalken and 13 May 2014, ECLI:NL:HR:2014:1094 *NJ* 2014, 391, m.nt. Schalken by contrast with the other three cases mentioned by the annotator Schalken: HR 4 February 2014, ECLI:NL:HR:2014:238, *NJ* 2014, 279, m.nt. Schalken; HR 18 February 2014, ECLI:NL:HR:2014:350, *NJ* 2014, 280, m.nt. Schalken; and 4 March 2014, ECLI:NL:HR:2014:476, *NJ* 2014, 281, m.nt. Schalken.

¹⁶⁸³ HR 8 April 2014, ECLI:NL:HR:2014:848, *NJ* 2014, 390, m.nt. Schalken; 13 May 2014, ECLI:NL:HR:2014:1094 *NJ* 2014, 391, m.nt. Schalken; HR 4 February 2014, ECLI:NL:HR:2014:238, *NJ* 2014, 279, m.nt. Schalken; HR 18 February 2014, ECLI:NL:HR:2014:350, *NJ* 2014, 280, m.nt. Schalken; and 4 March 2014, ECLI:NL:HR:2014:476, *NJ* 2014, 281, m.nt. Schalken.

12.6. Conclusion

This conclusion aims to answer the leading question for this chapter: What obligations do the authorities owe to the accused when confronted with ineffective legal assistance and what means of intervention should they employ in order to redress possible harm to an effective defence in Dutch criminal procedure?

For a first indication of how to answer this question, it is important to note that the Hoge Raad does not appear to have ever quashed a case because the authorities – here: the lower courts – did not intervene in the case when confronted with ineffective legal assistance in Dutch criminal proceedings under what in this research has been called the *Artico*-rule. While AGs, annotators and scholars have construed the requirement of “(...) if a failure by counsel to provide effective assistance is manifest or sufficiently brought to their attention in some other way”, the Hoge Raad appears to stay clear from any explicit judgment regarding an intervention in the case by lower courts which are confronted with ineffective assistance by counsel. It appears that any assessment of counsel’s performance appears to amount to State interference.

However, a positive example does exist of how the Hoge Raad did “sanction” a lower court, which had not allowed an accused to immediately address the bench when a lawyer who he later fired had addressed the bench in a way that did not conform to his earlier defence position (*Counsel dismissed during last word*-case, sub-section 12.2.1.). This can be inferred from the facts of the case at least, as the accused by his last word seemed to claim that his counsel did not provide him with effective legal assistance. This case was overturned so that the accused did not have to bear the consequences of what, he had alleged, had resulted in an instance of ineffective legal assistance. This decision regarding an *assisted* accused, who thereupon was by his own account an *unassisted* accused, also appears to follow the *Hoogerheide*-rule regarding *unassisted* accused who did “not obtain an effective defence”. Under such circumstances, the Hoge Raad appears to require that the lower courts do not remain passive, as the Court would most likely describe it. In this particular sense, the Hoge Raad thus offers equal protection to both types of accused who have not benefitted from an effective defence by self-representation or assistance by counsel. However, the Hoge Raad does not mention that lower courts have to intervene in the case due to ineffective assistance by counsel which was manifest or brought to their attention under the Court’s *Artico*-rule.

It is therefore important to determine whether such equal protection is also being provided in relation to the three aforementioned defence activities by counsel. This will have to be done, alas, on the basis of limited case law on the subject. The three defence activities to be explored are witness requests; activities regarding appeal and cassation; and substantive defences.

With regard to the first example of witness requests, it is important to note that the Hoge Raad has not “sanctioned” a lower court which wrongly rejected the defence request to hear a witness in court by holding that counsel was responsible for “neglecting” to point out a factual error by the appeal court. Lower courts’ verdicts have also been left intact when the *assisted* accused formulated a witness request inadequately while, on the other hand, the Hoge Raad offered legal protection to an *unassisted* accused who used more or less the same words to request to hear witnesses. Finally, the Hoge Raad’s overview judgment, as well as several confirming subsequent cases, appear to indicate that in relation to witness requests strict demands are being placed on counsel, literally referring to this participant in some instances rather than the defence as a unity. Thus, this appears to result in a combination of trends; the first more responsibilities of counsel regarding defence requests and the second from the lower courts which do not have to “fear” that their cases get overturned when relying on the position of the defence in relation to a witness request. As explained in the introduction to this research, such a combination is particularly important for the central issue of ineffective legal assistance and its redress in Dutch criminal proceedings (chapter 1). With “more demands” placed on counsel and “more passivity” allowed from the courts, the risk is that the accused has to bear the consequences of ineffective legal assistance. Not only does it come at the procedural risk of the accused when his lawyer does not provide him with the range of services that can reasonably be his responsibility, such as defence strategy. However, the risk also arises when the advocate has supposedly been “negligent” when he failed to point out the court’s own error regarding not hearing the witness in the case of the accused. As a result of this combination (of more responsibilities of counsel in relation to the hearing of witnesses and a position of the court that is dependent on whether or not the defence has rightly formulated that witness request) issues with fairness may arise. This

might already have been the situation in cases in which an accused was convicted on the mere basis of statements provided by police officers who had never been heard in court.

This leads to the second example of the category of defence activities regarding appeal and appeal in cassation. The Hoge Raad does not seem to “sanction” lower courts if a belated submitted appeal can be attributed to the conduct of counsel, for whose error the accused has to bear the consequences by not getting an appeal in his case at all. Even if the lawyer admits to a professional error, the Hoge Raad leaves a case intact because the accused did not also lodge an appeal while that same accused had explained during the appeal session that she was innocent and did not waive her right to lodge an appeal. Additionally, verdicts of lower courts are not overturned when either an unauthorised or authorised counsel requests a stay of the proceedings by claiming that the accused wanted to attend. The resulting supposed waiver of the right to attend the appeal of the *accused* because of the conduct of *counsel*, has to be borne by the accused whose appeal is thereby adjudicated in his absence. Finally, it seems that the Hoge Raad itself holds counsel responsible for a failure to include a ground in the appeal in cassation brief, therefore concluding that it did not have to examine *ex officio* whether the accused had been wrongly convicted. It did not feel it had to correct what the Court might label “a formal mistake”.

Turning to the last category of substantive defences, it has to be noted from the outset that this category allows this research to draw less conclusions than for witness requests and the aforementioned issues relating to appeal and cassation in appeal matters. First, this study has only encountered limited case law that helps to draw limited conclusions regarding substantive defence, less so than for the two aforementioned categories. This also results in a slightly longer summary of what has been encountered in relation to substantive defences. From the cited cases, it can be inferred that lower courts do not have their judgment overturned by the Hoge Raad when the accused has, at least implicitly, lodged a substantive defence that has the potential to exonerate him, if his counsel failed to do so. Moreover, the Hoge Raad appears to rule that lower courts have to meet a higher standard when having to decide upon a substantive defence by an unassisted accused than an assisted accused. As a final finding, it appears that the *defence* has to meet standards for substantive defences that arise from standards set for the courts. If the courts reject substantive defences, they have to meet these standards when they reason their rejections in their verdicts. As a result, the distinction between the court’s obligations of truth finding and fairness protection, on the one hand, and the responsibility of the defence for submissions of substantive defences on the other, is not always clear. For example, the courts have to respond with a “(...) clear, presented with arguments, and ending in an unequivocal conclusion” to an explicitly formulated standpoint by the defence – or prosecution for that matter. Now it appears also that the defence – and de facto often counsel – has to meet this same standard of clear, presented with arguments, and ending in an unequivocal conclusion. In itself, this inference about the lack of clarity has consequences for the risk that the accused has to bear the consequences of ineffective legal assistance regarding substantive defences in Dutch criminal proceedings. That risk arises because lower courts may *allege* that the defence did not submit a substantive defence and therefore not have their cases quashed because the defence, rather than the lower courts, can be held responsible for this supposed “negligence”. It is less clear than the case of witness requests, but this last category of defence activities of substantive defences also gives some indication as to the two trends of more being required from counsel while the bench can be reactive rather than active. In particular, no case has been encountered in which the Hoge Raad has held that counsel was responsible for an error by the court regarding a question under Articles 348 and 350 Sv that a substantive defence could have addressed. Certainly, it will be more difficult because of the nature of substantive defences to explore whether the Hoge Raad will accept “more passivity” of lower courts. This observation is based on the understanding that lower courts have their own obligations under Articles 348 and 350 Sv and substantive defences can touch upon all issues also encompassed in these formal and substantive questions about the criminal case. Consequently, an assessment is inevitably complex as to whether “more demands” are placed on counsel regarding substantive defences while “more passivity” is allowed of the courts where those are made or not. Nonetheless, this overview on substantive defences has given some indications as to how lower courts might not always have to intervene in the case when confronted with ineffective legal assistance in relation to a wrongly formulated or full omission of a substantive defence.

To come to a conclusion on all four issues examined in this chapter, it is now important to see all previous sections in conjunction with each other. When combined, it appears that both lower courts and the Hoge Raad itself do not seem to offer redress for several instances of both alleged and actual ineffective assistance by counsel. Alleged ineffective legal assistance occurs where, for example, a lawyer has to correct the appeal court's factual error, which thus results in consequences that have to be borne by the accused. The accused also appears to bear the consequences of actual ineffective assistance by counsel, such as when counsel does not raise a substantive defence that might have been integral to an effective defence; lodged an appeal submission after the deadline has passed; or asked for appeal in cassation about what can be the most damaging of all for the rights of the accused: a wrongful conviction. While it can be understandable that the Hoge Raad wants to prompt counsel into professional conduct, it may possibly result in real difficulties with the rights of the accused. As AG Vellinga stated in the context of the *Counsel laying down the defence before prosecution's submission*-case¹⁶⁸⁴: "(...) that cannot be a reason to have the consequences of the accused's counsel essentially lacking legal assistance to the accused come at his procedural risk." (section 10.2.). Without redress being afforded to the accused who "suffers" harm from ineffective legal assistance in Dutch criminal proceedings, not only the rights of the accused but also, by extension, the fairness of the entire criminal procedure might be damaged. An important question is, of course, whether the aforementioned approach of mostly the Hoge Raad conforms to the Convention on this issue regarding the principal research topic of ineffective assistance by counsel and its redress in Dutch criminal procedure. This particular question will have to be reserved until the final chapter that seeks to answer this normative central research question (chapter 13). However, the next section will make a comparison between the descriptive answers regarding both the Convention and Dutch criminal proceedings on the main theme of this book (section 12.7).

12.7. Overall conclusion Part VI Intervention due to ineffective legal assistance

The overall conclusion of this Part seeks to answer the leading question that guided the previous and the present chapter (chapters 11 and 12): What obligations do the authorities owe to the accused when confronted with ineffective legal assistance and what means of intervention should they employ in order to redress possible harm to an effective defence within criminal proceedings?

This question will be answered from what currently is the third vertical perspective, because of the direct relationship between the authorities which intervene in the case for the sake of protection of an effective defence of the accused. This overall conclusion follows chapter 2 on the conceptual framework that had elaborated upon aspects such as the relevant rights, context and cross-cutting notions and perspectives and sets out to answer the leading sub-question for both the Convention and Dutch criminal proceedings. It has to be noted that any answer sought to the aforementioned central question for this Part VI Intervention due to ineffective legal assistance takes into consideration the factors that affect conclusions that can be drawn on the basis of the case law of the Court and the contextual background information provided about Dutch criminal proceedings (chapters 3 and 4). A comparison will therefore be made here between the topic of interventions in the case due to ineffective assistance by counsel, while following the outline of the respective chapters and especially their concluding sections (sections 11.4. and 12.6.). Not only will this overall conclusion deal with the standard for incompetency of counsel for there to be ineffective assistance by counsel but also harm to the accused and related subjects. Ultimately, all these topics will also be important for the answer to the central evaluative research question because of their bearing on the central topics of ineffective assistance by counsel and its redress within Convention-conforming Dutch criminal proceedings (chapter 13).

While the Court established and, in repeated judgments confirmed, its *Artico*-rule of intervention by the authorities in the case that is being required "(...) if a failure by counsel to provide effective legal assistance is manifest or sufficiently brought to their attention in some other way" (e.g. *Artico v. Italy*; chapter 11), the Hoge Raad never appears to have established that lower courts had to do so, at least not explicitly. The Hoge Raad – which does quash cases in which an unassisted accused did not have an effective defence and where the accused fires his lawyer because of perceived ineffective legal assistance – does not seem to want to assess counsel's performance at all. Not only

¹⁶⁸⁴ HR 12 June 2010, ECLI:NL:HR:2012:BU7644, *RvdW* 2012, 870.

scholars but also AGs – and perhaps also the Hoge Raad – appear to agree that the Court’s *Artico*-rule has to be construed as requiring only an intervention in the case by the authorities when “(...) the lawyer is absent or otherwise does practically nothing at all for the accused” (e.g. the scholarly work of Spronken; chapter 1). They seem to think that the Court’s assessment of the conduct of counsel is restricted to questions of absenteeism, or unwillingness to act, so that the Court avoids any qualitative assessment of a lawyer’s performance because of the nature of the relationship between a lawyer and the accused. They appear to believe that the Court makes no distinction between State intervention and State interference in this regard. Moreover, they seem to agree that the Court clearly does not consider it within its jurisdiction to be able to criticize or reach conclusions on the competence of any individual lawyer, nor does it encourage what they suppose will necessarily be interference by the authorities. This interpretation of the *Artico*-rule is relevant because arrangements regarding the right to counsel appear to heavily depend on this interpretation of the Court’s case law. This is also manifested in the Netherlands in the minimal approach to *Salduz* that has for a long time, for example, been case fact-driven in its broader scope for minor accused. Consequently, the Hoge Raad and lower courts which do not have their cases quashed by this highest court can almost always be passive when confronted with ineffective legal assistance in Dutch criminal proceedings. Moreover, the Hoge Raad is almost always passive when confronted with ineffective legal assistance. The same goes for the lower courts.

The absence of almost any case law developments regarding what constitutes ineffective legal assistance in Dutch criminal proceedings also appears to have a relevant side-effect in so far as ineffective legal assistance as alleged by (lower) courts is concerned. In the context of three defence activities of witness requests, activities regarding appeal and cassation and substantive defences, chapter 12 has given an indication as to how some responsibilities of the authorities have been attributed to counsel. For example, counsel has been held ultimately responsible for neglecting to point out to the court its own error. Furthermore, lower courts did not have their verdicts quashed where the accused did – but the lawyer did not – point out a substantive defence with the potential to disculpate the accused. Also, the Hoge Raad itself did not invite a lawyer to rectify the lack of a specific ground for appeal in cassation that the accused had been wrongly convicted. In these limited case law examples, the accused had to bear the consequences and could not resort to redress with an effect on the course and outcome of the proceedings against him. These examples especially raise questions about the degree to which the Hoge Raad itself and lower courts might fail to intervene in the case when the right of the accused to an effective defence, and therefore also his right to a fair trial, is disrespected. If they are to conduct such an assessment, the Hoge Raad and the lower courts certainly have to be highly deferential when assessing counsel’s performance and give significant latitude to counsel who might have made a tactical decision. However, the current wholly non-interventionist approach to ineffective legal assistance and its redress in Dutch criminal proceeding does not seem to recognise, or at least not consistently, how the right to counsel is being interpreted by the Court. The Court holds there to be a substantive right to *effective* assistance by counsel, concluding that the negative obligation of State interference has to be distinguished from the positive obligation of an intervention in the case. The Court requires the latter when the *Artico*-rule directly applies. This rule is applicable when counsel’s legal assistance is “defective in a fundamental respect”. Rather than cause harm in terms of the strategy of the defence, legal assistance can be defective in a fundamental respect when the rights of the accused end up being harmed instead. Taking all these important points into consideration, the next chapter of this research will have to draw a conclusion. This conclusion will rest on an exploration as to whether or not the current approach to ineffective assistance by counsel and its redress in Dutch criminal proceedings, as described in the chapters above, conforms to the Convention (chapter 13).

PART VII CONCLUSION, RECOMMENDATIONS, AND A SUMMARY

CHAPTER 13. CONCLUSION AND RECOMMENDATIONS

13.1. Introduction

This research has tackled the two main research themes – ineffective assistance by counsel and its redress for at least its most serious manifestations in Dutch criminal proceedings – from as many relevant angles as possible.¹⁶⁸⁵ For the most part, this study has had to be chiefly exploratory (In Dutch: *verkennend*). This is despite earlier important work on positive norms that regulate counsel’s conduct in the criminal process in the Netherlands and defence as well as fair trial rights (also under the Convention) in more general terms.¹⁶⁸⁶ Consequently, original research was necessary in order to determine when Dutch criminal courts are confronted with ineffective assistance by counsel.¹⁶⁸⁷ This determination has been made on the basis of Dutch law and case law which will be evaluated in this chapter for its compliance with external benchmarks of directly binding Convention minimum guarantees. Several internal benchmarks, inferred from comparisons to defences lodged by either unassisted or assisted accused persons, will also be taken into consideration, though less prominently. Against this background, this chapter sets out to answer the evaluative central research question, which is:

To what extent does the current approach to ineffective legal assistance and its redress for the accused in Dutch criminal procedure comply with the minimum guarantees regarding the right to an effective defence in a fair trial set by the Court?

Two descriptive sub-questions are integral to this overall question: what are those Convention minimum guarantees and what is the approach to ineffective legal assistance and its redress in Dutch criminal proceedings? They call for descriptions of four elements of an effective defence in a fair trial under the Convention and in Dutch criminal proceedings respectively: (i) the right to counsel; (ii) the lawyer-client relationship; (iii) State interference with counsel; and (iv) State intervention in the case due to ineffective legal assistance. In this chapter, all four aforementioned elements that have been approached in order to answer the two descriptive sub-questions will be brought forward in order to formulate an answer to the evaluative central research question. For its outline, this chapter will build on the conceptual framework which created the structure for this entire research (chapter 2, Part II). In summary, that framework consists of: relevant rights, the relevant context and cross-cutting notions and the following four perspectives: a first vertical, a horizontal, a second vertical and, finally, a third vertical perspective. Therefore, this chapter will combine all these aforementioned elements in order to evaluate the compliance of the current approach to ineffective assistance by counsel and its redress in Dutch criminal proceedings with the Convention minimum guarantees.

Outline

This chapter is divided into four more sections. The first section will turn to the first part of that answer by discussing, in conjunction, the four sets of relevant Convention minimum guarantees (section 13.2.). The penultimate section will elaborate upon specific elements of the approach to ineffective legal assistance and its redress in Dutch criminal procedure that do not (fully) comply with the relevant Convention minimum guarantees (section 13.3.). Finally, recommendations will be made that offer solutions to specific elements of non-compliance of Dutch criminal procedure with the aforementioned Convention minimum guarantees, such as a rights-based approach to ineffective legal assistance and its redress within the criminal proceedings (section 13.5.).

¹⁶⁸⁵ See chapters 1 and 2.

¹⁶⁸⁶ See chapter 1.

¹⁶⁸⁷ See chapter 2.

13.2. The evaluation of the relevant Convention minimum guarantees

Many important developments regarding the right to counsel and related defence rights in the Netherlands seem to have been prompted, at least, by the Court's case law. For example, changes to Dutch criminal proceedings in terms of the hearing of witnesses and legal assistance during *in absentia* proceedings have followed such cases. Furthermore, it was only *after* the Court adjudicated its *Salduz*-case, that a right to counsel at the stage of police interrogations was granted to the accused in the Netherlands. Moreover, the interpretation of that *Salduz*-case by the Hoge Raad appears to rely heavily on the facts of the Court's case. Focusing on the fact that *Salduz* was a minor, the Hoge Raad construed that this case law requires that an adult accused is afforded a right to consultation *before* police interrogations, while a minor has this right coupled with a right of presence *during* police interrogations. In addition, several other changes to defence rights in Dutch criminal proceedings appear to have been made due to having to abide by Convention minimum guarantees that, moreover, seem to have been construed with heavy reliance on the facts of such cases – as noted in this book.

For this research into ineffective legal assistance and its redress in Dutch criminal proceedings as solutions for its most serious manifestations, it is important that the Convention is binding on the monist country of the Netherlands. This means that, *even if* Dutch law and case law do not grant the accused a right to obtain redress when confronted with ineffective legal assistance that damages his personal rights, rather than defence strategy, this obligation would nevertheless still directly arise under the Convention. Of course, this is assuming the Court holds there to be such an obligation. Even more so, Dutch criminal courts, which certainly have to abide by these Convention minimum guarantees, are not precluded from going above and beyond these basic standards of a fair trial.

For the answer to the central research question, this study has examined the minimum guarantees set by the Court for the right of the accused to an effective defence in a fair trial. The following sections will give an overview of the different components of this right to an effective defence, which have also been listed as external benchmarks as opposed to internal benchmarks that have been mostly derived from comparisons between the unassisted and assisted accused's defence activities (sub-sections 13.2.1. to 13.2.5.).

13.2.1. The underpinning Convention right to effective assistance by counsel

Since at least 1980, the Court appears to have recognised that several rights and principles are not fulfilled if counsel fails to provide *effective* legal assistance to the accused (e.g. *Artico v. Italy*; chapter 11). Repeated case law appears to indicate that those rights and principles include: the right to counsel under Article 6 (3) (c); the right to a fair trial under Article 6 “as a whole”; the principles of equality of arms and adversariality and lastly the equal protection of the right to legal assistance by retained and appointed counsel. In the cases that in this study have been clustered under the *Artico*-rule, the Court appears to explain the relationship between the effective assistance-requirement and the general nature of the quality required of counsel's performance that should not “(...) shirk his duties”. The centrality of the right to counsel is formulated as follows: “(...) a fundamental right among those which constitute the notion of fair trial and ensuring the effectiveness of the rest of the foreseen guarantees of Article 6 of the Convention, is a prime example of those rights” (e.g. *Pishchalnikov v. Russia*; chapter 5). Therefore, the Court has established the aforementioned Convention minimum guarantees in order to ensure that the accused is “(...) effectively defended by a lawyer, assigned officially if need be” as “one of the fundamental features of a fair trial”, primarily at an adversarial hearing as explained in this research (e.g. *Artico v. Italy*; chapter 11). From these considerations, it can be inferred that the Court appears to construe the right to counsel not formally – in that mere presence of counsel is insufficient for the Convention to be respected – but rather requires that the accused has obtained “practical and effective” legal assistance. In summary, in principle, the Convention right to counsel will not be respected if *effective* legal assistance has *not* been ensured.

13.2.2. The Convention right to counsel

The Convention minimum guarantees regarding the right to counsel are significant for this research because without a legal basis there cannot, reasonably speaking, be a Convention-worthy complaint about *ineffective* legal assistance. The Convention right to counsel is a first important component of an effective defence in a fair trial (as referred to in the central research question) which consists of a right to be legally assisted by retained and appointed lawyers.

Under the Convention, the accused is entitled to the right to counsel when he is “(...) charged with a criminal offence” (section 5.2.). The Court determines autonomously whether that “charge” is present in the adjudicated case. This means that even if domestic law does not consider there to be an accused, but rather a witness who later will be charged, the Court will decide itself whether that individual was deserving of the protection of the right to counsel (*Brusco v. France*; chapter 5). Moreover, once started, that charge with a criminal offence continues through to the end of the proceedings, including the appeal in cassation stage.

The right to counsel in relation to an effective defence – in summary an effective defence by counsel – is often seen in the context of the two principles of equality of arms and adversariality. Equality of arms is usually pointed out by arguing that there is almost always a lawyer on the side of the prosecution as well. Adversariality is often mentioned or implied, because the Court finds it germane that the domestic court has the benefit of, in principle, the two opposing sides of defence and prosecution bringing forward factual and legal arguments. In summary, by using these two principles the Court applies the same grounding and scope for its interpretation of the right to legal assistance by appointed and retained counsel.

However, given that the Court appears to deal more often with the right to appointed legal aid counsel than retained counsel this sub-section will inevitably have more to present on free legal aid by appointed counsel for indigent accused where necessary “in the interests of justice” (sub-section 5.2.2.). The case law of the Court regarding the right to retained counsel touches more, as the Court puts it, upon the *restrictions* on the lawyer of “his own choosing”. This will be reported on in the context of the lawyer-client relationship because of its impact on the assumed best possible defence by the lawyer of the accused’s choice (see in the next sub-section 13.2.3).

With regard to the obligations of the authorities to appoint a legal aid lawyer to ensure an effective defence by counsel in a fair trial, the Court holds the authorities to their obligation to appoint counsel in “certain cases”. “Certain cases” arise when the accused is vulnerable as a person, is in a situation that makes him vulnerable, or both. On a case-to-case basis the Court appears to establish whether the accused is entitled to appointed counsel and will accept that authorities have not appointed a legal aid lawyer if, for example, only a low sentence is “at stake” (to use its own terminology). Nonetheless, the Court’s wording in *Artico v. Italy* strongly suggests that in all but exceptional situations such appointment obligations arise in the aforementioned “certain cases”.

The Court also “derives” the right to counsel from other Convention rights, such as the right of the accused to remain silent and not to incriminate himself (e.g. *Salduz v. Turkey*; section 5.3.1.) and the right to witness confrontation (e.g. *Melnikov v. Russia*; section 5.3.2.). Similarly, the Court can seek to protect the rights under Articles 3 and 5 by requiring assistance by counsel so that equality of arms and adversariality are ensured. Under such circumstances, the Court also seeks to ensure equal protection to accused who are entitled to retain counsel but not to be appointed legal aid counsel under domestic law, for example during pre-trial identification proceedings from a “derived” right to counsel (e.g. *Yunus Aktaş and others v. Turkey*; section 5.3.2.3.).

Moreover, the Court appears to take a “critical” stages-approach to the Convention right to counsel, which means that the right does not extend to all stages at which legal assistance would be *helpful*, but has to be afforded at “critical” stages for the fairness of the criminal procedure “as a whole” (e.g. *John Murray v. the United Kingdom*; sub-section 5.2.3.). Examples of such “critical stages” appear to include police interrogations, proceedings regarding pre-trial detention, pre-trial investigative or evidence gathering-acts “other” than police interrogations (like a house search), trial, appeal (on points of law and facts) and appeal in cassation (points of law “only”).

The Court especially appears to examine whether the accused has been afforded an effective defence by counsel at the adversarial hearing. This adversarial hearing usually entails the first instance and/or *de novo* appeal phase (where existing in the domestic jurisdiction). An adversarial hearing has to abide by the aforementioned requirements of equality of arms and adversariality, a decision that the Court makes autonomously. While being aware of its distance from the facts, the Court assesses whether the national courts have fairly examined the facts of the case and the points of law, without making such a factual assessment itself (section 5.3.3.). This emphasis on the adversarial hearing does not mean, of course, that the Court does not also examine whether an effective defence by counsel has been provided pre- and post-trial.

Beginning with pre-trial, one specific aspect of the right to counsel at the “critical” stage of police interrogations will be highlighted. The Court’s *Salduz*-case law has raised so many questions, especially in civil law countries such as the Netherlands (for other elements, see Part III Right to counsel). This research has understood the *Salduz*-rule as meaning that, normally, all accused – minor and adult – will be entitled to assistance by counsel as a right to consult with his lawyer prior to and *during* custodial police interrogations. The reasons for this interpretation of the *Salduz*-rule are threefold. First, for police questions being posed outside of custody, the Court considers that legal assistance is supportive of protecting the right to remain silent and the right not to incriminate oneself. Second, for placement in police custody, legal assistance is deemed to help protect the right to an effective defence by counsel from that deprivation of liberty. As explained above, that effective defence by counsel should normally come to full fruition during the “critical” stage of an adversarial hearing of the first instance trial and the *de novo* appeal (where present in the jurisdiction). Third, during *custodial* police interrogations, both circumstances are combined. Therefore, for the protection of all three rights, the lawyer normally has to be able to consult with the accused before, and be present during, police interrogations. The underlying rationale appears to be that counsel can not usually change the course of the interrogations, but can protect – and have protected by the authorities – the right to remain silent, the right not to incriminate oneself and the right to an effective defence by counsel. Therefore, flowing from the Convention rights themselves, an effective defence by counsel at police interrogations will not usually be provided if no lawyer can confer with the accused before, and be present *during*, custodial police interrogations.

Turning to post-trial, the *Artico*-case is a case in point to illustrate that, on cassation, legal assistance must be effective for the Convention to have been complied with, as will be explored further below (sub-section 13.2.5.). Thus, while the requirements on first instance trials and *de novo* appeal sessions are even stricter than when a court only adjudicates points of law, *effective* legal assistance can also be required during the “critical” cassation stage (section 5.3.4.).

While the right to an effective defence by counsel “already” has to be afforded pre-trial, this does not (yet) mean that legal assistance has to be provided by the lawyer to the accused continuously from the earliest stage, such as placement in police custody up to the last exhausted remedy. “Only” at these critical stages will the Court explore what the effect is of the absence of effective legal assistance, such as at the stage of custodial police interrogations (e.g. *Pavlenko v. Russia*; sub-section 5.3.1.3.). Consequently, the Court will not accept it if the law is a formal impediment to the Convention right to counsel, if effective legal assistance at the specific stage is “critical” for the fairness of the criminal procedure “as a whole”. This “critical” stages-approach does not mean that the Court considers the right to counsel to be a one-off right that can be fulfilled by enforcing it once and once only. For example, in the *Salduz*-case, the Court deliberately refers to requiring legal assistance “as from” the first police interrogation. Therefore, while starting at police interrogations, the right to counsel will normally have to be afforded during subsequent identification proceedings or identification parades. A lack of effective legal assistance pre-trial can irreparably damage the rights of the accused so that no effective defence in a fair trial can subsequently be provided, even if counsel’s performance at trial was perfect. Under such circumstances, the Court repeatedly holds that: “neither the assistance provided subsequently by a lawyer nor the adversarial nature of the proceedings could counteract the defects which had occurred during his initial questioning”.

Another point that has to be made in the context of the Convention right to counsel is its waiver. The important background to how the Court deals with the waiver of the Convention right to counsel is that it is an entitlement, not an obligation (section 5.4.). Consequently, the accused who wants to proceed *pro se*, can normally renounce his right to counsel in order to opt for self-representation. For that waiver of the right to counsel to be Convention-conforming, the Court checks whether the national courts have ensured that the accused has renounced this right up to the standard of “knowingly and intelligently”. The underlying rationale for this higher waiver standard appears to be that the right to counsel is deserving of “special protection”. While other rights such as the right to attend the hearing or to appeal need to be checked up to the normal waiver, the “knowingly and intelligently” waiver standard helps to guarantee the right to an effective defence by counsel, which is not only an individual right of the accused but also a procedural guarantee. As explained above, that last consideration is also demonstrated by how legal assistance is supportive of the other Convention rights such as the right to remain silent.

