



ALBANIAN HELSINKI COMMITTEE
KOMITETI SHQIPTAR I HELSINKIT

RESEARCH REPORT

ON THE DENUNCIATION, INVESTIGATION
AND ADJUDICATION OF CRIMINAL OF-
FENSES IN THE FIELD OF CORRUPTION

(In reference to the analysis of some criminal denunciations of the High State Audit and the progress of their investigation and adjudication, as well as the findings resulting from the monitoring of some trial hearings and judicial decisions on the adjudication of criminal offenses in the field of corruption)

*Fighting together
corruption and contributing
to build a better and a fair
society for all of us!*



ALBANIAN HELSINKI COMMITTEE
KOMITETI SHQIPTAR I HELSINKIT

RESEARCH REPORT

ON THE DENUNCIATION, INVESTIGATION
AND ADJUDICATION OF CRIMINAL OF-
FENSES IN THE FIELD OF CORRUPTION

(In reference to the analysis of some criminal denunciations of the High State Audit and the progress of their investigation and adjudication, as well as the findings resulting from the monitoring of some trial hearings and judicial decisions on the adjudication of criminal offenses in the field of corruption)

December, 2016

The following persons were engaged in realizing the monitoring and drafting of reports:

1. Florian Xhahani, *Jurist*
2. Etilda Saliu (Gjonaj), *Jurist*
3. Erida Skëndaj, *Jurist*
4. Elton Frashëri, *Jurist*
5. Iva Bregasi, *Jurist*
6. Andi Muratej, *Attorney at Law*
7. Edis Ibrahimimi, *Jurist*
8. Klodian Reçi, *Jurist*

The following persons prepared the publication for printing:

1. Erida Skëndaj, *AHC Executive Director*
2. Niazi Jaho, *AHC Legal Advisor*
3. Elton Frashëri, *Jurist in AHC's Legal Clinic Program*

Editor: Ilir Dhima

Published under the care of “petanidesign”

All rights are reserved. No part of this publication may be reproduced without the consent of the author.

Autor: @ Albanian Helsinki Committee



ALBANIAN HELSINKI COMMITTEE
KOMITETI SHQIPTAR I HELSINKIT

Albanian Helsinki Committee

Rr. Brigada e VIII-të, Ap. 10, K. 5, K.P. nr. 1752, Tirana, Albania

Tel/Fax: ++355 (0)4 223 36 71, ++355 (0)69 407 57 32

web address: www.ahc.org.al

E-mail: office@ahc.org.al

Disclaimer: This publication is supported financially by the Democracy Commission Small Grants Program of the U.S. Embassy in Tirana. The opinions, findings, conclusions and recommendations expressed therein are only of the author/s and do not necessarily represent those of the U.S. Department of State.



Embassy of the United States of America
Tirana, Albania

“Society has entrusted judges with a very important role. They have the duty to evaluate the good and the bad and, in case of need, to render harsh sentences. However, it is expected that they will act under public scrutiny and behave correctly. If they do not fulfill these prescriptions, they are open to criticism, which they do not to be protected from. The democratic society and its expressors (such as judges) should allow even somewhat excessive criticism that is based on indisputable facts.”

M.A Nowicki, *On the European Convention*,
Publication of 2000, p. 317

CONTENTS

1. Introduction.....	5
2. Independent opinion on the Research Study, by Av. Arben Rakipi.....	9
3. Executive summary.....	13
3.1 Progress of investigations on some criminal referrals by the High State Audit.....	13
3.2 Findings regarding the monitoring of some judicial hearings.....	17
3.3 Findings regarding the analysis of some judicial decisions.....	19
4. Analysis on the progress of criminal referrals by the High State Audit in the Prosecutor's Offices of the Judicial District Courts of Tirana and Durrës.....	24
4.1 Purpose, object and pursued methodology.....	24
4.2 General Analysis.....	25
4.3 Analysis on special cases.....	27
5. The practice of denunciations by other auditing institutions.....	37
6. Findings resulting from the monitoring of court hearings on cases of corruption adjudicated in the Tirana and Durrës Judicial District and Appeals Courts as well as in the Serious Crimes Court.....	40
6.1 Purpose, object and pursued methodology.....	40
6.2 Findings regarding the aspects of due legal process and smooth conduct in court.....	41
6.3 Findings with regard to the thematic aspects about the adjudication of defendants accused of criminal offenses in the field of corruption.....	48
7. Analysis of final judicial decisions on corruption cases issued by the Tirana and Durrës Judicial District and Appeals Court and the Serious Crimes Court.....	51
7.1 Purpose, object and pursued methodology.....	51
7.2 Respect for the formal and procedural aspect of the publication of the decision.....	54
7.3 Judicial status of the defendants.....	56
7.4 Coercive measures for the defendants.....	56
7.5 Subjects that set the criminal process in motion.....	58
7.6 Analysis on the acceptance of requests for abbreviated adjudication.....	60
7.7 Causes for the dragging out of judicial hearings for cases that lasted more than average.....	62
7.8 Reasoning for judicial decisions.....	64
7.9 Position of the court on the legal qualification of the criminal offense and penal policy.....	70
8. Rekomandime.....	75

1. Introduction

During the 26 years of its activity, the Albanian Helsinki Committee (AHC) has devoted special attention to research and analytical reports on the impunity of criminal offenses in the area of corruption in our country. This research study is the second publication dedicated solely to the phenomenon of impunity for corruption in the country, which AHC is presenting to the public, media, state institutions, actors of the justice system, domestic and international organizations, and other interested parties inside and out of the country.

The purpose of this research study is to contribute to the improvement of the legal framework and the performance of institutions that have a legal responsibility for reporting, investigating and adjudicating criminal offenses in the field of corruption, aiming also to highlight positive institutional, investigative and judicial practices, as well as those that need to be unified.

Citizens' perceptions for the high level of corruption in the public sector, the high number of criminal referrals to the prosecutor's office on criminal offenses in the field of corruption and abuse of office, the imbalance between the high number of these criminal referrals and the number of cases investigated by the prosecutor's office and sent to court for adjudication, especially with the number of defendants found guilty by final court decision were some of the key factors that dictated a need to carry out a professional, objective and impartial analysis on the efficaciousness of the activity of the HSA, other independent/oversight institutions, the prosecutor's office and the courts with regard to preventing and fighting corruption in the country.

The European Commission' Progress Report on Albania for 2015,¹ stressed that the track record of convictions for corruption cases involving high-level officials is low. A number of cases, when media have cast doubts about violations by senior officials, judges and prosecutors, were not investigated seriously. The report stressed that in spite of amendments to the legal and institutional framework, there are still deficiencies, such as: clarity of jurisdiction on the criminal offenses of corruption; insufficiency of human and technical resources; lack of effective cooperation and trust

1 European Commission Report on Albania for 2015, Brussels, 10.11.2015

between police and prosecutors; the lack of cooperation and adequate exchange of information with other institutions. Sanctions imposed on corruption cases tend to be very soft. Courts have taken different stances on authorizing special investigation techniques and the acceptance of evidence obtained in an illegal manner, such as private recordings. Court rulings are often written and argued in a tepid manner.

The European Commission Progress Report on Albania for 2016 considers that with regard to the fight against corruption, Albania is to some extent prepared. The law on the protection of whistleblowers was passed. Prosecutors and police have increased access to national electronic public registers in order to exchange sensitive information and increase the efficiency of investigations. Further progress is needed to create a sustainable track record of investigations, prosecutions and convictions. More efforts are needed to fight high-level corruption. Proactive investigations, systematic risk assessment and interagency cooperation need to improve. Corruption remains widespread in many areas and remains a serious problem. With regard to cases related to justice and corruption, the European Commission recommends that further progress is needed for the approval and implementation of legislation, as a reformer of the justice system. Giving justice continues to be slow and inefficient, while corruption remains widespread across the sector.

Reforms implemented to date have not yielded significant results or changed public perception on the level of violations by public officials. Justice reform is expected to restore public confidence in the justice system. The attention of the public, but also of domestic and international organizations operating in the country has focused on Vetting (transitory re-evaluation) of judges and prosecutors, which will be realized in three components: audit of assets, control of the figure (inappropriate ties with organized crime) and evaluation of the professional skills of justice system actors.

The implementation of the law no. 84/2016 “On the transitory evaluation of judges and prosecutors in the Republic of Albania” was suspended by the Constitutional Court, which in requested an *Amicus Curiae* on some controversial provisions of this law from the Venice Commission. The supra-national body, upon a review with full expertise of the appealed amendments, on December 9, 2016, approved its advisory Recommendations to the body for constitutional review and interpretation in Albania, by expressing compliance of the Vetting law with the European Convention for Fundamental Human Rights and Freedoms.

Data obtained by the Balkan Investigative Reporting Network (BIRN Albania)² show that although there has been considerable increase in the past two years in the number of judges and prosecutors who have been investigated by the prosecutor's office for criminal offenses related to corruption or abuse of office, the number of convictions can be counted with the fingers of one hand. Judges interviewed by BIRN agree with the prosecutor's office with regard to the difficulty of investigating corruption cases. However, they argue that weaknesses and delays by investigative bodies are often the cause for failure of cases in the court. Florian Kalaja, a magistrate and judge in the Vlorë Court told BIRN that corruption discoverability is and will probably remain low because this kind of crime creates a "win-win" situation between parties. *"Officials of the justice system who are corrupted will never be those reporting their own crimes; those reporting the crimes will neither be the persons who exerted illegal pressure because they are the beneficiaries...the damaged...will never speak up,"* he argues.

The legal framework on criminal offenses of corruption has changed in recent years in a constant manner; nevertheless, cases of punishment by Albanian courts remain in very low levels, mainly for passive and active corruption by senior officials and local officials and in even lower levels for judges and prosecutors. Criminal legislation in the Republic of Albania, aligned with international conventions and recommendations, envisages the criminalization of the criminal offenses of corruption and their penalization with penal sanctions, based on the principles of lawfulness and guilt, criminal responsibility, protection of fundamental human rights and freedoms in fighting criminality.

The Albanian State ratified by law no. 8778, dated 16.09.2004, the criminal Convention "on Corruption" of the Council of Europe, as the main legal act for the criminal offenses of corruption, which have also been reflected in our Criminal Code. First, in support of the Criminal Convention, legal amendments were made to the Criminal Code of 2004, through law no. 9275, dated 16.09.2004. With the approval of this act, the alignment of terminology with that of the Convention was realized, including the terms "passive corruption" and "active corruption;" also, new criminal offenses were criminalized such as active and passive corruption in the private sector (article 164), active and passive corruption of persons holding public functions (articles 244 and 259), corruption of senior state functionaries and local officials (articles 245 and 260), active and passive corruption of judges, prosecutors and other functionaries of justice bodies.

2 Klodiana Lala, *Justice reform faces the vicious circle of corruption*, Birn Albania <http://www.reporter.al/reforma-ne-drejtessi-perballet-me-rrethin-vicioz-te-korrupsionit/>

The country has signed and ratified relevant Conventions of the Council of Europe on the fight against corruption and the OECD Convention on the fight against corruption of foreign public officials in international business transactions.

Pursuant to the additional Protocol on the Convention “On Corruption” and the recommendations of the group of countries against corruption (GRECO), in 2012, by law no. 23, dated 1.03.2012, other additions and amendments were made to the Criminal Code, for the criminalization and penalization of the criminal offenses of passive and active corruption of judges of international courts, juries, domestic and foreign referees (articles 319/a up to 319/e).

In 2014, with the latest changes that the Criminal Procedure Code underwent, the material competence for 4 criminal offenses in the field of corruption, (active and passive corruption of senior officials, local officials, as well as judges and prosecutors) moved from the joint investigative units to the Serious Crimes Prosecutor’s office and then the adjudication of these criminal offenses was moved under the material competence of the Serious Crimes Court.

The full implementation of legislation in practice, whereby all are treated equally before the law, remains the main challenge of all public institutions, justice system bodies, including independent institutions in the country. In particular when it comes to implementing legislation that aims at preventing and fighting corruption, the responsibility of state institutions toward the delivering responsibilities and exercise of competences should be maximal. The Albanian Helsinki Committee expresses its full readiness to collaborate and render its contribution to the fight against corruption and its prevention in all public and private sectors in the country.