Certainly, neither the right to legal assistance nor the right to self-representation are absolute. On the contrary, the Court appears to acknowledge that the domestic authorities are best placed to determine whether the interests of justice require that an accused will have to resort to counsel, rather than conduct his own defence. Therefore, once the domestic court is assured that the accused waived his right to counsel in order to proceed *pro se*, it matters not that counsel could have given the accused a better defence than he had given himself. Thus, that accused does not have a Convention-worthy complaint for *ineffective* self-representation. In this way, the Court protects the free choice of the accused who normally should not have a lawyer forced upon him. What happens with a subsequent complaint about *ineffective* legal assistance is another matter, which will be reserved for the next sub-section.

Two final issues regarding the right to an effective defence counsel must be noted. First, that the Court does not appear to hold that the appointment of standby counsel would be an impermissible restriction of the right of the accused to self-representation (sub-section 5.2.6.). Unlike the previous comment regarding the accused who remains unassisted by choice, in principle, a complaint about the poor performance of appointed standby counsel would be open to this assisted accused. Having seen these Convention minimum guarantees regarding the right to counsel, the following sub-section will turn to what the accused can reasonably expect of counsel in the lawyer-client relationship (section 13.2.3.).

13.2.3. The lawyer-client relationship under the Convention

Against the background presented in the previous sub-section, the Convention minimum guarantees regarding the lawyer-client relationship are relevant for this research amongst other issues because an indication of the responsibilities counsel owes towards the accused helps the Court to focus on ineffective legal assistance. The Court's dealing with the lawyer-client relationship is a second important component of an effective defence by counsel in a fair trial, since an accused should not, out of fairness, have to bear the consequences of ineffective legal assistance when that damages the accused in a specific manner that will be discussed in detail in this sub-section. Given that a common assumption is that effective legal assistance can normally best be provided by counsel of the accused's choice, the Convention minimum guarantees regarding the choice of retained and selection of appointed counsel will be addressed first.

With regard to choice of retained counsel, it is important that the accused's right to hire private counsel includes the right to select counsel of "one's own choosing". However, as also has to be stressed, the choice of retained counsel is not an absolute right, according to the Court. For example, the Court will usually not find a violation of the Convention, if the domestic court limits this right to choose retained counsel out of permissible scheduling requirements. However, the Court does require that, when the authorities make scheduling requirements, the absence of assistance by counsel of the accused's "own choosing" should not damage the rights of the accused such as the right to attend and have counsel present at "critical" stages. This last topic of the personal rights of the accused will have to be revisited later in this overview of Convention minimum guarantees regarding the lawyer-client relationship, but not before the permissible restrictions on the right to appointed counsel have been elaborated upon.

For the selection of appointed legal aid counsel, it is important to reiterate that the accused's right to appointed counsel "of his own choosing," is necessarily subject to certain limitations. Such restrictions are present because it is for the authorities to decide whether the interests of justice require that the accused be defended by counsel appointed by them. Consequently, the Court requires that the accused is assisted by an appointed lawyer who is capable of providing effective legal assistance, rather than requiring that the accused always has the lawyer "of his own choosing".

With regard to the distinction between actual and alleged ineffective legal assistance, this overview must return to the element of free choice first, because out of fairness an accused should usually be free to opt for legal assistance. However, where the accused does choose to be assisted by counsel, the Court can hold that lawyer responsible for defence strategy – even if it goes against the wishes of the accused (*Stanford v. the United Kingdom*; section 7.2. and *Mađer v. Croatia*; sub-section 11.2.3.). This means that, in principle, there will be no actual ineffective legal assistance in terms of the Convention, even if the lawyer made such tactical decisions contrary to the accused's wishes. This particular idea corresponds not only with what the Court has called the "(...) independence of the Bar

from the State”, but also with the following ideas about the role division between the accused and his lawyer. These are as follows:

This concept of counsel’s control over strategy also corresponds with the ideas of the Court regarding the role division between counsel and the accused. The Court holds that for counsel, effective legal assistance requires his ability to “zealously” defend the accused by being able to “(...) assess the relevance and usefulness of a defence argument” (e.g. *Panovits and Kyprianou v. Cyprus*; chapter 5). For the accused, it is important that he will have to be able to make “(...) decisions (...) as to how best to present an accused’s defence at trial (...) and it is the responsibility of the accused to select, with the advice of counsel, the defence which he wishes to put before the court” (e.g. *Ebanks v. the United Kingdom*; chapter 5). Thus, while the lawyer is responsible for defence strategy, the accused appears to retain the ultimate say about some decisions. These decisions, which may have a strategic element, concern rights that are so “personal” for the accused that he has the final word on them. Examples of such “personal rights” are the right to remain silent, the right not to incriminate oneself, the right to attend the hearing and the right to an effective defence, primarily at the adversarial trial hearing. Decisions about such rights have to be respected by the lawyer, who should follow the instructions of the accused. Therefore, the Court will usually infer it was ineffective legal assistance if counsel’s (negative) conduct ends up harming the accused’s personal rights, rather than defence strategy.

This idea regarding the distinction between actual and alleged ineffective legal assistance also appears to be reflected in the four delineated functions of counsel. Those functions are (i) the organisation of the defence, including the preparation of the adversarial trial hearing; (ii) the gathering and testing of evidence, including witness evidence; (iii) the check of investigative measures and use of other means to discover – exculpatory – materials; and (iv) for detained suspects, the check of the detention situation, including its justification, length and conditions and a more humanitarian type of assistance. For instance, the Court holds that counsel’s role in relation to the accused’s personal right to remain silent – which is intimately linked to the right not to incriminate oneself – is so important that the accused must not be “penalised” for following counsel’s advice to remain silent (e.g. *Condron v. the United Kingdom*; section 7.4.1.). Under such circumstances, not only the personal rights of the accused to remain silent and the right not to incriminate himself are at stake, but also the right to an *effective* defence by counsel. With regard to that latter right, as the court would put it, legal assistance would lose much of its *effectiveness* if the authorities would “sanction” the accused who follows his lawyer’s advice. Again, this overview indicates how the Court will consider it to be ineffective legal assistance if the authorities will not allow the accused to have his personal say about the rights over which he, not his lawyer, is the decision-maker.

It is only natural that this overview about the lawyer-client relationship already spills over into questions about what the Court would consider if the lawyer *fails* to follow the instructions of the accused as to a matter within the accused’s control regarding his aforementioned “personal” rights, for example. However, such points will be discussed in the corresponding sub-section (sub-section 13.2.5.). The present sub-section will conclude by remarking that where the realm of counsel’s responsibilities end and those of the authorities begin, can already be examined in the next sub-section (sub-section 13.2.4.).

13.2.4. State interference with counsel under the Convention

Against the background presented in the previous sub-section, the Convention minimum guarantees regarding State interference with counsel are relevant for this research, *inter alia*, because of its focus on the negative obligation of the authorities to not hinder effective legal assistance. The Court’s approach to State interference with counsel is a third important component of an effective defence by counsel in a fair trial, because the *authorities* should not thwart effective legal assistance by interfering with counsel. For this research, this particular topic is relevant because the Court appears to consider the lawyer’s supposed (negative) conduct to amount to mere *allegations* of ineffective legal assistance where the authorities hamper counsel from providing effective legal assistance to the accused. With a reference to ineffective legal assistance *per se*, harm done by the authorities to the accused’s personal rights – rather than defence strategy – appears to amount usually to a violation of the Convention even if counsel’s performance is perfect. Three examples of State interference with counsel include state-imposed restrictions on the lawyer, defective appointment of the legal aid advocate and State

interference in the lawyer-client relationship (chapter 9). All three examples of State interference with counsel will be discussed separately and their possible consequences for the accused will be elaborated upon at the end.

First, the Court appears to conclude that authorities should not impose restrictions on counsel, so that the accused is not being afforded an effective defence at the “critical” stage of an adversarial hearing as a result. For example, the Court holds there to have been a violation of the Convention when counsel wrongly explained to the bench that he could not be present during the session (by fax rather than phone) and the national court proceeds without counsel so that the accused had no legal assistance during the stage of the closing speech. The Court does not agree with the authorities which alleged that counsel was “negligent” by not informing the court correctly about his absence. Rather, the Court holds the authorities responsible for hindering the lawyer from providing the requisite effective legal assistance because the accused’s personal rights end up being harmed. Under such circumstances, the Court does not have to *assess* whether subsequent legal assistance, if any, was *effective* or not and concludes *per se* a breach of fair trial.

Second, a defective appointment of a legal aid lawyer or even no appointment at all, can amount to a violation of the Convention if the authorities hinder effective legal assistance and thus do not live up to the aforementioned negative obligation. The underlying reasoning appears to be fourfold. It is for the authorities to decide whether the interests of justice require that the accused should be defended by counsel appointed by them. Consequently, the right of the accused to appointed counsel “of his own choosing,” is thus necessarily subject to certain limitations. For this reason, the authorities have an obligation to appoint legal aid counsel correctly because they are not allowed to hinder effective legal assistance by defective or no appointment. Such correct appointment is necessary because the accused will only obtain legal assistance by an appointed legal aid lawyer, if the authorities fulfil this obligation. Again, no inquiry into counsel’s performance needs follow, because a fair trial is not afforded due to the authorities’ failure to live up to their negative obligation.

Third and finally, the Court appears to hold an interference in the lawyer-client relationship a violation of the right to an effective defence by counsel because “(e)ffective legal assistance is inconceivable without respect for lawyer-client confidentiality, which “encourages open and honest communication” between the lawyer and the accused. Consequently, such hindrance to effective legal assistance by breaching privilege and confidentiality can, in itself, amount to a violation of the Convention, even if the subsequent assistance by counsel was perfect. Again, the reasoning that underpins these decisions of the Court appears to be that State interference in the lawyer-client relationship has the potential to harm the ability of counsel to provide effective legal assistance to the accused because their exchanges have to be based on a relationship of trust. There does not have to be actual State interference either for the Court to conclude a violation; “(...) a genuine belief on reasonable grounds” that such an interference will happen is enough for the Court to hold there to have been State interference and thus a violation of the right to a fair trial.

In all these instances of State interference, the Court does not even have to assess the *effectiveness* of the assistance by counsel at the adversarial hearing in order to hold a violation of the right to a fair trial. This results in the situation whereby the accused does not have to bear the consequences of alleged, rather than actual, ineffective legal assistance. While this sub-section focused on a *negative* obligation not to hamper the right to effective legal assistance, the next one will turn to the *positive* one (sub-section 13.2.5.).

13.2.5. Intervention due to ineffective assistance by counsel under the Convention

Against the background presented in the previous sub-section, the Convention minimum guarantees regarding interventions by the authorities out of ineffective legal assistance are relevant for this study, *inter alia*, because of its focus on the positive obligation of the authorities to ensure effective legal assistance. The Court’s approach to such interventions in the case is a fourth and final important component of an effective defence by counsel in a fair trial, because the authorities should prevent the accused ending up being harmed in his personal rights due to ineffective legal assistance. In its case law (that in this research has been summarised under the *Artico*-rule) the Court has already established in 1980 that: “(...) within the ambit of criminal proceedings, the competent national authorities are required under Article 6 to intervene only if a failure by counsel to provide effective legal assistance is manifest or sufficiently brought to their attention in some other way” (*Artico v. Italy*; sub-section

11.2.1.). The *Artico*-rule entails that the authorities should not “remain passive” when confronted with counsel’s (negative) conduct that encompasses legal assistance that is “(...) defective in a fundamental respect” (*Ebanks v. the United Kingdom*; section 11.2.1.).

For the Court to conclude that the authorities have not lived up to the *Artico*-rule, the accused must demonstrate the presence of either condition of, in summary, manifest ineffective legal assistance or due notification thereof. The Court assesses these conditions on the grounds of their objective reasonableness. On the basis of all the facts of the case, the Court will determine whether the conduct of counsel can be deemed outside of the realm of what can reasonably be expected of professional competent counsel. This last remark does not mean that the Court assesses the competency of counsel on the basis of any domestically generally accepted performance standards for lawyers. Rather, the Court scrutinises whether counsel’s services ensure equality of arms and an adversarial hearing. In other words, the aforementioned standard of “fundamentally defective” legal assistance was formulated by the Court in the context of wrong pre-trial advice about the “personal” right of the accused to remain silent and his right not to incriminate himself.

No distinction as to the assessment of ineffective assistance by counsel is being made between retained or appointed lawyers. Earlier case law of the Court might have given the impression that deficient trial performance by retained counsel does not present a violation of the Convention unless that deficiency was “manifest” so that the bench should have known that no adversarial hearing could reasonably occur. Perhaps it could even have been believed in the earliest days that performance by retained counsel was distinguished from incompetency by appointed counsel, where the State was thought to have greater responsibility because the authorities had appointed that lawyer. However, by 1984 the Court had made clear that no such distinction between retained and appointed counsel, on the issue of their possible provision of ineffective legal assistance, followed from the Convention (*Goddi v. Italy* and later also *Orlov v. Russia*; sub-section 11.2.2.).

The Court makes its assessment of the performance of counsel with sensitivity to its distance from the facts. The Court is itself reticent and thus does not seem to want domestic courts second-guessing counsel’s performance. This inquiry into counsel’s performance is therefore being made with significant latitude to the possibility that the lawyer made tactical decisions, moreover respecting the independence of the lawyer or Bar from the State (*Stanford v. the United Kingdom*; chapter 7). The Court realises that judicial assessments of counsel’s performance are, and should be, highly deferential and not distorted by hindsight knowledge. Therefore, it appears from the repeated case law that the Court and, by extension, national courts appear to be required to evaluate the conduct of counsel from the perspective of the lawyer at the time. Because of the difficulties inherent in making an assessment of counsel’s performance, there is a strong presumption that the conduct of the lawyer falls within the wide range of reasonable professional legal assistance (*Kamasinski v. Austria*; chapter 11). The applicant before the Court, and thus also before the domestic courts, has to *overcome* the presumption that, under the circumstances, the conduct of counsel was not a sound defence strategy (*Stanford v. the United Kingdom* and especially *Kamasinski v. Austria*; chapters 7 and 11 respectively).

The Court and, by extension, domestic courts have to assess the performance of counsel in order to determine whether the right of the accused to an effective defence by the lawyer within a fair trial has been guaranteed. By extension, the Court thereby determines whether the fairness of the criminal procedure “as a whole” has been respected. This is where the comparison between unassisted and assisted accused is also relevant again. Both are entitled to an effective defence, whether by equally effective self-representation or legal assistance. An effective defence is not only important for the individual accused but also for the fairness of the criminal procedure “as a whole”.

Consequently, the Court, which examines the criminal procedure “as a whole”, explores not only whether the authorities have guaranteed the preconditions for an effective defence by means of the right to counsel, but also scrutinises whether the accused has indeed had his right to an effective defence by equally effective assistance by counsel respected at, in particular, the adversarial hearing. As the Court has already held in the 1980 *Artico*-case, an effective defence at the adversarial hearing by means of equally effective legal assistance – officially assigned if need be – is essential to a fair criminal procedure “as a whole”.

While the accused has to demonstrate that his personal rights ended up being harmed, he does not, for example, need to substantiate prejudice in the sense that, but for the conduct of counsel, he would have been acquitted. The Court has held explicitly in *Artico* that such a standard of the damage

done to his case in full would be too high and, rather, requires the other two conditions. This is only different where counsel never consulted with the accused and no directions were given to the lawyer. That failure to consult *may* constitute ineffective assistance by counsel, depending on the performance of counsel on the basis of a two-pronged test. Under such conditions, the Court assesses both (i) the incompetence of counsel and (ii) prejudice, despite the earlier remark regarding its explicit rejection in *Artico*. This means that the accused who was not able to instruct his lawyer has to provide evidence to the Court that, but for the conduct of counsel, he would have been acquitted (*Mader v. Croatia*; sub-section 11.2.3.). However, as explained above, where the lawyer fails to follow the instructions of the accused as to a matter within the accused's control about the aforementioned "personal" rights, the Court holds it to be ineffective legal assistance.

The means for an intervention in the case by the authorities are varied. For example, under the Convention the court should either appoint a substitute lawyer or oblige counsel to "(...) perform his duties", where those duties are being "shirked" (*Artico v. Italy*; section 11.2.). Further available options, where the lawyer is present so that he can in principle provide the accused with an effective defence in court, are: interventions by means of an adjournment or a suspension of the court session. Other such options for redress are suitable arrangements for contact and communication between the accused and his lawyer. Another possibility is the invitation by the court to the lawyer to correct his "formal mistake" such as where the lawyer forgot to include an element in his brief for an appeal in cassation (sub-section 12.4.2.). Where faced with counsel, who has reasonably not been able to prepare for the hearing, the authorities can appoint the lawyer who acted earlier for the accused. Or, where the accused takes part in the hearing from outside of the courtroom, the authorities can appoint a second lawyer who stays with the accused in addition to the lawyer acting in court. The Court also requires the judge to be the "ultimate guardian of the fairness of the proceedings". For example, the bench should actively protect these minimum defence rights in its interactions with defence counsel who might risk harming the right to translation or the right to witness confrontation. Similarly, the authorities cannot assume that there must have been effective legal assistance at the trial hearing, where already during the pre-trial phase the investigative authorities did not "(...) keep a close eye on the effectiveness of the defence" so that pre-trial legal assistance was nothing but "a mere formality". Accordingly, the Court assesses whether national courts make the accused bear the consequences of counsel's ineffective legal assistance by taking both earlier and later stages than the adversarial hearing into consideration under its "as a whole" approach. This final conclusion regarding the "as a whole" approach by the Court will also be taken into consideration in the next and final sub-section regarding the Convention minimum guarantees (sub-section 13.2.6.).

13.2.6. Interim conclusions about the Convention minimum guarantees

All four sets of Convention minimum guarantees seen in conjunction are essential in order to answer the central research question. While domestic courts have to be reticent in that they should not compromise the independence of the Bar from the State and therefore give much leeway in assuming that counsel might have worked under a defence strategy, the accused should not bear the consequences of ineffective legal assistance. It is for that reason that the Court considers that there should be redress for ineffective legal assistance, so that an effective defence by counsel and by extension a fair trial is guaranteed.

The Court leaves a considerable "margin of appreciation" to the Member States as to how to implement and sometimes even interpret the Convention minimum guarantees, and this also the case for the right to an effective defence (chapter 3). Nonetheless, from the rich case law regarding Article 6 the aforementioned and quite specific jurisprudential lines have been demarcated (sub-sections 13.2.1. to 13.2.5.).

In addition to the Convention minimum guarantees, EU Directive 2013/48/EU on minimum rules regarding *inter alia* "the right to access to a lawyer" will also require adjustments regarding the right to counsel in Dutch criminal proceedings. In summary, the most important changes will be required for procedural moments – summarised here as the *Salduz*-rule and other investigative and evidence gathering acts. When the Netherlands has to implement this Directive, some of the important issues regarding non-compliance with the Convention will be solved because the Directive is largely based on codification of the Court's case law (analysed in this book: sub-section 5.3.1.4.). Consequently, for the purpose of this research, this analysis of the Directive has also been an internal

measure of quality control for the original Court's case law analysis made in the substantive research chapters (chapters 5, 7, 9 and 11). Seeing the correspondence between the Directive and this study's analysis of the Convention minimum guarantees, the findings of this original research into the Court's case law have also been checked.

This does not mean that this research has not been affected by factors that should be mentioned here (sub-section 3.3.). The Convention minimum guarantees presented above have been inferred from casuistic decisions by the Court. While this research has gone beyond such cases by also exploring their underlying general principles, care still has to be taken when making more generalised inferences. Moreover, it should be noted that the present study has been affected by its specific focus on ineffective assistance by counsel and its redress in Dutch criminal procedure. More attention has been paid, therefore, to (negative) conduct of counsel rather than their positive contribution to an effective defence for the accused and, by extension, a fair trial.

With all these considerations taken into account, this overview of the four sets of Convention minimum guarantees shows how they are intricately connected building blocks for the ultimate evaluation of compliance of Dutch criminal proceedings with these Convention minimum guarantees and appear to centre on the Convention right to *effective* legal assistance. Certainly, the current approach to ineffective assistance by counsel and its redress in Dutch criminal procedure has to abide by these guarantees and there is nothing precluding the Netherlands from providing *more* protection than these necessarily basic fair trial standards.

13.3. The evaluation of compliance of Dutch criminal proceedings

While there is no reason to believe that Dutch criminal proceedings are fully incompliant with Article 6, this research will not shy away from highlighting specific issues of no (full) compliance with regard to the main research themes that are addressed in this book. These aspects have to be mentioned in order to formulate a *complete* answer to the central research question, which this chapter sets out to provide. Consequently, in the remainder of this section any reference to a *particular* issue of no (full) compliance of the approach to ineffective legal assistance and its redress in Dutch criminal proceedings with the Convention minimum guarantees should be understood in the context of otherwise abidance with basic fair trial standards in the Netherlands.

13.3.1. The lack of a right to effective legal assistance in Dutch criminal proceedings

This first sub-section will directly deal with the issue of whether or not Dutch law and case law interpret the right to legal assistance materially, rather than formally, as explained in the previous section in relation to the Convention (section 13.2.). This question is essential for the further exploration of compliance with the Convention of the approach to ineffective legal assistance and its redress in Dutch criminal proceedings. After all, this exploration will have to explain compliance with the Court's repeated case law in which it has established a right to *effective* legal assistance within fair criminal proceedings.

Starting with the Dutch Criminal Procedural Code, Article 28 Sv does not grant a right to *effective* legal assistance to the accused. Moreover, other provisions under the Dutch criminal procedural code seem to regulate, *who* should provide legal assistance rather than *how* counsel should perform within the criminal process. Additionally, Dutch deontological norms appear to leave largely undefined what constitutes effective legal assistance or, negatively put, what (negative) conduct of counsel would amount to *ineffective* legal assistance. Therefore, this research, for the most part, has had to assess whether, in its case law, the Hoge Raad construes the right to counsel as a substantive right to *effective* legal assistance.

The case law examined in the course of this study, which focused on the specific issues of ineffective legal assistance and its redress in Dutch criminal proceedings, has not encountered a single case in which the Hoge Raad considered there to be a substantive right to *effective* legal assistance, at least not explicitly. Even though the Convention right is directly binding under Article 6 (3) (c) in the Netherlands, also that reading of this fair trial right does not appear to have resulted in case law that establishes a right to *effective* legal assistance in Dutch criminal proceedings. Some AGs have advised the Hoge Raad to take a decision on the basis of the right to *effective* legal assistance. However, such non-binding conclusions appear not (yet) to have resulted in case law by the Hoge Raad that recognises this material right.

A closely connected issue is that this research has not encountered a single case in which the Hoge Raad applied the *Artico*-rule to lower courts which remained passive when confronted with what might have been ineffective legal assistance. For example, in a case in which the accused claimed he was not provided an effective defence by counsel, whom the accused moreover supposedly fired as he mentioned when addressing the bench during his last word when his lawyer was absent, no reference to the *Artico*-rule is discovered, not even to render it inapplicable (*Counsel dismissed during last word*-case; section 12.2.). Somewhat differently, the Hoge Raad does cite the *Artico*-rule in a case in which the (old) lawyer admits to having made a professional error by lodging the appeal submission too late but holds that this conduct of counsel has to come at the procedural risk of the accused without exploring whether the accused waived her right to lodge an appeal (*Counsel's professional error relating to an appeal submission*-case section 12.4.4.1.). This same observation about the lack of a reference to *Artico* applies also for a case in which the accused allegedly had followed his counsel's advice to waive his right to counsel at the "critical" stage of appeal when his advocate had supposedly mentioned that he would be better off without counsel (*Counsel suggested waiver*-case; see further in sub-section 13.3.2.). As a penultimate example, the Hoge Raad does not refer to the *Artico*-rule in the context of a case in which counsel was prohibited to plead, so that the accused ended up without an advocate during the closing speech – a moment that the Court appears to value significantly for an adversarial hearing (*Counsel prohibited from pleading*-case; see further in sub-section 13.3.3.). Finally, no reference to the *Artico*-rule is encountered in a case in which counsel laid down the defence, despite the AG's reference to the *Artico*-rule (*Counsel laying down the defence before prosecution's submission*-case; see further in sub-section 13.3.3.). To make this point clear, this sub-section does not claim that these *are* instances of ineffective legal assistance. This study would not be able to make that assessment, because it would be for a court that can try all of the facts of the case to come to such a conclusion. However, the aforementioned cases do indicate that in this study that explored the two main research themes of ineffective legal assistance and its redress in Dutch criminal proceedings, no case was encountered in which the Hoge Raad referred to the *Artico*-rule, while it might have been at least worth explaining to the lower courts why there was no need for cassation in a case in which the authorities had *not* intervened during the factual instances.

Against this background of the lack of a reference to the *Artico*-rule in the case law of the Hoge Raad, it is important to note how, by referring to Article 41 Sv in several relevant cases, it can at least give the impression that it does not treat instances of possible ineffective assistance by counsel between retained or appointed lawyers alike. For example, in two cases regarding a waiver of the right to counsel, the Hoge Raad stated it would have required "more" from the appeal court in relation to the unassisted accused if he were to have been entitled to legal aid by appointed (under Article 41; Sv 2013 *No need to examine a waiver*-case and 2014 *Explicit and checked waiver*-case). Similarly, in another case in which the appeal court was confronted with a lawyer who laid down her defence because she claimed she could not provide the accused with an effective defence, the Hoge Raad deemed that this case had been handled correctly on appeal because this accused was *not* entitled to legal aid by appointed counsel (under Article 41; *Counsel laying down the defence before prosecution's submission*-case). With these references to this Article regarding legal aid by appointed counsel without a further explanation as to what "more" means and what the relevance is of the lack of the absence of an entitlement to legal aid by appointed counsel, the Hoge Raad might run a risk. Lower courts might infer from these cases that more protection has to be afforded to an accused who is assisted by legal aid counsel than other accused (Article 41). However, such a distinction as to the protection of accused who are, or are not, entitled to legal aid by appointed counsel might be contrary to the Convention. After all, the Court does not appear to make a distinction as to the assessment between retained or appointed lawyers' ineffective legal assistance of possible ineffective assistance by counsel between retained or appointed lawyers (*Goddi v. Italy* and later also *Orlov v. Russia*; sub-section 13.2.5.). Rather, the Court stresses that accused should be offered equal protection and that there should be no discrimination between accused persons who can afford counsel, or for other reasons are not entitled to legal aid by appointed counsel, and those who are. As explained in the previous section, the Court does not want the situation whereby an accused who will be appointed counsel will be "worse off" than an accused who can retain private counsel or *vice versa*. In other words, the Court appears to hold that it is not acceptable to discriminate against an accused who is entitled to an appointed legal aid lawyer on the one hand and an accused who can opt for a retained

counsel on the other. Additionally, the underlying reason appears to be that discrimination against an accused who has the financial means to pay for retained counsel on the fundamental issue of an effective defence by counsel would not be fair. While the accused can be required to be active in seeking to retain counsel, the general understanding appears to be that a lay person cannot assess the performance of his lawyer under all circumstances. Therefore, the authorities can be required to intervene in the case when ineffective legal assistance occurs, and they should in principle not make a distinction between retained or appointed counsel on this fundamental issue. This argument in favor of equal protection also has its value when seen from the perspective of the accused. It would not be fair if an accused, who has the financial means to retain counsel and has not been given the additional protection that an accused who has been detained pre-trial would get, would not be protected (or be less protected) under the urgent circumstances of ineffective legal assistance.

The seeming absence of Dutch law and almost any case law developments regarding what constitutes ineffective legal assistance in Dutch criminal proceedings also has a relevant side-effect. This side-effect will be revisited on the basis of the three defence activities mentioned earlier: (i) witness requests; (ii) activities in relation to the right to appeal, attend the appeal hearing and the appeal in cassation; and (iii) substantive defences (chapter 12). For example, this study has encountered a case by the Hoge Raad in which it attributed a factual error by the appeal court regarding an omission to hear a witness in court to counsel, as if it was the lawyer's "negligence" to point that error out (sub-section 12.3.1.). Also, the Hoge Raad itself did not invite a lawyer to rectify a lacking ground for appeal in cassation that the accused had been wrongly convicted, thereby making the accused bear the consequences of what possibly could have been another outcome of the criminal case because the lawyer "neglected" to raise the point (sub-section 12.4.2.). Moreover, the Hoge Raad did not quash a case in which a former lawyer had admitted to having made a professional error of not lodging the appeal submission on time, so that the accused needed to bear the consequences of not having the case dealt with on appeal (paragraaf 12.4.1.1.). Moreover, the Hoge Raad did not quash a case in which the lower court was confronted with counsel who failed to point out a substantive defence with the potential to disculpate the accused, while the accused appeared to want to have this potentially exonerating information taken into consideration, while the lawyer acting at first instance had also submitted such a substantive defence to the court (sub-section 12.5.1.). Perhaps, those instances under the *Artico*-rule would not amount to ineffective legal assistance, given that they do not all seem to fall in the category of legal assistance that is "(...) defective in a fundamental manner" and result in harm to the accused in terms of his personal rights, rather than defence strategy. However, in these cases the accused had to bear the consequences without the Hoge Raad examining whether the *Artico*-rule was applicable or inviting counsel to correct the mistake. Rather, it seems that by supposing counsel was negligent, the authorities are not kept to their *own* obligations. At least in the first example, the appeal court is itself responsible for hearing witnesses in court and not rejecting a request to hear a witness on a false ground. This approach to the three aforementioned defence activities risks supposing a responsibility of counsel which he did not live up to when authorities did not fulfill their responsibilities. In this way, counsel is being held at least jointly responsible for obligations of the courts and the accused bears the consequences of this supposed "negligence" of counsel. Taken one step further, this may mean that a real risk emerges that the accused has to bear the consequences of conduct of counsel that reasonably speaking cannot be deemed to be part of a defence strategy and that risks harming him in his personal rights, such as by not hearing a witness against him in the case against him.

In these select case law examples – that nonetheless include all relevant cassation cases that were found in the course of this study – the accused appears to have had to bear the consequences of what might well have been (negative) conduct of counsel that went fully unexamined. Consequently, Dutch law and case law might not ensure that the accused receives redress for ineffective legal assistance *within* the criminal proceedings. Outside of the criminal process, Dutch disciplinary law and tort law can deal with (negative) conduct of counsel. However, these two bodies of law cannot remedy the course and/or outcome of the criminal process in the Netherlands that ineffective legal assistance can negatively affect. Therefore, it would be especially important that courts intervene in the case if the right of the accused to an effective defence, and therefore also by extension his right to a fair trial, have not been guaranteed. Such redress for ineffective legal assistance within the criminal process is, as the Court has stated repeatedly, not only important for the individual right of the accused to an

effective defence but also, by extension, for the fairness of the criminal procedure “as a whole”. As explained numerous times within this study, the interrelationship between individual rights and procedural guarantees are too complex to simply argue that only a right of the accused has been harmed and not also the course and/or outcome of the criminal proceedings. It will never be known for certain without an examination by a court that explores whether an instance of ineffective legal assistance in Dutch criminal proceedings really occurred if also the fair trial “as a whole” has been violated. However, without any such examination there could be situations that are currently not being redressed that harm the accused not only in terms of his defence strategy but also in terms of his personal rights and such damage might, by extension, also harm the fairness of the criminal procedure “as a whole”.

There is an important benefit to a court examining whether ineffective legal assistance occurred because it can be expected that the other professionals, rather than the lay accused, can assess the quality of counsel’s services. After all, an accused without legal training, expertise and skills will often be unaware or unfamiliar with the requirements for adequate performance of the lawyer. Instead, the trial judge and other participants will be able to assess another professional in their field.

This does not mean that no cases have been encountered in which the Hoge Raad might have come close to what underpins the aforementioned *Artico*-rule. For example, the Hoge Raad does seem to require lower courts to intervene in the case when confronted with an *unassisted* accused who might not give himself “an effective defence” (*Hoogerheide*-cases; section 6.4.). The Hoge Raad overturns these cases so that at least the *unassisted* accused does not have to bear the consequences of what might well have been a lack of “an effective defence”. Moreover, the Hoge Raad has overturned a case in which an *assisted* accused might not have had “an effective defence” but on a ground that does not seem to be present in Dutch criminal procedure: an immediate chance to address the bench (*Counsel dismissed during last word*-case; section 12.2.). However, in that last mentioned case as in all other cases mentioned again in this chapter, the Hoge Raad does not refer to the *Artico*-rule explicitly, even if it is to overturn the case. This is not just problematic in relation to this one case in which the accused supposedly dismissed his lawyer at the stage of his last word because he felt he did not receive effective legal assistance. The more difficult effect of this case law might be that lower courts are *not warned* that they should not remain passive when confronted with ineffective legal assistance or else have their cases quashed. While lower courts may, on their own initiative, actively intervene in the case when confronted with ineffective legal assistance, they do not foresee the risk that their case will be overturned if they do not. Therefore, differences between the lower courts can arise while out of legal certainty and uniformity, it would be important for the Hoge Raad to set a standard for all lower courts. This would also strengthen the legal protection of the accused in cases when lower courts might not intervene in the case on their own initiative.

Even more so, while the Hoge Raad at least seems not to want to have the unassisted accused bear the consequences of a lack of “an effective defence”, this research infers from the select case law that the assisted accused might not get such legal protection due to no apparent assessment of *counsel’s performance* at all. The Hoge Raad, which has not been seen to have set a benchmark of the right to *effective* legal assistance to which counsel did not live up to, also did not indicate in any of its cases that lower courts have to inquire into whether the lawyer’s (negative) conduct was “(...) defective in a fundamental manner”. This situation in which the Hoge Raad appears to want to avoid a quality assessment of counsel’s assistance to the accused is problematic in light of the Court cases that have been analysed in this study. The reasons for coming to this interim conclusion is that ultimately the aforementioned (negative) conduct of counsel can end up harming the accused in terms of his personal rights, rather than defence strategy, as the examples of the case law of the Court also demonstrated.

Of course, there are good reasons for the reticence of both the Hoge Raad and the lower courts to refrain from disrespecting “(...) the independence of the Bar from the State”, as the Court also acknowledges. Lower courts and especially the Hoge Raad, which is not a trier of facts and law, should be highly deferential in case they make an assessment of counsel’s conduct and thus disrespect this important principle. However, the Court’s *Artico*-rule appears to be designed with that aim kept in mind of respect for what in Dutch criminal proceedings is referred to as the independence and partisanship of counsel. National courts – and ultimately the Court – are given an “ultimate sanction”, as former Court Judge Myjer from the Netherlands phrases it. In other words, the *Artico*-rule is

accompanied by the requisite guarantees to make it a measure of last resort. After all, this rule only applies when there is manifest ineffective legal assistance or due notification thereof and defence strategy is excluded from both categories.

Therefore, it is important for the answer to the central research question that issues with the Convention appear to arise if ineffective legal assistance goes by “unsanctioned”, thereby risking, at least, the accused having to bear the consequences of harm to his personal rights, rather than defence strategy. As implied, it would be up to a court to *assess* whether in the specific case, an accused would indeed end up being harmed in such manner. In other words, this research cannot determine whether ineffective legal assistance indeed occurred. However, the issue that this study seeks to highlight is that the Hoge Raad does not overturn verdicts by lower courts that have not abided by the *Artico*-rule. In this very specific sense, the current approach to ineffective legal assistance by defence counsel in Dutch criminal procedure does not appear to comply with the Convention minimum guarantees regarding the right of the accused to an effective defence in a fair trial. This interim conclusion that partly answers the central research question also has to be seen in light of the other elements of the right to an effective defence in a fair trial: the right to counsel; the lawyer-client relationship; and the negative obligation not to hinder the right to effective legal assistance, as will be examined below (section 13.3.2.).

13.3.2. The effect of the lack of the right to effective legal assistance

In addition to the important remarks previously made regarding the apparent absence of the application of the *Artico*-rule, it also helps to return to the right to counsel. This right is important in its own right but also because it constitutes the legal ground for a Convention-worthy complaint of *ineffective* legal assistance. Of course, the latter is the leading theme for the central research question.

In the Netherlands, the right to counsel is guaranteed under Article 28 Sv and directly under Article 6 (3) (c) of the Convention. Overall, this right appears to have gained importance in Dutch criminal proceedings. This right is being earlier applied and increasingly recognised, and is apparently deemed to be more important than before. For example, the right to counsel currently applies earlier in the criminal proceedings than before, because Dutch law has responded to the *Salduz*-case by requiring the right to counsel already at the stage of police interrogations (sub-section 6.2.2.). There is also increased application of the right to counsel in Dutch criminal proceedings, as the right to legal assistance nowadays is also required at more stages which include appeal in cassation and revision (sub-section 6.2.2.). As these examples allude to, changes to the right to counsel in the Netherlands do seem to have correlated at least with case law of the Court (section 6.2.). Therefore, in accordance with what the Court appears to encourage, increased value is being attached to “a” role of counsel during earlier and more stages of Dutch criminal proceedings.

Before turning to the question of *what role* counsel should play at these stages, it is worth mentioning that Dutch law and case law seem to conform to the Convention in that the accused is entitled to retain counsel. Therefore, access to a lawyer is ensured. Moreover, under certain circumstances, the authorities have to appoint a legal aid counsel to the accused. Therefore, appointment of counsel is guaranteed. The latter means that the authorities have to go one step further and, by appointing counsel, have to ensure that the accused is certain of receiving legal assistance.

There does seem to be an issue with that latter arrangement in the Netherlands. Dutch law and case law do not appear to approach the category of “certain cases” as the Court does. “Certain cases” are present when the accused person is vulnerable or finds himself in a vulnerable position (or both). For example, persons with a mental illness will generally be deemed to be vulnerable and therefore deserving of being afforded legal assistance by an appointed legal aid lawyer. At present, there is a noteworthy discrepancy regarding persons with a mental illness in the Netherlands. On the one hand, the right to counsel is unwaivable for children and persons with a mental illness *at trial*. On the other hand, Dutch criminal proceedings do *not* afford similar “special protection” to adults with a mental illness *pre-trial*. To give an example, after *Salduz*, a minor is now entitled to consultation before, and presence of counsel during, police interrogations. However, the other person who is deemed equally vulnerable at trial – the person with a mental illness – is only granted a right to consultation *before* police interrogations.

This internal discrepancy between affording more protection to a person with a mental illness at trial, but not during police interrogations, does not appear to have been accompanied with an

explanation. In more general terms, the Hoge Raad refers to the legislator to codify the right to counsel at the stage of police interrogations. However, in the *Hoogerheide*-case in which the Hoge Raad had to decide how to deal with an unassisted accused who might not have provided himself with an effective defence at trial, the Hoge Raad referred to this protection afforded to persons with a mental illness at trial in order to explain its decision. Therefore, there does not appear to be a good explanation as to why the Hoge Raad could not do the same for persons with a mental illness at the stage of police interrogations.

A related aspect that cannot be overlooked, is that Dutch law and case law appear to attach importance to *deprivation of the accused's liberty* for the authorities to have to go one step further than granting him to retain counsel by appointing legal aid counsel and thus ensure that the accused certainly has legal assistance (the yet mentioned Article 41 Sv). For example, the accused is entitled to the appointment of legal aid counsel as of the prosecutor-ordered detention and he has not retained counsel, irrespective of his financial situation (Article 40 Sv). This appointment obligation also arises when the judge of instruction orders detention, thereupon legal assistance has to be afforded during all subsequent stages of the procedure (under Articles 41 and 43 (2) Sv). As a last example, the authorities also have to go one step further than providing access to counsel when the accused has lodged an appeal, and had been in such pre-trial detention (Article 41 Sv). Under such circumstances, the presiding appeal court judge has to appoint counsel *ex officio*. This particular situation of being deprived of one's liberty, in all the aforementioned ways, has the potential to make the accused *vulnerable*. In Dutch law and case law that vulnerability of the person appears to call for compensation by the authorities who have to appoint counsel so that the accused surely has legal assistance. This particular emphasis on Article 41 Sv has already been stressed at this point in the conclusion regarding interventions in the case due to ineffective legal assistance (sub-section 13.3.2.).

Returning to how Dutch criminal proceedings do *not* appear to fully abide by the Convention minimum guarantees regarding the appointment of a legal aid lawyer for "certain cases", other examples of vulnerable persons can be mentioned. Persons who are under the influence of alcohol, or a foreigner who does not understand the court language are such vulnerable persons who do not get the same protection at trial as minors and persons with a mental illness. They also do not get the same protection pre-trial as minors alone. The issue of compliance of Dutch criminal proceedings in relation to "critical" stages will be examined further immediately below.

As explained above, though Dutch criminal proceedings generally abide by the Convention minimum guarantees regarding the right to counsel, at not all "critical" stages this right is being afforded. Of course, the Court does not hold that the right to counsel has to be ensured to the accused at all stages at which assistance by counsel would be *helpful*. However, the Court does appear to hold that the Convention minimum guarantees entail legal assistance at stages that are "critical" for the fairness of the criminal proceedings "as a whole".

Dutch criminal proceedings do not appear to be fully Convention-conforming on the issue of legal assistance to adult accused during police interrogations (at the time of writing, February 2016). This will change as of 1 March 2016. However, even then, the Hoge Raad seems to require less legal consequences for violations of the right to be present during than the right to consult before a police interrogations. This distinction does not seem to correspond with the case law of the Court.

Not only does the Convention already bind Dutch criminal proceedings in this regard, but so does the aforementioned EU Directive 2013/48/EU, which will have to be implemented in the Netherlands. This Directive does not only indicate that the accused should get the protection of the right to counsel at the "critical" stage of police interrogations. Instead, this EU Directive also requires that the accused shall obtain legal assistance during other "investigative or other evidence-gathering acts" (sub-section 5.3.1.4.). This particular piece of legislation will have an important effect. For example, at this moment, Dutch law and case law do afford the accused legal assistance at, for example, a house search, but not yet at those other "critical" stages of: crime scene visits, identification procedures and witness examination proceedings. Consequently, in this way, Dutch criminal proceedings do not yet seem to fully comply with the Convention minimum guarantees regarding the right to counsel at "critical" stages, while the Netherlands will also have to abide by EU Directive 2013/48/EU. Even more so, given the history of how the right to counsel has been dealt with in the recent past, it is most likely that Dutch criminal proceedings will only adapt to the Convention requirements regarding the right to counsel *because of* having to implement the EU Directive

2013/48/EU. The implementation of the EU Directive is to be expected at the time of writing (in February 2016) by the end of this year. In relation to the answer to the central research question, it has to be noted that, at present, Dutch law and case law do not fully comply with the Convention minimum guarantees that seek to safeguard that the accused's right to counsel at stages that is "critical" for the fairness of the criminal procedure "as a whole".

Another connected issue at which Dutch criminal proceedings might currently not fully abide by the Convention minimum guarantees is the *waiver* of this right to counsel. A waiver is important because the right to counsel is an entitlement rather than an obligation in the Netherlands, as it is under the Convention. Therefore, the accused is usually not *required* to have legal assistance with Dutch criminal proceedings, unless the right is unwaivable or mandatory, as explained above.

The rationale for this particular understanding of this element of the right to an effective defence appears to be that the accused should be free to opt for self-representation or legal assistance and should not feel as if the law contrives against him by imposing counsel upon him. While Dutch law generally complies with the Convention, no waiver of the right to counsel appears to be regulated under Article 28 Sv or Article 6 (3) (c). Also, the Hoge Raad appears to "only" apply its lower "(...) unequivocally, deliberately and freely" waiver standard rather than the Court's "knowingly and intelligently" waiver standard out of "special protection" of the right to counsel (section 5.2.5.). For its examination of whether the accused renounced his right to counsel at the "critical" stage of appeal, for example, the Hoge Raad uses the "freely and unequivocally" waiver standard. This is the waiver that the Court appears to use for rights other than the right to counsel, such as the right to attend a hearing and appeal.

By using the "(...) unequivocally, deliberately and freely" waiver standard, the Hoge Raad does not appear to offer the "special protection" required for this right which is not only an individual entitlement but also a procedural guarantee. In this way, Dutch law and case law do not appear to abide by the Convention minimum guarantees regarding the right to counsel.

This interim conclusion is also important as an internal benchmark. It is also relevant to relate to the activity required from lower courts when confronted with a lack of "an effective defence" by an accused who renounced his right to counsel and thereupon continued *pro se* (*Hoogerheide*-case law; section 6.4.). This comparison is relevant if Dutch law and case law is to afford equal protection to assisted and unassisted accused.

As explained in the substantive research chapters, the Hoge Raad has placed a three-tiered requirement on the appeal court when it quashed the aforementioned *Hoogerheide*-case in which an unassisted accused did not have an "effective defence". Those three tiers of the requirement entail: (i) the check on the waiver of the right to counsel, (ii) the examination as to whether the decision of the accused to proceed *pro se* was deserving of respect, and (iii) "(...) pay special attention to the position of the accused, particularly by providing compensatory information to the unassisted accused who will have to seek to lodge his own defence without legal assistance". In principle, the Hoge Raad thus appears to require in this *Hoogerheide*-case that lower courts should not remain passive when confronted with a lack of "an effective defence" for an *unassisted* accused. Rather, appeal courts should provide the unassisted accused with the information he lacks because he has no counsel. By extension, it might only be fair that an assisted accused is also met with redress where he does not get "an effective defence" by counsel. After all, an ineffectively assisted accused might also suffer from lacking information. Indeed, there might be no difference in practice between an unassisted accused and an ineffectively assisted accused in terms of the lack of information. Therefore, it might only be fair to also require that an ineffectively assisted accused has his rights protected by an actively intervening court. This particular subject leads back to the earlier sub-section regarding the interventions in the case out of ineffective legal assistance (sub-section 13.3.1.). This particular topic will be returned to at the end of this section, but before that additional important issues have to be noted relating to the right to counsel in Dutch criminal proceedings.

Earlier observations have pointed out a lack of compliance, but this section will explore compliance of Dutch criminal proceedings with the Convention minimum guarantees regarding the right to counsel. One specific issue that can be mentioned in this respect is the right to appointed counsel in the Netherlands. This right remains in force during the *entire* procedure once the lawyer is appointed, regardless of whether or not the deprivation of liberty continues (Article 43 (1) Sv). In this way, Dutch criminal proceedings might go further than what is required under the Convention. By

comparison, the Court requires that the accused afforded the right to counsel at all above-discussed “critical” stages. In that respect, the Court does not (yet) seem to require a continuous right to counsel as of the placement of the accused in police custody until the latest procedural moment when all domestic remedies have been exhausted, as would be the equivalent of the Dutch arrangement. On the contrary, the Court mostly appears to explore whether the right to counsel has been afforded at the several different independently assessed “critical” stages, which can be by interval. Therefore, it should also be emphasised how Dutch criminal proceedings offer more protection to the accused in this particular manner.

To conclude on the right to counsel, it can be stated that, overall, Dutch criminal proceedings comply with the Convention minimum guarantees regarding the right to counsel but that they might not comply on specific issues related to the right to counsel which the Court construes as substantive *effective* legal assistance. Notably, some aspects of the appointment of legal aid counsel, the provision of the right to counsel at “critical” stages and the waiver standards used for “special protection” do not appear to abide by these basic standards for an effective defence in a fair trial. It is exactly the lack of the substantive interpretation of the right to counsel that also causes the absence of compliance with the Convention. In other words, as long as Dutch law and case law do not abide by the Convention right to *effective* legal assistance, its effect also on the right to counsel is visible.

Turning from the right to counsel to the lawyer-client relationship, it is important to reiterate the common assumption with which that overview started. *Effective* assistance by counsel can usually best be provided by counsel of the accused’s preference. For this same reason, it helps to return to the arrangements regarding the choice of retained and selection of appointed counsel in Dutch criminal proceedings first.

Overall, Dutch law and case law seem to conform to the Convention minimum guarantees regarding the lawyer-client relationship, in that hardly any restrictions on the choice of retained counsel appear to exist. However, comparing two cases – one of which was discussed in chapter 6 and one in chapter 8 – some issues with an effective defence in a fair trial do seem to arise. Before turning to such negative examples, this overview will also embed them in positive examples.

First, there appears to be no problem with the first instance in which the Hoge Raad quashed a case in which the appeal court refused the accused his requested stay to obtain a lawyer (*Requested stay to obtain a lawyer*-case; sub-section 6.2.1.1.). Also, there appears to be no issue with the Convention in the second case in which the accused fires his lawyer and thereupon requests a stay to obtain a new lawyer (*Requested stay to obtain a new lawyer*-case; sub-section 8.2.2.). As the Court does, the Hoge Raad appears to assess whether the absence of services of counsel can be “attributed” “to a considerable degree” to the accused’s “own action”, in this case of firing his lawyer. As already mentioned when this case was described, it can be understandable that the Hoge Raad comes to such a decision in the case because the right to legal assistance by retained counsel of one’s choice is not absolute and can be limited due to considerations of scheduling requirements out of concerns of judicial administration (*Requested stay to obtain a new lawyer*-case). However, in this case, the Hoge Raad did *not* appear to assess what the effect was of the fact that this accused no longer had a lawyer as a result of this response of the appeal court. The Hoge Raad did not *check* whether the appeal court had assessed that this accused, who had obviously opted for legal assistance and not self-representation but fired his lawyer, had received an *effective* defence in the absence of legal assistance. This last issue has already been touched upon in the previous sub-section regarding an intervention in the case out of ineffective legal assistance (sub-section 13.3.1).

In a more positive vein, with regard to the selection of appointed counsel, Dutch criminal proceedings do not appear to go beyond the permissible limitations regarding the right of the accused to counsel of his choosing under the Convention. For example, both the Court and Dutch law and case law require that, in principle, the accused can choose to retain who he wants as his lawyer. Moreover, both the Court and case law do not require that the accused always has the appointed legal aid lawyer “of his own choosing”.

However, there does appear to be, as an internal benchmark, a difference between how the Hoge Raad deals with disturbances of court order by the lawyer of the assisted accused and the unassisted accused himself (Article 273 (3) Sv). On the one hand, the Hoge Raad quashes the case of a self-representing accused who was prohibited from continuing to submit his case (Article 273 (3) Sv; *Unassisted accused prohibited from defending*-case). This first case is relevant moreover because this

decision of the Hoge Raad was contrary to the advice of the AG, who stressed that there is no appeal in cassation open to the provision that regulates disturbances of court order. On the other hand, the Hoge Raad left a case intact in which counsel was removed from the case against an accused who thereupon was made to represent himself (Article 273 (3) Sv; *Counsel prohibited from pleading*-case; sub-section 8.2.2.). In that latter case, the Hoge Raad moreover did not appear to assess what the *effect* on the rights of the accused were due to the absence of a lawyer during closing speech. This last issue is emphasised here, because the closing speech is deemed to be a moment of significance for an adversarial hearing according to the Court. It has also been touched upon in the previous sub-section regarding an intervention in the case out of ineffective legal assistance (sub-section 13.3.1.).

Returning to this section's exploration of the compliance of Dutch criminal proceedings with the Convention minimum guarantees regarding the lawyer-client relationship, the Court appears to highlight counsel's control over strategy and the role division between the accused and his lawyer (sub-section 13.2.3.). In order to determine how Dutch law and case law deal with this particular aspect, this research first turned to Dutch law and deontology. The interim finding in this study was that Dutch law and deontology do appear to regulate how counsel should keep confidentiality and confer especially with the accused who is subjected to a criminal investigation or detained (section 8.3.1.). Moreover, Dutch law and deontology appear to indicate that the accused should be considered to be *dominus litis*, as further shown by norms in the code of conduct that forbid counsel to act contrary to the accused's rights, interests and wishes. These are two indications as to how Dutch law and case law, as well as deontology, appear to conform to the role division between the accused and his lawyer, as the Court also holds it to be. However, Dutch law and deontology do *not* appear to explain *how* counsel should provide the defence for the accused. Except that counsel's position has mostly been derived from the accused's position and that counsel should not violate the law, there is hardly any indication as to what can reasonably be expected of the advocate who acts for the accused in Dutch criminal proceedings. This research has sought to explore whether Dutch law and deontology define what constitutes ineffective legal assistance. However, the interim conclusion that had to be drawn in this study, is that Dutch law and deontology appear to leave that largely *undefined*. This same observation appears to be substantiated by the fact that no case law of the Hoge Raad has been encountered in which counsel's control over strategy or the role division between the lawyer and the accused has been construed in relation to the benchmark of the right to substantive *effective* legal assistance. Therefore, this appears to be yet another indication as to how the lack of the right to *effective* legal assistance appears to prevent Dutch criminal proceedings from complying with the Convention minimum guarantees. It does not appear to be the case that in the Netherlands counsel is being held responsible for strategy and the accused does not get treated as the person with the ultimate say about his "personal" rights as under the Convention right to *effective* legal assistance.

This last observation also has a bearing on the final topic of this section: the negative obligation of the authorities to not hinder effective legal assistance. This study has discussed three topics in order to examine whether Dutch law and case law comprise this negative obligation that authorities cannot hinder effective legal assistance by way of State interference. The three examples that were used are: state-imposed restrictions on counsel, defective appointment of the legal aid lawyer and State interference in the lawyer-client relationship. The same examples were used in the corresponding section on the Convention (sub-section 13.2.4.). This research has observed that Dutch law and case law prohibit State interference in a more general sense, because of the value attached to the principle of the independence of the Bar from the State. Nonetheless, this study has also paid particular attention to the three aforementioned examples in order to determine non-compliance with the Convention minimum guarantees in situations of state-imposed restrictions on counsel, defective appointment of the legal aid lawyer and State interference in the lawyer-client relationship. All three examples will be revisited here.

First, the Hoge Raad had to deal with the issue of state-imposed restrictions on counsel in a case of *Counsel laying down the defence before prosecution's submission*-case. While the AG advised the Hoge Raad to assess the *effect* for the accused of the laying down of the defence by counsel on the accused's *effective* defence, and thus quash the case as the Court did in the case of *Hüseyn and Others v. Azerbaijan*, for example (section 9.2.), the case was nevertheless left in-tact (section 10.2.). The emphasis by the Court of the *effect* for the *effective* legal assistance of the accused of conduct by the authorities has also been observed in the context of the cases of *Kyprianou* and *Panovits v. Cyprus*

(sub-section 7.3.2.) and *Kononov v. Russia* (sub-section 7.3.2.). However, in this *Counsel laying down the defence before prosecution's submission*-case, the Hoge Raad did not assess whether the absence of counsel resulted in the absence of effective legal assistance or an obligation of the authorities to take the appropriate positive measures to remedy this situation. Rather, the Hoge Raad held the case intact without a reference to the negative obligation such as formulated in the aforementioned case of *Hüseyn and Others v. Azerbaijan*. Therefore, it can be concluded that, while the Court examines whether restrictions imposed on counsel that led to the absence of legal assistance during the closing speech resulted in *per se* ineffective legal assistance, the Hoge Raad does not seem to examine the effect of the resulting lack of counsel for the formerly assisted accused. This observation can be explained better by contrasting how the Hoge Raad and the Court dealt with this same issue. In this same case, the Hoge Raad also did not “sanction” the appeal court which did not seem to have checked with reasons in its verdict that the accused, who prior to his lawyer laying down the defence had clearly opted for legal assistance, had himself *renounced* his right to counsel. The Court would normally state that it should not depend on the assertiveness of the accused whether or not he would end up being legally assisted because it is exactly the passivity of counsel that could be an indication of ineffective legal assistance by this lawyer. As PG Fokkens had reiterated in another conclusion cited in the previous chapter, the Netherlands should be well aware, thanks to the Court’s *Lala*-case, that authorities cannot ascribe a lack of assertiveness to the lawyer and/or the accused in order to avoid responsibility for not ensuring an effective defence by counsel (section 12.2.2). Rather, the case was left intact because the appeal court had supposedly found that the accused still could have resorted to appointed counsel who had left by then and had stated, in the presence of the accused, that she would no longer represent the accused during the proceedings. As a last remark, it is important to note that the AG suggested to the Hoge Raad that it should have overturned the case because “(...) the consequences of the accused’s counsel essentially lacking legal assistance to the accused” should not “(...) come at his procedural risk”.

Second, for appointments of counsel, the Hoge Raad does not seem to take the same view as the Court. In a range of cases regarding defective appointment, the Court holds the authorities to their obligation to appoint legal aid counsel in a timely and correct manner. It is, after all, up to the authorities to decide whether the interests of justice require that the accused should be defended by counsel appointed by them. Therefore, under the Convention, proper appointment of counsel is a responsibility of the authorities alone because they are not allowed to hinder effective legal assistance, as a negative obligation. However, in a case included in this research, the Hoge Raad appears to make proper appointment of a legal aid lawyer a shared responsibility of both the authorities and counsel (*Lack of earlier appointment*; section 10.3.). That is, the lawyer is held responsible out of “negligence” for not pointing out to the appeal court that he had not been appointed in a timely and correct manner. Not only does this decision make an appointed legal aid lawyer co-responsible for an error of his appointment, but also the accused has to bear the consequences of “negligence” of pointing out to the appeal court its own error. As a related point, the Hoge Raad, by holding counsel responsible for supposed “negligence”, does not appear to “sanction” the lower court which had not checked whether this accused, who was entitled to an appointed legal aid lawyer, waived his right to counsel. Lastly, the Hoge Raad does not appear to examine whether the authorities hindered effective legal assistance by this lack of appointment and did not explore what the effect had been for the rights of the accused of this authorities-alleged ineffective legal assistance consisting of “negligence” of counsel.

Third and finally, in relation to State interferences in the lawyer-client relationship, the Court holds that the right to “(e)ffective legal assistance is inconceivable without respect for lawyer-client confidentiality, which “encourages open and honest communication” between them”. Consequently, the authorities are not allowed to invade in the lawyer-client relationship because that amounts to *per se* ineffective legal assistance. The Hoge Raad does not seem to use the right to effective legal assistance as a benchmark for deciding that conduct of the authorities is impermissible as an interference in the lawyer-client relationship, if it acknowledges this right at all (see sub-section 13.3.1. and also 13.3.6.). Rather, the Hoge Raad considers that there can be “extraordinary circumstances” that allow for breaches of lawyer-client privilege, which as an internal benchmark seem to raise more issues than special investigative measures used against a lawyer who is suspected of a crime. As a last observation, with regard to a State interference in the lawyer-client relationship,

the Hoge Raad does not seem to hold there to be a negative obligation of the authorities to not hinder effective assistance by counsel, as the Court would examine these situations.

Therefore, the most important conclusions of this research can be listed under the lack of a right to *effective* legal assistance in Dutch criminal proceedings that in turn impacts on the compliance in relation to the right to counsel, the lawyer-client relationship and the negative obligation not to thwart this right by way of State interference. This same observation has already been made in relation to the positive obligation to intervene in the case when confronted with ineffective legal assistance in order to protect this right (sub-section 13.3.1.). Seeing that neither Dutch law nor case law seem to use this benchmark of the right to *effective* legal assistance in all four aforementioned ways, the next sub-section will set out to answer the central research question (sub-section 13.3.3.).

13.3.3. Answering the central research question

This sub-section seeks to answer the central research question, which will combine the more general aspects of abidance by the Convention but also the aforementioned specific elements of no (full) compliance regarding the right to effective legal assistance and the four sets of Convention minimum guarantees (sections 13.2. and sub-sections 13.3.1. and 13.3.2.). For this answer, the structure of the conceptual framework will be followed which, in summary, consists of: relevant rights, the relevant context and cross-cutting notions and the four perspectives of: a first vertical, a horizontal, a second vertical and, finally, a third vertical perspective.

As an initial observation, the current approach to ineffective legal assistance and its redress in Dutch criminal proceedings with the aforementioned Convention minimum guarantees does not appear to comply with the Convention right to substantive *effective* legal assistance. This lack of recognition of the underpinning right also appears to affect compliance with the four related basic standards of an effective defence in a fair trial. Those are: (i) the right to counsel; (ii) the lawyer-client relationship; (iii) State interference with counsel; and (iv) intervention in the case due to ineffective legal assistance. For example, Dutch criminal proceedings do not appear to fully abide by Convention minimum guarantees that are a further elaboration of the right to effective legal assistance such as under (i) the right to counsel. That is, in Dutch criminal proceedings the right to counsel does not seem to be provided at all “critical” stages and does not appear to be accompanied by the “special protection” of the higher “knowingly and intelligently” waiver standard. Similarly, on element (ii) of the lawyer-client relationship, in Dutch criminal proceedings there appears no clarity regarding counsel’s control over defence strategy and the role division with the accused as decision-maker about his personal rights. As a consequence, there also appears to be lacking conceptual clarity as to what constitutes actual and alleged ineffective legal assistance. It appears that this latter aspect of the seemingly absent distinction between actual and alleged ineffective legal assistance also complicates Convention-abiding compliance with the basic fair trial standards regarding (iii) State interference with counsel; and (iv) intervention in the case due to ineffective legal assistance. Overall, the Hoge Raad does not appear to consider there to be a right to effective legal assistance that the authorities are not allowed to hinder, as a negative obligation, without affording legal protection to the accused by exploring the possible effect on his rights. As a flipside of that consideration, the Hoge Raad does not seem to hold there to be a positive obligation that would require an intervention in the case when lower courts are confronted with ineffective legal assistance. Therefore, it is most important to note that the current approach to ineffective legal assistance and its redress in Dutch criminal procedure does not appear to fully comply with the Convention minimum guarantees for the right of the accused to an effective defence in a fair trial, especially on the right to *effective* legal assistance.