2. Independent opinion on the Research Study

By Att. Arben Rakipi

The research report drafted by experts of the Albanian Helsinki Committee summarizes an analysis of the judicial activity of the Judicial District Courts of Tirana and Durrës as well as the First Instance Serious Crimes, during the year 2013-2014. Also, part of this research is the analysis of the progress of criminal referrals by the High State Audit during 2014. The connection of these materials is logical and the joint presentation before the audience of professionals or the public aims to clarify the procedural mechanism that is used in addressing criminal referrals and their final fate.

At the start, I wish to stress that the research in question should be singled out an entirely new element, compared to many other similar researches that have been presented to the public. It analyzes in numerous occasions judicial decisions by critiquing them, placing them against the law, the practice of the court itself, and in a few cases, even the consistency of the same decision with regard to different defendants. From this standpoint, the positioning of the drafting experts of the research is at the level of a reviewer of the judicial decision.

Without getting into a discussion on whether a judicial decision may be discussed or not in its basic element, which has to do with the inner conviction of the judge and the independence of his/her power or the judiciary as a whole in rendering and reviewing judicial decisions, in my opinion, if specialists of the field, those writing the critique and those it is addressed to will reach the understanding that what has been written is and remains only an enhanced technical analysis that only seeks to highlight visible defects of the judicial ruling and has not at all to do with questioning, even minimally, the independence of the judge and the judiciary as a whole, the critique should be addressed appropriately and its truthfulness should be analyzed. The real report in the findings that it presents is of great service to those it targets but also to the transparency of judicial activity overall.

It is not useless to say that the Report, in many of its elements, has noted the same findings, just as the analysis of the justice system drafted by the Ad Hoc Parliamentary Committee on Justice Reform. This compliance adds even more to the truthfulness of this Report and its credibility before the public.

Moving on to the specific elements of the report, I need to highlight the difficult procedural relationship between the petitioner, HSA, and the Prosecutor's Office. The same characterizes the relationship between the police and the prosecutor's office. I mention this fact in order to help understand that the lack of harmonization in joint investigative-prosecution work has turned into a culture among relevant institutions and is not related only to the bodies mentioned in this research report.

This conclusion comes out clearly from the statistics presented in the Report. Based on HSA criminal referrals, the prosecutor's office has only been able to forward for adjudication only 20% of them, always for 2014. This percentage is much lower than the multi-year average of cases moved to court because of the committed crimes. The conclusion is two-fold: either the quality of criminal referrals is poor, thus turning the referral into a fictitious one, or the direction of investigations and the professionalism of the prosecutor is poor. Or, it is both of these. The rest of criminal referrals have either dropped or they have not been initiated. The report further finds that none of the decisions to not initiate investigations or to drop them have been appealed in court by the institution making filing the criminal referral. The report in question includes no data whether the complaint has been filed with General Prosecutor and what decision the later eventually made. What is known for sure is that less than 20% of such cases have been taken to court.

Seen from this standpoint, when analyzing the figures, the relationship investigation-prosecution is disturbing. The report has not managed (maybe it was not its task or possibility) to verify what relationship developed during the time of investigations between expert petitioners who filed the criminal referrals and the prosecutor. This analysis would show, in the greatest extent possible, who would be to blame as responsible for this defect.

The report also notes an important element that I wish to mention in support of the fact that the relationship between the petitioner and the prosecutor appears difficult. There is no data - the report says - that decisions of the prosecutor were communicated to the petitioner.

In looking at the analysis of the Report on the fate of these cases during the adjudications, one finds the figure that indicates that more than half of the defendants charged in court with regard to committing criminal offenses that are the subject of this research were declared innocent by the courts. There is no data as to how the cases in question fared in the higher instance courts of the country. Should we stick to this result, with the above-mentioned reservations, then this piece of data strongly supports the conclusion that the quality of investigations is poor.

Looking at the entirety of the elements of this phenomenon that justice bodies have dealt with, which begins with addressing preliminary investigations from the phase of the criminal referral, but also the procedures pursued in court, based on the figures provided in the report and analyzed above, one creates the idea that overall, the tendency is to conduct formally some cold bureaucratic procedures and nothing more. There is no case of the bodies responsible for prosecution, for filing the criminal referral, the damaged party, etc., to have dealt with the essence of the major problem that is caused by the criminal activity: economic damage caused to the state. Even in those few cases that have been taken to court, nobody has dealt with the civil responsibility of the persons who are criminally responsible.

The report presents the important situation regarding the capacity of subjects that have been criminally reported. It concludes that the level of officials in the hierarchy of the state administration is low. There may be tens of good reasons for this to happen, but seen from a statistical standpoint, or even from understanding how the state administration in the country functions, it leaves the impression that the conducted investigations are not adequately deep.

The analysis of detailed procedural elements, such as for instance, the time of the completion of adjudications, the number of hearing sessions, deadlines for investigations, etc., the report finds accurately the great shortcoming that is known by all: that adjudication in our system goes beyond reasonable deadlines that such a criminal offense should take to review. Sometimes, stretch in time even of abbreviated adjudication goes beyond any limits and loses the very essence of this institution. However, it is recommendable to recognize the infrastructure difficulties that the courts face, not in their entirety, but those related to the said case. This might ensure a clear picture of the causes for our adjudications going beyond any reasonable deadlines.

The same care is called for by the treatment of causes related to the quality of investigations, in order to highlight where the shortcoming lies: with the institution filing the criminal referral, the leader of investigations or the lack of coordination between them? Also, elements such as the manner in which the measure and kind of criminal convictions are determined, the declaration of guilt or innocence of persons, the connection between the length or manner of adjudication to the final fate of the case need to have better document support.

In closing, I reiterate that the presented Report is the outcome of serious work by AHC experts. It highlights essential truths that have to do with

the manner in which the justice system functions, its operation, and coordination of work with specialized institutions tasked to address the issues of the relevant field. Moreover, the Report provides a great novelty, the professional treatment of the quality of judicial decisions. At least the debate opened for this element is sufficient to view the Report in question as welcome.

3. Executive summary

3.1 Progress of investigations on some criminal referrals by the High State Audit

The HSA has filed a considerable number of criminal referrals for damages caused to the state budget in considerable amounts, but annual reports do not appear to contain data on the impact of these referrals, the progress of investigations and the punishment of subjects reported to the prosecutor's office and how that affected the activity of the HSA to fulfill its mission with regard to the effective, efficient and wise use of public funds, public and state property, and the development of an appropriate management system.

In spite of public statements by the Prosecutor General in support of the work of the HSA, as well as the exercise of prosecutions and charges raised in court against defendants suspected as perpetrators of the criminal offense, according to the published bulletins of the HSA it appears that all criminal referrals are in the phase of investigation. These findings, which we consider are a source of the phenomenon of impunity in our country, are encountered also on referrals filed by other auditing institutions, such as the High Inspectorate for the Declaration and Audit of Assets and Conflict of Interest (HIDAACI).

In the course of collecting data for realizing the research study on the progress of investigations on criminal referrals by HSA, in general, the access to information right was respected by the contacted institutions, with the exception of the lack of additional information on discrepancies of copies of decisions made available by the prosecutor's office in the Tirana Judicial District Court with the number of criminal referrals filed by the HSA.

In every criminal referral filed with the prosecutor's office, the HSA refers to article 281 of the Criminal Procedure Code, assuming the criminal-procedural "role" of the petitioner, **defender of the public interest** with regard to the use of the state budget and public finances in compliance with legislation. We found that **HSA criminal referrals did not contain data on the place of residence of the referred persons, as an essential element envisaged in item 3 of article 281 of the CPC.**

The referred persons appear to be officials or former officials of a medium or low level and other executive employees (specialists and inspectors)

in sectors such as: registration of immovable properties, concessions, procurement, health care, electricity, provision of other public services (water supply and sewage, roads, port services – customs, legalization of constructions, etc.).

The referred persons have been investigated for committing elements of the criminal offenses of “*abuse of office*,” “*violation of equality in public tenders or auctions*,” “*fraud*,” “*fraud in insurance*” and “*document fraud*,” sanctioned by articles 248, 258, 143, 154 and 186 of the Criminal Code (CC). In some cases, the same person is referred as a suspect for the commission of more than one of these criminal offenses.

The application of the personal security measure “Obligation to appear before judicial police” has been minimal in number, applied on only two defendants in two cases sent by the Durrës Judicial District’s Prosecutor’s Office for adjudication. The civil servants investigated with this measure belong to the “*executive*” category, i.e. specialists, although the economic damage for which other officials have been reported and investigated too, as well as the criminal offense they are suspected to have committed poses high social threat and is related to decision-making functions and competences of the active subject. In these cases, the prosecutor’s office has sent the case for adjudication in court. In the cases when prosecution has been dropped or has not been initiated, it appears that no personal security measures have been applied by any segment of the Prosecutor’s Office.

AHC finds that, of the 22 analyzed decisions by the Judicial District prosecutor’s offices of Tirana and Durrës, it results that less than 1/4th of them, namely 6 (six) cases in total have been sent for adjudication, 3 by the prosecutor’s office of the Durrës Judicial District Court and 3 by the Tirana Judicial District Court, pursuant to criminal referrals by HSA. The other criminal proceedings in the two prosecutor’s offices have been dropped and in 1 case, it was decided to not initiate criminal proceedings.

In some cases, when the Prosecutor’s office decided to send the case for adjudication, the names of the accused have been changed, increasing the number of other persons suspected as involved in the commission of criminal offenses, mainly civil servants of the low leading category or executive ones (specialists).

The analysis of decisions of the prosecutor’s office shows that in about 75% of the cases, the criminal prosecution body investigated in a detailed fashion the technical and financial aspect of the referred case, in the spirit of the legislation, especially based on the Criminal Code. In some

other cases, mainly in the Tirana Judicial District Prosecutor's Office, there was a lack of legal and financial analysis, adapting only to the listing of claimed facts and the structure of the HSA criminal referral.

With the exception of the decision to not initiate criminal prosecution, in all decisions to drop the criminal case, the **Prosecutor's Office talks about notifying the interested parties, without nominally referring to the HSA**, making it difficult to identify the petitioner, which may cause the violation of the right to appeal, per article 329 of the Criminal Procedure Code.

In the researched decisions of the Prosecutor's Office, **only in the case of non-initiation of criminal prosecution the 5-day deadline for the right to file an appeal has been expressly established**. Meanwhile, **only in 3 decisions to drop the case, the Tirana Judicial District Prosecutor's Office** spoke about the right that subjects enjoy to appeal the decision in the Tirana Judicial District Prosecutor's Office and/or the Highest Prosecutor.

In most of the criminal referrals, the HSA established the economic damage to the state budget, in a total of about **3.324.403.000 ALL**. Based on data from Bulletin no. 4/2014, it results that there were **1135 administrative measures recommended** by HSA, of which only **65% were implemented**. HSA requested **financial remuneration in the amount of 11.085.084.000 ALL**, which was **implemented at 34%**, thus displaying the indispensability of increasing the real impact of the activity of the institution in recuperating damages or preventing them.

During 2014, over 70% of the cases have been dropped or not initiated by the prosecutor's office, mainly because of the absence of the elements of the criminal offense in the reported fact, indicating incorrect legal qualification of the circumstances by the HSA. On these decisions, **it does not appear that the HSA exercised the right to appeal the dropping or non-initiation of criminal proceedings to court or the Highest Prosecutor**.

The same institutional practice of not exercising the right to appeal decisions of the Prosecutor's Office appears also for other auditing institutions, such as the High Inspectorate for the Declaration and Audit of Assets and Conflict of Interest (HIDAACI).

HIDAACI annual reports before the Assembly present **high figures of economic damage caused by the unlawful activity of state officials**. It results that there has been a **high number of criminal referrals³** filed by this institution for these actions, but **there is no information on the cases**

³ Based on information submitted by HIDAACI electronically, for the years 2014-2015, there appear to be a total of 159 criminal referrals.

of appeals in court, according to the Criminal Procedure Code (CPC) to decisions by the Prosecutor's Office for dropping or not initiating criminal proceedings.

We are hereby underscoring with positive notes the fact that AHC reactions time after time on the failure of these institutions to exercise the right to appeal, which have been addressed during meetings that have been conducted with HSA representatives, appear to have been reflected in the activity of the latter. More concretely, based on data in the HSA Bulletin no1/2016, with regard to criminal referrals to the Prosecutor's Office, **HSA has reflected positive change** because during the period January-April 2016, it has used appeals to court and to the Prosecutor General on criminal referrals filed during 2015. The positive impact of the HSA initiative is noticed also in these directions:

First, in the Resolution "On the evaluation of the activity of the High State Audit for 2015," approved by the Assembly on October 20, 2015, the latter recommends that "HSA should engage to increase institutional cooperation with the Prosecutor General's Office, through monitoring the progress of criminal lawsuits and conduct a final analysis in cases of the dropping of cases or the non-initiation of cases referred by the HSA to the prosecution office. This would help conduct a more complete final analysis as well as the control of the quality of the auditing reports."