Against the background of these impacting factors, it is important to stress that the Hoge Raad does quash cases in which an *unassisted* accused did not have “an effective defence” and an assisted accused allegedly fired his lawyer at last word because of that lack. However, the Hoge Raad does not appear to want to afford the same level of protection to accused who get legal assistance which is “defective in a fundamental manner”. Not only scholars but also AGs – and perhaps also the Hoge Raad – appear to agree that the Court’s *Artico*-rule has to be construed as requiring only an intervention in the case by the authorities when “(...) the lawyer is absent or otherwise does practically nothing at all for the accused” (e.g. the scholarly work of Spronken; chapter 1). They seem to think that the Court’s assessment of the (negative) conduct of counsel is restricted to questions of absenteeism, or unwillingness to act. By extension, they appear to think that the Court avoids any

qualitative assessment of a lawyer's performance because of the nature of the relationship between a lawyer and the accused. Also, they appear to believe that the Court makes no distinction between State intervention and State interference in the lawyer-client relationship. Furthermore, they seem to consider that the Court clearly does not hold it within its jurisdiction to be able to criticize or reach conclusions on the competence of any individual lawyer, nor does it encourage what they suppose will necessarily be interference by the authorities. This interpretation of the *Artico*-rule in the Netherlands is relevant because also other arrangements regarding the right to counsel appear to heavily depend on this interpretation of the Court's case law. For example, the minimal approach to *Salduz* that stays very close to the facts of that case, is another such influential interpretation of the Court's case law in the Netherlands. Because of this supposed idea that the *Artico*-rule only applies where counsel is absent or does hardly anything, the Hoge Raad – and by extension the lower courts because they do not have their cases quashed by this highest court – can almost always be passive when confronted with ineffective legal assistance. An important reason for that lack of redress for ineffective legal assistance appears to be that Dutch law and case law do not yet acknowledge that the accused has a substantive right to *effective* legal assistance at “critical” stages. Not only can this be problematic for the accused whose individual right is thus not necessarily safeguarded, but also for the fairness of the criminal procedure “as a whole”. The reason for coming to that conclusion is that, as explained above, effective legal assistance is not only an individual right of the accused but also a procedural guarantee out of equality of arms and adversariality under the Convention.

The formulation of this answer to the central research question has taken into account the context of Dutch criminal proceedings. After using the four perspectives to explain current Dutch criminal procedure, it has to be noted that currently counsel might not have sufficient procedural means pre-trial to live up to what is required of him in court. Of course, the example of *Salduz* but also the lacking right to counsel during the EU Directive 2013/48/EU's other “investigative or other evidence-gathering acts” are indicative in this respect. Without corresponding pre-trial rights for counsel, the apparent shift towards a “more contradictory” procedure at trial risks exacerbating the situation where the accused has to bear the consequences of almost all forms of (negative) conduct by counsel. This situation appears to be problematic, as explained in this book, because there are no other solutions open to the accused that remedy the negatively affected course and/or outcome of the proceedings in case of ineffective legal assistance. For example, Dutch disciplinary law and tort law do not ensure that the criminal case will be reopened (chapter 4). Therefore, the situation in which counsel appears to be held increasingly responsible for the three defence activities of (i) witness requests; (ii) activities in relation to the right to appeal, attend the appeal hearing and the appeal in cassation ; and (iii) substantive defences (chapter 12) may be problematic. After all, currently, there does not appear to be a “sanction” for lower courts which do not live up to their obligation and no redress for ineffective legal assistance if counsel's (negative) conduct harms the accused in terms of his personal rights, rather than defence strategy. As a result, it will come at the procedural risk of the accused whose effective defence is at stake, as explained in several ways in this chapter.

The formulation of the answer to the central research question also took into account whether priority has been given to the more adversarial changes to Dutch criminal procedure over the more inquisitorial ones (chapter 4). Particularly, this study has paid attention to changes pertaining to defence rights that “fit” within the largely more inquisitorial criminal procedural framework in the Netherlands. This study has been able to draw interim conclusions as to the effect that some of the traces of the origins of Dutch criminal procedure have left. At least by way of legal tradition, these elements still appear to influence a more inquisitorial pre-trial phase. For example, the defence is still dependent on the authorities to hear witnesses, particularly in court. The judge can still play an active role in questioning those witnesses. The balance in the criminal procedural triangle in relation to the hearing of witnesses is being struck by requiring that lower courts which reject to hear a witness who has been requested by the defence, must reason that decision in their verdicts. However, as this research has also been able to demonstrate, the lawyer can be held responsible for “negligence” for not pointing out the court's error in relation to a factually wrong rejection. Against this background, it also has to be pointed out that pre-trial the accused has not yet obtained all the rights that would be required to make the defence a full procedural party. For example, an adult accused does not have legal assistance during police interrogations or to question witnesses on his own in order to gather information. The defence still does not have a position as “party” pre-trial in the Netherlands. For this

same reason, it could result in unfairness if the defence would nonetheless be held responsible as a “party” during a full-fledged adversarial trial stage.

Certainly, the Dutch trial stage is not fully adversarial. In the Netherlands, there are still some traces left of the trial judge who was and remains, supposed to compensate the accused for that relatively weak pre-trial position somewhat. There is no reason to believe that the judge cannot still act as active guarantor of fair trial rights and truth finder. However, this research has also given some indications as to where the trial judge might not have been really active, especially where the bench might have been confronted with ineffective legal assistance.

It is important that the court acts as guarantor of fair trial rights and truth finder because in the general sense it helps all individuals, including the accused, if the truth has been found in a fair process. In individual cases, not all accused persons, particularly not if they are guilty, will benefit from that role of truth finder, but that is not what is being meant with these terms. The importance of an active role of the bench lies in the fact that there remains a need to compensate for the pre-trial stage that thus still appear to be more embedded in the civil law tradition.

Especially with regard to the problem discussed in this book – ineffective assistance by counsel – the influence of legal tradition still appears to exist. However, contrary to what appears to be often believed in the Netherlands, the Court does not require the bench in an adversarial trial to be more passive, especially not when confronted with ineffective legal assistance. Rather, the Court requires the judge to be the “(...) ultimate guardian of the fairness of the proceedings”, as explained above (sub-section 13.2.5.). Therefore, the analysis of the Court’s case law as presented in this book does not seem to confirm the rather generally accepted idea in the Netherlands that the adversarial trial would require a more passive judge under all circumstances.

Moreover, while the two more active sides of the defence and prosecution might indeed be part of an adversarial hearing, the safety net for ineffective legal assistance lies with the *active* bench. When confronted with ineffective legal assistance, the court cannot remain passive, as the Court would put it. The Court also does not seem to consider that activity of the court can depend on the assertiveness of the accused. Rather, as the Court would argue, passivity of counsel can be a sign of ineffective legal assistance and harm to the accused’s rights. Therefore, the often referred to interpretation of the Court’s case law as if the court can always have its role depend on the defence – which assumedly would have to be more active as a “party” while also being passive in light of ineffective legal assistance – does not seem to comply with the Convention.

Certainly, non-compliance with the Convention cannot be explained away by referring to the influence of the *civil law tradition* on Dutch criminal proceedings either. Corresponding with its tradition, the criminal process in the Netherlands still appears to be a rather more inquisitorial than adversarial process, as implied above (chapter 4). For example, the defence remains dependent upon the authorities to hear witnesses, as yet articulated. Accordingly, the defence is not, simply put, a fully-fledged adversarial “party” to criminal Dutch proceedings from the early start until all remedies are exhausted. However, this interim conclusion does not mean that the Court’s case law does not help to distinguish actual from alleged ineffective legal assistance under the Convention. Instead, this research has been able to indicate that, mostly, the Court’s case law requires an *alignment* of criminal proceedings across the common law-civil law divide in so far as the right to counsel and other defence rights are concerned. This chapter has already explained how many of these changes to the defence position in Dutch criminal procedure have been prompted – if not caused – by the Court’s case law. This study has not encountered reasons to infer that the Court would deal with ineffective legal assistance differently in common law than in civil law countries. Rather, the underlying Convention rights that the Court builds on in order to explain its approach to ineffective legal assistance apply across the common law-civil law divide. This approach is not without problems because the intricacies of the different common law and civil law criminal proceedings require their own solutions. For the Court, that solution is normally found in applying its general principles to the specific facts of the case. Nonetheless, the Convention right to *effective* legal assistance has been held applicable across the common law-civil law divide and has been consistently upheld as underpinning and interconnecting the four components mentioned in this study. Therefore, this concluding chapter will have to propose solutions so that the Dutch approach to ineffective assistance by counsel and its redress in Dutch criminal proceedings also becomes Convention-conforming on this – admittedly particular – issue at hand (section 13.4.).

As a penultimate important remark, all the aforementioned elements of the answer to the central research question have not overlooked the fact that the inevitably select case law of the Hoge Raad impacts the study in several ways. Surely, not all cases that might shed a light on ineffective legal assistance and its redress in Dutch criminal proceedings come before lower criminal courts in the first place and the Hoge Raad as last instance court. Also, some cases of ineffective legal assistance that could have been helpful to the analysis in this book might have been resolved at the factual levels and the adopted cassation case law is largely only useful in relation to norm-setting, rather than offering factual-level solutions to ineffective legal assistance. Some further limitations regarding the Hoge Raad case law are worth stressing, such as that no response in cassation is required if a cassation lawyer does not mention a specific issue explicitly in his brief. As such, this last remark should also be read as an encouragement for lawyers acting on cassation to include relevant grounds regarding ineffective legal assistance and its redress in Dutch criminal proceedings in their cassation briefs. Also, the Hoge Raad, in line with the Dutch *Rechtsstaat* which is based on the division of State powers, cannot act on issues regarding the right to counsel that fall within the domain of the legislator. For example, the Hoge Raad has repeatedly referred to the responsibility of the *legislator* to adopt the appropriate *Salduz*-legislation. With regard to such *Salduz*-legislation, it will most likely be the national implementation law of EU Directive 2013/48/EU on minimum rules regarding *inter alia* “the right to access to a lawyer” that will codify the right to counsel at “critical” stages such as police interrogations. Finally, this research often had to resort to the Hoge Raad case law in order to explain how Dutch criminal proceedings deal with ineffective legal assistance and its redress. Because these cassation cases are inherently focusing on how lower courts have acted – or not – when responding to possible instances of ineffective legal assistance, this study could hardly separate the two possible trends identified at the outset (chapter 2). In other words, it has been complex to separate the one trend of – increased – responsibilities of counsel from the second trend of a – more – passive attitude of the bench in criminal proceedings. Taking these factors into consideration, this sub-section on this answer to the central research question did not want to make claims that are too general in nature.

To conclude on this answer to the central research question, the “margin of appreciation” for the Netherlands will allow it to deal with the Convention right to effective legal assistance in its specific criminal process with its own design of the interaction between counsel and the role and conduct expected of the authorities. Consequently, Dutch criminal proceedings will have to find the best possible “fit” to ensure that the Convention right to effective legal assistance can be guaranteed within its relatively more inquisitorial criminal procedure with the active judge. Rather than an *Ebanks*-style *ex post* procedure for ineffective legal assistance, it could therefore be more “natural” to Dutch criminal proceedings perhaps to emphasise the ultimate guardian-role of the judge to prevent the accused from having to bear the consequences of harm done to his personal rights, rather than defence strategy. The following section will deal with this and related recommendations (section 13.4.).

13.4. Recommendation: A new approach to redress for ineffective legal assistance

This section will propose a new Convention-conforming and thus rights-based approach to redress for ineffective assistance by counsel in Dutch criminal procedure (sub-section 13.4.1.). The aspiration of this section is to also ensure that this solution to the main research themes acts as a specific and general deterrent in order to prevent ineffective legal assistance from occurring.

After the possibilities for redress have been elaborated upon, a shift will be made to suggestions for performance standards for counsel (sub-section 13.4.2.). The reason for these suggestions is that this study has had to acknowledge that those performance standards appear to be largely lacking in Dutch law and case law as well as in the lawyers’ deontological norms (chapter 8). The Court itself certainly does not need such performance standards for its decision regarding ineffective legal assistance under the *Artico*-rule. However, performance standards in the Netherlands does appear to fill a void left by criminal procedural law and deontology that leave largely *undefined* what constitutes actual ineffective assistance by counsel in Dutch criminal procedure. While this study inevitably has focussed more on *intra*-criminal procedural solutions to the specific topic of ineffective legal assistance, it is only reasonable that questions about the responsibilities of the Bar in this respect are also touched upon. In order to do so in conformity with this research, this sub-section will use as guidance the underpinning general principles of the Court.

Finally, a recommendation will be made as to how prevention of ineffective legal assistance in Dutch criminal proceedings should be encouraged (sub-section 13.4.3.). Prevention is always better than cure, of course. Certainly, the preventive capacity and deterrent effect of case law that “sanctions” lower courts that remain passive when confronted with ineffective legal assistance, is notoriously difficult to assess. Nonetheless, this research does not want to conclude with a section on how to offer redress only, but also wants to propose solutions for the prevention of ineffective legal assistance, as will be discussed in final sub-section (sub-section 13.4.3.).

13.4.1. Convention-conform redress for ineffective legal assistance

Given the lack of compliance of Dutch criminal proceedings with the minimum guarantees under the Convention in the specific ways mentioned above, it seems key to ensure either judicial supervision or a separate *ex post* appeal procedure specific to redress ineffective assistance by counsel or both. Some scholars like Schalken already construe these norms, but they shall have to be made more context-specific to Dutch criminal proceedings in relation to the *Artico*-rule. In other words, the Hoge Raad will have to determine how to require from lower courts that they inquire into the quality of assistance by counsel under the *Artico*-rule – quite similar to how they already are prompted to do where an ineffective defence by the unassisted accused occurs (the *Hoogerheide* cases). This section will propose how to combine that internal benchmark with the external benchmark derived from the Convention right to effective legal assistance.

The emphasis shall be on the more natural “fit” for Dutch criminal proceedings, but this does not mean that the Dutch *legislator* cannot create yet another separate appeal procedure regarding ineffective legal assistance *per se*, perhaps also by modelling it after the Convention-conforming solution of two instances of domestic courts (*Ebanks v. the United Kingdom*; chapter 11). Such an appeal process would allow an accused to raise the specific issue of a complaint about ineffective legal assistance at two instances so that the case can be examined in great detail. After a first instance decision, the accused would be allowed to appeal. At the end of the proceedings, a decision would have to be made as to whether or not the accused had been harmed in terms of his rights, rather than defence strategy, by ineffective legal assistance. If the Court would be as strict as in the *Ebanks*-case mentioned, the decision would have to have an effect *in Dutch* criminal proceedings. This means that both the potentially negatively affected course and outcome would have to be changed if it has been established that ineffective legal assistance occurred. Under such circumstances, the case would be remitted to a regular criminal court that would start with the case or perhaps to the appeal court that would consider the case *de novo*. However, it does seem that yet two other rounds of proceedings in the Netherlands would not be the most foreseeable option, considering that the Dutch judge can be as active as required under the *Artico*-rule.

Before getting to that active trial judge, it has to be stressed that, as explained above, both means of intervention in the case can exist in one jurisdiction (section 12.7.). Therefore, there is no reason for the legislator not to include yet another *ex post* procedure that will specifically deal with complaints by accused of ineffective legal assistance. Having said that about the compatibility of judicial supervision and an *ex post* review process, of course, it can be said that judicial supervision seems a better fit in more inquisitorial criminal proceedings with a more active judge. Nonetheless, perhaps it would be good to also include a separate ground of a *novum* for revision related to ineffective legal assistance, so that two courses of judicial supervision and an *ex post* review are available. Both can be means to offer redress and hopefully thereby also prevent that the accused has to bear the consequences of counsel’s (negative) conduct that harms him in terms of his personal rights, rather than defence strategy.

As a penultimate remark and a recommendation for criminal defence lawyers, the Hoge Raad might have to be prompted to ensure the aforementioned case law developments. Therefore, it is suggested here that cassation counsel who write the briefs should explicitly argue before the Hoge Raad whether or not the lower courts have checked, and reasoned in their verdicts, that the accused had indeed waived his personal rights where this was apparently assumed by those courts. They will have to submit cassation in appeal briefs that refer to the Convention right to effective legal assistance. Given that the standards regarding the three aforementioned defence activities might still not be fully clear, this research suggests to also call on cassation lawyers to invite the Hoge Raad to explain why such a standard was, or was not, met. Only when the Hoge Raad explains the standards for lower

courts that have to respond with reasons in their verdict to witness requests, substantive arguments, and timely submissions of briefs for appeal, for example, will the lower courts know that the defence lawyer has *not* done what can reasonably be expected of him. Such standards will also help to distinguish actual from alleged ineffective legal assistance. Therefore, cassation lawyers can and should trigger the Hoge Raad to explain its standards, which as explained above are still not clear, despite some of the Hoge Raad's overview judgments.

This research also proposes that counsel should point out to the other participants within the Dutch criminal procedure that the aforementioned aspects of the approach to ineffective legal assistance do not abide by the minimum guarantees of an effective defence set by the Court. In their pleadings in court, lawyers should emphasise the importance of the personal rights of the accused and how those require a final say by their possessor: the accused. In this way, the lawyer can contribute to ensuring that an effective defence is both seen as an individual right of the accused and as a procedural guarantee for a fair criminal procedure with truth finding.

Therefore, all participants in Dutch criminal proceedings have their role to play so that the accused does not end up bearing the consequences of (negative) conduct of counsel that harms him in terms of his rights. In the interaction of all participants, including authorities and the lawyer, ineffective legal assistance has to be met with redress and, hopefully, also prevented from happening in the first place. Before this research will draw a conclusion as to what in chapter 2 has already been labelled the “third” way because it combines the core values of autonomy and an intervention in the case out of protection of the right of the accused to an effective defence within a fair trial, first performance standards for counsel will be elaborated upon (sub-section 13.4.2.).

13.4.2. The need for performance standards for counsel

As explained above, both the Court and, by extension, domestic courts do not require national generally accepted performance standards for lawyers in order to assess counsel's performance on ineffective legal assistance under the *Artico*-rule. Rather, they have to determine whether counsel's services ensure equality of arms and an adversarial hearing (sub-section 13.2.6.). Nonetheless, because Dutch law and deontology leave largely *undefined* what constitutes ineffective legal assistance, it would be helpful if the Bar in the Netherlands would develop performance standards for counsel. At least two benefits of such performance standards follow from the general context in which this study into the main research themes of ineffective legal assistance and its redress in Dutch criminal proceedings is made.

First, performance standards for counsel could make it foreseeable for lawyers who would then know what can reasonably be expected from them, as a positive issue. Second, these standards could make lawyers aware of the circumstances under which they would possibly fall short from what is required from them – ineffective legal assistance – as a negative issue. This latter aspect can hopefully also have a preventive effect. If lawyers can anticipate what conduct can amount to ineffective legal assistance – also at worst under the *Artico*-rule – they will hopefully find ways to not be accused of such (negative) conduct.

These benefits are important to highlight in this sub-section, and require a further explanation of relevant existing rules that will be reiterated from previous substantive research chapters (mostly chapters 8 and 10). Important norms are laid down in the Lawyers' Act, there are deontological norms, and a non-binding Profile of Defence Counsel (section 8.3.1.). Taking these norms one step further, as this research has explained, additional norms will be needed in order to fully explain what constitutes *ineffective* legal assistance. The development of performance standards would be helpful because Dutch procedural law and deontological norms give hardly any insight into how counsel should have control over defence strategy. Also, these norms can indicate what the role division between the lawyer as advisor and the accused as decision-maker entails. If this void of the lack of specificity regarding counsel's performance will be filled, it can help the Hoge Raad and lower courts not to conflate the roles of counsel and the accused because of a better appreciation of the defence as a unity consisting of two different actors. As explained in this research, it is exactly this lack of clarity of the role division between counsel and the accused that currently is an important contributing factor to the result that the accused has to bear the consequences of almost all conduct of counsel. Certainly, even at this stage, situations are excepted in which the lawyer, simply put, breaches the law and confidentiality. While there is a general understanding that the accused is *dominus litis* and the

competences of counsel at trial are derived from the accused's, nonetheless this study has given indications at least as to how *de facto* counsel will be held responsible while that comes at the procedural risk of the accused. Therefore, in this apparently unclear situation, further illumination appears to be necessary.

Of course, it would go beyond the content and scope of this research to develop performance standards here for lawyers who act for accused in Dutch criminal proceedings. However, this section will give an indication as to important principles that could underpin such standards, based as far as possible on the context of the process in the Netherlands and insights from the Court's case law. As noted in the introduction to this chapter, this study will resort to general principles from the Court's cases.

Independence and partisanship, but seen in light of the presumption of innocence

Taking into consideration what the Court has adjudicated, three important principles that could underpin performance standards of counsel can be formulated. These include: (i) counsel has to zealously defend the accused's rights, interests and wishes, within the boundaries of the law, by constructing and presenting the accused's own story; (ii) counsel has to refrain from behaviour that does not bring forward the accused's subjective position; and (iii) counsel has to act in accordance with the lawyer-client privilege.

A zealous defence

With regard to the first notion of a zealous defence that evolves around the accused's own story in the criminal procedure, it is important that the lawyer has to construct a theory concerning the case that is consistent with the evidence and which is most favourable to, and the best possible defence for the accused, without acting contrary to the law and deontology. In this way, counsel respects the presumption of innocence, even if the accused makes an allegation in bad faith. In accordance with the personal rights of the accused that are underpinned also by the presumption of innocence, counsel must not pass judgment on the accused. These personal rights and the presumption of innocence requires that counsel – like all other participants in the procedure – have to respect the criminal procedural framework within which such guilt is found. Guilt cannot be pre-judged, also not by counsel. Only after the entire criminal procedure has taken place can guilt be established.

Certainly, this particular idea of what a zealous defence would entail, does not mean that counsel should refrain from advising the accused about what will happen if the trial judge *fails to believe* the defence's theory. For instance, counsel should inform the accused about the possibility that the prosecution would meet its burden of proof on issues such as that the accused has committed the indicted offence and the court might convict him on that basis. Here it is meant that the lawyer has to act in conformity with the personal rights of the accused which are also underpinned by the presumption of innocence that should also govern his conduct vis-à-vis the accused.

Critics might argue that deontological norms require that in the Netherlands counsel puts forward no propositions that he knows to be, or should reasonably know to be, untrue. However, the lawyer does not breach this norm and makes no information public that has been given to him in confidence, when constructing a theory of the case on the basis of the facts without arguing issues which he knows to be, or should reasonably know to be, untrue. The lawyer is required to provide the accused with such a zealous partisan defence, while other participants such as the trial judge are free to, for instance, pose questions to the accused in order to verify what the lawyers knows from his client about details of the crime.

Respect for the accused's subjective position

The second principle that would be relevant for performance standards would be that the lawyer should not defy the accused's freedom of choice in how to present the accused's theory of the case or invent a so-called "own good" that negates the rights, interests and wishes of the accused, subjectively speaking. Counsel has to respect the accused's subjective beliefs and commitments, so that, in principle, the accused's ideas about the world and about his self are respected. This role perception of counsel also encompasses that the lawyer should carefully consider the wishes and the vision of the accused regarding the defence strategy and should realise that the accused can possess important information, which has the potential to be particularly relevant for the facts of the case.

This description of what, in this research, might best be seen as a call against acting contrary to the accused's subjective position should not be understood to entail that counsel can neglect to explain or possibly use persuasion to help the accused to see how his rights, interests and wishes are best served. After all, counsel will, generally speaking, also have to advise accused persons who are not so able to make the best use of their supposed autonomy. In this category of persons currently fall minors and persons with a mental illness or impairment.

However, ultimately counsel cannot use a surprise defence that goes against the accused's rights, interests and wishes or otherwise substitute the accused's theory of the case with his own version, even if this would better serve the accused. This description of the role of counsel corresponds with the leading notion in the Netherlands that the accused is the *dominus litis* in the criminal proceedings, so that the lawyer cannot defy the will of the accused and cannot (publicly) renounce the position of the accused. That role perception does not encompass that counsel can "only" act as a spokesman for and a "translator" of the standpoint of the accused. Counsel ought to make the best possible use of significant insights and suggestions by the accused about the defence strategy.

Hence, counsel cannot and should not override the rights, interests and wishes of the accused. Where counsel considers that he cannot act in accordance with the subjective position of the accused, Dutch law offers a clear option: the lawyer can withdraw from the case. In such a case counsel is required to give the accused due notice, so that another lawyer can assist the accused if counsel fundamentally disagrees with the accused. Withdrawal is possible where counsel cannot dissuade the accused from, for example, having him present certain standpoints, defences or requests, such as asking to hear certain witnesses, that he – with his knowledge of the *dossier* and the law – cannot professionally countenance.

Compliance with the lawyer-client privilege

Finally, the third issue is best visible where there are tensions between the first aspect of the accused's own theory of the case and the second aspect of counsel not acting contrary to the accused's subjective position. Where the accused does not consent to the presentation of the theory of the case which is consistent with the evidence because the lawyer wants to go against the accused's subjective wishes as to his defence, the requirement for counsel to keep discussions between him and the accused confidential is relevant. Counsel's proper role and conduct under the rights-based approach which is being proposed here, is to keep the accused's confidence on the basis of the lawyer-client privilege. This principle is important also if there is no conflict between the first two issues, of course, but can be best explained when the two conflict, as above.

The lawyer-client privilege has a specific meaning in criminal proceedings. This special connotation derives from the accused's personal rights which are underpinned by the presumption of innocence. In criminal cases, the lawyer-client privilege is connected to the accused's entitlements such as the right to remain silent and the right not to incriminate oneself. Therefore, the basis is twofold in criminal proceedings: the lawyer-client privilege is not only based on the law which is applicable to all lawyers including defence lawyers but also rests on the rights of the accused. The right to legal assistance would lose much of its effectiveness if an accused who chooses to be assisted by counsel would not be able to pass on his own story to his lawyer. In other words, the accused's rights cannot be subsumed by the impersonal needs of the legal system which should be in favour of the accused's personal needs. For this same reason, the provision of rights exclusively to the lawyer, who can then, in effect, not work on the basis of the accused's instructions, will also often undermine the lawyer-client privilege. For instance, where the law allows a lawyer to have access to items in the dossier whilst the accused cannot examine them, this results almost inevitably in a wedge being driven between the accused and his lawyer. As a consequence of exclusive rights of counsel, the accused can hardly be expected to give his lawyer instructions upon which counsel has to advise the accused on how to launch the best possible defence while the accused can take most of the decisions in his case. Likewise, the lawyer will often face difficulties in building a relationship of trust with the accused. Therefore, it would also be important for Dutch law and case law to further develop the negative obligation not to hinder effective legal assistance by State interference and the positive obligation to protect the right of the accused to effective legal assistance when confronted with a lawyer whose services amount to ineffective legal assistance. This last observation leads to the final recommendation

regarding a new approach to ineffective legal assistance and its redress in Dutch criminal proceedings that conform to the aforementioned Convention minimum guarantees (sub-section 13.4.3.).

13.4.3. “Third way” for redress for ineffective legal assistance

This research recommends a rights-based approach to ineffective legal assistance (section 13.4.1.). Because that rights-based approach has to be made specific to the Dutch context, it is important to revisit the two notions of autonomy of the accused and an intervention in the case for “an effective defence” as mentioned in the conceptual framework (section 2.4.2.). This earlier explanation already highlighted the tension between these two core values when taken to their extremes. Therefore, against this background, this final sub-section will propose a “third way” for redress for ineffective legal assistance in Dutch criminal proceedings, which will reconcile both aforementioned core values in a manner that conforms to the Convention minimum guarantees.

Returning briefly to the Convention minimum guarantees in relation to these two core values, two important remarks have to be made. First, the overview of the Court’s case law in this research has demonstrated how the tension between the autonomy of the accused, on the one hand, and the importance of an effective defence for a fair process with truth finding, on the other, is predominantly dealt with by giving the accused a right to counsel during stages of the criminal procedure that are critical for the fairness of the criminal procedure “as a whole”. Second, in doing so, the Court reconciles both core values, which were identified in chapter 2, while construing an effective defence in anti-consequentialist terms because the accused is entitled to the best possible defence in subjective terms. This means that the accused does not have to opt for legal assistance. However, where the accused proceeds with counsel, it is only reasonable that counsel is responsible for defence strategy and the accused continues to have the final say about his personal rights. This reasoning comes with a negative obligation of the authorities not to resort to State interference as well as a positive obligation to intervene in the case as a safety net under the *Artico*-rule. By this entire system of the four components of an effective defence of the accused in a fair trial, the Court “manages” the aforementioned tension between the autonomy of the accused and the importance of an effective defence for a fair process with truth finding.

On the one hand, this rights-based approach ensures that cases are not being disposed of on the basis of the accused’s purported “consent” by having the supposed autonomy hold sway over any effective defence. On the other hand, this rights-based approach guarantees that the authorities intervene in the case in order to protect the rights of the accused when confronted with ineffective legal assistance without allowing them to go against the subjective position of the accused whose defence is central to a fair trial. By prioritising the autonomy of the accused in so far as ineffective legal assistance is concerned, the Hoge Raad usually does not abide by the aforementioned minimum guarantees, as explained in the sub-section on specific elements of non-compliance (sub-section 13.3.6.). Also, this position of the Hoge Raad that appears to consider autonomy of the accused almost absolute – so that it is given priority at the expense of an effective defence – does not appear to be in line with Dutch law in the following specific way. The Hoge Raad no longer gives primacy to the autonomy of the accused in relation to, for instance, the choice of the accused for either self-representation or legal assistance at several stages of the criminal procedure while establishing mandatory legal assistance during some procedural stages. This research has established that there are internal benchmarks inferred from rules created in relation to the lack of an effective defence for unassisted accused which it does not yet apply to this absence caused by ineffective legal assistance under the *Artico*-rule (comparing *Hoogerheide*-case law with possible instances of ineffective legal assistance that currently are not examined by a court). By not overturning cases in which lower courts might not have complied with the *Artico*-rule, the Hoge Raad runs a real risk. As a consequence of allowing autonomy to hold sway over an effective defence, lower courts do not have to offer legal protection to the accused at the risk of having their cases overturned on cassation. The Hoge Raad could use its ultimate sanction, as Judge Myjer would call it, so that the accused has his fundamental right to an effective defence guaranteed by counsel and also, by extension, a fair trial with truth finding are ensured. This “third way” based on a rights-based approach is how the Court resolves the tension between the two core values – autonomy of the accused and an effective defence – which are needed for both the rights protection of the accused and the fairness of the criminal procedure “as a

whole". As explained above, this solution to ineffective legal assistance complies with the Convention and the design of Dutch criminal proceedings.

The observations about the case law of the Hoge Raad in this research should certainly not be misunderstood to mean that this research would imply the Court always requires the authorities to intervene in the case. It has been explained that the Court holds that the authorities have to be reticent when intervening in the case under the *Artico*-rule. However, it has also become clear in this research that the Court does not accept State interference or passivity by the domestic authorities which are confronted with ineffective legal assistance. The Court emphasises the *interactions* between all participants for the protection of the rights of the accused. The authorities are ultimately held responsible where the accused ends up with ineffective legal assistance which harmed the accused in his personal rights, rather than defence strategy. A lack of assertiveness of the defence will not "save" the State from a violation of Article 6, as PG Fokkens would phrase it, exactly because that could be an indication of ineffective legal assistance.

For this rights-based approach to responding to ineffective legal assistance to be even more effective than the above-explained reactive response, it will also be important to turn to more proactive solutions. Ideally, the implementation of the *Artico*-rule to ineffective legal assistance should also help to *prevent* that an accused will even have to suffer from ineffective legal assistance in Dutch criminal procedure. The reason for this expansion into other proactive and preventive solutions is that an intervention in the case is only one way to prevent the accused bearing the consequences for ineffective legal assistance. Of course, supposedly, such interventions in the case could have a specific and general deterrent effect. The particular lawyer might be warned not to perform below par in the next procedure. Also, other lawyers more generally speaking might also learn from the specific instance in which the lower court inquired into the performance of counsel under the *Artico*-rule. This applies equally to judicial supervision and a separate appeal *ex post*, although this option is currently not available under Dutch law. However, it also has to be realised that a deterrent effect is notoriously difficult to assess in many cases, potentially including instances of interventions in the case.

This is not to say that the judge cannot play an important role in providing redress and possibly also as a consequence prevent ineffective legal assistance, especially given that a lay accused will not always be able to assess whether his lawyer provides him with the services that can be expected of him. However, it should be understood as an appeal to not leave it to the judges only and to view a judicial intervention in the case as a last resort.

To give a few examples, criminal defence lawyers are well-placed to discuss ineffective legal assistance with their peers. The Bar can and should play this role, not only on the basis of case specific matters but also more generally in drafting the above-proposed performance standards for counsel in Dutch criminal proceedings (sub-section 13.4.2.). In particular criminal cases, it will be much harder for prosecutors to respond to ineffective legal assistance, but as explained in this research the prosecution can point out an apparent disagreement between counsel and the accused. Criminal defence lawyers should, of course, also point out lacking arrangements for the right to counsel and explain to authorities why State interferences prohibit them from providing the accused with effective legal assistance. Perhaps also accused persons should not hesitate to discuss difficulties with their defence lawyer with the authorities. Finally, real issues arise where cases are settled out of court and there will not be a judge who can provide redress for ineffective legal assistance, if the right to counsel is granted at all. From this perspective of ineffective legal assistance, it would therefore be helpful to limit the resort to out-of-court settlements that will only come before a judge when the accused resists and thus does not give his "consent" to the settlement.

As follows from this description, both under Dutch law and case law developments it will have to be considered how in the *interactions* between all participants – both within and outside of the specific criminal case – the accused is afforded his right to an effective defence. Counsel shall have to prevent themselves from providing ineffective legal assistance to the accused. The court shall have to intervene in the case by inquiring into counsel's performance under the *Artico*-rule. The prosecutor and other officials might have to indicate pre-trial, at trial or after trial that counsel might not perform well. Overall, this research ends with a call on all involved persons and their institutions. Concerted action is necessary, because the right to an effective defence is not only an individual right of the accused but also a procedural guarantee for the fairness of the trial as a whole.

SAMENVATTING

Deze dissertatie behandelt twee nauw met elkaar verbonden onderwerpen – ineffectieve rechtsbijstand en redres voor ten minste de ergste vormen daarvan in het Nederlandse strafproces. Dit onderzoeksterrein is in Nederland nog grotendeels onontgonnen. Daarom is deze studie veelal verkennend van aard.

Dat wil niet zeggen dat eerdere studies naar gerelateerde onderwerpen niet een belangrijk fundament voor dit proefschrift hebben gelegd. Uiteraard zijn dergelijke studies naar de normen voor een *goede* verdediging door de raadsman en naar verdedigingsrechten en andere *fair trial*-rechten meegenomen. Maar het betekent wel dat voor dit proefschrift veelal zelfstandig is bepaald hoe ineffectieve rechtsbijstand en redres daarvoor in het Nederlandse strafproces worden benaderd. Daarvoor is met name origineel casuïstisch onderzoek verricht.

De nadere afbakening van dit onderzoek is verwezenlijkt door met name jurisprudentie te bestuderen van de Hoge Raad en het Europese Hof voor de Rechten van de Mens (hierna: het Hof). Overwogen is hierbij dat het hedendaagse karakter van het Nederlandse strafproces en de twee onderzoeksthema's het best te duiden zijn aan de hand van Hoge Raad jurisprudentie. Bovendien is meegewogen dat het monistische Nederland voorziet in directe werking van het Verdrag voor de Rechten van de Mens en Fundamentele Vrijheden (hierna: Verdrag of EVRM). Dit laatste betekent dat, zelfs al zou men in Nederland ineffectieve rechtsbijstand en redres voor de verdachte in de wetgeving en/of jurisprudentie niet conform de minimumwaarborgen inrichten, dan nog moeten dankzij de doorwerking van het Verdrag in het Nederlandse strafproces de desbetreffende verdedigingsrechten en andere *fair trial*-rechten worden beschermd. De jurisprudentie van het Hof wordt hiertoe onderzocht omdat deze uitleg geeft aan hedendaagse minimumwaarborgen in het Verdrag dat een "*living instrument*" geacht wordt te zijn.

Geleid door deze inzichten, benadrukt deze dissertatie een op rechten gebaseerde aanpak van ineffectieve rechtsbijstand en redres daarvoor voor de verdachte in het Nederlandse strafproces. Daarom combineert dit boek zowel een Nederlands als een Straatsburgs perspectief om de volgende centrale onderzoeksvraag te beantwoorden:

In hoeverre voldoet de huidige benadering aangaande ineffectieve rechtsbijstand en redres daarvoor voor de verdachte in het Nederlands strafproces aan de minimumwaarborgen die het Europese Hof voor de Rechten van de Mens aan het recht van de verdachte op een effectieve verdediging in een eerlijk proces stelt?

Bovenstaande normatieve hoofdvraag omvat twee beschrijvende deelvragen. De eerste beschrijvende deelvraag is: (A) Welke minimumwaarborgen stelt het Hof ten aanzien van het recht op een effectieve verdediging in een eerlijk strafproces? De tweede beschrijvende deelvraag is: (B) Wat is de huidige benadering van ineffectieve rechtsbijstand en redres daarvoor in het Nederlandse strafproces? Voor de beantwoording van deze twee beschrijvende deelvragen is een conceptueel kader ontworpen (hoofdstuk 2). Dit kader structureert zoveel mogelijk het originele, veelal casuïstische onderzoek. Uiteindelijk kunnen dankzij deze structuur, een vergelijking worden gemaakt tussen de twee voornoemde delen (A en B) om de hoofdvraag te beantwoorden.

Alvorens de resultaten van dit onderzoek te presenteren, is het van belang om aan te geven dat, zoals de hoofdvraag ook benadrukt, deze studie met name is gericht op het verlenen van een inzicht in de minimumwaarborgen die het Hof aan het Verdragsrecht van de verdachte op een effectieve verdediging in een eerlijk proces stelt. Deze minimumwaarborgen die in het Verdrag besloten liggen, worden externe maatstaven genoemd. Zo wordt bijvoorbeeld onderzocht of het Hof het voldoende acht voor een effectieve verdediging in een eerlijk strafproces dat louter rechtsbijstand is verleend (formele interpretatie). Maar er wordt ook bekeken of het Hof bepaalt dat deze bijstand *effectief* moet zijn geweest om aan de minimumwaarborgen in het Verdrag te voldoen (materiële interpretatie). Bovendien wordt onderzocht of het Hof beoordeelt dat de autoriteiten verplichtingen hebben ten opzichte van de verdachte indien aan hem ineffectieve rechtsbijstand wordt verleend en, zo ja, hoe de jurisprudentie daaromtrent is opgebouwd.

Hoewel het accent dus ligt op externe maatstaven, komen interne maatstaven in mindere mate ook aan bod. Deze interne maatstaven zijn veelal afgeleid uit vergelijkingen tussen Nederlandse strafzaken waarin de verdachte wel of niet werd bijgestaan door een advocaat. Daarbij is in het bijzonder gelet op de interne consistentie van de Nederlandse benadering van ineffectieve zelfvertegenwoordiging en dito rechtsbijstand. Bovendien zijn vergelijkingen gemaakt tussen verdedigingsactiviteiten – zoals het indienen van verzoeken, het voeren van verweren en het verrichten van andere handelingen zoals het instellen van hoger beroep of cassatie – door bijgestane en niet-bijgestane verdachten. Op basis van deze vergelijkingen wordt bekeken wat redelijkerwijs van de raadsman in het Nederlandse strafproces wordt verwacht en of niet *te veel* van die advocaat wordt geëist. Daarbij wordt ook onderzocht of Nederlandse autoriteiten hun verantwoordelijkheden niet afwentelen op de raadsman op een wijze die ten koste gaat van de verdachte.

Bij zowel de externe als interne maatstaven gaat het steeds om het (negatieve) optreden van de raadsman in het strafproces in plaats van de positieve bijdrage die men toch meestentijds van de advocaat mag verwachten. Daarbij is meegewogen dat in een eerlijk strafproces een door een raadsman bijgestane verdachte niet “slechter” af behoort te zijn dan een niet-bijgestane verdachte. Voor dit laatste punt geldt dat om die reden in de hoofdvraag de terminologie van “een effectieve verdediging” is gekozen en niet louter aan effectieve rechtsbijstand wordt gerefereerd. Ook is als uitgangspunt genomen dat een verdachte, die toch vaker een leek zal zijn, begrijpelijkerwijs minder juridisch beslagen ten ijs kan komen dan een rechtsgeleerde raadsman. Daarbij is ook meegewogen dat bijgestane verdachten, omdat zij niet juridisch onderlegd zijn, niet altijd zullen kunnen beoordelen of hun raadsliden hen wel effectieve rechtsbijstand verlenen of hebben verleend. Tot slot is daarbij niet over het hoofd gezien dat gelijke bescherming door de autoriteiten aan bijgestane en niet-bijgestane verdachten van belang is voor een eerlijk strafproces. Om die reden wordt in de hoofdvraag aan “een effectieve verdediging in een eerlijk strafproces” gerefereerd en niet enkel aan een effectieve verdediging.

De onderzoeksresultaten worden hieronder beschreven volgens dezelfde structuur die in het conceptueel kader is neergelegd. Immers, op grond van de relevante rechten, de van belang zijnde context, een aantal noties die de voornoemde rechten en context doorkruisen en, tot slot, vier perspectieven, zijn voor het conceptueel kader vier elementen gekozen. Deze zijn: (i) het recht op rechtsbijstand; (ii) de raadsman-cliënt relatie; (iii) de inmenging door de autoriteiten ten aanzien van de advocaat; en (iv) het ingrijpen door de autoriteiten in de strafzaak van staatswege in verband met ineffectieve rechtsbijstand. Deze vier elementen zijn stuk voor stuk van belang om de hoofdvraag en de twee deelvragen te beantwoorden. Maar zij zijn in de jurisprudentie niet altijd even goed te onderscheiden. Daarom is in dit proefschrift een analytisch onderscheid gemaakt om achtereenvolgens of de verhouding tussen de autoriteiten en de verdachte (een verticaal perspectief) of tussen de raadsman en de verdachte te benadrukken (een horizontaal perspectief genomen). Deze perspectiefwisseling levert de volgende structuur op, die ook in deze samenvatting weer is gevolgd:

- (i) het eerste verticale perspectief, het recht op rechtsbijstand,
- (ii) het horizontale perspectief, de raadsman-cliënt relatie,
- (iii) het tweede verticale perspectief, inmenging door de autoriteiten ten aanzien van de advocaat en
- (iv) het derde verticale perspectief, ingrijpen in de strafzaak van staatswege in verband met ineffectieve rechtsbijstand.

Hieronder volgt een samenvatting van de belangrijkste conclusies per element, maar niet zonder te benadrukken dat alle gevolgtrekkingen zijn en worden beïnvloed door factoren met betrekking tot de jurisprudentie van het Hof (hoofdstuk 3; “impacting factors”) en door de vele “verschuivingen” in het Nederlandse strafproces (hoofdstuk 4). Voor zover bepalend voor de bevindingen in dit onderzoek, wordt hieronder ook expliciet naar deze factoren verwezen.

Structuur

In Deel A worden de vier elementen van de minimumwaarborgen die in het Verdrag besloten liggen, behandeld. Daarna gaat Deel B over diezelfde vier elementen voor de huidige benadering van

ineffectieve rechtsbijstand en redres daarvoor in het Nederlandse strafproces. In dit deel wordt ook meteen antwoord gegeven op de hoofdvraag. Tot slot, worden in Deel C, naar aanleiding van de resultaten van dit onderzoek, drie aanbevelingen gedaan.

A. Minimumwaarborgen in het Verdrag

(i) Het eerste verticale perspectief, het recht op rechtsbijstand

Het eerste element, het recht op rechtsbijstand, is relevant voor deze dissertatie omdat er een rechtsgrond moet zijn, wil het Hof zich kunnen buigen over een klacht over eventuele ineffectieve rechtsbijstand. De klager kan namelijk rechtens geen “Verdragswaardige klacht” over eventuele *ineffectieve* rechtsbijstand hebben, als hij niet over een recht op rechtsbijstand beschikt. Deze rechtsgrond is te vinden in artikel 6 (3) (c) EVRM. Hieronder worden vier aspecten van de interpretatie door het Hof van de reikwijdte en inhoud van het recht op rechtsbijstand besproken (zie ook de opbouw van hoofdstuk 5).

Ten eerste, voor de interpretatie van de reikwijdte en inhoud van het Verdragsrecht op rechtsbijstand is het van belang dat het Hof een *autonome* beslissing neemt over het ingangsmoment en de duur. In de regel betekent dit dat het Hof vaststelt dat de verdachte onder het Verdrag recht heeft op rechtsbijstand vanaf de “charge” tot en met het moment waarop het laatste rechtsmiddel in de nationale strafzaak is uitgeput (paragraaf 5.2.). Hiermee bedoelt het Hof overigens niet dat de verdachte vanaf de “charge” constant recht heeft om bijgestaan te worden door een raadsman tot en met dat laatste rechtsmiddel. In tegendeel, het Hof stelt vast dat de verdachte recht op rechtsbijstand heeft op “kritieke momenten” van het strafproces. Dit laatste aspect wordt hieronder nog apart behandeld, maar niet voordat is aangegeven dat de autoriteiten onder deze lezing van artikel 6 (3) (c) EVRM een verplichting hebben om op deze “kritieke momenten” “toegang tot een advocaat” (“*access to a lawyer*”) voor de verdachte te realiseren en dat het Hof soms een stap verder gaat en vergt dat de autoriteiten een raadsman toevoegen.

Voor die laatste situatie geldt dat het Hof in “zekere zaken” (“*certain cases*”) een toevoegingsverplichting voor de autoriteiten bepaalt. Van die “zekere zaken” is sprake wanneer de verdachte op zich een kwetsbare persoon is, of zich een situatie bevindt die de verdachte kwetsbaar maakt of, ten slotte, als beide condities gelijktijdig aanwezig zijn. Onder de omstandigheden van “zekere zaken”, stelt het Hof vast dat de autoriteiten een advocaat moeten toevoegen. Van deze verplichting is geen sprake als de verdachte “alleen” een lage straf riskeerde. Maar hiertoe moeten de autoriteiten wel overgaan als, zonder een (toegevoegde) advocaat, de verdachte geen *effectieve* verdediging krijgt (bijvoorbeeld *Artico v. Italy*; paragraaf 11.2.1.). Hieronder wordt het begrip *effectieve* verdediging nog verder besproken, maar niet voordat is aangegeven dat het Hof het recht op rechtsbijstand meestal in het licht van twee procedurele beginselen beziet.

Het Hof acht het recht op rechtsbijstand van belang *per se*, maar ook in het licht van gelijkheid van wapenen (“*equality of arms*”) en adversarialiteit (“*an adversarial hearing*”). Dit betekent dat het Hof het recht op rechtsbijstand belangrijk vindt voor gelijkheid van wapenen (“*equality of arms*”) omdat, dankzij een advocaat aan de zijde van de verdachte, de verdediging in evenwicht wordt gebracht met de zijde van de “prosecution”. De aanklager is immers meestal ook een strafjurist. Voor het tweede procedurele beginsel, adversarialiteit (“*an adversarial hearing*”), geldt dat het Hof meestal bepaalt dat rechtsbijstand garandeert dat ook een jurist aan de zijde van de verdachte in beginsel gelijkelijk feitelijke en juridische argumenten naar voren kunnen brengen. Immers, er is ook een strafjurist aan de zijde van de “prosecution” en beide juristen kunnen in het algemeen de rechter voorleggen al hetgeen nodig is voor een *faire* afweging. Het Hof acht het recht op rechtsbijstand daarom van belang voor gelijkheid van wapenen (“*equality of arms*”) en adversarialiteit (“*an adversarial hearing*”), twee beginselen die het Hof op hun beurt van essentieel belang acht voor de verwezenlijking van een eerlijk strafproces in zijn totaliteit (“*as a whole*”). Dit laatste punt van het belang van een eerlijk strafproces in zijn totaliteit (“*as a whole*”) zal hieronder nog verder worden behandeld, maar niet voordat is beschreven dat het Hof ook kan vaststellen dat de verdachte een “afgeleid” recht op rechtsbijstand heeft indien dit nodig is om andere Verdragsrechten te waarborgen.

Zo bepaalt het Hof dat rechtsbijstand dienend kan zijn aan de bescherming van het zwijgrecht en het “recht” van de verdachte om zichzelf niet te belasten als de verdachte bijvoorbeeld wordt

ondervraagd door de autoriteiten (bijvoorbeeld *Salduz v. Turkey*; paragraaf 5.3.1.). Bovendien komt het Hof tot de beslissing dat de verdachte een “afgeleid” recht op rechtsbijstand heeft als daarmee een ander Verdragsrecht zoals het “confrontatierecht” van getuigen wordt gewaarborgd (bijvoorbeeld *Melnikov v. Russia*; paragraaf 5.3.2.). Bovendien komt het Hof verder tot de beslissing dat de verdachte een “afgeleid” recht op rechtsbijstand heeft indien dit nodig is om de twee voornoemde procedurele beginselen, gelijkheid van wapenen en adversarialiteit, in het licht van andere artikelen dan artikel 6 EVRM te garanderen. Dit geldt bijvoorbeeld voor procedures waarin de autoriteiten de Verdragsrechten om niet te worden gemarteld of anderszins mishandeld te worden (artikel 3 EVRM) en op vrijheid en veiligheid (artikel 5 EVRM) in het licht van vrijheidsbeneming in het vooronderzoek dienen te beschermen. Tot slot kan het Hof ook beslissen dat de verdachte een “afgeleid” recht op rechtsbijstand had opdat via die weg gelijke rechtsbescherming aan verdachten onder artikel 6 EVRM wordt geboden. Zo stelde het Hof bijvoorbeeld vast dat in een zaak waarin tijdens een identificatieprocedure tijdens het vooronderzoek onder het nationale recht alleen minderjarigen een recht op rechtsbijstand toekwamen, dit recht onder het Verdrag ook aan de meerderjarige verdachten had behoren te worden gegund (bijvoorbeeld *Yunus Akaş and others v. Turkey*; paragraaf 5.3.2.3.). Op deze voornoemde manieren interpreteert het Hof de reikwijdte en inhoud van artikel 6 (3) (c) EVRM en daarom wordt hieronder verder gegaan met de reeds aangehaalde aspecten van de “kritieke fasen”-benadering ten aanzien van het recht op rechtsbijstand door het Hof.

Ten tweede, met de “kritieke fasen”-benadering ten aanzien van het recht op rechtsbijstand bedoelt het Hof *niet* dat de verdachte onder het Verdrag op ieder moment dit recht heeft wanneer het optreden van een raadsman *behulpzaam* zou kunnen zijn. Maar deze benadering houdt wel in dat het Hof eraan hecht dat de verdachte recht op rechtsbijstand heeft tijdens fasen die “kritiek” zijn voor de eerlijkheid van het strafproces in zijn totaliteit (“*as a whole*”) (bijvoorbeeld *John Murray v. the United Kingdom*; paragraaf 5.2.3.). Voorbeelden van bedoelde “kritieke momenten” zijn: politieverhoren, procedures die betrekking hebben op beslissingen die gaan over vrijheidsontneming in het vooronderzoek, “andere” momenten dan politieverhoren waarop onderzoek wordt gedaan en bewijs wordt verzameld, de zitting in eerste aanleg, hoger beroep of cassatie. Let wel, in sommige jurisdicties is er enkel *appeal* dat over louter juridische en niet ook feitelijke kwesties gaat. Voor al deze voornoemde “procesmomenten” geldt dat het Hof rechtsbijstand kritiek acht voor de eerlijkheid van het strafproces in zijn totaliteit (“*as a whole*”), maar daarbij wordt een effectieve verdediging tijdens de “*adversarial hearing*” van het uiterste belang geacht. Dit betekent dat het Hof in het bijzonder beoordeelt of de verdachte een effectieve verdediging heeft gehad tijdens de zitting (of een reeks aan zittingen) in eerste aanleg en/of in hoger beroep omdat dan de strafzaak op zowel feitelijke als juridische kwesties wordt onderzocht. Deze effectieve verdediging kan worden gegarandeerd dankzij dito zelfvertegenwoordiging of rechtsbijstand. Daarvoor beoordeelt het Hof of de verdachte een effectieve verdediging *tijdens* de “*adversarial hearing*” heeft gekregen omdat dit mede van belang is voor de twee procedurele waarborgen, gelijkheid van wapenen (“*equality of arms*”) en adversarialiteit (“*an adversarial hearing*”). Zoals aangegeven, het Hof acht rechtsbijstand vaak van belang voor deze twee procedurele waarborgen. Daarom onderzoekt het Hof ook vaak specifiek of effectieve verdediging dankzij dito rechtsbijstand wordt gerealiseerd *tijdens* de “*adversarial hearing*”. Dit laatste punt betekent ook dat het Hof beziet of de verdediging tijdens het vooronderzoek uitmondt in een effectieve verdediging tijdens de “*adversarial hearing*” en of de verdediging daarna effectief was. Daarom bespreekt deze paragraaf verder nog het voorbeeld van de interpretatie door het Hof van het recht van de verdachte op rechtsbijstand op het “kritieke moment” van politieverhoren.

Deze paragraaf gaat daarom ook nog in op de interpretatie van het recht op rechtsbijstand op het “kritieke moment” van politieverhoren, omdat dit juist in *civil law* landen zoals Nederland zoveel vragen heeft opgeroepen. Voor andere “kritieke momenten” wordt verwezen naar het proefschrift (zie hoofdstuk 5).

Het Hof heeft, zo heeft dit onderzoek vastgesteld, een zogenoemde *Salduz*-regel vastgesteld. Die regel behelst, zo stelt het Hof, dat, in de regel, alle verdachten – minderjarig en meerderjarig – het recht hebben op rechtsbijstand vanaf het eerste politieverhoor. Deze studie heeft naar de beginselen gekeken die het Hof aan deze interpretatie van het recht op rechtsbijstand ten grondslag legt om te beoordelen welke reikwijdte en inhoud deze regel onder het Verdrag heeft. Het Hof lijkt vast te stellen

dat drie beginselen, die gekoppeld zijn aan andere Verdragsrechten dan het recht op rechtbijstand, van belang zijn voor deze *Salduz*-regel.

Ten eerste, voor politieverhoren, ook als deze buiten “*custody*” plaatsvinden, acht het Hof het recht op rechtsbijstand ondersteunend aan het zwijgrecht en het recht van de verdachte om zich niet te belasten. Rechtsbijstand is van belang om te voorkomen dat de verdachte geen gebruik kan maken van deze twee andere Verdragsrechten die ook van belang zijn in het licht van de onschuldpresumptie van de verdachte in een eerlijk strafproces. Het Hof stelt namelijk dat de verdachte in beginsel niet gedwongen mag worden om aan zijn eigen veroordeling mee te werken en dat de aanklager aan zijn verplichting van het vinden van voldoende bewijs tegen de verdachte (“burden of proof”) zonder dergelijke dwang (“coercion”) behoort te voldoen. Deze uitleg van deze rechten houdt niet in dat het Hof meent dat de autoriteiten geen consequenties kunnen verbinden aan de situatie waarin de verdachte zich op zijn zwijgrecht beroept. Zo kan het zo zijn dat een eerlijk strafproces heeft plaatsgevonden als de autoriteiten uit het stilzwijgen van de verdachte afleiden dat hij wel degelijk het strafbaar feit heeft gepleegd als daarvoor voldoende bewijs was en de verdachte daarom “heel wat had uit te leggen”. Maar het betekent wel dat het Hof het van belang kan achten dat de verdachte recht op toegang tot een advocaat had en “in zekere zaken” een toegevoegde raadsman had die ervoor zorg droeg dat de verdachte gebruik kon maken van zijn zwijgrecht en het recht van de verdachte om zich niet te belasten.

Ten tweede, in het geval van plaatsing “in custody”, zonder dat sprake is van verhoor, acht het Hof het recht op rechtsbijstand van belang om het recht op een effectieve verdediging van de verdachte die van zijn vrijheid is beroofd te beschermen. Zoals hierboven reeds aangegeven, vindt het Hof het belangrijk dat de verdachte in het bijzonder tijdens de “*adversarial hearing*” een effectieve verdediging krijgt. Onder sommige omstandigheden kan de verdachte zichzelf een effectieve verdediging geven. Maar soms zal het Hof het nodig achten voor een effectieve verdediging dat de verdachte een gekozen of toegevoegde raadsman aan zijn zijde heeft. Rechtsbijstand is met name van belang als dit nodig is om, zoals hierboven reeds is aangegeven, de twee procedurele waarborgen, gelijkheid van wapenen (“*equality of arms*”) en adversarialiteit (“*an adversarial hearing*”), te garanderen.

Ten derde, tijdens “*custodial*” politieverhoren zijn beide voornoemde omstandigheden aanwezig (in custody en politieverhoor tezamen). Daarom moeten volgens het Hof alle drie de voornoemde rechten worden beschermd: het zwijgrecht, het recht om jezelf niet te belasten en het recht op een effectieve verdediging, in het bijzonder tijdens de “*adversarial hearing*”. Soms kan een verdachte dat zelfstandig maar in andere gevallen zal het Hof beslissen dat de verdachte hiervoor rechtsbijstand nodig had. Uiteraard kan de raadsman vrijwel in geen enkele jurisdictie de gang van het politieverhoor beïnvloeden. Dat is het domein van de autoriteiten. Maar rechtsbijstand op het “kritieke moment” van het politieverhoor kan er wel toe bijdragen dat de advocaat de drie voornoemde rechten beschermd en laat beschermen door de autoriteiten. Daarbij is het vanzelfsprekend afhankelijk van de strafzaak welke vorm de rechtsbijstand tijdens het verhoor moet krijgen. Maar het ligt niet voor de hand dat een raadsman het zwijgrecht, het recht om jezelf niet te belasten en het recht op een effectieve verdediging kan beschermen en kan laten beschermen door de autoriteiten als hij alleen passief mag zijn en niets mag zeggen. Vandaar dat uit deze grondslagen wordt afgeleid dat het Hof normaliter tijdens het “kritieke moment” van “*custodial*” politieverhoren zal willen dat de verdachte de mogelijkheid heeft om voorafgaand aan het verhoor een consultatie te houden met een raadsman en tijdens het verhoor een raadsman heeft die aanwezig zal zijn. De herhaaldelijke jurisprudentie van het Hof onderschrijft deze uitleg van de *Salduz*-regel.

Overigens betekent de *Salduz*-regel niet dat deze “alleen” van toepassing zou zijn in geval van “*custodial*” politieverhoren. Zo heeft het Hof expliciet bepaald dat de verdachte recht heeft op rechtsbijstand “vanaf” het eerste politieverhoor. De vervolgmomenten onder de *Salduz*-regel lijken plaats te vinden wanneer de drie andere Verdragsrechten ook in het geding kunnen zijn. Zo lijkt het erop dat het Hof ook meent dat de autoriteiten het mogelijk moeten maken voor de verdachte om rechtsbijstand te krijgen tijdens “andere” activiteiten dan politieverhoren waarop de autoriteiten bewijs verzamelen of onderzoek doen. Deze “andere” “kritieke” procesmomenten worden ook in Richtlijn 2013/48/EU genoemd wanneer verdachte’s zwijgrecht, het recht om je niet te belasten en het recht op een effectieve verdediging aan de orde kunnen zijn.

Bovendien moet ten aanzien van de *Salduz*-regel nog worden benadrukt dat het Hof de afwezigheid van rechtsbijstand op voornoemde kritieke momenten zoals “*custodial*” politieverhoren “irreparabel” kan achten. Onder zulke omstandigheden, concludeert het Hof dat een Verdragsschending heeft plaatsgevonden, zelfs als de raadsman tijdens de “*adversarial hearing*” “*perfect*” heeft kunnen functioneren. Het Hof heeft in deze zaken herhaaldelijk tot het volgende beginsel vastgesteld: “(...) noch de bijstand die na de politieverhoren door de raadsman wordt geboden, noch de adversaire aard van het proces kunnen de tekortkomingen tegengaan die gedurende het eerste verhoor hebben plaatsgevonden.” Tot slot moet ten aanzien van de *Salduz*-regel nog worden aangegeven dat het nationale recht hieraan niet in de weg mag staan. Dan acht het Hof het recht op een eerlijk strafproces in zijn totaliteit *per se* geschonden, omdat deze “formele” hindernis het Verdrag schendt. Nu de “kritieke fasen”-benadering is beschreven en ook een “kritiek procesmoment” eruit is gelicht, kan dit overzicht verder gaan met een eennalaatste, interessante conclusie omtrent de interpretatie door het Hof van de reikwijdte en inhoud van het recht op rechtsbijstand.

Ten derde, het Hof stelt dat de verdachte afstand kan doen van het recht op rechtsbijstand (“*waiver*”). Deze afstandsverklaring past in de lijn van het Hof dat het Verdrag een *recht* op rechtsbijstand behelst – en niet een verplichting (paragraaf 5.4.). Het zou, anders gezegd, het Verdragsrecht op eerlijk strafproces niet waardig zijn als de verdachte tegen zijn wil een raadsman krijgt opgedrongen.