Second, the Assembly of Albania has addressed the recommendation provided by AHC on the practice of not exercising the right to appeal for another independent institution such as the High Inspectorate for the Declaration and Audit of Assets and Conflict of Interest. In the resolution for the approval of the annual report of HIDAACI for 2015, the Assembly recommends to this Institution to exercise the right to appeal, including administrative and judicial complaints, to decisions of the prosecutor's office to not initiate or to drop criminal proceedings on criminal referrals filed by this institution.

Third, it is worth stressing that **HSA reflected positive change in the presentation of data in Bulletin no.1/2016 with regard to criminal referrals it has referred to the prosecutor's office.** During the period January-April 2016, HSA addressed 7 criminal referrals for 41 mid-level and high-level officials of the Albanian Road Authority, the TUHC (Tirana University Hospital Center), the Tirana and Shkodra LORIP (Local Office for the Registration of Immovable Properties), and the Water Supply and Sewage Enterprise Pogradec. *Form 5* attached to this Bulletin shows that all criminal referrals are under investigation, while *Form 5.1* and *5.2* there are evidences of the criminal referrals appealed in court and even with the Prosecutor General, which represents a novelty in the institutional

practice of the HSA. The referrals belong to 2015 while the complaints against decisions to drop proceedings were realized in 2016. In total, it results that the HSA filed a total of 9 appeals, namely 4 appeals in the judicial route and 4 to the Prosecutor General's Office, thus implementing article 24/5 and 329/1 of the CPC in the same manner.

Fourth, the HSA conducted in the beginning of October this year the right to appeal in the High Court against a decision of the Prosecutor's Office to drop criminal proceedings against two senior public officials referred with regard to negotiations for the agreement between the electricity company CEZ and the Albanian state. AHC has a positive evaluation for the fact that the HSA exercised the right to appeal in court against two high-level officials, but our evaluation does not extend to the essence of the case, which only the court has a right to pass a final decision on.

3.2 Findings regarding the monitoring of some judicial hearings

During the monitoring of 53 judicial hearings on criminal cases of corruption, it resulted that **12** hearings began on time (less than 23%) while **41** began late (over 77% of the total). The First Instance Court of Serious Crimes is the institution where the time for the beginning of judicial hearings is most respected. Intervals of delays were **minimally 3 minutes** up to **maximally 23 minutes**, due to the overlapping of judicial hearings by the same jury of judges.

87 % of judicial hearings that were monitored took place in the courtroom while **13%** of them were conducted in the judges' offices. Judicial hearings conducted in the judges' offices are those at the Tirana Judicial District Court.

In about **94 % of the cases** there were no obstacles to monitoring and only in **3 cases**, although AHC monitors were allowed to observe, they initially ran into difficulties, especially at the entrance of the court, where they were asked by security officers about the reason for entering the court, were searched in detail or were left in the place set aside for monitors, although there were plenty of free seats in the room to follow the judicial hearing. This mainly occurred in the First Instance Court of Serious Crimes.

AHC has found that only in about **75% of the cases, the prosecutor's representative did not wear the special attire**, while the court violated this aspect of the solemnity of adjudication in **28% of the hearings**. Defense lawyers demonstrated greater regularity in this regard. Meanwhile, in **92.5⁰% of the cases**, participants in the criminal adjudication respected ethics of communication.

Based on our monitoring, it did not appear that any panel of judges demonstrated bias toward any of the parties in the adjudication process and it results that objective impartiality was respected; in other words, there were no indicators or signs that would highlight visible compromises between the three subjects of the criminal proceedings: the court, the prosecutor's office and the defendant.

The average **length of adjudication** was about **138 days**, with the highest seen at the First Instance Court of Serious Crimes with **an average time length of 169 days**. The reason for the interruption and postponement of judicial hearings came as a result of the absence of the prosecutor's office, the absence of the defendant or his/her lawyer, the absence of members of the panel of judges to form the necessary quorum, time requested by the prosecutor or defense lawyer to prepare the final conclusions, failure to effectively notify the witnesses summoned to testify; there were also cases of postponements due to the end of the official hours, lack of experts or interpreters, the need for reformulating the request for adjudication, etc.

In the First Instance Serious Crimes Court, **50%** of the defendants were remanded to "*arrest in prison*," and in the other courts, **56%** of defendants were adjudicated while at large.

Referring to the categorization envisaged in Law 152/2013 "On the civil servant," amended, about 80% of the defendants employed in the public sector, in almost all cases, belong to the low leading and executive (specialist) level. Defendants come from different areas of public services, such as customs, traffic police, environmental service, energy, justice, etc. Three defendants came from the ranks of the justice system, namely 1 judge and 2 prosecutors.

Charges of corruption against defendants had *money* as a material object and amounts reach high figures up to 30,000 Euro, with the purpose of influencing decision-making of public administration officials, involving prosecutors and judges, in favor of private citizens.

During the monitoring, we noticed the pursuit of similar criminal policy by the prosecutor's office and the courts, especially those of Serious Crimes. We noticed that the degree of imprisonment sentences was minimal, or the average envisaged by the Criminal Code. In cases that resulted with guilty verdicts, abbreviated sentences were used, which in some cases reduced the level of punishment under the minimum envisaged by law.

3.3 Findings regarding the analysis of some judicial decisions

The sample of judicial decisions that are the object of this research study includes a total of 48 decisions that adjudicated 97 persons as defendants. The researched judicial decisions mostly belong to the Tirana Judicial District Court.

The sample of researched judicial decisions shows that the tendency of the court is to not present a summarized overview of the adjudicated case and particularly of the procedural circumstances of the case, the circumstances of the fact, the evidence reviewed in adjudication the legal analysis of evidence and the claims of parties in the process, etc. It is noticed that judges of the First Instance Serious Crimes Court wrote decisions that are more complete and more reasoned compared to the decisions of the other courts. This may also be the result of the higher caseload of the latter.

Coercive measures, which were applied on all defendants accused of corruption are dominated by the remand measure of "arrest in prison," which is followed by house arrest, alternated coercive measures or bail. The least applied remand measure is "the obligation to appear before a judicial police officer." Other coercive measures envisaged in article 232 of the CPC are less applied, such as "prohibition to travel out of the country," "prohibition and obligation to remain in a set place," "temporary hospitalization in a psychiatric hospital."

The damaged persons do criminal referrals upon their initiative. Generally, the quality of criminal referrals of criminal offenses of corruption is poor. In a series of criminal proceedings, the subjects that set in motion the criminal process were persons who were denied a right envisaged by law and is asked to pay for the exercise of this right. A number of decisions show that the criminal referral is done when the damaged person and the defendant do not agree on the amount of remuneration or in case of financial impossibility to pay for it. There are cases when the damaged person filed the criminal referral after paying for part of the material benefit of the criminal offense, while the subjects of the offense requested that a higher amount be paid.

The number of defendants adjudicated with abbreviated sentence for the criminal offenses that are the subject of this research study is a considerable one. The analysis of judicial decisions showed that in about 69% of the adjudications (including here the cases of some convicts in the process of adjudication), abbreviated adjudication was used, which according to the Criminal Procedure Code is a special adjudication. Experts of the field note that at the national level, abbreviated sentence is applied for 80% of

the criminal cases and what mostly results from these processes is that the quality of investigations is not at the adequate level. As a result, this quality affects the evidence secured during the investigation, on which the court should rely in issuing its verdict. Statistics and investigative and judicial practice have dictated the need for changes to our procedural legislation, in order to exclude from the possibility for abbreviated adjudication some persons or criminal offenses that pose a high threat rather than give extensive discretion to the court.

Criminal judicial processes for corruption offenses in some cases take place beyond average deadlines envisaged for the adjudication of such cases. The research of calendars of criminal corruption cases, for a sample of 15 decisions of the Tirana Judicial District court and 3 decisions of the First Instance Serious Crimes Court shows that in 73 judicial hearings, the postponement is dominated by causes related to the absence of the prosecutor or his/her request for a postponement. In some cases, it results that the prosecutor is absent from about half the judicial hearings. In 51 cases, the postponement of hearings took place for reasons related to the defense lawyers of the defendants. In 49 cases, the cause was the absence of the defendant and his/her request, etc. AHC considers that the prosecutor's body should not be a cause for postponement in such a considerable number of judicial hearings. These cases have a high profile and the prosecutor's office has the obligation to respect the law and not drag out judicial hearings. We also consider that the prosecutor's office has the positive obligation to take effective measures for internal organization in order for adjudication to take place in an uninterrupted manner and for hearings to not be postponed even when the prosecutor has an objective reason to not appear, such as workload. The court should also be active in disciplining parties in the process, avoiding any intentional dragging out by the defender and the defendant.

Evidence referred to in decisions to prove the guilt of defendants are mainly those obtained through recordings in public premises, wiretapping of phone calls, secret photographic or film or video recordings, the commission of simulating actions, the exercise of personal controls, and residence search.

In some of the judicial decisions, it results that evidence secured during the investigative process and administered during adjudication have been contested because of their validity. The court has deemed that the results of such evidence are unusable on the grounds that they have been obtained in violation of the law. The declaration of evidence secured during investigation as unusable in some of the decisions that are the subject of this research study questions the quality of investigations of

criminal offenses in the field of corruption. In certain decisions, the court openly expresses the unlawfulness of how the evidence is obtained during the phase of investigations conducted by the prosecutor's office, using as a source of information the very acts of the prosecutor's office, whereby the decision on the delegation of competences of the prosecutor concludes that the three committed corrupt acts for a criminal offense are provoked ones.

We notice that there is no unified position of the court with regard to the use of results of evidence obtained through wiretapping, even when this has been allowed by decision of the proceeding body. In these cases, the court has not provided contradicting arguments with regard to the legitimacy of these recordings but has concluded that the wiretappings do not produce sufficiently facts that prove the commission of the criminal offense by the defendants. Again, this raises questions about the quality of investigations. However, in one case, AHC experts noticed that the facts emerge clearly from the transcripts of recordings cited in the judicial decision.

The criminal case against a judge accused of passive corruption ended with an innocent verdict at a time when citizens' perceptions and sensitivity about corruption in judiciary ranks is high. In this case, the court opposes the evidence presented by the prosecutor's office as wiretappings that are not procedural, were not conducted by decision of the proceeding body and nor may be considered non-typical evidence, because they do not meet the criteria envisaged in article 151/3 of the CPC. This case too presents the need for the conduct of more complete effective and comprehensive investigations by the prosecution body.

In some cases, the court does not take under analysis in a summarized manner the evidence on which facts referred to in the judicial decision rely, sufficing in some cases with the citing of documental evidence and testimonies of citizens questioned by the prosecutor's office, without any references to facts on which such evidence shed light. In one case, the manner in which the reasoning for evidence administered in this judicial process, citing facts resulting only from recorded conversations and facts deriving from other evidence administered in the process, does not convey to the public and the professionals of law the confidence in the impartiality of the panel of judges. In the same decision, based on the same evidence that the prosecutor's office charges 4 of the defendants for passive corruption of officials in public functions, abuse of office and smuggling of goods for which excise tax is paid, the Court deems that only two of these defendants are found guilty of the criminal offense of smuggling. Without wanting to pass on judgment on the justice of this decision, an attribute that only belongs to a higher court, we wish to raise

as a concern the question marks that emerge for the public on the respect by the court for the principle of equality before the law.

Analysis of decisions highlights that in the majority of cases, the legal arguments of the defendant's lawyer and the prosecutor are reflected in the researched judicial decisions. However, in some of these decisions, the reflection of arguments is not complete, but rather summarized in brief and there is no reasoning why the court finds opposite evidence as unacceptable.

In some cases, we find that the courts do not have the correct understanding of the elements of criminal offenses in the area of corruption. Such cases cause the confidence of the public and particularly of experts of the law to shake with regard to the principle of impartiality of the adjudicating panel of judges. Also, we observed judicial decisions that, in terms of how the analysis is done on whether there has been a criminal offense or not, do not fully respond to the elements of the criminal offense of which the defendant has been accused.