Maar voor een dergelijke “*waiver*” vergt het Hof wel dat de nationale rechters moeten hebben beoordeeld of de verdachte afstand heeft gedaan van zijn recht op rechtsbijstand tegen de standaard van “in wetenschap en vol begrip” (“*knowingly and intelligently*”). Deze standaard is hoger dan voor afstandsverklaringen voor andere rechten, zoals die voor het recht om aanwezig te zijn tijdens een zitting of om in appèl te gaan.. Dan is de standaard namelijk “vrijwillig en duidelijk” (“*freely and unequivocally*”). Met deze hogere standaard voor de afstandsverklaring draagt het Hof er zorg voor dat het recht op rechtsbijstand “speciale bescherming” (“*special protection*”) geniet. Deze “speciale bescherming” wordt geboden als de autoriteiten zich ervan vergewissen dat de verdachte “in wetenschap en vol begrip” afstand doet van zijn recht op rechtsbijstand tijdens “kritieke momenten”. Zo wordt voorkomen dat de verdachte bijvoorbeeld tot rechtsbijstand of zelfvertegenwoordiging wordt gedwongen.

Dit laatste punt is belangrijk omdat het Hof geen van beide rechten namelijk absoluut acht. In tegendeel, het Hof erkent dat de nationale autoriteiten het beste kunnen beoordelen of het in het belang van de rechtvaardigheid (“*interests of justice*”) is dat de verdachte bijgestaan wordt door een advocaat, danwel zijn eigen verdediging kan voeren. Maar het Hof vergt daarbij wel dat, als de verdachte *geen* rechtsbijstand heeft tijdens “kritieke momenten”, dat de nationale rechters zich ervan verzekerd hebben dat de verdachte rechtmatig afstand heeft gedaan van zijn recht op rechtsbijstand. Met andere woorden, het Hof accepteert het niet als de autoriteiten vermenen dat de verdachte zelf koos voor zelfvertegenwoordiging terwijl de verdachte eigenlijk door een raadsman wilde worden bijgestaan.

Dit laatste aspect is ook relevant voor een onderwerp waarover deze dissertatie strikt genomen niet gaat. Voor de rechtsgrond voor een Verdragswaardige klacht aangaande ineffectieve *zelfvertegenwoordiging* is het irrelevant als de klager zou stellen dat, nadat hij afstand had gedaan van zijn recht op rechtsbijstand, een advocaat hem een *effectievere* verdediging had kunnen geven. Onder zulke omstandigheden, heeft de verdachte, anders gezegd, geen “Verdragswaardige klacht” aangaande ineffectieve zelfvertegenwoordiging omdat hij zelf afstand heeft gedaan van zijn recht op rechtsbijstand en daarom onder zulke omstandigheden niet gerechtvaardigd kan klagen over de kwaliteit van zijn zelfverkozen zelfvertegenwoordiging. Deze laatste opmerking is uiteraard ook relevant als de verdachte juist geen afstand heeft gedaan van zijn recht op rechtsbijstand en wil klagen over de de kwaliteit van de rechtsbijstand die hij van zijn raadsman kreeg. Met dit laatste onderwerp gaat de volgende alinea verder.

Ten vierde en ten slotte, het Hof gaat nog een stap verder dan enkel vast te stellen dat onder het Verdrag de verdachte of “toegang tot een gekozen raadsman” of zelfs “in zekere zaken” rechtsbijstand door een toegevoegde advocaat tijdens “kritieke momenten” dient te hebben. Het Hof meent dat tijdens “kritieke momenten” de verdachte het recht heeft op *effectieve* rechtsbijstand. Deze constatering is van het uiterste belang voor deze studie die ook beoordeelt onder welke omstandigheden de verdachte redres moet worden geboden wanneer hij lijdt aan ineffectieve

rechtsbijstand. Daarom bespreekt deze laatste alinea meer gedetailleerd hoe het Hof omgaat met deze materiële (in plaats van formele) interpretatie van artikel 6 (3) (c) EVRM.

Zoals reeds aangegeven, heeft het Hof vastgesteld dat de verdachte ten minste het recht heeft op *effectieve* verdediging en dito rechtsbijstand tijdens de “*adversarial hearing*”. Maar dit betekent niet dat het Hof het uitblijven van recht *effectieve* rechtsbijstand tijdens het politieverhoor niet fataal kan achten voor de eerlijkheid van het strafproces in zijn totaliteit (bijvoorbeeld *Pavlenko v. Rusland*; paragraaf 5.4.). Bovendien kan het Hof ook tot deze zelfde beslissing van een Verdragsschending komen als de verdachte geen *effectieve* rechtsbijstand tijdens de cassatiefase wordt verleend (bijvoorbeeld *Artico v. Italië*; paragraaf 11.2.1.). Dit laatste aspect zal verder worden behandeld bij de bespreking van het vierde en laatste element, omdat bij die bespreking ook kan worden aangegeven wat *effectieve* rechtsbijstand tijdens deze “kritieke momenten” behoort in te houden (paragraaf 5.3.4.). Maar hier wordt deze bevinding nog wel teruggekoppeld aan het eerste element dat hier centraal staat, te weten de interpretatie van de reikwijdte en inhoud van het Verdragsrecht op rechtsbijstand.

Als de verdachte geen effectieve verdediging heeft gekregen doordat zijn raadsman hem *ineffectieve* rechtsbijstand tijdens de “*adversarial hearing*” heeft verleend, dan kan dit een rechtsgrond zijn voor een Verdragswaardige klacht aangaande artikel 6 (3) (c) EVRM. Dit geldt overigens niet enkel voor de gekozen of toegevoegde raadsman, maar *kan* in beginsel ook gelden voor de raadsman die de autoriteiten hebben toegevoegd om op *stand by* te staan voor de verdachte die voor zelfvertegenwoordiging koos. De redenering voor deze laatste conclusie is tweeledig. Ten eerste geeft het Hof aan dat de toevoeging van een *stand by*-raadsman in beginsel geen ontoelaatbare beperking vormt op het recht van de verdachte om zichzelf te verdedigen (paragraaf 5.2.6.). Daarom heeft de verdachte, die rechtsbijstand krijgt van een toegevoegde *stand by* raadsman die *ineffectieve* rechtsbijstand verleent in beginsel een Verdragswaardige klacht aangaande ineffectieve rechtsbijstand. Oftewel, zowel de verdachte die geen effectieve verdediging krijgt door ineffectieve rechtsbijstand door of een reguliere of een *stand by* advocaat in het bijzonder tijdens het “kritieke moment” van de “*adversarial hearing*” heeft in beginsel een rechtsgrond om te klagen bij het Hof over een Verdragsschending.

Uit al deze vier aspecten van de interpretatie van het Verdragsrecht van de verdachte op rechtsbijstand blijkt dat de klager in beginsel een rechtsgrond voor een “Verdragswaardige klacht” aangaande *ineffectieve* rechtsbijstand kan hebben als de verdachte geen *effectieve* rechtsbijstand heeft gekregen op “kritieke momenten” van het strafproces. Op deze momenten kan het uitblijven van *effectieve* rechtsbijstand namelijk een schending van het Verdrag opleveren. Hiervoor beoordeelt het Hof met name onder welke omstandigheden de verdachte *ineffectieve* rechtsbijstand heeft gekregen van zijn raadsman tijdens de “*adversarial hearing*”. Op dit onderwerp gaat de volgende alinea door.

(ii) *Het horizontale perspectief, de raadsman-cliënt relatie*

Het tweede element, de raadsman-cliënt relatie, gaat in op de vraag of, en zo ja, welke verantwoordelijkheden de raadsman heeft ten op zichte van de verdachte in het licht van diens recht op een *effectieve* verdediging door dito rechtsbijstand tijdens de “*adversarial hearing*”. Hiervoor moet een horizontaal perspectief worden gehanteerd om de raadsman-cliënt relatie nader te onderzoeken. Dit perspectief leverde weer vier deelonderwerpen op (zie ook de opbouw van hoofdstuk 7).

Ten eerste, het Hof accepteert twee soorten beperkingen op het recht van de verdachte op een voorkeursadvocaat. Deze geaccepteerde beperkingen zijn relevant voor deze studie, omdat de voorkeursadvocaat geacht wordt de beste verdediging te kunnen geven. Hiervoor is met name de vertrouwensband tussen de verdachte en de door hem gewenste advocaat van belang. Het Hof vooronderstelt namelijk dat de verdachte het meeste vertrouwen in de raadsman van zijn keuze zal hebben en hem daarom de beste instructies zal geven. Op zijn beurt kan daarom de voorkeursraadsman worden geacht de beste verdediging te geven. Maar het Hof stelt vast dat het Verdragsrecht op de voorkeursadvocaat niet absoluut is, zoals zal blijken uit de volgende geaccepteerde beperkingen op dit recht.

Om een eerste voorbeeld te noemen, voor de keuze voor een gekozen raadsman geldt dat het Hof het kan accepteren als de autoriteiten dit recht hebben beperkt omdat de zittingsrol dat vergde. Als

de “*administration of justice*” dat vereist, dan mogen de autoriteiten op deze manier het recht van de verdachte op een gekozen voorkeursadvocaat beperken.

Bovendien is het Hof niet tegen bepaalde beperkingen op het recht op een toegevoegde voorkeursadvocaat. De redenering die het Hof hierbij hanteert, is tweeledig. Allereerst, het Hof stelt vast dat de autoriteiten bepalen *of* het in het belang van de rechtvaardigheid (“*interests of justice*”) is dat een advocaat wordt toegevoegd. Hieruit volgt dat de autoriteiten eigenlijk altijd gelegitimeerd een selectie van een toegevoegde raadsman kunnen maken. Maar hieraan heeft het Hof wel vereisten verbonden, net als in het geval van de gekozen advocaat.

Uit beide voornoemde aspecten blijkt dat het Hof het kan accepteren dat de autoriteiten het recht op de voorkeursadvocaat beperken. Maar in beide gevallen eist het Hof wel dat de verdachte *effectieve* rechtsbijstand tijdens met name de “*adversarial hearing*” kreeg. Deze laatste constatering brengt ons weer bij het hoofdthema van dit tweede element, de raadsman-cliënt relatie. Immers, het Hof bepaalt dus raadsliden aan de verdachte *effectieve* rechtsbijstand moeten verlenen, in het bijzonder tijdens de “*adversarial hearing*”.

Tegen deze achtergrond, is het van belang dat het Hof het volgende van de raadsman verwacht ten aanzien van *effectieve* rechtsbijstand. Het Hof neemt als uitgangspunt dat het de verdachte vrij staat om zich wel of niet door een raadsman te laten bijstaan. Maar, *als* de verdachte wordt bijgestaan door een raadsman, dan kan het Hof diens raadsman verantwoordelijk houden voor beslissingen die rederlijkerwijs onder een *verdedigingsstrategie* kunnen worden geschaard (*Stanford v. the United Kingdom*; paragraaf 7.2. en *Mađer v. Croatia*; paragraaf 11.2.3.). Daarbij gaat het Hof zo ver dat het optreden van de raadsman tot “*tactical decisions*” wordt gerekend zelfs als de verdachte aangeeft het *niet* eens te zijn met diens optreden. De hiervoor reeds genoemde *Stanford*-zaak kan verduidelijken hoe het Hof tot deze beslissing komt dat de advocaat verantwoordelijk is voor de verdedigingsstrategie.

In de *Stanford*-zaak stelde het Hof vast dat de verdachte tijdens de behandeling van het strafproces al geklaagd had dat hij de getuige niet kon horen. Daarom had hij aan de autoriteiten aangegeven dat hij dicht wilde zitten bij de getuige die tevens het slachtoffer van het vermeende misdrijf was. Maar het Hof meende dat de raadsman door de rechter niet te vragen om de verdachte dichter bij de getuige te laten zitten, een verdedigingsstrategische handeling had verricht. Zo beschermde het Hof het belang van “(...) de onafhankelijkheid van de advocatuur van de Staat” en bepaalde het Hof dat de raadsman verantwoordelijk is voor de verdedigingsstrategie.

Ten derde, de hierboven gegeven uitleg aan de *Stanford*-zaak staat niet op zich. Sterker nog, deze uitleg past in de lijn die het Hof herhaaldelijk ten aanzien van de rolverdeling tussen de raadsman en de verdachte heeft vastgesteld. Deze rolverdeling heeft consequenties voor zowel de raadsman als de verdachte, die hieronder zullen worden belicht.

De raadsman moet de mogelijkheid hebben om de verdachte “*zealously*” te verdedigen (bijvoorbeeld *Panovits en Kyprianou v. Cyprus*; hoofdstuk 5). Dit betekent dat hij onder meer de relevantie en het nut van een verdedigingsargument dient te beoordelen en naar voren moet brengen.

De verdachte moet de mogelijkheid hebben om beslissingen te kunnen nemen ten aanzien van de beste manier om zijn verdediging te presenteren in het bijzonder tijdens de “*adversarial hearing*” (bijvoorbeeld *Ebanks v. the United Kingdom*; hoofdstuk 5). Dit betekent dat de verdachte, op basis van het advies van zijn raadsman, de verdediging moet kunnen selecteren die hij in de rechtszaal naar voren wil brengen.

Door deze rolverdeling te bepalen, zorgt het Hof er dus voor dat de raadsman de “*leider*” is ten aanzien van de verdedigingsstrategie en dat de verdachte het laatste woord heeft ten aanzien van zijn “*persoonlijke rechten*”. Voorbeelden van bedoelde “*persoonlijke rechten*” zijn het zwijgrecht, het recht om jezelf niet te belasten, het recht om aanwezig te zijn op een zitting en het recht op een effectieve verdediging met, zoals reeds aangegeven, de nadruk op de “*adversarial hearing*”. De verdachte heeft het laatste woord over deze “*persoonlijke rechten*” omdat deze aan hem persoonlijk en niet aan de raadsman of bijvoorbeeld de autoriteiten zijn gegund. Deze rechten zijn namelijk zo persoonlijk dat alleen de verdachte en niet een ander hierover de ultieme beslissing kan nemen.

Overigens kunnen deze beslissingen van de verdachte omtrent “*persoonlijke rechten*” ook wel een strategisch element omvatten. Maar de raadsman zal de beslissingen van de verdachte met

betrekking tot zijn “persoonlijke rechten” moeten respecteren. Daarom moet de raadsman ook de instructies van de verdachte ten aanzien van deze “persoonlijke rechten” opvolgen.

Zo maakt het Hof trouwens niet alleen onderscheid tussen verantwoordelijkheden van de raadsman en de verdachte. In het verlengde hiervan, maakt het Hof ook onderscheid tussen verantwoordelijkheden van de raadsman en van de autoriteiten. Op dat laatste onderwerp van de verantwoordelijkheden de autoriteiten ten aanzien van de “persoonlijke rechten” (niet de verdedigingsstrategie) kan vanuit dit horizontale perspectief nog niets worden aangegeven. Immers, daarvoor is een verticaal perspectief nodig. Maar in deze paragraaf waarin een horizontaal perspectief is genomen, kan nog wel worden aangegeven dat het idee dat de raadsman de “leider” is ten aanzien van de verdedigingsstrategie ook past bij de “functies” die de advocaat volgens het Hof heeft.

Ten vierde en ten slotte, het Hof refereert aan de volgende functies van de raadsman: het opzetten van de verdediging, inclusief het voorbereiden van de “*adversarial hearing*”; het verzamelen en onderzoeken van bewijs, inclusief getuigenbewijs; de controle op onderzoeksmaatregelen en de inzet van middelen om – ontlastende – informatie te vinden; en voor verdachten die zich in hechtenis bevinden, het controleren van de detentiesituatie (gronden, lengte en verblijfscondities). Ook ten aanzien van deze functies stelt het Hof dat de advocaat de verdachte moet kunnen adviseren om van zijn zwijgrecht gebruik te maken en dat de verdachte dit advies “ongestraft” moet kunnen volgen (bijvoorbeeld *Condron v. the United Kingdom*; paragraaf 7.4.1.). Immers, het Hof verwoordt dit als volgt: rechtsbijstand zou “veel aan effectiviteit verliezen” de verdachte zouden mogen worden “gestraft” voor het volgen van dit advies. Maar dit betekent ook dat het Hof het van belang acht dat de raadsman verantwoordelijk is voor de verdedigingsstrategie, maar dat de verdachte beslissingen moet kunnen nemen over zijn “persoonlijke rechten”. Zo bevestigt het Hof ook met de beschrijving van de “functies” van de advocaat dat hij de “leider” is ten aanzien van de verdedigingsstrategie en de verdachte het laatste woord heeft ten aanzien van zijn “persoonlijke rechten”.

Zo gezien, kan in deze alinea de conclusie worden getrokken dat de raadsman door het Hof verantwoordelijk kan worden gehouden voor de verdedigingsstrategie. Omdat de verantwoordelijkheden van de raadsman bij de verdedigingsstrategie (niet “persoonlijke rechten”) “eindigen”, zouden de verantwoordelijkheden van de autoriteiten daar weleens kunnen “beginnen”. Daarom gaat de volgende alinea over het derde element verder met een van de twee vormen van verantwoordelijkheden die de autoriteiten zouden kunnen hebben.

(iii) Het tweede verticale perspectief, de negatieve verplichting van het voorkomen van inmenging van staatswege ten aanzien van de advocaat

Het Hof onderscheidt twee vormen van verantwoordelijkheden van de autoriteiten waar de verantwoordelijkheden van de raadsman ten aanzien van verdedigingsstrategie (niet “persoonlijke rechten”) “eindigen”. Deze paragraaf gaat in op de eerste vorm daarvan, te weten het verhinderen door de autoriteiten dat de advocaat effectieve rechtsbijstand kan geven.

Het Hof beschrijft deze verantwoordelijkheden van de autoriteiten als een “negatieve verplichting” ten aanzien van het recht van de verdachte op *effectieve* rechtsbijstand. Daarmee bedoelt het Hof dat de autoriteiten het recht op effectieve rechtsbijstand van de verdachte *niet* mogen *verhinderen*.

Deze “negatieve verplichting” ten aanzien van het recht op effectieve rechtsbijstand is relevant omdat het Hof kan vaststellen dat, door de verhindering daarvan door de autoriteiten, het recht op een eerlijk strafproces is geschonden. In dergelijke gevallen hoeft het Hof niet te beoordelen of het (daaropvolgende) optreden tijdens “*de adversarial hearing*” van de raadsman desondanks “*perfect*” was. Onder zulke omstandigheden, is immers sprake van ineffectieve rechtsbijstand *per se*. Drie voorbeelden, van ineffectieve rechtsbijstand *per se*, die ontleend worden aan de jurisprudentie van het Hof worden hieronder apart behandeld. Deze zoektocht naar de “negatieve verplichting” leverde dus weer vier deelonderwerpen op (zie ook de opbouw van hoofdstuk 9).

Ten eerste, is het van belang uit te leggen dat het Hof in de hier nader samen te vatten *Hüseyn en anderen*-zaak vaststelde dat, als gevolg van de volgende opstelling van de *nationale rechters*, de

verdachten tijdens een aanzienlijk deel van de “*adversarial hearing*” geen effectieve rechtsbijstand hadden (*Hüseyn and Others v. Azerbaijan*; paragraaf 9.2.). De nationale rechters stelden namelijk dat de verdachten wel effectieve rechtsbijstand konden krijgen terwijl hun raadslieden, met voldoende redenen omkleed, aangaven dat zij verhinderd werden effectieve rechtsbijstand te verlenen. Als gevolg van deze beslissing door de nationale rechters legden de advocaten de verdediging neer en hadden de verdachten gedurende een aanzienlijk deel van de “*adversarial hearing*” geen rechtsbijstand door hun voormalige advocaten. Volgens het Hof leverde dit irreparabele schade aan de “persoonlijke rechten” van de verdachten op en kon zelfs een perfect optreden van de raadsman tijdens latere procesfasen deze schade niet meer ongedaan maken. Oftewel, de autoriteiten schonden de “negatieve verplichting” en er was sprake van ineffectieve rechtsbijstand *per se*.

Een tweede voorbeeld gaat over de specifieke situatie van de toevoeging (en niet over gekozen raadslieden, terwijl de meeste andere voorbeelden evenzeer gelden voor gekozen en toegevoegde raadslieden). De autoriteiten kunnen namelijk ook hun “negatieve verplichting” niet naleven door een raadsman gebrekkig of zelfs in het geheel niet toe te voegen (paragraaf 9.3.). Het Hof hanteert hiervoor een driedelige redenering, die deels teruggrijpt op hetgeen eerder over de toevoeging is aangegeven (onder het tweede element). Ten eerste, dienen de autoriteiten te beslissen of het in het belang van de rechtvaardigheid is dat een advocaat door hen dient te worden toegevoegd. Voorts, omdat de autoriteiten dit beslissen, accepteert het Hof dat het recht van de verdachte op een toegevoegde voorkeursraadsman mag worden beperkt. Ten slotte, stelt het Hof vast dat, indien de autoriteiten geen of geen goede toevoeging verzorgen, zij meestentijds effectieve rechtsbijstand van de verdachte in de weg staan. Als zij namelijk geen of een verkeerde toevoeging verzorgen, dan maakt het bijna niet meer uit of de raadsman daarna nog perfecte rechtsbijstand verleende. Immers, het Hof kan onder omstandigheden van een verkeerde of geen toevoeging concluderen dat de autoriteiten het recht van de verdachte op effectieve rechtsbijstand *per se* niet hebben nageleefd. Zo zorgt het Hof ervoor dat de verdachte niet de consequenties hoeft te dragen voor schade aan zijn “persoonlijke rechten”, omdat de verdachte niet zelf kan zorgen voor een goede toevoeging van zijn advocaat.

Ten derde en ten slotte, kan inmenging in de advocaat-cliënt relatie een soortgelijke schending van het recht op een effectieve rechtsbijstand *per se* opleveren (paragraaf 9.4.). Het Hof meent namelijk dat “(e)ffectieve rechtsbijstand onvoorstelbaar is zonder voor de vertrouwelijkheid tussen de advocaat en de verdachte te zorgen”, hetgeen tussen hen “open en eerlijke communicatie bevordert”. Er hoeft voor het Hof overigens geen sprake te zijn van een daadwerkelijke inmenging om niet toch een Verdragsschending te concluderen. Zelfs een “(...) oprecht geloof op redelijke gronden” dat een dergelijke inmenging zal plaatsvinden, kan voor het Hof voldoende zijn om te concluderen dat sprake is een schending van het recht op een eerlijk strafproces. Daarom kan ook inmenging in de advocaat-cliënt relatie een schending opleveren van het recht van de verdachte op effectieve rechtsbijstand *per se*.

Op dit punt waar de “negatieve verplichtingen” van de autoriteiten “eindigen”, kunnen hun “positieve verplichtingen” “beginnen”. Daarom gaat de volgende paragraaf met dit vierde en laatste element verder.

(iv) Het derde verticale perspectief, de positieve verplichting van ingrijpen in de strafzaak van staatswege in verband met ineffectieve rechtsbijstand

Reeds in 1980 heeft het Hof een “positieve verplichting” bepaald ten aanzien van het recht van de verdachte om niet het slachtoffer te worden van ineffectieve rechtsbijstand. In de reeds aangehaalde *Artico*-zaak stelde het Hof vast dat “(...) in het strafproces, de competente nationale autoriteiten onder artikel 6 moeten interveniëren als het falen van de raadsman om effectieve rechtsbijstand te verlenen manifest is of voldoende duidelijk is gemaakt” (*Artico v. Italy*; paragraaf 11.2.1.). Deze jurisprudentie die hier samengevat is onder de *Artico*-regel houdt in dat de autoriteiten niet “passief kunnen blijven” wanneer zij geconfronteerd worden met het (negatieve) gedrag van de advocaat. Zulk negatief gedrag is aanwezig als de rechtsbijstand “(...) ondeugdelijk is op een fundamentele manier” (*Ebanks v. the United Kingdom*; paragraaf 11.2.1.). De klager moet voor het Hof wel kunnen aantonen dat sprake was

van manifeste ineffectieve rechtsbijstand of voldoende notificatie daarvan, in het bijzonder tijdens het “kritieke” moment van de “*adversarial hearing*”.

De twee bedoelde condities beoordeelt het Hof op basis van objectieve redelijkheid. Dit houdt in dat het Hof, op grond van alle feiten en omstandigheden van de strafzaak, vaststelt of het gedrag van de advocaat gezien kan worden als vallend buiten hetgeen redelijkerwijs kan worden verwacht van een professionele, competente advocaat. Aan de ene kant, betekent dit niet dat het Hof de bekwaamheid van de advocaat beoordeelt op basis van algemeen geaccepteerde *nationale* prestatiestandaarden. Aan de andere kant, betekent het *wel* dat het Hof onderzoekt of de bijstand van de raadsman gelijkheid van wapenen en adversarialiteit heeft gewaarborgd. Dit laatste punt houdt in dat de “fundamenteel ondeugelijk”-standaard ten aanzien van rechtsbijstand gekoppeld is aan de voornoemde schending van de “persoonlijke rechten” van de verdachte (*Ebanks v. the United Kingdom*; paragraaf 11.2.1.). Zo waarborgt het Hof dat de autoriteiten voorkomen dat, door passief te blijven in geval van ineffectieve rechtsbijstand, de verdachte geschonden wordt in zijn “persoonlijke rechten” (in plaats van zijn verdedigingsstrategie). Voor de duidelijkheid, het Hof maakt ten aanzien van ineffectieve rechtsbijstand geen onderscheid tussen het optreden van de gekozen en toegevoegde raadslieden (*Goddi v. Italy* en later ook *Orlov v. Russia*; paragraaf 11.2.2.). Meer specifiek, ineffectieve rechtsbijstand kan volgens het Hof bijvoorbeeld plaatsvinden als de advocaat verkeerd advies heeft gegeven tijdens het vooronderzoek over de wijze waarop de verdachte gebruik kon maken van zijn zwijgrecht. Het Hof acht dat een situatie waarin de verdachte, door het (negatieve) optreden van de raadsman kan worden geschonden in zijn “persoonlijke rechten” (in plaats van zijn verdedigingsstrategie).

Het Hof is zich hierbij bewust van het feit dat het “afstand heeft ten opzichte van de feiten van de zaak” en beoordeelt daarom het optreden van de raadsman stellig met veel terughoudendheid. Het Hof zal daarom niet snel tot de conclusie komen dat de raadsman *geen* “tactische beslissingen” in het licht van een redelijkerwijs aan te nemen verdedigingsstrategie heeft genomen om zodoende ook de onafhankelijkheid van de raadsman en de advocatuur van de Staat te waarborgen (*Stanford v. the United Kingdom*; hoofdstuk 7). Bovendien neemt het Hof in acht dat het een beoordeling maakt die kan worden gekleurd door kennis achteraf. Zoveel mogelijk maakt het Hof daarom een beoordeling vanuit het perspectief van de raadsman op het moment waarop de bijstand is gegeven (*Stanford v. the United Kingdom* en in het bijzonder *Kamasinski v. Austria*; hoofdstukken 7 en 11 respectievelijk). Het Hof beoordeelt de eventuele ineffectieve rechtsbijstand daarom vanuit het perspectief dat de advocaat op het moment van zijn optreden redelijkerwijs kon hebben en neemt als uitgangspunt dat het optreden van de raadsman meestentijds dat van een redelijk optredend advocaat kan worden geacht (*Stanford v. the United Kingdom* en in het bijzonder *Kamasinski v. Austria*; hoofdstukken 7 en 11 respectievelijk).

Al deze vooronderstellingen en uitgangspunten zijn meegenomen door het Hof in de voornoemde *Artico*-regel. Deze regel vergt daarom bij hoge uitzondering dat, *indien* het optreden van de raadsman manifest ineffectieve rechtsbijstand opleverde of de verdachte de autoriteiten hiervan gedegen op de hoogte bracht, dat de autoriteiten “niet passief kunnen blijven”. Alvorens in te gaan op wat dit inhoudt voor de nationale autoriteiten, wordt hier eerst besproken hoe het Hof een dergelijke klacht zal behandelen.

In de *Artico*-zaak heeft het Hof bepaald dat de klager *niet* hoeft aan te tonen dat zijn “persoonlijke rechten” (in plaats van de verdedigingsstrategie) zijn geschonden in de zin van “*prejudice*”. De “*prejudice*”-standaard is namelijk expliciet verworpen door het Hof in de *Artico*-zaak. Deze standaard houdt in dat, “als de raadsman niet zo zou hebben opgetreden, dan was de uitkomst van de zaak anders geweest” (bijvoorbeeld een vrijspraak). Maar het Hof heeft aangegeven dat een dergelijke standaard een te hoge drempel zou opleveren voor de klager.

Dit is alleen anders indien de raadsman *nooit* met de verdachte heeft kunnen overleggen. In een dergelijk geval, zijn namelijk nooit instructies gegeven aan de advocaat. Daarom *kan* het Hof dan de volgende tweeledige test doorlopen om een klacht ten aanzien van ineffectieve rechtsbijstand te beoordelen.

Deze test behelst dat het optreden van de raadsman incompetent moet zijn geweest en dat er sprake moet zijn geweest van “*prejudice*”. Dit betekent dat de verdachte, die niet de mogelijkheid heeft gehad om zijn advocaat te instrueren, moet aantonen dat, als de raadsman zich anders had gedragen, hij bijvoorbeeld zou zijn vrijgesproken (*Mađer v. Croatia*; paragraaf 11.2.3.). Deze “*prejudice*”-standaard geldt wel in deze specifieke zaken omdat, onder deze omstandigheden, de raadsman niet tegen de door de verdachte geuite “persoonlijke rechten” (in plaats van de verdedigingsstrategie) heeft kunnen ingaan omdat de advocaat hieromtrent dan geen instructies heeft gekregen. Dit is dus de enige situatie waarin de *prejudice*-standaard wel wordt gehanteerd, ondanks de expliciete verwerping daarvan in de *Artico*-zaak. Maar de stelling dat de “*prejudice*”-standaard te hoog is voor alle andere omstandigheden dan wanneer geen instructies zijn gegeven door de verdachte aan de raadsman omtrent de “persoonlijke rechten” (in plaats van de verdedigingsstrategie) geldt verder sinds 1980.