Referring to a decision of the Serious Crimes Court, we consider that it is worth discussing more broadly the need to make more accurate or clarify the special subjects envisaged in article 319/ç of the Criminal Procedure Code, which sanctions passive corruption of judges, prosecutors and other justice bodies functionaries. More concretely, who will be considered a functionary of justice bodies?

Senior public functionaries or functionaries of the justice system, even in those few cases when declared guilty, receive minimal sentences, for which the courts order the suspension of their execution. Criminal policy toward high-level functionaries accused of the criminal offenses of corruption appears different in decisions of different courts.

Analyzed data highlight that for the criminal offenses of corruption in the public sector, the imprisonment sentence of 26 defendants has been applied, and the sentence of a fine and imprisonment for 3 of the defendants declared guilty. In no case has the court applied the maximum of the sentence, while most decisions applied the minimal limits of the main criminal sentence. It is worth mentioning that of the 25 defendants sentenced to imprisonment, about 90% of them have benefited from the reduction of 1/3 of the sentence because of the application of the abbreviated adjudication. Namely, about 50% of those sentenced to imprisonment have benefited from the alternative sentence envisaged by article 59 of the Criminal Code "Suspension of the execution of the imprisonment sentence and placement on probation." Only in half of the cases when this alternative sentence has been issued, the court has clearly

expressed itself on the obligations that the convict needs to respect during the time of probation, envisaged in article 60 of the Criminal Code.

The tendency of Appeals Courts is to not change the decision issued by the First Instance Courts. Even in those few cases when the decision is changed, the given sentence is reduced even more, particularly for special subjects of the criminal offense who hold high-level or important public functions (judges). Only in 15% of the cases, in parallel with the alternative sentence, the court has also issued as a completing sentence the "Prohibition of the right to exercise public function" and the "Ban of the right to exercise public functions."

In issuing the kind and measure of the sentence for criminal offenses in the area of corruption, the court takes into consideration the social threat posed by the criminal offense, the danger posed by the defendant, the degree of guilt, the admittance of the charges and guilt by the defendant, the request of the defendant for adjudicated sentence, alleviating circumstances envisaged in article 48/c of the Criminal Code, the economic and family condition, the living style and needs, age, the consequence and damage caused as a result of unlawful benefits, as well as the intentional commission of the offense. In some judicial decisions, we find that the elements related to the economic and family conditions are not analyzed in the decision and there is no reference to the evidence that prove their existence.

In most of the decisions, the court does not take into consideration and does factor in establishing the degree of the sentence the consequence and damage caused or the amount of proceeds or benefit that the defendant took, mainly as a result of passive corruption. Some decisions feature relatively small amounts of benefits. What stands out in different decisions is that there is no proportionality between the degree of the sentence and the amount of the bribe taken/given by the defendant. In fact, in some cases, persons convicted for passive corruption for relatively small amounts are sentenced the same as persons corrupted in considerable amounts.

The researched decisions show that the Court mainly tends to render the same degree of sentence requested by the prosecutor's office and this is mainly seen in the practice of the Tirana Judicial District Court.

The practice of the First Instance Serious Crimes Court, in adjudicating those criminal offenses in the field of corruption that it has material competence on, is more unified with regard to punishability, the establishment of damages including complementary ones, as well as the more complete analysis reflected in these decisions. Based on the material competence of this court, the researched decisions indicate that high level officials of local governments, judges and lawyers appear convicted.

4. Analysis on the progress of criminal referrals by the High State Audit in the Prosecutor's Offices of the Judicial District Courts of Tirana and Durrës

4.1 Purpose, object and pursued methodology

AHC analyzed the **activity of the HSA in addressing and filing charges on suspected cases of corruption or abuse of office by state officials during 2014**, as well as the investigation of these criminal referrals by the prosecutor's offices in the First Instance Courts of Tirana and Durrës.

The *purpose* of this analysis is to address the findings and recommendations with regard to the practice of HSA criminal referrals and their investigation by the prosecutor's body in the two most important judicial districts, on criminal cases related to corruption and abuse of office, aiming at increasing accountability of and responsibility of audit institutions and the prosecutor's office and at increasing public confidence in the fight against this phenomenon.

The *object* of this analysis includes the criminal referrals filed with the Prosecutor's Office in the First Instance Courts of Tirana and Durrës during 2014, for the criminal offenses of corruption, abuse of office or similar offenses as well as the progress of investigations and adjudication of these criminal referrals by the relevant prosecutor's offices/courts. The analysis addresses theoretical and practical aspects of procedural-criminal legislation related to the petitioner, investigation, decision-making of the prosecutor's office and appeals against them, aiming at highlighting practices that are not unified, present deficiencies, were not carried out in accordance with legislation or may represent a cause for the existence of the phenomenon of impunity.

The *methodology* pursued in realizing the Report extended in several directions, seeking to obtain and crosscheck information in different manners and from different sources.

First, the working group responsible for realizing this report was established with representatives from AHC staff. Initially, the working group established the needs and main directions to focus the work to realize the study, whose findings have been highlighted in this analytical report.

Second, meetings were held and official communication was maintained with HSA representatives, the Prosecutor General's Office, senior officials and representatives of the prosecutor's offices and the First Instance Courts of Tirana and Durrës, as well as representatives of the HIDAACI. Also, with some of these institutions, official correspondence was maintained through official letters or electronically and requests for information were submitted in keeping with the law on the access to information law.

Although in some cases we encountered delays and difficulties in collecting data, AHC appreciates the support of institutions involved in this analysis for providing the information requested in accordance with legislation in force.⁴

Third, following the collection of materials and official information, we established in more concrete terms the main issues on which the analysis would focus, the legal basis as well as the structure of the report. The collection and processing of such information was based on a careful comparative, professional, objective and impartial review and analysis. Controversial practices of the HSA and the Prosecutor's Office are in the special focus of this analysis.

Namely, the working group analyzed the HSA Bulletins of 2014, 25 criminal referrals by HSA, 22 decisions of the Prosecutor's Offices of Tirana and Durrës, as well as data submitted by the First Instance Courts of Tirana and Durrës.

4.2 General Analysis

Based on data from the Auditing Bulletins No.4/2014 of HSA,⁵ there appear to have been 160 completed audits of the institution for 2014. Based on the results of these audits, the HSA filed a total 41 criminal referrals with the prosecutor's office, mainly on the criminal offenses of "Abuse of office," and "Violation of equality of participants in public tenders or auctions." These criminal referrals denounce 149 subjects suspected of causing a damage that totals 5.069.494.000 ALL.

The criminal referrals that fall under the territorial competence of the **Tirana and Durrës Judicial District Prosecutors' Offices** represent 61%

4 Following the public reaction of AHC, the HSA immediately provided information with the relevant criminal referrals, demonstrating a positive will in the realization of this Report. http://ahc.org.al/web/images/deklarata/al/VITI_2016/Deklarate_Zbatimi_i_ligjit_eshte_i_detyrueshem_per_te_gjithe.pdf

5 http://www.klsh.org.al/web/Buletini_Auditimeve_80_1.php?kc=0,1,1,0,0

of the total number of referrals. For these referrals, we find a **total damage in the amount of 3.324.403.000 ALL**, which represents about **65.6 %** of the economic damage highlighted in all 41 criminal referrals altogether.

In this Bulletin, we find that HSA filed criminal referrals for a total of 86 public officials, of which **43** citizens only for the criminal offense of “Abuse of office,” envisaged by article 248 of the Criminal Code (CC), **22** citizens for the criminal offense of “Abuse of office” and “Violation of equality in public tenders or auctions” together, envisaged by articles 248 and 258 of the CC, **18** citizens for the criminal offenses of “Fraud” and “Falsification of documents” together, envisaged by articles 143 and 186 of the CC, **2** citizens only for the criminal offense “Violation of equality in public tenders or auctions” and “Abuse of competences” together, envisaged in articles 248 and 164 of the CC. The number of **public officials** who have been criminally referred during 2014 represents **about 57.7 % of the total** of persons criminally referred for this year.

In reference to the categorization and classification provided in article 19 of the Law no. 152/2013 “*On the civil servant*,” amended, the criminally referred individuals appear mainly mid-level and low-level officials or former officials, as well as other executive employees (specialists and inspectors) in sectors such as: registration of immovable properties, concessions, procurement, health care, electricity, provision of other public services (water supply and sewage systems, roads, port services – customs, legalization of constructions, etc.).

In 2014, HSA filed 25 criminal referrals, of which 19 to the Tirana Judicial District Prosecutor’s Office and 6 to the Durrës Judicial District Prosecutor’s office. With regard to criminal referrals filed with the Tirana Judicial District Prosecutor’s Office, the latter made available to us only 16 decisions. Some of the decisions of the prosecutor’s office to drop proceedings or to not initiate proceedings belong only to one criminal referral and for 7 criminal referrals of the HSA it was not possible to study the relevant decision of the prosecutor’s office because of the lack of necessary information.

Data on Bulletin no. 4/2014 of the HSA highlight the fact that all criminal referrals appeared to be in the phase of initial investigations. This conclusion has been cross-checked against official data provided by the Tirana and Durrës First Instance Courts, in response to AHC requests, respectively through letters No. 6098/1 Prot., dated 12.05.2016 and No. 1337 Prot., dated 04.05.2016. In this official communication, there appeared to be no complaint in court against relevant decisions of the prosecutor’s office to drop or not initiate proceedings.

The research and analysis of information and materials made available by HSA, the Prosecutor's Offices and Courts of the Tirana and Durrës Judicial Districts showed that all criminal referrals of HSA are submitted to the relevant prosecutor's offices with copies to the Prosecutor General. The legal basis for the criminal referral is **article 281 of the Criminal Procedure Code (CPC)**, which establishes the obligation for criminal referral by the public official, if during the exercise of duties or because of his/her functions or services, he/she receives information about a criminal offence that is prosecuted by initiative (without a referral). Also, the article envisages that when during civil or administrative proceedings, a fact representing a criminal offence that is prosecuted by initiative is discovered, the relevant body files a criminal referral with the prosecutor.

HSA referrals are in document form and contain the subject, the prosecutor's office it is directed to, the generalities and official function of the defendants, the circumstances and essential elements of the fact that is considered a criminal offense by the HSA, sources of evidence, and the definition of the criminal offense, citing the number and title of the concrete provision. However, with regard to these referrals, they lack **data on the places of residence of the referred persons**, while according to article 281/4 of the Criminal Procedure Code, it is required that the criminal referral contain the place of residence and everything else that is useful for identifying the person that the fact is attributed to.

4.3 Analysis on special cases

HSA filed 6 criminal referrals to the Prosecutor's Office of the Durrës First Instance Court during 2014.⁶ A total of 16 decisions were taken on HSA referrals at the prosecutor's Office of the Tirana First Instance Court during 2014.⁷ The Albanian Helsinki Committee focused its analysis on these elements of the practice of HSA denunciations and the investigative practice of the Prosecutor's Office, following this paragraph.

- a) *Analysis and summary of causes for non-initiation, dropping of proceedings or forwarding for adjudication of cases filed by the HSA*

Chapter VIII of the CPC envisages the phase of the conclusion of initial investigations by the prosecutor's office, during which it may decide to drop the case or send it to court for trial.

⁶ Letter No. 993/1 Prot, dated 12.02.2016 of the Prosecutor's Office in the Durrës First Instance Court

⁷ Letter No. 200/1 Prot, dated 19.02.2016 of the Prosecutor General's Office, Task-Force Directory

Article 328 of this Code envisages, “1. In any stage of the proceedings, the prosecutor decides the dismissal of the charge or of the case when: a) it is clear that the fact does not exist b) the fact is not provided by law as a criminal offence c) the aggrieved person has not lodged a complaint or waives it in cases where the proceedings are initiated on his request; ç) the person cannot be taken as defendant or he may not be punished; d) a reason which renders the criminal offence null and void or does not allow the initiation or the continuation of the criminal proceedings exists dh) it proved that the defendant has not committed the offence or it is not proved that he committed it; e) the defendant is convicted by a final court decision for the same criminal offence ë) the defendant dies f) in other cases provided by law.”

Based on the research we have conducted, it appears that the Prosecutor’s Office in the Durrës Judicial District dismissed 3 cases and sent for adjudication 3 other cases on the 6 criminal referrals filed by the HSA during 2014.