Aangekomen bij de “positieve verplichting” van de autoriteiten om het recht van de verdachte op een effectieve verdediging te beschermen in het geval dat zij met ineffectieve rechtsbijstand worden geconfronteerd, is het volgende van belang. Het Hof stelt vast dat doorgaans de autoriteiten, in een strafzaak waarin de advocaat *wel* instructies van de verdachte kreeg, moeten interveniëren. Op deze manier bieden de autoriteiten redres aan de verdachte die niet de gevolgen moet dragen van schade aan diens “persoonlijke rechten” (in plaats van de verdedigingsstrategie) door *ineffectieve* rechtsbijstand. Het Hof noemt vele vormen van mogelijke redres, zoals het toevoegen van een vervangende advocaat, het opdragen aan de raadsman om zijn plichten na te komen die hij heeft “verzaakt” (*Artico v. Italy*; paragraaf 11.2.), aanhouding van de zaak en het maken van regelingen voor contact en communicatie tussen de verdachte en de raadsman. Bovendien kan de cassatierechter de advocaat uitnodigen om een “formele fout” te corrigeren zoals in het geval van een vergeten aspect in de cassatieschriftuur (paragraaf 12.4.2.). Ook minder precies gedefinieerd heeft het Hof te berde gebracht dat de rechter de rol van “ultieme bewaker van de eerlijkheid van het proces” (“*ultimate guardian*”-rol) moet vervullen, moet voorkomen dat de verdediging “louter een formaliteit was” en “niet passief” mogen zijn. In al deze gevallen, is het voor het Hof van belang of de nationale rechter door bij gebrek aan interventie in de zaak de verdachte niet de consequenties heeft laten dragen van ineffectieve rechtsbijstand. Daarbij oordeelt het Hof ook hier weer of het strafproces “in zijn totaliteit” eerlijk was. Zo zorgt het Hof ervoor dat de verdachte de door de ineffectieve rechtsbijstand door zijn raadsman veroorzaakte schade aan zijn “persoonlijke rechten” (niet aan de verdedigingsstrategie) niet hoeft te dragen. Met deze laatste opmerking in het vizier, kan op deze plek in de samenvatting over worden gegaan op een interim conclusie ten aanzien van de minimumwaarborgen in het Verdrag die het Hof ten aanzien van een effectieve verdediging in een eerlijk strafproces stelt.

Interim conclusie: A. Minimumwaarborgen in het Verdrag

Ten minste sinds 1980 lijkt het Hof te hebben vastgesteld dat aan belangrijke rechten en beginselen van een eerlijk strafproces *niet* worden voldaan als de verdachte *geen effectieve rechtsbijstand* van diens raadsman heeft gekregen (bijvoorbeeld *Artico v. Italy*; hoofdstuk 11). Herhaaldelijk heeft het Hof aangegeven dat deze rechten en beginselen het volgende behelzen: het recht op rechtsbijstand onder artikel 6 (3) (c) EVRM, het recht op een eerlijk proces in zijn totaliteit onder artikel 6 EVRM, de beginselen van gelijkheid van wapenen en adversarialiteit en gelijke bescherming in het geval van het recht op een gekozen of toegevoegde advocaat.

Deze in dit onderzoek genoemde *Artico*-regel houdt in dat het Hof de relatie lijkt te leggen tussen het voornoemde *effectieve* rechtsbijstand-criterium en het feit dat de kwaliteit van de gegeven bijstand van de advocaat niet van dien aard mag zijn dat hij zijn verplichtingen niet nakomt. Het belang van het recht op rechtsbijstand wordt door het Hof aangegeven met de zin dat “(...) het een fundamenteel recht is dat, naast andere rechten, de notie van een eerlijk strafproces vormt en zorg draagt voor de effectiviteit van de andere waarborgen die artikel 6 tracht te realiseren” (bijvoorbeeld *Pishchalnikov v. Russia*; hoofdstuk 5). Daarom stelt het Hof ook dat de verdachte recht heeft op een *effectieve* verdediging, waar van toepassing door een toegevoegde advocaat, in het bijzonder tijdens de “*adversarial hearing*” (bijv. *Artico v. Italy*; hoofdstuk 11).

Uit deze uitleg van de *Artico*-regel volgt dat het Hof het recht op rechtsbijstand dus niet in formele maar in materiële zin uitlegt. Zoals het Hof het zegt: het recht op bijstand van de advocaat moet “praktisch en effectief” zijn.

Om die reden stelt het Hof ook dat redres moet worden geboden aan de verdachte in het strafproces zodat ineffectieve rechtsbijstand niet ten koste van zijn “persoonlijke rechten” gaat. Dat is nodig om zowel de effectieve verdediging van de verdachte als een eerlijk strafproces “in zijn totaliteit” te garanderen.

Het Hof laat een ruime waarderingsdiscretie aan de lidstaten, hoe de hierboven besproken minimumwaarborgen in het Verdrag te implementeren en soms zelfs te interpreteren (hoofdstuk 3). Maar lidstaten zoals Nederland moeten wel voldoen aan de minimumwaarborgen in het Verdrag ten aanzien van effectieve rechtsbijstand, zoals uiteengezet aan de hand van de vier voornoemde elementen. Aangezien al deze vier elementen worden verbonden door het recht op *effectieve* rechtsbijstand, gaat de samenvatting verder op dit punt van de interpretatie van dit recht in Nederland.

B. De Nederlandse benadering van ineffectieve rechtsbijstand en redres daarvoor voor de verdachte

Om meteen met het belangrijkste ten aanzien van de formele of materiële interpretatie van het recht op rechtsbijstand (element (i), zie p 355) te beginnen, verdient hier de opmerking dat de Nederlandse wetgeving, in het bijzonder artikel 28 Sv, de verdachte geen recht gunt op *effectieve* rechtsbijstand. Het Nederlandse Wetboek van Strafvordering lijkt eerder aan te geven wie rechtsbijstand dient te verlenen dan hoe de advocaat aan effectieve rechtsbijstand kan voldoen.

Bovendien laten de Nederlandse deontologische normen grotendeels ongedefinieerd wat *effectieve* rechtsbijstand inhoudt. In het verlengde daarvan kan worden gesteld dat de deontologie daarom ook geen inzicht toont in welk (negatief) gedrag van de raadsman in het Nederlandse strafproces redelijkerwijs voor *ineffectieve* rechtsbijstand kan worden gehouden.

Tegen de achtergrond van deze vaststelling dat zowel het Nederlandse recht als de deontologie niet inzichtelijk maken wanneer sprake is van *ineffectieve* rechtsbijstand in het strafproces, moest in dit onderzoek een verdere beslissing worden genomen. De keuze is gemaakt om veelal een analyse te verrichten van de Hoge Raad jurisprudentie om te achterhalen of het recht op rechtsbijstand hierin als materieel recht op *effectieve* rechtsbijstand of als een formeel recht op louter rechtsbijstand wordt geïnterpreteerd.

Deze studie heeft zoveel mogelijk relevante zaken van de Hoge Raad bestudeerd, maar heeft *geen enkele* zaak aangetroffen waarin wordt aangegeven, althans niet expliciet, dat de verdachte in het Nederlandse strafproces recht heeft op een materieel recht op *effectieve* rechtsbijstand. Sommige A-G's hebben de Hoge Raad wel geadviseerd om een beslissing te nemen waarin dit recht op *effectieve* rechtsbijstand zou worden vastgesteld. Maar de Hoge Raad lijkt een materiële interpretatie van het recht op rechtsbijstand (nog) niet te hebben bepaald. Hieronder worden vijf zaken besproken om deze interim conclusie te staven.

Ten eerste, wordt hier een zaak belicht waarin de Hoge Raad een oordeel moest geven over de situatie waar de verdachte naar eigen zeggen zijn raadsman bij het laatste woord had ontslagen (*Advocaat ontslagen tijdens het laatste woord*-zaak; paragraaf 12.2.). In deze zaak opperde de raadsman dat de verdachte een lagere straf zou moeten krijgen, terwijl het Openbaar Ministerie aangaf dat de verdachte tot de appèlzitting steeds had ontkend het misdrijf te hebben gepleegd. Daarop stelde de verdachte dat hij bij het laatste woord zijn advocaat zou hebben ontslagen. Maar de Hoge Raad onderzocht niet of in deze zaak de verdachte mogelijk beschermd had dienen te worden onder de *Artico*-regel.

In een tweede zaak gaf de (voormalige) advocaat toe een beroepsfout te hebben gemaakt (*Professionele fout van de raadsman ten aanzien van hoger beroep*-zaak; paragraaf 12.4.4.1.). De advocaat stelde te laat appèl in namens de verdachte. Het gerechtshof liet deze situatie voor het risico van de verdachte komen. Daarbij beoordeelde het gerechtshof niet of de verdachte wel afstand had

gedaan van zijn “persoonlijke recht” om hoger beroep in te stellen. Ook hier verwees de Hoge Raad niet naar de *Artico*-regel, ook niet om deze niet van toepassing te verklaren.

In een derde zaak, stelde de verdachte het advies van zijn raadsman te hebben opgevolgd om afstand te doen van zijn recht op rechtsbijstand tijdens de “kritieke” fase van appèl (*Door de raadsman gesuggereerde afstandsverklaring*-zaak; paragraaf 13.3.2.). In deze zaak, zou diezelfde advocaat hebben aangegeven dat de verdachte beter af zou zijn zonder rechtsbijstand in hoger beroep. De Hoge Raad beoordeelde niet of tijdens deze appèlfase, die zoals hierboven vermeld door het Hof vaker als “kritiek” wordt benoemd, rechtsbijstand niet nodig was voor de eerlijkheid van het strafproces in zijn totaliteit, althans niet expliciet. Wederom refereerde de Hoge Raad in het geheel niet aan de *Artico*-regel, ook hier niet om deze niet van toepassing te verklaren.

Een voorlaatste voorbeeld van wederom geen verwijzing naar de *Artico*-regel is een zaak waarin het gerechtshof de raadsman verbood verder te pleiten (*Raadsman verboden te pleiten*-zaak; paragraaf 13.3.3.). In deze zaak, had de verdachte als gevolg van de verwijdering van de raadsman geen rechtsbijstand gekregen tijdens het gehele pleidooi. De Hoge Raad oordeelde niet of tijdens deze fase van de appèlzitting van het pleidooi rechtsbijstand nodig was voor de eerlijkheid van het strafproces in zijn totaliteit, althans niet expliciet. Sterker nog, de Hoge Raad verwees niet naar de *Artico*-regel of naar een “negatieve” verplichting ten aanzien van het recht op *effectieve* rechtsbijstand, ook niet om deze twee mogelijkheden niet van toepassing te verklaren.

Ten slotte, refereerde de Hoge Raad ook niet aan de *Artico*-regel in een zaak waarin de advocaat de verdediging neerlegde voorafgaand aan het requisitoir (*Advocaat die de verdediging neerlegt voorafgaand aan het requisitoir*-zaak; paragraaf 13.3.3.). In deze zaak, verwees de A-G overigens in diens (niet-bindende) conclusie voor overweging voor de Hoge Raad *wel* naar de *Artico*-regel. Desondanks nam de Hoge Raad deze uitleg van de jurisprudentie van het Hof niet over. Ook in deze zaak blijkt dus niet dat de Hoge Raad overgaat tot een materiële interpretatie van het recht op *effectieve* rechtsbijstand, dan wel dat melding wordt gemaakt van de “positieve verplichting” ten aanzien van het recht op *effectieve* rechtsbijstand die kan voortvloeien uit dit recht als de verdachte schade ondervindt aan zijn “persoonlijke rechten” (in plaats van verdedigingsstrategie).

Zo zijn er dus ten minste vijf voorbeelden te noemen waarin de Hoge Raad niet een recht op *effectieve* rechtsbijstand heeft vastgesteld. Deze constatering is van belang omdat die ten minste aanleiding geeft om aan te nemen dat in Nederland het materiële recht op *effectieve* rechtsbijstand (nog) niet wordt erkend.

Hoewel deze vijf voorbeelden van belang zijn, dient te worden vermeld dat deze studie *niet* stelt dat in deze voornoemde zaken onomstotelijk is vast komen te staan dat *ineffectieve* rechtsbijstand is verleend. In tegendeel, dit onderzoek kan niet tot een dergelijke beoordeling komen. Immers, alleen iemand die alle feiten en omstandigheden van een zaak kan onderzoeken, kan tot een dergelijke conclusie omtrent *ineffectieve* rechtsbijstand komen. Daarom wordt hier benadrukt dat de enige interim conclusie die aan deze vijf besproken zaken wordt verbonden, is dat de Hoge Raad niet naar de *Artico*-regel verwijst, ook niet om aan te geven dat de lagere rechters geen interventieverplichting hadden om de “persoonlijke rechten” van de verdachte (in plaats van de verdedigingsstrategie) te beschermen. Dit is opvallend omdat er ten minste wel aanleidingen in een aantal van deze vijf zaken te vinden zijn om te stellen dat de lagere rechters “passief” zijn gebleven toen zij mogelijk met *ineffectieve* rechtsbijstand werden geconfronteerd. Maar de Hoge Raad refereerde niet aan de *Artico*-regel, zoals hierboven is gebleken, ook niet om deze niet van toepassing te verklaren.

Dat de autoriteiten niet intervenieerden in mogelijke gevallen van *ineffectieve* rechtsbijstand is van belang omdat dit onderzoek zich heeft gericht op redres voor de verdachte voor ten minste de ergste vormen van *ineffectieve* rechtsbijstand *in* het Nederlandse strafproces. Als de lagere rechters niet interveniëren in de strafzaak onder hun “positieve verplichting”, dan heeft de Hoge Raad nog de “ultieme sanctie”, zoals de voormalige Nederlandse rechter in het Hof, dhr Myjer, dat noemt. Dan kan de cassatierechter er namelijk voor zorgdragen dat de eventuele gevolgen van schade aan de

“persoonlijke rechten” beschermen (in plaats van de verdedigingsstrategie) van de verdachte door mogelijke ineffectieve rechtsbijstand niet voor rekening van de verdachte komen. Zo kan de Hoge Raad niet alleen het recht van de verdachte op een effectieve verdediging, maar ook, in het verlengde daarvan, het recht op een eerlijk strafproces in zijn totaliteit waarborgen. Maar in ieder geval de aangehaalde zaken geven geen blijk van het feit dat de Hoge Raad die ultieme “sanctie” hanteert.

Daarbij moet worden gewezen op het feit dat de Hoge Raad in een aantal voor deze studie relevante zaken verwijst naar artikel 41 Sv. Hiermee kan de Hoge Raad bij lagere rechters ten minste de indruk wekken dat de verdachte meer rechtsbescherming dient te krijgen in zulke gevallen dan wanneer hem geen rechtsbijstand door een toegevoegde raadsman onder artikel 41 Sv wordt gegund. Alvorens dit onderscheid te bespreken, zullen drie voorbeelden van dergelijke zaken worden aangehaald om dit punt te illustreren.

In twee zaken waarin de verdachte afstand deed van diens recht op rechtsbijstand, gaf de Hoge Raad aan dat “meer” kan worden verwacht van de rechter als de verdachte recht zou hebben gehad op rechtsbijstand door een toegevoegde raadsman onder artikel 41 Sv (2013 *Geen noodzaak om de afstandsverklaring te onderzoeken*-zaak en 2014 *Expliciete en gecontroleerde afstandsverklaring*-zaak). Een vergelijkbare verwijzing naar artikel 41 Sv is aangetroffen in een andere, reeds aangehaalde zaak waarin de Hoge Raad leek te stellen dat het gerechtshof correct had gehandeld door met de zaak toch voort te gaan toen de raadsman de verdediging neerlegde (*Advocaat die de verdediging neerlegt voorafgaand aan het requisitoir*-zaak). In deze zaak legde de advocaat de verdediging neer omdat zij stelde dat zij de verdachte niet van een effectieve verdediging kon voorzien. De Hoge Raad concludeerde dat het gerechtshof correct had gehandeld omdat voor de verdachte artikel 41 Sv en dus bijstand door een door een toegevoegde raadsman niet van toepassing was.

De Hoge Raad verwijst in al deze drie zaken naar artikel 41 Sv, maar legt niet uit waarom er “meer” kan worden verwacht van een toegevoegde raadsman voor de verdachte die recht heeft op rechtsbijstand onder artikel 41 Sv dan de verdachte die dat niet heeft. Bovendien geeft de Hoge Raad niet aan wat de relevantie van deze vorm van gefinancierde rechtsbijstand is. Daarmee lijkt de Hoge Raad een risico te lopen dat relevant is voor de centrale thema’s in dit onderzoek. Immers, de feitenrechters kunnen uit deze Hoge Raad jurisprudentie afleiden dat meer bescherming dient te worden geboden aan een verdachte die recht heeft op rechtsbijstand door een toegevoegde raadsman onder artikel 41 Sv dan hij die dat niet heeft. Echter, het Hof maakt duidelijk dat als het gaat om mogelijke situaties van ineffectieve rechtsbijstand een dergelijk onderscheid tussen gekozen en toegevoegde raadslieden irrelevant is (*Goddi v. Italy* and later also *Orlov v. Russia*; sub-section 13.2.5.). Het Hof benadrukt juist dat verdachten gelijke bescherming dienen te krijgen. Daarom heeft het Hof herhaaldelijk geconcludeerd dat, bijvoorbeeld, een verdachte met een toegevoegde raadsman niet “slechter” af mag zijn dan de verdachte die een gekozen raadsman heeft of *vice versa*. De Hoge Raad lijkt van dit uitgangspunt van gelijke bescherming aan verdachten die een gekozen of toegevoegde raadsman hebben, af te doen door te verwijzen naar artikel 41 Sv als ware dit recht relevant voor situaties waarin de verdachte mogelijk geen *effectieve* rechtsbijstand kreeg.

Naast de hierboven genoemde zaken ten aanzien van mogelijke ineffectieve rechtsbijstand en artikel 41 Sv, kan ook een relevant neveneffect worden ontwaard in de Hoge Raad jurisprudentie. Dat neveneffect wordt hier behandeld aan de hand van de drie verdedigingsactiviteiten. Deze activiteiten zijn het indienen van getuigenverzoeken; het aantekenen van hoger beroep, het bijwonen van de zitting in hoger beroep en cassatie en het doen van verweren (hoofdstuk 12; in het Engels beschreven als *substantive defences* zodat steeds duidelijk was dat werd gesproken over een verweer en niet over de verdediging, aangezien hiervoor hetzelfde Engelse woord wordt gebruikt). Hiervoor worden vier zaken aangehaald om te benadrukken dat de Hoge Raad het risico loopt dat mogelijke situaties waarin *ineffectieve* rechtsbijstand heeft plaatsgevonden niet door lagere rechters worden onderzocht, althans niet onder de druk dat in dergelijke zaken de Hoge Raad de “ultieme sanctie” van cassatie zal hanteren door de beslissingen van de feitenrechters te vernietigen.

In een eerste zaak hield de Hoge Raad de advocaat verantwoordelijk voor het “nalaten” het gerechtshof te wijzen op de feitelijke fout op grond waarvan het hof het getuigenverzoek van de verdediging afwees (*Feitelijke fout door de raadsman*-zaak; paragraaf 12.3.1.). In een andere zaak

nodigde de Hoge Raad de raadsman niet uit om een niet opgenomen cassatiemiddel aangaande een gerechtelijke dwaling op te nemen en liet de verdachte daarvan de gevolgen dragen (*Niet opgenomen cassatiemiddel*-zaak; paragraaf 12.4.2.). Ten derde, casseerde de Hoge Raad niet toen de vorige raadsman zelf had aangegeven een beroepsfout te hebben gemaakt door geen hoger beroep op tijd in te stellen, zodat de verdachte de consequenties moest dragen in die zin dat de zaak daardoor niet in hoger beroep werd behandeld (*Beroepsfout van de raadsman ten aanzien van een te laat ingesteld hoger beroep*-zaak; paragraaf 12.4.1.1.). In een vierde zaak casseerde de Hoge Raad niet toen de raadsman niet een verweer voerde, terwijl de verdachte wel een argument had aangevoerd dat hem had kunnen ontlasten en zijn vorige advocaat (in eerste aanleg) dit punt wel had gemaakt (*Topje van het mes*-zaak; paragraaf 12.5.1.).

Alvorens aan deze zaken interim conclusies te verbinden, moet wederom worden benadrukt dat hier niet wordt geïmpliceerd dat in deze vier aangehaalde zaken sprake was van *ineffectieve* rechtsbijstand. Zoals gezegd, dit onderzoek kan dat niet beoordelen. Maar hier wordt wel weer aangegeven dat de Hoge Raad de *Artico*-regel niet te berde bracht in deze vier zaken, ook niet om deze regel niet van toepassing te verklaren. In tegendeel, het lijkt erop dat de Hoge Raad, door de raadsman van “nalatigheid” te betichten, het toestaat dat de lagere rechters zich niet aan hun eigen verplichtingen houden. Hiermee loopt de Hoge Raad wederom een risico. Ook uit deze vier zaken kunnen lagere rechters afleiden dat de verantwoordelijkheden van de autoriteiten kunnen worden afgewenteld op de verdediging door de raadsman bijvoorbeeld van “nalatigheid” te betichten. Dergelijke interpretaties van de Hoge Raad jurisprudentie kunnen gevolgen hebben voor de verdachte. Immers, de verdachten hebben in deze vier zaken de consequenties moeten dragen van wat ten minste in de eerste zaak expliciet als “nalatigheid” van de raadsman werd beoordeeld. Bovendien lijkt de Hoge Raad lagere rechters niet aan te zetten tot een beoordeling of de *Artico*-regel mogelijk van toepassing was. Daaronder valt, ten minste voor het eerste zaaksvoorbeeld, dat het gerechtshof *zelf* verantwoordelijk is voor het *niet* afwijzen van een getuigenverzoek op een *feitelijk foutieve grond*.

Anders gezegd, de Hoge Raad riskeert, door bij de drie aangehaalde verdedigingsactiviteiten (additionele) verantwoordelijkheden aan de raadsman toe te schrijven, dat de advocaat ten minste medeverantwoordelijk wordt gehouden voor de verplichtingen van de rechters. Bovendien kan dit betekenen dat een reëel risico ontstaat dat de verdachte de gevolgen moet dragen voor (negatief) optreden van de raadsman, dat rederlijkerwijs niet tot een verdedigingsstrategie behoort en kan leiden tot schade aan zijn “persoonlijke rechten”. Het gevolg was dat in deze zaak de verdachte door de “nalatigheid” van de raadsman en de passiviteit van de autoriteiten niet de *à charge* getuige kon horen. Het Hof acht het recht op rechtsbijstand dienend aan een dergelijk “persoonlijk recht” op confrontatie van getuigen om reden ook van gelijkheid van wapenen en adversarialiteit, zoals hiervoor ook omschreven (Deel A).

Op basis van alle voornoemde voorbeelden kan hier een interim conclusie worden getrokken. Het is relevant dat deze selectie aan voorbeelden aantoont dat de verdachte meestentijds de gevolgen moest dragen van (negatief) gedrag van de raadsman dat door de rechter niet werd onderzocht. Als gevolg daarvan kan het zo zijn dat de Nederlandse wetgeving en jurisprudentie geen redres voor de verdachte voor ineffectieve rechtsbijstand *binnen* het Nederlandse strafproces waarborgen. Uiteraard kunnen er *buiten* het strafproces – via procedures onder het tucht- en civielrecht – enkele oplossingen voor ineffectieve rechtsbijstand worden gevonden. Maar zoals A-G Vellinga het ook stelde: deze twee rechtsvormen bieden geen echte oplossing omdat zij niks veranderen aan de gang of uitkomst van het Nederlandse strafproces die door ineffectieve rechtsbijstand negatief beïnvloed kunnen zijn. Daarom is het in het bijzonder van belang dat de Nederlandse rechters interveniëren tijdens de strafzaak als het recht van de verdachte op een *effectieve* verdediging en, in het verlengde daarvan, een eerlijk strafproces niet wordt gegarandeerd.

Deze vorm van redres voor de verdachte voor ineffectieve rechtsbijstand binnen het Nederlandse strafproces is, zoals het Hof het herhaaldelijk heeft bepaald, niet alleen van belang voor het individuele recht op een effectieve verdediging maar ook voor de procedurele waarborgen van een eerlijk strafproces in zijn totaliteit. Zoals vaker besproken in deze studie, is de verhouding tussen rechten van de verdachte en procedurele waarborgen inderdaad te complex om simpelweg te stellen dat “alleen”

een recht van de verdachte is geschonden en niet ook de gang of uitkomst van het strafproces. Opmerking verdient nog dat als niet door de rechter wordt onderzocht *of sprake is van ineffectieve rechtsbijstand* in het Nederlandse strafproces, het uiteraard ook niet zeker is of het eerlijk strafproces in zijn totaliteit is gewaarborgd. En zonder een dergelijk onderzoek door de rechter kunnen er situaties ontstaan waarin geen redres wordt geboden aan de verdachte wiens “persoonlijke rechten” (in plaats van de verdedigingsstrategie) zijn geschonden. Indien bedoeld onderzoek niet wordt gedaan is er alleen nog .het Hof dat de “ultieme sanctie”.

Een belangrijk voordeel van voornoemd rechterlijk onderzoek naar de vraag of *ineffectieve rechtsbijstand* heeft plaatsgevonden is ook dat professionals de kwaliteit van de advocaat eerder kunnen beoordelen dan de verdachte, die toch veelal een leek zal zijn. De verdachte zal zonder juridische training, expertise en vaardigheden meestal onbekend zijn met en onwetend zijn over wat adequaat optreden van de raadsman behelst. Maar de rechter en andere juridisch geschoolden kunnen wel een gelijke in hun veld beoordelen.

Opmerking verdient ook nog dat de Hoge Raad in enige zaken al dicht bij de *Artico*-regel is gekomen, zodat een interventieplicht voor de lagere rechters voor handen is. Om een eerste voorbeeld te geven, in zaken waarin een niet-bijgestane verdachte zichzelf mogelijk geen effectieve verdediging gaf, lijkt de Hoge Raad soms wel te willen dat de lagere rechters interveniëren in de strafzaak (*Hoogerheide-zaken*; paragraaf 6.4.). Zo heeft deze studie een tweetal zaken aangetroffen waarin de Hoge Raad casseerde waardoor ten minste niet-bijgestane verdachten niet de gevolgen hoefden te dragen van een gebrek aan een effectieve verdediging. Bovendien heeft de Hoge Raad ook een zaak gecasseerd waarin de *bijgestane* verdachte misschien geen effectieve verdediging door zijn raadsman heeft gekregen (*Advocaat ontslagen bij het laatste woord-zaak*; paragraaf 12.2.). Maar in de laatstgenoemde zaak, casseerde de Hoge Raad op een grond die niet aanwezig lijkt te zijn in het Wetboek van Strafvordering: te weten het recht om een onmiddellijke kans te krijgen om de rechter te adresseren. Ook hier refereerde, zoals hierboven reeds aangegeven, de Hoge Raad niet aan de *Artico*-regel, ook niet om deze niet van toepassing te verklaren. Dit laatste punt moet worden benadrukt, omdat het niet alleen problematisch is in deze zaak waarin de verdachte meldde dat hij zijn advocaat had ontslagen omdat hij meende dat hij geen effectieve bijstand van zijn advocaat had gekregen. Maar het is ook problematisch omdat lagere rechters door deze jurisprudentie van de Hoge Raad *niet* worden gewaarschuwd dat zij niet “passief” kunnen blijven als zij geconfronteerd worden met ineffectieve rechtsbijstand. Op deze manier geeft de Hoge Raad namelijk niet het signaal af dat het de “ultieme sanctie” zal hanteren om toch het recht op *effectieve* rechtsbijstand van de verdachte te garanderen. Dit laatste zegt natuurlijk niet dat rechtbanken en gerechtshoven mogelijk niet op eigen initiatief al actief interveniëren in de zaak wanneer zij zich geconfronteerd zien met ineffectieve rechtsbijstand. Maar het betekent wel dat deze feitenrechters dat niet hoeven te doen omdat zij geen rekening hoeven te houden met mogelijke cassatie van hun uitspraken als zij nalaten te interveniëren in de strafzaak. Deze constatering kan de volgende nadelige gevolgen hebben. Ten eerste, verschillen kunnen ontstaan tussen de diverse rechters met nadelige gevolgen voor de door de Hoge Raad te bewaken rechtseenheid en rechtszekerheid. Zo kunnen sommige feitenrechters wel en andere niet interveniëren in de strafzaak op basis van hun eigen interpretatie van de jurisprudentie van het Hof. Bovendien kan dit ertoe leiden dat, omdat de Hoge Raad niet één standaard heeft vastgesteld voor alle lagere rechters, dat niet alle verdachten dezelfde rechtsbescherming genieten. Het is daarom wenselijk dat de Hoge Raad wel een standaard vaststelt, omdat dit de rechtsbescherming van verdachten zou versterken in zaken waarin lagere rechters niet uit eigener beweging interveniëren in de strafzaak. Daarbij komt dat het er op dit moment op lijkt alsof de Hoge Raad in het geheel niet wil dat lagere rechters beoordelen of het (negatieve) gedrag van de raadsman “fundamenteel tekortschoot”. Maar dat is volgens het Hof in zulke uitzonderlijke situaties wel nodig. De ogenschijnlijk ontstane situatie waarin de Hoge Raad vermijdt dat er een eenduidige kwaliteitsbeoordeling van de rechtsbijstand aan de verdachte plaatsvindt, is problematisch in het licht van de in deze studie geanalyseerde zaken van het Hof. Uiteindelijk kan namelijk het (negatieve) gedrag van de raadsman wel degelijk een schending opleveren van de “persoonlijke rechten” van de verdachte (in plaats van de verdedigingsstrategie) en een passieve houding van alle rechters, inclusief de Hoge Raad, is onder dergelijke omstandigheden niet in overeenstemming met de minimumwaarborgen in het Verdrag.

Uiteraard is het van belang dat de Hoge Raad en de lagere rechters terughoudend zijn in hun oordeel over ineffectieve rechtsbijstand door de raadsman zodat zij, net als het Hof, niet ingaan tegen de “(...) onafhankelijkheid van de advocatuur ten opzichte van de Staat”. Daarom moeten de lagere rechters en in het bijzonder de Hoge Raad de vooronderstelling als uitgangspunt nemen dat de raadsman in het licht van een verdedigingsstrategie heeft gehandeld en zodoende dit beginsel niet schenden. Maar het Hof heeft de *Artico*-regel juist zo ingericht dat dit beginsel wordt beschermd. Nationale rechters – en als laatste redmiddel het Hof – hebben deze “ultieme sanctie” onder de strikte voorwaarden die in dit onderzoek zijn besproken (zie Deel A). Daarom is deze *Artico*-regel ook alleen van toepassing als ineffectieve rechtsbijstand manifest is of als er sprake is van duidelijke notificatie door de verdachte in de richting van de autoriteiten.

Voor de beantwoording van de hoofdvraag is het daarom in ieder geval van belang dat, in deze zeer specifieke zin, de huidige Nederlandse benadering van ineffectieve rechtsbijstand en redres daarvoor in het proces niet de minimumwaarborgen in het Verdrag lijkt na te leven. De belangrijkste reden om tot deze interim conclusie te komen is dat de Hoge Raad het recht op *effectieve* rechtsbijstand (in de materiële in plaats van formele zin) (nog) niet lijkt te erkennen. Aangezien deze interimconclusie ook gevolgen heeft voor de andere drie elementen (anders dan het vierde element, staatsinterventie, dat hier al is besproken), gaat de volgende alinea nog in op die andere drie elementen (zie hieronder onder (i-iii) De andere drie elementen).