In the 3 dismissed cases, the Prosecutor’s Office of the Durrës Judicial District analyzed in a detailed manner the circumstances of the fact referred by the HSA, documentation or statements administered during the investigation, from a technical, legal and financial aspect, comparing them against legislation, respectively, on the registration of immovable property, the freedom of citizens to participate in a concession procedure, etc. For these issues, the Prosecutor’s Office has concluded that *there had been no commission of the objective and subjective elements of the criminal offenses* envisaged in articles 248 and 258 of the Criminal Code. According to the Prosecutor’s Office, the fact referred by the HSA and investigated does not represent a criminal offense, given the conditions of letter “b” of article 328 of the Criminal Procedure Code. According to this body, public administration employees referred by the HSA acted in accordance with legal provisions, according to prosecutor’s office decisions to dismiss the cases.

In the 3 other cases, the Prosecutor’s Office in the Durrës Judicial District sent for adjudication the persons referred by the HSA or suspected during the investigation, according to article 331 of the Criminal Procedure Code. The analysis of facts, circumstances and concrete action or inaction of the defendants vis-à-vis the elements of the criminal offense, the Prosecutor’s Office concluded that in these three cases, there was a commission of the objective and subjective aspects of the criminal offense of “Abuse of office” or “Violation of equality of participants in public tenders or auctions,” envisaged by articles 248 and 258 of the Criminal Code, arguing extensively on the technical and financial aspects of the circumstances. Criminal proceeding no. 259 of 2012, which involves a criminal referral

filed by the HSA during 2014, the Prosecutor's Office sent for adjudication 4 of 7 persons referred by the HSA while in criminal proceeding no. 1785 of 2014, 4 persons were sent to court, although the HSA only referred 1 of them, thus demonstrating investigation by the Prosecutor's Office beyond the facts and persons referred by the HSA.

In the cases sent to court for adjudication, the prosecutor's office reviewed the duties of the defendants on the basis of binding administrative legal provisions that governed their activity. The request for adjudication of each of the cases contains the generalities of the defendants, the presentation of facts in a detailed manner, references to relevant articles of the Criminal Code and legislation in the relevant area, sources of evidence and facts they refer to, the date and signature of the prosecutor; however, it does not contain the generalities of the person damaged by the criminal offense, aside from the financial damage in cases when it emerges from the referral of the HSA, generally respecting the requirements of article 331 of the Criminal Procedure Code.

Referring to the 16 decisions of the Prosecutor's Office in the Tirana Judicial District on the referrals of HAS during 2014, it results that in 1 case, it was decided to not initiate criminal proceedings, **3 were sent to court for adjudication** and **12 were dismissed**.

In the 12 dismissed cases, the Prosecutor's Office in the Tirana Judicial District analyzed in a detailed manner the circumstances of the fact referred by the HSA, documentation or statements obtained during the investigation, from a technical and legal aspect, **but not in all cases from a financial aspect**. The investigation of the prosecutor's office focused mainly on an enhanced analysis of the administered documentation, as well as from statements obtained from persons in their capacity as defendants or witnesses, following a practice similar to the investigation of the Prosecutor's Office of the Durrës Judicial District for similar criminal offenses.

Referring to decisions of the Prosecutor's Office in the Tirana Judicial District, it appears that based on Article 328 of the CPC, respectively items a), b) and d), the cases were dismissed because *the fact does not exist, the verified facts do not represent a criminal offense* and *due to the highlighting of a legal cause that rendered the criminal offense null*. Based on the investigation of the dismissed cases, the Prosecutor's Office has drawn the conclusion that *there was no commission of the objective and subjective elements of the criminal offenses* envisaged in articles 248 and 258 of the Criminal Code. Instead, in 3 of the dismissal decisions, it results that elements of the criminal offense were highlighted based particularly

on documents seized as material proof, but the prosecutor's office noticed an expiry of the statute of limitations on the criminal offense, according to article 66/c of the Criminal Code. During the investigation, it was noticed that the legal deadline, within which the criminal prosecution might be conducted, had expired and in these circumstances, the Prosecutor's Office decided to drop the case referred by the HSA.

On three cases, the Tirana Prosecutor's Office found the commission of elements of the criminal offense of the "Abuse of office" or "Violation of equality of participants in public tenders or auctions," envisaged by articles 248 and 258 of the Criminal Code, arguing extensively the technical and legal aspects of the circumstances. The requests for adjudication contain the generalities of the defendants, the presentation of facts in a detailed manner, including references to the relevant articles of the Criminal Code and relevant legislation, the source of evidence and facts they refer to, the data and signature of the prosecutor, except for the financial damage when it appears from the HSA referral, thus generally respecting the requirements of article 331 of the Criminal Procedure Code, as the practice pursued in the Prosecutor's Office of the Durrës Judicial District.

In the only decision to not initiate criminal proceedings, the Prosecutor's Office of the Tirana Judicial District concluded that the fact presented in the referral was not envisaged by law as a criminal offense, based on article 290/1/ç and 291/1 of the CPC.

b) *Investigative actions and deadlines of the Prosecutor's Office*

Referring to decisions to dismiss criminal proceedings of the Prosecutor's Office of the Durrës Judicial District, it results that investigations on average lasted for **8 months** from the moment the proceedings were registered. Meanwhile, the investigation of 3 criminal cases for which the prosecutor's office requested adjudication in court lasted on average for **15 months**, i.e. about twice as the length of investigations for which a decision to dismiss was taken. In total, the investigation of the Prosecutor's Office in the Durrës Judicial District on criminal referrals by HSA during 2014 lasted on average **11.5 months**.

Article 323, 324 and 325 of the CPC envisages the 3-month deadline of investigations, from the moment of registration of the name of the person who is attributed the criminal offense to the registration of the notification of the criminal offense, the extension of the investigation deadline by three months, but no more than 2 years in cases of complex investigations and of objective impossibilities to conclude them within the deadline, as well as the right to appeal in court the extension of the investigation deadline by

the defendant or damaged person. Our verification in this regard, for both prosecutor's offices was partial and we did not have access to the entire investigation file in order to see whether the deadline of investigations was extended by decision of the prosecutor or not.

In the 6 decisions of the Prosecutor's Office in the Durrës Judicial District, we find generally detailed and individualized investigations, focusing on technical, financial and legal circumstances and facts. The analysis of the Prosecutor's Office focuses mainly on comparing facts proven by investigative actions with legal and sub-legal provisions that regulate juridical relations, whose subjects appeared to be under criminal proceedings. On average, there were about **20 investigative actions**, but in the cases on which the Prosecutor's Office requested adjudication in court, we notice a larger number of investigative actions, namely **up to 37 such actions**, especially the questioning of persons who are aware of the event and not only the persons referred by the HSA, as it mainly results in the cases that the Prosecutor's Office has dismissed.

Referring to decisions of the Prosecutor's Office of the Tirana Judicial District to dismiss criminal proceedings, investigations lasted **from 2 months up to 9 months**, and for **an average of 5 months**, from the moment the proceedings were registered. The data show faster investigation deadlines, almost halved, for the investigation of similar criminal offenses in comparison to the period of time taken for investigations by the Prosecutor's Office of the Durrës Judicial District.

Referring to the practice of this body that carries out criminal prosecution and represents the state, it results that, for cases referred by the HSA, in general the same investigative actions are undertaken, such as: administering documentation, questioning of the referred persons in their capacity of persons aware of the criminal offense and institutional communication through official letters to obtain data for the prosecutor's office investigation, and in few cases the conduct of experts' acts for potential financial damages caused. The analysis of the prosecutor's office is mainly focused on comparing the facts proven by investigative actions against legal and sub-legal provisions that regulate juridical relations, whose subjects appeared in the proceedings. On average, there were **10 investigative actions**, but in cases for which the prosecutor's office requested adjudication in court, there appears to be a higher number. In some cases, investigation on the financial aspects of the referred facts is lacking or deficient, thus following the structure and features of the referral material of the HSA, without going beyond it.

c. *Implementation of security measures during the investigation of HSA referrals*

With regard to the implementation of personal security measures, envisaged in articles 227 onward of the CPC, we find that in the dismissed cases, the referred persons, belonging to the 32-56 age group, were investigated in the absence of a security measure by the Durrës Prosecutor's Office; in two of the three cases sent for adjudication by this prosecutor's office, namely Criminal Proceeding No. 1223, dated 01.07.2014, and Criminal Proceeding No. 1785, 2014, the referred persons were investigated while being remanded to "*Obligation to appear before judicial police*," based on article 234 of the CPC.

During the investigation, we found that **not the same standard was maintained for establishing remand measures for persons under investigation**, in two aspects: *first*, for cases with the same object and the same suspected criminal offenses committed by the citizens referred by HSA, the security measure "*Obligation to appear before judicial police*" was ordered in only two criminal proceedings that led to requests for adjudication in court and it was not applied in any case for investigations that led to the dismissal of the criminal case; *second*, within a criminal proceeding, namely No. 1785, 2014, 3 of the accused were investigated under the security measure "*Obligation to appear before judicial police*," while one of them was investigated without a security measure although he was a higher-level official and his role was more important with regard to overseeing tendering procedures.

With regard to the Prosecutor's Office in the Durrës Judicial District, there appear to have been no personal security measures toward investigated persons or defendants, as observed in some decisions of the Prosecutor's Office of the Durrës Judicial District.

d) *The position of the high-level, mid-level and low-level officials vis-à-vis the Prosecutor's Office's decision-making*

The position of officials referred by HSA is an important indicator of the investigation and punishability of criminal offenses that have caused financial damages to the state budget during the exercise of public duties and functions.

Based on the categorization and classification envisaged in article 19 of Law No. 152/2013 "*On the civil servant*," amended, the referred persons appear to be mainly mid-level or low-level officials or former officials, as well as other executive employees (specialists and inspectors) in sectors

such as registration of immovable properties, concessions, procurement, provision of public services, such as: water supply system, port-customs services, legalizations, etc.

Specifically, HSA referred and the Prosecutor's Office of the Durrës Judicial District investigated: **1 high-level leading official; 6 mid-level leading officials; 8 low-level leading officials**, as well as **7 employees of the executive category**. Among these, 16 were male and 6 were female.

The analysis of figures indicates that **about 70%** of officials referred by the HSA or/and investigated by the Prosecutor's in the Durrës Judicial District are **employees or officials of the executive and low levels**. Meanwhile, about **27 %** of officials belong to the mid-level leading category and only **5%** are former high-level officials.

Those referred to the Prosecutor's Office in the Tirana Judicial District appear to be mainly from the ranks of public officials or former mid-level leading officials, low-level leading officials and executive officials (specialists and inspectors), and in certain cases from high leading levels. The peculiarity of cases investigated by the Prosecutor's Office in the Tirana Judicial District is the fact that investigations include 20 citizens who did not exercise public functions or duties.

The analysis of figures shows that **about 80%** of officials referred by the HSA belong to the **executive and low-level leading category**. Meanwhile, about **10 %** of officials belong to the mid-level and high-level leading categories.

Decisions of the prosecutor's office show that a decision was taken to send the case for adjudication in court only toward 3 of those referred by the HSA. Defendants are not public officials, but private subjects that, according to investigations of the Prosecutor's Office, committed criminal offenses. For public officials, decisions were taken to not initiate criminal proceedings or to dismiss the criminal case.

Statistical data on the number of high-level officials investigated or prosecuted by the prosecutor's office pursuant to referrals by HSA in the Tirana and Durrës judicial districts, are an indicator of the low level of punishability of these officials for the financial damages caused by their unlawful activity.

e) *Complaints in administrative and judicial routes on cases referred by HSA*

The right to administrative and judicial complaint for the decisions of public administration bodies, including the decisions of the prosecutor's office, is one of the standards of due legal process, as a fundamental right of every individual, sanctioned in the Constitution and the European Convention of Human Rights. At the same time, the exercise of this right guarantees judicial oversight on the activity of public administration bodies, including independent auditing bodies and investigation bodies in the criminal process.

Article 329 of the Criminal Procedure Code envisages the right to complaint of the *damaged* and *the defendant* in court against the decision of the prosecutor's office to dismiss charges or to dismiss the case. In the case of criminal referrals by the HSA, the *damaged* appears to be the state, which in these cases is "*represented*" by the HSA, whose activity *aims at the effective, efficient and economic use of public funds, public and state property, the development of an appropriate financial management system, the proper conduct of administrative actions, as well as the informing of public authorities and the public, through the publication of its reports.*⁸

The study of 3 decisions of the Prosecutor's Office in the Durrës Judicial District and 12 decisions of the Prosecutor's Office in the Tirana Judicial District to dismiss referrals by HAC, among other things includes the *notification of the interested parties to exercise the right to complaint*, without expressly defining the "*interested*" in the decision, thus reducing the possibility to verify the actual notification of the damaged party (referring party) in this case on the dismissal decision, in order to guarantee the right to complaint. Based on information made available by the Prosecutor's Offices of the Durrës and Tirana Judicial Districts, there appears to be no complaint by the HSA in court against dismissal decisions. Unlike the Prosecutor's Office of the Durrës Judicial District Office, in 3 of the dismissal decisions, the Prosecutor's Office of the Tirana Judicial District clarified the right to a complaint not only in the Tirana Judicial District Court (*as observed in every decision*), but also to the highest prosecutor, according to article 24/5 of the CPC. The collected data do not indicate any case of a complaint against the dismissal decision to the highest prosecutor. The decision of the prosecutor's office to not initiate proceedings, the HSA has been specified as the referring party, as the institution to be notified and that has the right to complaint within 5 days upon notification, pursuant to article 291 of the CPC.

⁸ Article 2 of the Law No. 154/2014 "*On the organization and functioning of the High State Audit.*"

The Administrative Procedure Code in force and administrative legislation overall envisages the right to an administrative complaint in public administration bodies in order to address issues. This has been envisaged also in Law No. 154/2014 "*On the organization and functioning of the High State Audit*," which establishes the right of this institution to file a complaint and address findings of the conducted audits with competent public administration bodies.

Referring to the jurisprudence of the Constitutional Court of Albania, namely Decision no. 22, dated 07.20.2008, and Decision no. 37, dated 25.07.2013, it appears that the criminal responsibility competes with administrative or disciplinary responsibility. In the circumstances when criminal proceedings have been initiated, an administrative proceeding may be pursued if such a violation has been encountered. So, if the HSA finds elements of a criminal offense and refers the relevant subjects, in parallel, it may recommend the taking of administrative measures by relevant bodies of the public administration.

The source of information with regard to recommendations made by HSA on the same cases for which a criminal referral has been filed is Bulletin No. 4/2014 of the HSA. Form No. 3 presents the evidence of recommended disciplinary and administrative measures and their implementation for 2014. This information is provided in a summarized manner for all public institutions and not separately for the referred cases.

Data reflected in Form No. 3 does not make it clear in detail which referral the administrative measures taken by competent administrative bodies refer to. Because of the large number of HSA recommendations for the taking of administrative measures with regard to criminal referrals, it results that on some cases, only disciplinary and administrative measures have been taken and there was no referral for criminal prosecution. It does not appear to be the case that in every case of the HSA filing a criminal referral it also recommended the taking of administrative measures.

There appear to be **1135 recommended administrative measures**, of which **732 were implemented**, i.e. 64.5% of the total, for 2014. Among other things, the bulletin reflects the amounts requested for financial remuneration, whereby for 2014, HSA requested **remuneration in the amount of 11.085.084.000 ALL**, for which **remuneration was implemented in the amount of 3.737.734.000 ALL**, i.e. **34 % of the total**, for 2014. This information corresponds to all audits conducted by HSA for 2014 and not only to the cases for which a criminal referral was filed.

f) *Lack of information from the Prosecutor's Office in the Tirana Judicial District*

The study of referrals obtained from HSA shows that for 7 (seven) of them, no information or copy of the relevant decisions was provided by the Prosecutor's Office of the Tirana First Instance Court. The analysis of these referrals indicates that 23 persons were referred by HSA for committing elements of the criminal offenses of "*Fraud*," "*Falsification of documents*," or "*Violation of equality of participants in public tenders or auctions*," envisaged respectively in articles 143, 186, 248 and 258 of the Criminal Code.

The referrals for which AHC was not able to obtain the decision of the prosecutor's office had to do with failure to respect legal and sub-legal criteria for entering into contracts, in violation of procurement procedures, persons' benefiting unjustly through fraud, violation of the legal framework for legalizations, abuse of fuel for cars, etc.

These referrals are attributed to public officials of the mid or low leading levels and executive levels, as well as to citizens without any public functions or duties.

Of the 7 referrals, only 4 of them contain detailed analysis and description of the economic damage, from a technical aspect of the circumstances of the fact, as well as juridical elements, which was reflected also in Bulletin No. 4/2014. In 3 other referrals of the HSA, the violation was not analyzed against the criminal law and there was a brief analysis of damage to state interests but not economic ones. In total, the damage appears in the amount of **452.343 ALL**. **Our research with regard to the progress** of their investigation is objectively impossible due to the lack of information and relevant decisions of the Prosecutor's Office of the Tirana Judicial District.

5. The practice of denunciations by other auditing institutions

In order to carry out as complete and comparative an analysis as possible, AHC addressed other auditing institutions, such as the Minister of Justice (MoJ), the High Council of Justice (HCJ), and HIDAACI, in order to obtain the necessary information for cases when they, during their activity, encountered disciplinary violations involving judges or when they had suspicions about the existence of criminal offenses related to corruption or similar to them.

During February 2016, AHC addressed the Minister of Justice with an official request for information on requests for disciplinary proceedings filed during 2014 with the HCJ, as well as on criminal referrals toward judges for the criminal offenses envisaged in articles 319 and 319/ç of the Criminal Code. This institution responded⁹ by referring 22 requests for disciplinary proceedings for 20 judges; with regard to HCJ decision-making, it said that only the latter institution would provide accurate information. With regard to criminal referrals on potential cases of corruption by judges, **there appears no criminal referral by the Ministry of Justice against judges during 2014**. In its response, the institution refers to the Prosecutor General's Office, as the competent body that carries out criminal prosecution, although the AHC request had to do directly with possible referrals by the Ministry of Justice.

On 12.02.2016, AHC addressed the HCJ through an official letter to inquire about cases of disciplinary proceedings and criminal referrals against judges during 2014. The HCJ responded officially¹⁰ to inform us about 22 requests for disciplinary proceedings submitted to the HCJ for 20 judges who appeared to have disciplinary measures such as: "Remark," "Remark with warning," "Transfer" or "Dismissal." The HCJ informed us about the dismissal of two judges because of the start of criminal proceedings on them and adjudication for the criminal offense of passive corruption, envisaged by article 319/ç of the Criminal Code. In the HCJ correspondence, there is no sufficient information on the subject that set the prosecutor's office into motion, whether the proceedings were initiated by their initiative or on the basis of a referral.

9 Official Letter no. 1288/1 Prot, dated 23.02.2016, of the Minister of Justice

10 Official Letter no. 797/1 Prot, dated 23.02.2016, of the HCJ

Also, on 12.02.2016, AHC addressed the HIDAACI through an official letter to request information about criminal referrals by this institution to the Prosecutor's Offices in the Tirana and Durrës Judicial District Offices during 2014, as well as the progress of their investigation regarding cases suspected of corruption. The HIDAACI responded through electronic mail and informed us that during 2014, it filed 74 referrals, of which 20 in the Prosecutor's Offices of the Tirana and Durrës judicial districts.

Based on information obtained from the Prosecutor's Office at the Durrës First Instance Court, it appears that for every HIDAACI referral, a dismissal decision was taken and there were no appeals in court against them, per the CPC. This piece of data also appears from the Annual Report of this institution, given that there is detailed information on legal violations, assets of high value that are hidden or undeclared by senior public officials and criminal referrals, while there is a lack of information with regard to cases of dismissal or non-initiation of criminal proceedings.

These data reflect a similar institutional stance and approach by audit or independent institutions to that of the HSA toward decisions of the prosecutor's offices with regard to their own criminal referrals. In spite of considerable financial damages, the ability to exercise judicial control or control by the highest prosecutor has been "diminished" also because of the lack of appeals against decision to not initiate or dismiss by the prosecutor's office, based on articles 291/2 and 329/1 of the CPC.

The Albanian Helsinki Committee considers that the interests of the state and the society may be severely harmed if public servants, in exercising their duties or because of their function, are only confined to criminal referrals and do not follow their progress, especially when the prosecutor decides non-initiation of criminal proceedings and the dismissal of the case.

Criminal procedural legislation and the jurisprudence of the Constitutional Court of the Republic of Albania (Decision no. 26, dated 04.12.2006) envisages the right of the referring party or petitioner to complain against the decision to not initiate criminal proceedings, while article 329/1 of the CPC envisages the possibility of the *damaged* and the defendant to complain against the decision of the Prosecutor's Office to dismiss the charges or dismiss the relevant case.

In the case of criminal referrals by independent public institutions, such as the HSA or HIDAACI, the procedural role of the *damaged* party lies with these institutions because the referrals are addressed during the activity and because of the state function that they carry out. The criminal offenses

for which these institutions file criminal referrals to the prosecutor's office, envisaged by articles 248, 257, 258, etc., are mainly **criminal offenses against state activity**, acting on behalf of and for the "state" or the "damaged" party.

AHC has addressed this concern officially to the Parliament's Committee on Legal Affairs, Public Administration and Human Rights.¹¹ Draft-Resolution "On the evaluation of the work of HIDAACI for 2015," the Committee reflected the objections of AHC, requesting the HIDAACI to hold in the focus of its work during 2016 "*...the exercise of the right to complain, based on the CPC with regard to decisions of the prosecutor's office to not initiate criminal proceedings and to drop cases.*"

6. Findings resulting from the monitoring of court hearings on cases of corruption adjudicated in the Tirana and Durrës Judicial District and Appeals Courts as well as in the Serious Crimes Court

6.4 Purpose, object and pursued methodology

One of the three specific objectives of the AHC in the context of this research study has to do with improving transparency and the implementation of the principles of a due legal process, in judicial processes on criminal corruption cases.

The **object** of the monitoring were the trial hearings for the adjudication of the criminal offense of corruption in the Tirana and Durrës Judicial District Courts, in the Serious Crimes Court, and the respective Appeals Courts, focusing especially on respect for the standards of due legal process, such as the principle of solemnity, impartiality of the judge/panel of judges, publicity of the hearing session, adjudication within a reasonable time, presence of the parties in the process, the principle of the equality of legal tools, etc.

AHC staff prepared a methodology for monitoring these processes and drafted a questionnaire model, based on the provisions of the Criminal Procedure Code and the standards of due legal process, on the basis of jurisprudence of the Constitutional Court and the European Court of Human Rights.

AHC selected from its extensive network of observers **11 persons for the monitoring** of judicial hearings on cases of corruption, abuse of office or other similar cases. Monitors were selected taking into consideration their experience and professional skills in previous AHC monitoring missions. The observers were trained in order to build their capacities with regard to thematic monitoring of trial hearings for criminal offenses in the field of corruption, the methodology for monitoring and reporting.

For a 6-month period, February – July 2016, observers monitored **53 judicial hearings**, precisely in the Tirana and Durrës First Instance Courts, the Appeals Courts in Tirana and Durrës, and the First Instance Court of Serious Crimes. The monitoring of judicial hearings focused mainly on

cases on **criminal offenses envisaged in articles 244, 245, 259, 260, 319 and 319 / ç of the Criminal Code**, which are related to corruption, but in some cases also involved other interrelated criminal offenses, envisaged in article 172, 175, 186/3, 248, 291 and 301 of the Criminal Code.¹² In total, the **number of defendants** in the process of adjudication in the monitored cases was **31 persons**, of Albanian nationality, except for one case of **1 foreigner of Chinese nationality**.

The principles that guided the observers in this monitoring were respect for ethics rules, security rules and control in the relevant courts, as well as hearing schedules, non-use of mobile phones or other equipment forbidden in the courtroom, principles of professionalism, impartiality and objectivity.

The project staff selected the monitored cases. The schedule of hearings of the First Instance Court, the Appeals Court and the Serious Crimes Court in Tirana was public on the official websites, from where the monitored judicial hearings were selected. Information on the judicial hearings in the First Instance and the Appeals Courts of Durrës was obtained from direct meetings or letters submitted by the chief justices or chancellors of these courts. The primary criterion for the selection of the judicial hearings were the criminal cases for those articles of the Criminal Code that envisage criminal offenses in the field of corruption and are the object of this research study.

Following the monitoring process, the observers drafted a *report* for every judicial hearing, featuring the main findings, and in the end filled out a detailed questionnaire with the necessary data for the progress of the adjudication.

6.5 Findings regarding the aspects of due legal process and smooth conduct in court

a) Starting time of hearings

Of 53 monitored judicial hearings, **11 hearings began** in the planned time, **41 or about 77% of the total began late**, and for 1 hearing there is no data on the respect for the starting time of the hearing. The First Instance Court of Serious Crimes respected the most the starting time of the judicial hearings that were monitored compared to other courts.