(i-iii) De andere drie elementen: recht op rechtsbijstand, raadsman-cliënt relatie en staatsinmenging

Naast de hierboven besproken zo mogelijk belangrijkste conclusie aangaande de beantwoording van de hoofdvraag is het voor de volledigheid van deze samenvatting ook nog van belang de Nederlandse benadering van de andere drie elementen aan te stippen. Deze andere drie elementen zijn, zoals bekend, interpretatie van de reikwijdte en inhoud van het recht op rechtsbijstand, de verantwoordelijkheden van de raadsman ten aanzien van de verdachte en, ten derde en ten slotte, de “negatieve verplichting” van de autoriteiten in de Nederlandse context.

Omdat in al deze gevallen de Hoge Raad (nog) niet een materiële lezing lijkt te hebben gegeven aan het recht op *effectieve* rechtsbijstand, wordt de bespreking van deze drie elementen hierdoor uiteraard ook beïnvloed. Desondanks is er geen reden om aan te nemen dat het Nederlandse strafproces niet veelal Verdragsconform is. Maar deze samenvatting zal wel meer accent leggen op de aspecten die dat niet zijn. Deze aspecten hebben namelijk de meeste theoretische en maatschappelijke relevantie. Daarbij is het voor alle drie voornoemde elementen van belang dat het uitblijven van een interpretatie van het recht in Nederland op een materieel recht op *effectieve* rechtsbijstand op de overige drie elementen ook de volgende, nog te beschrijven impact heeft.

Ten eerste levert het onderzoek naar het eerste element, het recht op rechtsbijstand, met name voor het politieverhoor een belangwekkende conclusie op. De hierboven besproken *Salduz*-regel is door de Hoge Raad uitgelegd als een recht op consultatie voorafgaand aan en bijstand tijdens politieverhoren (paragraaf 6.2.2.). Op het moment van schrijven (15 februari 2015) heeft de aangehouden minderjarige verdachte beide rechten en de meerderjarige “alleen” een consultatierecht. Maar daarmee is de Nederlandse strafprocedure (nog) niet Verdragsconform ten aanzien van deze *Salduz*-regel. Dat heeft de Hoge Raad overigens in zeer recente jurisprudentie ook erkend (22 december 2015). Per 1 maart 2016 zal er daarom een wijziging komen ten aanzien van het politieverhoor, waardoor ook aangehouden meerderjarige verdachten beide rechten zullen hebben (consultatie- en aanwezigheidsrecht). Maar ook dit nieuwste arrest van de Hoge Raad lijkt in het licht van minder verstreckende rechtsgevolgen voor schendingen van het bijstandsrecht dan voor het consultatierecht niet geheel Verdragsconform. Dit onderscheid tussen het belang van beide rechten en de wijze waarop hun schending moet worden “gerepareerd” door daaraan rechtsgevolgen in het strafproces te verbinden, lijkt namelijk niet in overeenstemming te zijn met de in dit onderzoek uitgelegde beginselen die de jurisprudentie van het Hof tracht te beschermen. Daarbij is het in het bijzonder van belang dat de enkele aanwezigheid van een raadsman die niet daadwerkelijk de verdediging mag

voeren van de verdachte tijdens het politieverhoor waarschijnlijk niet de drie rechten van de verdachte kan beschermen: het zwijgrecht, het recht om jezelf niet te belasten en het recht op een effectieve verdediging ten minste tijdens de “*adversarial hearing*”. Dat is ook de reden waarom voor de *Salduz*-regel in zijn volle omvang aandacht wordt gevraagd in deze studie (zie hierboven onder A onder element (i)).

Een tweede punt waarop het Nederlandse strafproces ten aanzien van de interpretatie van het recht op rechtsbijstand (nog) niet Verdragsconform lijkt te zijn, is dat in Nederland niet voor alle door het Hof aangehaalde “*zekere zaken*” de garantie van toevoeging wordt geboden. Daardoor ontstaat ook op een specifiek punt een voor de Nederlandse context onverklaarbaar verschil bij kwetsbare verdachten (onder meer die met een mentaal probleem). Op dit moment hebben meerderjarige verdachten met een mentaal probleem op zitting wel, maar tijdens het politieverhoor niet, het recht op rechtsbijstand. Dit levert een probleem op met de interne consistentie van het Nederlandse strafproces.

Bovendien lijken dus niet alle kwetsbare verdachten onder de minimumwaarborgen in het Verdrag het recht op rechtsbijstand te genieten op alle “kritieke momenten”. Daarmee is deze voornoemde situatie ten aanzien van de meerderjarige verdachten met een mentaal probleem ook niet Verdragsconform.

Ook lijken er volgens de jurisprudentie van het Hof meer “soorten” kwetsbare personen aanwezig te zijn dan naar Nederlands begrip. Dit geldt bijvoorbeeld voor personen die onder invloed van alcohol zijn en buitenlanders die de relevante taal niet spreken.

Ook de “kritieke fasen”-benadering lijkt in Nederland niet in het geheel gevolgd te worden, ten minste niet voor hetgeen de EU Richtlijn 2013/48/EU aangeeft als “andere” momenten dan politieverhoren waarop de verdachte rechtsbijstand dient te krijgen (paragraaf 5.3.1.4.). Deze worden in het Engels “*investigative or other evidence-gathering acts*” genoemd. De nieuwste Hoge Raad jurisprudentie ten aanzien van *Salduz* heeft daarmee nog niet alle “kritieke momenten” behandeld.

Daarmee levert deze bespreking van het eerste element, het recht op rechtsbijstand, een complexe en genuanceerde interim conclusie ten aanzien van de bescherming die dit recht in het Nederlandse strafproces biedt.

Ook lijkt de afstandsverklaring van de verdachte van het recht op rechtsbijstand op dit moment (nog) niet in overeenstemming met de door het Hof vastgestelde hogere standaard: “in wetenschap en vol begrip” (“*knowingly and intelligently*”). Eerder lijkt de Hoge Raad de lagere standaard die voor de afstandsverklaring van andere rechten geldt, toe te passen. Dit punt van de afstandsverklaring is ook relevant voor de interne consistentie van het Nederlandse strafproces, als bedoeld in de vergelijking met de voornoemde *Hoogerheide*-zaken (paragraaf 6.4.). De *Hoogerheide*-zaak stelde namelijk de volgende drie criteria vast voor *niet-bijgestane* verdachten: controle op de afstandsverklaring van de verdachte van het recht op rechtsbijstand; beoordeling of die “positie” van de verdachte moet worden gerespecteerd en, ten slotte, speciale aandacht voor de positie van de niet (of althans niet langer) bijgestane verdachte, in het bijzonder ten aanzien van het verstrekken van informatie. In deze zaken lijkt de Hoge Raad daarom een interventie door de lagere rechters in de strafzaak te verlangen in het belang van het recht van de verdachte op een effectieve verdediging. Een consistente benadering zou eenzelfde actie vergen in situaties waarin de *bijgestane* verdachte mogelijk geen effectieve verdediging heeft gekregen doordat zijn raadsman hem *ineffectieve* rechtsbijstand verleende. Daarmee is het Nederlandse strafproces dus (nog) niet geheel in overeenstemming met de minimumwaarborgen in het Verdrag zoals het Hof deze heden ten dage uitlegt (als “*living instrument*”).

Alles bij elkaar genomen lijkt het vooral het gebrek aan vaststelling van het recht op *effectieve* rechtsbijstand dat ook de problemen oplevert ten aanzien van de hierboven reeds vermelde zogenaamde “zekere zaken”, de “kritieke fasen” en de afstandsverklaringsstandaard. Hierdoor is het Nederlandse recht op deze specifieke punten niet geheel in overeenstemming met deze minimumwaarborgen in het Verdrag omtrent het eerste element: het recht op rechtsbijstand.

Nu het eerste element is besproken, zal deze samenvatting ook twee aspecten van het tweede element, advocaat-cliënt relatie, benadrukken. Voor de afbakening van verantwoordelijkheden die redelijkerwijs tot de raadsman respectievelijk de verdachte behoren, is, zoals hierboven reeds

aangegeven, voor het Hof van belang dat een effectieve verdediging wordt geacht het best te kunnen worden gegeven door de voorkeursadvocaat. Deze voorkeursadvocaat kan namelijk worden geacht het beste de rechten, belangen en wensen van de verdachte na te leven. Het Hof geeft aan dat de keuze van de gekozen of de selectie van de toegevoegde raadsman van verdachte's voorkeur wel degelijk mogen worden beperkt. In zoverre voldoet het Nederlands strafproces veelal aan deze minimumwaarborgen in het Verdrag.

Maar over de wijze waarop in het Nederlands strafproces wordt omgegaan met dergelijke beperkingen, kan nog iets anders worden aangegeven. Daarom worden hier nog twee zaaksvoorbeelden besproken.

In een eerste zaak casseerde de Hoge Raad wel een strafzaak waarin het gerechtshof de verdachte niet een aanhouding gunde om een raadsman in de arm te nemen (*Verzochte aanhouding om een raadsman in te huren*-zaak; paragraaf 6.2.1.1.). In een tweede zaak casseerde de Hoge Raad *niet* maar werd door het gerechtshof niet tot een aanhouding besloten omdat de verdachte een *nieuwe* raadsman in de arm wilde kunnen nemen (*Verzochte aanhouding om een nieuwe raadsman in te huren*-zaak; paragraaf 8.2.2.).

Zoals het Hof dat ook doet, lijkt de Hoge Raad de afwezigheid van rechtsbijstand in de laatstgenoemde zaak “voor een aanzienlijk deel” “toe te schrijven” aan de “eigen acties” van de verdachte. Dat hoeft dus geen problemen op te leveren met de minimumwaarborgen in het Verdrag.

Maar wat wel bepalend kan zijn voor deze laatstgenoemde strafzaak is dat de Hoge Raad niet heeft gecontroleerd wat het effect was van het feit dat deze verdachte, die toch koos voor rechtsbijstand, niet langer werd bijgestaan. Of deze verdachte recht zou hebben gehad op redres is hierboven al besproken (paragraaf 13.3.1). Daarom wordt hierop niet nogmaals ingegaan. Maar hier wordt wel, op basis van het horizontale perspectief, belicht dat de Hoge Raad hier niet, althans niet expliciet, heeft beoordeeld wat het effect was voor de verdediging van de verdachte dat hij niet langer werd bijgestaan door een advocaat. Dit kan problemen opleveren ten aanzien van de overeenstemming met de minimumwaarborgen van het Verdrag omdat het Hof, dat beperkingen op het recht op de voorkeursraadsman wel toestaat, ook beoordeelt of het uitblijven van rechtsbijstand niet de “persoonlijke rechten” (in plaats van de verdedigingsstrategie) van de verdachte schendt.

Hier wordt verder nog aandacht gevraagd voor een tweetal strafzaken die een laatste aspect zullen belichten. Deze zaken zijn ook relevant voor de interne consistentie van het Nederlandse strafproces. Het gaat namelijk over hoe rechters moeten omgaan met de situatie waarin bijgestane en niet-bijgestane verdachten de orde op de terechtzitting verstoren (artikel 273 lid 3 Sv).

In een eerste zaak casseert de Hoge Raad omdat de niet-bijgestane verdachte de orde verstoort en daardoor niet verder kon gaan met zelfvertegenwoordiging (273 lid 3 Sv; *Niet-bijgestane verdachte die niet verder mocht pleiten*-zaak). Deze eerste zaak is verder nog relevant omdat de Hoge Raad niet het advies volgde van de A-G die stelde dat er geen cassatie openstaat tegen ordeverstoringen onder artikel 273 lid 3 Sv.

In een tweede zaak, laat de Hoge Raad een zaak in stand waarin de raadsman van de bijgestane verdachte niet verder mocht pleiten en de verdachte daardoor alleen verder moest (*Advocaat die niet verder mocht pleiten*-zaak; paragraaf 8.2.2.). In deze tweede zaak leek de Hoge Raad ook niet te beoordelen wat het effect was op de rechten van de verdachte die geen rechtsbijstand meer had gedurende het pleidooi. Dit laatste punt wordt hier benadrukt, omdat het Hof de “*closing speech*” meestal belangrijk acht voor een “*adversarial hearing*”.

Een vergelijking tussen beide zaken laat zien dat de Hoge Raad voor een niet-bijgestane verdachte wel en voor een bijgestane verdachte niet casseert op basis van een grond die in de Nederlandse wetgeving niet lijkt te bestaan: cassatie tegen ordeverstoringen onder artikel 273 lid 3 Sv. Hieruit kunnen lagere rechters afleiden dat van hen “meer” mag worden verwacht wanneer zij worden geconfronteerd met een niet-bijgestane verdachte dan een bijgestane verdachte die de orde op zitting verstoort. Ook deze constatering kan problemen opleveren ten aanzien van de overeenstemming met de minimumwaarborgen van het Verdrag. Immers, het Hof, dat beperkingen op het recht op de voorkeursraadsman wel toestaat, beoordeelt ook of het uitblijven van rechtsbijstand niet de “persoonlijke rechten” (in plaats van de verdedigingsstrategie) van de verdachte schendt.

Tot slot lijkt in het Nederlandse strafproces ten aanzien van de advocaat-cliënt relatie overeenkomstig de minimumwaarborgen in het Verdrag te worden gedacht over de advocaat als “leider” van de strategie en de verdachte als beslisser over “persoonlijke rechten” (paragraaf 13.2.3.). Het Nederlandse recht en de geldende deontologie in Nederland stellen namelijk dat vertrouwelijkheid en consultatie met name van een onderzochte of gehechte verdachte van belang zijn (paragraaf 8.3.1.). Verder wordt de verdachte *dominus litis* geacht, hetgeen ook inhoudt dat de raadsman in beginsel niet tegen de rechten, belangen en wensen van de verdachte in moet gaan. Daarom lijkt de rolverdeling in ieder geval niet in strijd met hoe daarover door het Hof wordt gedacht. Maar het Nederlandse recht en de deontologie geven niet veel inzicht in de wijze waarop de raadsman rechtsbijstand – laat staan *effectieve* rechtsbijstand – aan de verdachte moet verlenen. Alleen heel duidelijke punten, zoals het feit dat de advocaat niet de wet moet schenden, worden geëxpliciteerd. Dus laten deze rechtsbronnen veelal ongedefinieerd wat effectieve rechtsbijstand zou kunnen inhouden. Dit laatste aspect leidde ook al tot de eerdere interim conclusie dat het nodig zal zijn voor de Hoge Raad om ook deze rolverdeling tussen de raadsman en de verdachte voor de lagere rechters te verduidelijken (zie deel B bovenaan).

Ten derde en ten slotte voor wat betreft de Nederlandse benadering, de analyse van de “negatieve verplichting” van de autoriteiten om niet effectieve rechtsbijstand te verhinderen toont een aantal aspecten van het Nederlandse strafproces die niet conform de minimumwaarborgen in het Verdrag zijn vormgegeven (paragraaf 13.2.4.). Aan de ene kant, is het zo dat Staatsinmenging in de meer algemene zin wordt verboden in Nederland om reden van de bescherming van de onafhankelijkheid van de advocatuur van de Staat. Maar aan de andere kant kunnen drie voorbeelden van meer specifieke gevallen inzicht geven in de wijze waarop in Nederland toch niet altijd Verdragsconform lijkt te worden gehandeld ten aanzien van deze “negatieve verplichting”. Ook hier komt dat weer veelal doordat de Nederlandse wet en jurisprudentie geen recht op *effectieve* rechtsbijstand erkent.

Ten eerste ging de Hoge Raad niet in op de door de Staat opgelegde beperkingen op de advocaat in de reeds aangehaalde strafzaak: *Advocaat die de verdediging neerlegde voor het requisitoir*-zaak. In deze zaak adviseerde de AG aan de Hoge Raad om ook het effect van deze situatie voor de *effectieve* verdediging van de verdachte te beoordelen. Maar de Hoge Raad liet de zaak in stand zonder verwijzing naar een negatieve verplichting zoals het Hof bijvoorbeeld deed in *Hüseyn and Others v. Azerbaijan*. Bovendien is er in deze strafzaak ook geen verwijzing te vinden naar een beoordeling of deze verdachte wel afstand deed van zijn recht op rechtsbijstand, terwijl hij toch juist met een raadsman naar de zitting kwam. Tot slot is niet bekeken of het hier niet de autoriteiten waren, in plaats van de advocaat, die dusdanige beperkingen oplegden waardoor de raadvrouw in deze strafzaak geen *effectieve* rechtsbijstand aan de verdachte kon verlenen.

Ten tweede geldt in een strafzaak dat de Hoge Raad de raadsman ten minste medeverantwoordelijk lijkt te maken voor goede toevoeging door aan te geven dat het de “nalatigheid” van de advocaat was dat hij niet aangaf dat hij niet tijdig en goed was toegevoegd (*Gebrek aan een eerdere toevoeging*-zaak; paragraaf 10.3.). Ook in deze zaak leek de Hoge Raad weer niet te beoordelen wat de effecten hiervan waren voor de verdediging van de verdachte. Diezelfde verdachte had immers recht op rechtsbijstand en misschien waren het hier juist wel de autoriteiten die hun “negatieve verplichting” om effectieve rechtsbijstand niet te verhinderen door de advocaat niet goed of in het geheel niet toe te voegen. Immers, het lijkt problematisch dat een toegevoegde advocaat medeverantwoordelijk wordt gemaakt voor zijn goede toevoeging terwijl alleen de autoriteiten een advocaat kunnen toevoegen.

Ten derde en ten slotte, de Hoge Raad lijkt ten aanzien van de mogelijkheid dat een wig wordt gedreven tussen de raadsman en de cliënt wederom niet de standaard van een recht van de verdachte op *effectieve* rechtsbijstand te hanteren (paragraaf 13.3.1. en 13.3.6.). De Hoge Raad staat juist “onder uitzonderlijke omstandigheden” een inbreuk op vertrouwelijkheid toe. Deze situatie veroorzaakt mogelijk ook een probleem van uitblijven van interne consistentie van het Nederlandse strafproces. Zo worden namelijk mogelijk meer waarborgen gegeven voor inzet van bijzondere onderzoeksmiddelen wanneer de raadsman wordt verdacht van een misdrijf dan voor deze mogelijkheid dat er een wig tussen de advocaat en de verdachte kan worden gedreven. Ook hier geldt dus weer dat de Hoge Raad

geen “negatieve verplichting” van de autoriteiten lijkt vast te stellen om niet effectieve rechtsbijstand te verhinderen, zoals het Hof dit soort kwesties behandelt.

Zo blijkt ook voor alle drie andere elementen dat dit onderzoek niet heeft gevonden dat het Nederlandse recht en de jurisprudentie de norm van *effectieve* rechtsbijstand hanteren zoals deze door het Hof wordt vastgesteld. Deze omstandigheid is voor alle vier de elementen vastgesteld. Al deze elementen waren bepalend voor de beantwoording van de hoofdvraag (paragraaf 13.3.3.) en geven daarom ook de belangrijkste aanleiding om tot de volgende drie aanbevelingen te komen (in Deel C). Daarom geldt ook dat in deze hele specifieke voornoemde zin – met name ten aanzien van het uitblijven van de erkenning van een recht op *effectieve* rechtsbijstand – de huidige benadering aangaande ineffectieve rechtsbijstand en redres daarvoor voor de verdachte in het Nederlands strafproces niet aan de minimumwaarborgen die het Europese Hof voor de Rechten van de Mens aan het recht van de verdachte op een effectieve verdediging in een eerlijk proces stelt.

C. Aanbevelingen

(1) Een nieuwe aanpak van ineffectieve rechtsbijstand in het strafproces

Tegen de achtergrond van het gebrek aan naleven van de minimumwaarborgen in het Verdrag, lijkt het van het uiterste belang dat er in Nederland rechterlijke controle of een aparte *ex post* beroepsmogelijkheid komt zodat de verdachte zich kan beklagen over ineffectieve rechtsbijstand. De eerste mogelijkheid kan gemodelleerd worden naar het reeds aangehaalde voorbeeld van de niet-bijgestane verdachten (*Hoogerheide*-regel). Deze optie lijkt ook het eenvoudigst in te passen in de Nederlandse context waarin de rechter toch al actief moet optreden. De tweede optie kan naar het model ingericht worden van twee beroepsinstanties waarin de verdachte in de Commonwealth kan klagen over ineffectieve rechtsbijstand (*Ebanks v. the United Kingdom*; hoofdstuk 11). Maar, zoals gezegd, de eerste optie past beter in het Nederlandse strafproces omdat de rechter de benodigde activiteiten kan verrichten die de *Artico*-regel vergen.

Cassatieadvocaten kunnen nu al de Hoge Raad bewegen om de *Artico*-regel in de jurisprudentie te ontwikkelen door naar de relevante zaken van het Hof en in het bijzonder de norm van het recht op *effectieve* rechtsbijstand te wijzen. Cassatieadvocaten kunnen nu al de Hoge Raad bewegen om de *Artico*-regel in de jurisprudentie te ontwikkelen door naar de relevante zaken van het Hof en in het bijzonder de norm van het recht op *effectieve* rechtsbijstand te verwijzen. Zaaksadvocaten kunnen ook gedurende het strafproces aan de minimumwaarborgen refereren. Zo kunnen zij in hun pleidooien al eventuele wijzen op de meergenoemde “persoonlijke rechten” van de verdachte. Daarmee kunnen zij ook aangeven dat *effectieve* rechtsbijstand van belang is niet louter voor een effectieve verdediging als een recht van de verdachte maar ook als procedurele waarborg voor een eerlijk strafproces in het geheel.

Kortom, alle procesdeelnemers moeten hierin hun rol spelen zodat het (negatieve) gedrag van de raadsman niet voor rekening komt voor de verdachte indien dit hem in zijn “persoonlijke rechten” (in plaats van in de verdedigingsstrategie) schendt. Zo kan ervoor worden gezorgd dat redres wordt geboden aan de verdachte die lijdt aan ineffectieve rechtsbijstand op een manier die de belangrijke kernwaarden van autonomie van de verdachte en het ingrijpen in de zaak uit bescherming van de effectieve verdediging in het strafproces samenbrengt. Deze in het conceptueel kader reeds aangeduide “derde weg” wordt nog besproken, nadat de tweede aanbeveling is behandeld (zie verder onder (3) en ook in paragraaf 13.4.2.).

(2) De noodzaak van prestatiestandaarden voor de raadsman

Hier wordt voorgesteld dat voor het Nederlandse strafproces prestatiestandaarden voor de raadsman worden ontwikkeld, ook al gebruikt het Hof die niet om de *Artico*-regel toe te passen – om dat nog maar te benadrukken. De reden om deze aanbeveling te doen, is dat het Nederlandse recht en de deontologie grotendeels ongedefinieerd laten wat *effectieve* rechtsbijstand inhoudt. Daarom leveren deze rechtsbronnen (nog) geen inzicht op ten aanzien van de vraag welk (negatief) gedrag van de raadsman redelijkerwijs voor *ineffectieve* rechtsbijstand kan worden gehouden. Prestatiestandaarden voor de raadsman kunnen dit gat vullen. Aan de hand daarvan, wordt namelijk duidelijk wat *effectieve* rechtsbijstand inhoudt en dus ook wat, in afwijking daarvan, *ineffectieve* rechtsbijstand oplevert.

Het bijkomende voordeel van dergelijke prestatiestandaarden voor de *raadsman* is dat het voor hem voorzienbaar maakt waaraan hij moet voldoen. Bovendien kan de raadsman hieruit afleiden wanneer de *Artico*-regel met betrekking tot *ineffectieve* rechtsbijstand haar intrede doet. Dan zal de raadsman ook hopelijk proberen om te *voorkomen* dat de verdachte de dupe kan worden van *ineffectieve* rechtsbijstand.

Bovendien maakt het duidelijk aan de feitenrechters en de Hoge Raad wanneer zij de *Artico*-regel dienen toe te passen. Hoewel de Hoge Raad deze standaard zelfstandig kan en behoort te stellen, kan het helpen dat ook de advocatuur bijdraagt aan een beter inzicht van wat rechters van de raadsman in het Nederlandse strafproces mag verwachten.

Deze voorgestelde, nog te ontwikkelen prestatiestandaarden moeten natuurlijk de bestaande normen volgen. Zij behoren ook een verdere uitwerking te zijn van begrippen die in Nederland reeds worden erkend. Daarbij kan worden aangesloten bij de reeds ontwikkelde normen ten aanzien van de onafhankelijkheid en partijdigheid van de raadsman in het licht van de onschuldpresumptie, de verdachte als *dominus litis* en de hierboven reeds aangehaalde rolverdeling tussen de raadsman en de advocaat. Daarin moeten ook de nadere eisen die het Hof stelt worden meegewogen. Daarom kunnen deze prestatiestandaarden ontwikkeld worden aan de hand van de begrippen die in deze studie zijn uitgewerkt. Dit geldt bijvoorbeeld voor de volgende begrippen: de “*zealous*” verdediging, het respect voor de subjectieve positie van de verdachte en de naleving van de normen omtrent de vertrouwelijkheidsrelatie tussen de verdachte en de raadsman.

(3) Een “*derde weg*” voor redres voor de verdachte voor *ineffectieve* rechtsbijstand

De laatste aanbeveling stelt een op rechten gebaseerde aanpak van *ineffectieve* rechtsbijstand in het Nederlandse strafproces centraal. Een dergelijke aanpak biedt niet alleen een oplossing als het kwaad al is geschied maar heeft hopelijk ook zoveel mogelijk een preventieve werking.

De voorgestelde “*derde weg*” rust op de twee reeds aangehaalde kernwaarden: autonomie én, indien vereist, van staatsingrijpen ter bescherming van de persoonlijke rechten van de verdachte, zoals het recht op een effectieve verdediging. Deze twee kernwaarden werden in dit onderzoek het eerst besproken in het licht van de ontwikkeling van het conceptueel kader (hoofdstuk 2).

De reden om deze twee kernwaarden op deze plek van de aanbevelingen weer aan te halen is dat het Hof de spanning tussen deze twee begrippen oplost door zoveel mogelijk de verdachte het Verdragsrecht op rechtsbijstand van toepassing te achten tijdens “*kritieke momenten*” in het strafproces. Het Hof doet dat door de vier voornoemde elementen te hanteren (Deel A en Deel B). Naast het vangnet dat de *Artico*-regel biedt, is daarom nog nodig dat *voorkomen* wordt dat het nodig is om de laatste “*sanctie*” toe te passen en dat hier zoveel mogelijk een afschrikwekkende werking van uitgaat.

Daarom wordt hier aanbevolen dat strafrechtadvocaten onderling bespreken wanneer sprake is van *ineffectieve* rechtsbijstand om hun beroepsgenoten hiervoor te behoeden. Daar kan de advocatuur als beroepsgroep verder een rol bij spelen door het proces van het samenstellen van de hierboven reeds aangehaalde prestatiestandaarden voor de raadsman te starten (zie hierboven onder 2 en ook paragraaf 13.4.2.). Voorts kunnen, hoewel dat vaak lastig zal zijn, ook officieren van justitie en advocaten-generaal ten minste ter zitting aangeven dat zich mogelijk een probleem omtrent *ineffectieve* rechtsbijstand voordoet. Ook verdachten moeten natuurlijk de mogelijkheid hebben om eventuele problemen over *ineffectieve* rechtsbijstand met de autoriteiten te bespreken. Alles overziende zullen, zoals reeds aangegeven, het in het Nederlands strafproces toch veelal de rechters zijn die als laatste redmiddel de *Artico*-regel inzetten. Problematisch is dat natuurlijk wel waar strafzaken vaker worden afgedaan *zonder* rechter. Deze ontwikkelingen in het strafproces om zaken buitengerechtelijk af te doen zodat een rechter steeds minder van pas komt, kunnen dus vanuit het oogpunt van *ineffectieve* verdediging probleem vormen. Immers, hoe meer de Nederlandse wetgever zal overgaan tot consensuele afdoeningsvormen en andere mogelijkheden om strafzaken zonder strafrechter af te doen, hoe vaker problemen met het gebrek aan enige rol van de rechter in het licht van *ineffectieve* verdediging zal plaatsvinden. Bovendien is over de goede rechterlijke interventie (*Artico*-regel) nog niet alles gezegd.

Zoals bij de verdachte die zichzelf verdedigt, maar dat niet effectief doet, zal de rechter ambtshalve ervoor moeten zorg dragen dat aan de verdachte niet door toedoen van *ineffectieve*

rechtsbijstand door zijn raadsman zijn recht op een effectieve verdediging wordt ontnomen. Daarom zal de rechter moeten interveniëren in de strafzaak, zonder ook maar het risico te nemen dat hij zich in de advocaat-cliënt relatie mengt. Dat kan betekenen, zoals het advies was van de annotator in de zaak van de ontslagen raadsman, dat de rechter onmiddellijk de zitting schorst en de afdoening van de zaak op het gewezen moment (verder) laat plaatsvinden. Ook is het mogelijk dat de zittingsrechter andere middelen inzet die niet het risico in zich dragen dat tegen de rechten, belangen en wensen van de verdachte wordt ingegaan. Zo kan de rechter ervoor kiezen om een andere advocaat toe te voegen of de verdachte de mogelijkheid geven om met diens raadsman te overleggen. Voor de rechter zijn er verder ook nog andere mogelijkheden: het voorzichtig navragen bij de verdachte of hij zich bewust is van de door zijn advocaat gehanteerde strategie, een aanhouding van de zaak of de tijd gunnen aan de verdachte om zelf zijn advocaat te vervangen. Hoewel de rechter hierbij heel prudent te werk zal moeten gaan, laat dat onverlet dat een interventie in de strafzaak door de rechter in voornoemde uitzonderlijke gevallen wel degelijk nodig is. De rechter zal de balans moeten vinden en bewaren tussen enerzijds zijn onpartijdigheid en anderzijds de aan de verdachte te bieden rechtsbescherming. De verdachte die wordt bijgestaan door een raadsman, evenals de verdachte die zichzelf verdedigt, heeft immers het recht op een effectieve verdediging. Dit zal alleen lukken als in de *interactie* tussen alle procesdeelnemers verdachte's recht op een effectieve verdediging wordt waargemaakt. Daarom wordt in dit onderzoek tot slot een expliciet beroep gedaan op *alle* betrokkenen en hun instituties. Goed op elkaar afgestemde actie is noodzakelijk omdat het recht op een effectieve verdediging zowel een individueel recht van de verdachte als een procedurele waarborg voor een eerlijk strafproces vertegenwoordigd. Daarom is het van het uiterste belang dat op de reeds uitgelegde manier in onze Nederlandse rechtsstaat het recht op effectieve verdediging van de verdachte en daarmee ook het eerlijk strafproces in zijn totaliteit wordt gegarandeerd.

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