¹² Respectively: *Smuggling of goods that require excise tax* – article 172, *Smuggling by employees related to customs activity* – article 175 of the CC, *Falsification of Documents* – article 186/3 of the CC, *Abuse of office* – article 248, *Driving in irregular manner* – article 291 of the CC, *Actions obstructing the discovery of truth* – article 301

The reasons for the delayed start of the hearings had to do with the overlapping of adjudication times for members of the panel of judges, the case prosecutor, delays of defense lawyers or failure of defendants to appear. In some cases, these delays were caused due to internal organization of the court, such as accommodation of participants in the room or due to the delay of experts summoned to the process.

Of the hearings that began late, the panel of judges related the causes of the delay in only **6 cases**, and no reasons were given by the court in **35 hearings** that were started late and represented about **85%** of their total.

The average length of delays for the start of judicial hearings is about **10 minutes**. The First Instance Court of Serious Crimes featured a higher average of delays compared to the other courts, about 12 minutes.

b) *Location of judicial hearings*

In order to increase solemnity and publicity, the conduct of judicial hearings needs to be realized in appropriate premises for the subjects participating in the adjudication and the public, concretely in courtrooms.

The monitoring found that 87% of the monitored judicial hearings were conducted in the courtrooms while in **13% of the cases**, the hearings were held in the judges' offices. Judicial hearings in the judges' offices belonged to the Tirana Judicial District Court. In every case in the First Instance Court of Serious Crimes, the hearings were held in the relevant courtrooms.

Also, in one case in the Tirana First Instance Court, adjudication was moved from the judge's office to the courtroom because it was not possible to accommodate those present. In another case in the same court, the judge's office that was 12m² was inappropriate for holding the adjudication because the panel of judges was divided in two tables, the lawyer was sitting next to the prosecutor's office representative, and the defendant accused of *passive corruption of person exercising public functions* was standing together with AHC observers.

In all cases when the judicial hearing took place in the judges' offices, the defendants had no personal security measure. In 3 of these hearings, the court said the reason for holding the hearing in the office was because the courtrooms were taken by other judicial processes and in 1 other case because the court had been notified in advance about the absence of the prosecutor and had not deemed it necessary to formally hold the hearing in the courtroom because it was going to be postponed to another date.

c) *Publicity of judicial hearings*

The publicity of the judicial hearing is of essential importance for due legal process, envisaged expressly in the Constitution and article 339 of the Criminal Procedure Code. The violation of the publicity of the judicial hearing, except for exclusive cases envisaged in article 340 of this Code, leads to **invalidity of the hearing**.

During the monitoring of judicial hearings, it resulted that in most cases, AHC observers encountered no obstacles from security officers or other employees of the court. In about **90% (48 hearings) of the cases**, there were no obstacles to the monitoring; only in **3 cases**, although AHC monitors were allowed to observe, they initially encountered difficulty, particularly at the entrance of the court. Concretely, in the Durrës Judicial District Court, a security officer asked AHC observers about the reason for entering the building. At the First Instance Court of Serious Crimes,¹³ observers underwent detailed physical searches at the start and were assigned a place to stand, although there were plenty of seats available in the courtroom to follow the judicial hearing.

There was no case of AHC representatives being obstructed by the panel of judges to monitor the judicial hearings; meanwhile, the actions, physical controls and the assignment of a concrete place to sit by security officers, in our opinion, obstruct effective public access to monitoring judicial hearings. The monitored courts did not take any intermediate decision to hold closed hearings because there were no specific conditions or circumstances established in the Criminal Procedure Code for taking such a decision.

In some monitored cases, on cases that were publicly sensitive or had media attention, the court allowed the presence of TV cameras only at the start of the hearing and journalists were allowed without obstacles to monitor the continuation of the hearings. In all hearings held in courtrooms, the judicial process was recorded through the electronic audio recording system, thus having a positive impact on respect for the principles of transparency and access.

Access to information on the data and progress of judicial processes by the public represents an important aspect for the publicity of judicial hearings and transparency before citizens. The Tirana Judicial District Court and

¹³ For instance, all hearing sessions in which former prosecutors and others were defendants for criminal offenses envisaged in articles 319 and 319/ç of the Criminal Code (*Active and passive corruption of the judge, prosecutor and other justice functionaries*).

the Serious Crimes Court work with the ART system, for electronic case management, which enables online access through the websites of these courts about defendants, the object of the cases, progress, time length, as well as information about the future hearing of criminal cases in process. Meanwhile, the other courts use the ICMIS electronic case management system, which is linked with an online portal, managed by the Ministry of Justice. For some of these courts, it enables the display of a list of cases under review but does not enable information about the progress and the time taken. The lack of portal electronic infrastructure in the Durrës Judicial District Court did not give us the possibility to have more complete information as in the case of the two other courts, in spite of the will and very good cooperation with the Durrës Judicial District Court chief justice and judicial administration.

d) *Respect for solemnity and ethics in judicial hearings*

Solemnity in adjudication consists in the conduct of the judicial process in respect of some standards such as: special location¹⁴ and conditions for the conduct of the adjudication, special dress, and appropriate conduct of the subjects present,¹⁵ while ethics indicates the participation of judges in the establishment, respect and application of high behavior standards as well as the maintenance of a position that makes independence, impartiality and fairness possible for them as judges.¹⁶

During the monitored hearing sessions, AHC found that in 72% of them, namely in **38 cases**, the panel of judges wore the special robe. At the Serious Crimes Court, the special robe was always respected by the panels of judges.

AHC observers found that in **4 cases or 7.5% monitored cases, the representative of the prosecutor's office did not wear the robe**. Of these cases, only one belongs to adjudication in the First Instance Court of Serious Crimes.

The wearing of the special robe during adjudication by the **defense lawyers**, whether selected or assigned, **was respected in all the monitored hearings**.

14 See item 3.2

15 Referring to Decision No. 232/8, dated 07.07.2008, and Decision No. 238/1/b, dated 24.12.2008 "On the solemnity of adjudication and the special judge's robe" of the High Council of Justice.

16 Code of Judicial Ethics, National Judicial Conference.

The subjects of the criminal proceeding, including the panel of judges, generally respected the ethics of communication, especially in hearing sessions in the First Instance Court of Serious Crimes. Concretely, in **49 cases** communication ethics was respected by participants in the criminal adjudication, and in **4 other cases** communication ethics was not respected but that was not reflected as bias of the judges during the hearing.

It is worth stressing that in 1 hearing session in the First Instance Court of Serious Crimes (*before its start*), the chair of the panel of judges reacted harshly in confidence toward the defense lawyer because of the delay and the manner of his communication on the phone, indicating extra-judicial communication between them. In two other cases monitored in the same court, before the start of the judicial hearing, insufficiently ethical communication was encountered by security officers.

e) *Defense by lawyer*

Article 48 and 49 of the CPC envisages the right of the defendant to have a lawyer who he/she selects or that is assigned, as one of the fundamental procedural rights, a guarantee for the conduct of an objective, fair and effective judicial process.

During the monitoring of judicial hearings, AHC observers found that of 31 defendants in total, **97%** of them were adjudicated with a **defense lawyer selected** by them. In 1 case, the defendant was represented in court by a defense lawyer assigned by the court who was replaced during the process by another defense lawyer selected privately through a statement by the defendant before the panel of judges.

During the conduct of the monitored judicial processes, we noticed that for 6 defendants, the defense lawyer selected by them was replaced by defense lawyers assigned by the court, especially the First Instance Court of Serious Crimes, because of the continued absence of the private lawyers in some hearings. In general, the defendants asked the continued defense by the lawyers selected by them, but because of judicial economics and effectiveness, the court assigned courts, pursuant to article 49 of the Criminal Procedure Code. In the following hearings, the defendants requested again to be defended by the lawyers they had selected, and the court decided to stop the functions of court-assigned lawyers and their replacement. As a result, in spite of measures taken by the panel of judges to not drag out the judicial process, the replacement of lawyers did not appear to be effective. This might require a careful review of the Criminal Procedure Code in order to find an effective formula that guarantees proportionality between the right to due legal process and the right to a

legal process within a reasonable time that has uninterrupted adjudication in its essence. In general, defense and legal representation by privately selected defense lawyers was professional.

f) *Impartiality and equality of juridical tools*

The equality of juridical tools during the judicial process represents one of the essential guarantees of due process, and indicates in principle the possibilities for the parties in the criminal process to have knowledge of and to comment all evidence presented to influence the decision of the court. The principle of equality of tools requires “fair balance between the parties,” whereby every party should be given a reasonable opportunity to present its case in conditions that do not place it in a considerable disadvantage vis-à-vis its opponent.¹⁷

The monitoring of the manner in which requests to obtain evidence and the decision-making of the panel of judges for such evidence and the manner of their administration in judicial hearing, showed that in general, the principle of the equality of judicial tools in the monitored courts was respected. CPC norms envisage the manner in which evidence is obtained were respected, independently of the defendants, the criminal offense they are being adjudicated for, or the court where the process takes place.

The monitoring did not indicate that a panel of judges showed bias toward any of the sides in the adjudication process or that there were any evident displays of compromise between the three subjects of the criminal proceeding, the court, the prosecutor’s office and the defendant.

Although in general the findings are positive in this regard, in some cases, in the Tirana Judicial District Court and the Serious Crimes Court, before the start of the judicial process, or while waiting in cases of interruptions, defense lawyers as well as representatives of the prosecutor’s office held friendly conversations between them or with members of the panels of judges, thus “compromising” the objectivity and impartiality of the adjudication. **This phenomenon was not manifested during the conduct of judicial hearings.** In spite of the latter, such cases may increase public distrust in justice bodies and can be avoided.

g) *Conduct of the process within a reasonable time*

The Constitution, the Criminal Procedure Code and international acts do not establish a maximal time for the length of the adjudication, but each of

¹⁷ See *Batsanina vs. Russia*, no. 3932/02, § 22, 26 May 2009, *Lika and Laska vs. Albania*, April 20, 2010.

them establishes length of time as one of the main components of due legal process, as a fundamental human right.

The dragging out of judicial processes has been highlighted as a disturbing issue in our justice system, which leads to marked lack of confidence by the public in the delivery of justice and also affects the perception of the level of impunity.

During the monitoring period, the records of judicial hearings showed that the **average length of adjudication** was about **138 days**, with the highest being encountered in the First Instance Court of Serious Crimes for an **average length of 169 days**, for cases that involved the same criminal offenses.

The frequency of the postponement of monitored judicial hearings appears to be **on average 9.5 days**, with an almost insignificant difference between the different monitored courts. In general, the length of the postponement of hearings was not longer than 2 weeks, except for **3 cases**, of which **2** in the First Instance Court of Serious Crimes. According to the calendar of the case, it appears that the postponement was up to **41 days** also because compulsory annual leave. More concretely, in one criminal case heard by this court, the hearing of 28.07.2016 was postponed because of the lack of the defendant's lawyer for 07.09.2016.

Based on data from the schedule of cases on the official websites of courts and the monitoring of judicial hearings, there appeared to be a series of causes for the postponement of judicial hearings on criminal offenses of corruption.

Concretely, we encountered the following as the causes for the interruption and postponement of judicial hearings:

- i. In 50.6% of the cases, for causes related to the absence of the defendant, his/her defense lawyer or because of the presentation of requests by defense lawyers to become familiar with the acts of the case or to present final conclusions;
- ii. In 10% of the cases, because of the presentation of other requests to obtain evidence;
- iii. In 10% of the cases, because of the end of the official hours of the court, lack of experts, interpreters;
- iv. In 8% of the cases, for causes related to the notification of witnesses;
- v. In 4% of the cases, for causes related to the absence of prosecutors;
- vi. About 17.4% of the cases, for other circumstances that may not be categorized into the above causes.

6.6 Findings with regard to the thematic aspects about the adjudication of defendants accused of criminal offenses in the field of corruption

a) *Data on the status of defendants and their generalities*

The monitoring conducted by AHC shows that of 31 defendants, 5 of them were remanded to "Arrest in prison," 6 defendants were remanded to "House Arrest," 14 defendants were adjudicated at large, while for the other 6 there is no information about the security measure. For 50% of the defendants in the First Instance Court of Serious Crimes, the security measure of "arrest in prison" was issued; in the other courts, at least 56% of the defendants were adjudicated at large, thus reflecting proportionately the social threat posed by the criminal offenses they were accused of.

The criminal offenses, which the adjudicated defendants were charged with, were as follows:

- i. *Active corruption of persons exercising public functions* – 6 defendants,
- ii. *Passive corruption of persons exercising public functions* - 11 defendants,
- iii. *Passive corruption of the judge, prosecutor and other functionaries of the justice bodies* – 4 defendants,
- iv. *Active corruption of the judge, prosecutor and other functionaries of justice* – 4 defendants,
- v. *Abuse of office* – 3 defendants,
- vi. *Exercise of unlawful influence on persons exercising public functions* – 1 defendant,
- vii. *Smuggling by employees connected to customs activity* – 2 defendants,
- viii. *Actions obstructing the discovery of truth* – 1 defendant,
- ix. *Smuggling with goods for which excise tax is paid* – 2 defendants,
- x. *Driving in irregular manner* – 1 defendant,
- xi. *Falsification of documents* – 1 defendant

Among the above-mentioned criminal offenses, in 8 judicial processes there were **co-defendants**.

About **80 % of the defendants** appear to be citizens employed in the **public sector** and **20%** in the **private sector, or unemployed**. Referring to the categorization envisaged in Law No. 152/2013 "On the civil servant," amended, the defendants employed in the public sector belong in almost 100% of the cases to the low leadership and executive (specialist) level. These defendants appear to be employed or formerly employed in the public sector and belong to different areas of public services, such as

customs services, traffic police, environment service, energy, justice, etc. Three defendants are from the justice system, namely 1 judge and 2 prosecutors.

During the monitoring of judicial hearings, we noticed that for defendants employed in the public sector, public administration bodies, including justice bodies, decided to suspend their services until the conclusion of the relevant adjudication. In rare cases, no administrative cases were taken in parallel with the criminal process.

In some cases, during the monitoring of judicial hearings, there appeared to be no information about the referring party or the manner in which the criminal proceedings had begun. In other cases, it is noticed that the referral was made by citizens without public functions who are mostly persons damaged by the criminal process. It is worth mentioning the positive example of the start of investigations, due to the criminal referral of a citizen, by a prosecutor in Prosecutor's Office of the Elbasan Judicial District, for the criminal offense "Active corruption of the judge, prosecutor and other justice system functionalities."

During the period of monitoring judicial hearings, we found that there are no cases of adjudication of defendants who are high-level officials or senior state functionaries. This finding is the same as that resulting from the study of judicial decisions, in spite of the different period of time (*Research during 2013-2014 and the Monitoring in February-September 2016*).

There appeared to be a small number of investigations begun based on video footage publicized on TV investigative shows or investigations initiated by prosecutors.

b) *Data on the adjudication of defendants*

Article 403 of the CPC and onwards envisage the *abbreviated adjudication*. The abbreviated adjudication aims to avoid an ordinary procedure for the purpose of judicial economics, but it should not damage in itself the issuance of a fair decision. In this context, the court has the right to decide with regard to special adjudication, which should make a preliminary evaluation of the acts.

In different research studies, AHC has raised the concern of the possibility for abuse with this possibility by defendants, in cases of criminal offenses that are particularly severe and/or when defendants are public officials or former officials, in spite of whether they meet the conditions for the admission of the request for abbreviated adjudication and the possibility

for just decision-making in the conditions of the acts obtained during the investigation.

Judicial processes that were in the focus of the monitoring showed that in **6** cases, abbreviated adjudication was applied following a request filed by the defendant. In one case, the case under review was separated for a defendant because he did not request an abbreviated adjudication as the other defendants had done.

Only **3 defendants** accepted the charges raised by the prosecutor's office before the court, while there were no such cases in the Serious Crimes Court.

Requests of the prosecutor's office for adjudication and final conclusions showed that the corruptive actions of the defendants sought to obtain *cash*, foreign or domestic, which reach relatively high amounts, up to 30.000 Euro. Through these figures they sought to affect the decision-making of public administration officials, involving prosecutors and judges, in favor of private persons' interests.

About 50 % of the cases monitored until the end of July this year appeared to have judicial decisions. The announcement of the judicial verdict was done verbally by the panel of judges, providing summarized arguments. No case featured the announcement of the full decision with arguments.

Among judicial decisions announced during the course of the AHC monitoring, decisions that were applied by the court the most, in case of guilty verdicts, involved imprisonment sentences.

During the monitoring, we found that similar penal policies were pursued by the Prosecutor's Office and the Court, especially those of Serious Crimes. Imprisonment sentences appeared near the minimum or the average of what the Criminal Code envisages, maximally up to 3.5 years in prison. In cases that ended in guilty verdicts, abbreviated adjudication was applied, which in some cases reduced the sentence measure below the minimum envisaged in the law for the concrete criminal offense. The prosecutor's office and the court followed proportional penal policies vis-à-vis the social threat posed by the defendants, in the sense of distinguishing subjects, special or general, with public functions and citizens without such functions.

7. Analysis of final judicial decisions on corruption cases issued by the Tirana and Durrës Judicial District and Appeals Court and the Serious Crimes Court

The judiciary plays an important role in the fight against corruption and contributes to the improvement of the use of public funds and the quality of public policies, thus affecting the manner in which citizens perceive public institutions. A transparent judiciary with high legitimacy would have more efficiency in the fight against corruption.

Respect for the right to information by judicial power bodies and its transparency are two important factors that affect and contribute to the operations and efficiency of the judiciary and strengthen its good governance.

Transparency of the judiciary should include not only the publicity of judicial hearings and the publication of decisions, as well as data on archived cases and cases in process, but at the same time should give the opportunity to the public, to professionals of law, journalists, civil society and any interested person to have access to judicial decisions, which should reflect in a complete manner all the elements required in relevant procedural Codes, and should be provided with arguments. Thus, professional debate and analysis on these decisions would increase.

7.1 Purpose, object and pursued methodology

The purpose of this analysis is to highlight the data, findings and problems that have emerged from the research of judicial decisions on criminal offenses in the field of corruption in the public sector, provided by the Judicial District Courts of Tirana and Durrës, the First Instance Court of Serious Crimes and the respective Appeals Courts.

Also, this analysis seeks to highlight the problems and difficulties that actors of the justice system (lawyers, judges and prosecutors) encounter in their investigative and judicial practice as pertains to the content, clarity and harmony of the legal framework applicable for the investigation and adjudication of these cases.

The findings and problems highlighted in this research study, as well as the recommendations directed by the actors of the justice system at the round table for consulting this research, we believe will be of assistance to the legal discussion that will take place particularly for amendments to the Criminal Code and the Criminal Procedure Code. The clearer and more harmonized criminal material and procedural provisions are, the more consolidated and unified will be investigative and judicial practice, and particularly the efficaciousness of penal justice in the fight and punishment of criminal offenses in the field of corruption.

The **object** of this analysis is the practice during the years **2013-2014** of the Judicial District Courts of Tirana and Durrës as well as the First Instance Court of Serious Crimes, for the adjudication of criminal offenses in the field of corruption in the public sector. Focus in this analytical report is directed on those criminal offenses that envisage corruptive actions directly, established in the following provisions of the Criminal Code:

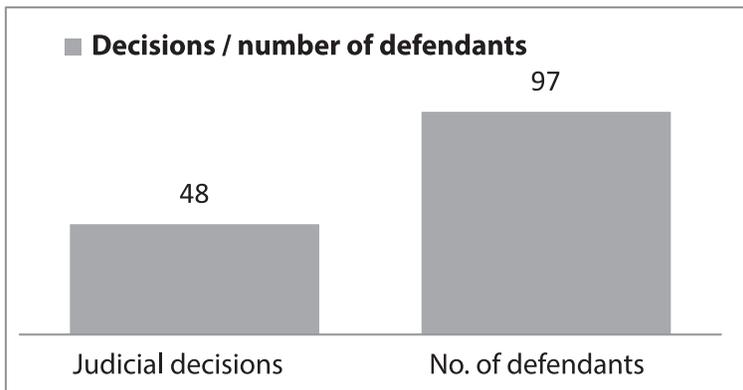
- Article, 244 *“Active corruption of persons exercising public functions,”*
- Article 245 *“Active corruption of senior state functionaries or local elected officials,”*
- Article 259 *“Passive corruption of persons exercising public functions,”*
- Article 260 *“Passive corruption of foreign public officials,”*
- Article 319 *“Active corruption of judges, prosecutors and other justice functionaries,” and,*
- Article 319/ç *“Passive corruption of judges, prosecutors and other justice functionaries.”*

One of the main arguments for the object of this enhanced analysis of the decisions has to do with the fact that in a study conducted in 2014, for decisions issued for the period 2007-2012, it resulted that the large number of criminal offenses considered criminal offenses of corruption, these provisions appeared with almost insignificant data compared to other offenses, for instance, abuse of office, or stealing through abuse of office.

Given that in some of the criminal cases for which judicial decisions that are subject of this research were given, some defendants were adjudicated with charges of other criminal offenses related to those of active or passive corruption in the public sector, the research study reflects data that affect these defendants as well, charged mainly for the criminal offenses of “Exercise of unlawful influence on persons exercising public functions,” “Abuse of office,” “Fraud,” “Failure to report crime,” “Actions obstructing the discovery of truth,” criminal offenses in the field of smuggling and customs, etc.

From a methodological aspect, the criteria for selecting the judicial decisions were based on criminal offenses of this analysis, the period in which they were given, namely the years 2013 – 2014 and the courts that issued them, namely the Tirana and Durrës Judicial District Courts as well as the Tirana Appeals Court. Also, we took under review some decisions issued during 2014 by the First Instance Court of Serious Crimes, after the entry into effect of amendments made to the Criminal Procedure Code, to pass the material competence to this court for 4 criminal offenses in the field of corruption (active and passive corruption of senior officials, locally elected officials, as well as judges and prosecutors), which are the object of this analysis.

The sample of judicial decisions that are the object of this research study includes a total of **48 decisions with 97 persons adjudicated as defendants**. The researched judicial decisions mostly belong to the Tirana Judicial District Court with 40 decisions. The other sample of researched decisions is from the Durrës Judicial District Court, with 3 decisions, the First Instance Court of Serious Crimes with 3 decisions, and the Tirana Appeals Court with 2 decisions.

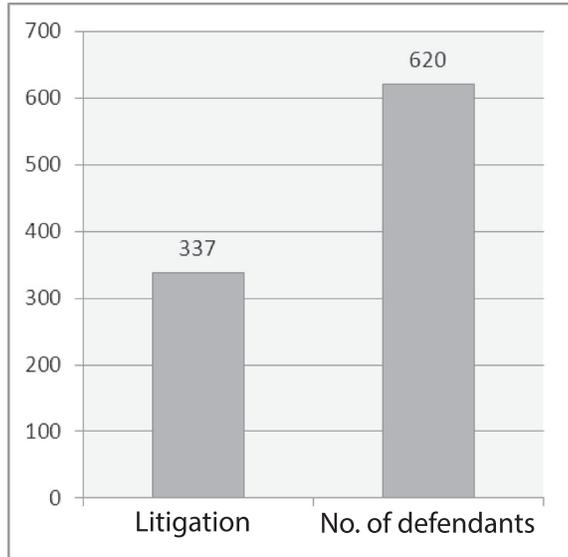


Graphic presentation No. 1 – Data on judicial decisions and the number of defendants

Drawing a comparison with the previous research study of the Albanian Helsinki Committee¹⁸ published in 2014, we notice the same ratio between the number of judicial decisions and the number of defendants, precisely according to an average of two defendants per judicial decision.

¹⁸ Research of the Albanian Helsinki Committee, "Research study on criminal offenses of corruption and forms of abuse of office," Tirana 2014, 'Vllamas' Publishing House. The research focused on final judicial decisions for 21 criminal offenses of corruption, for the period 2007 – 2012 in the Tirana and Durrës Judicial District Courts.

The engaged group of experts researched 48 judicial decisions on criminal offenses related to passive and active corruption of senior officials, locally elected officials, judges and prosecutors. The focus of this analysis was on the one hand the collection and processing of different statistical data that lead to important conclusions. On the other hand, we paid attention to the quality analysis of judicial decisions without engaging in the analysis of the personal conviction of the judge. This qualitative



Graphic presentation No. 2 – Data on decisions from 2007 – 2012 to compare with data from the period that is the object of this research study (2013 – 2014)

analysis seeks to highlight the problems and defects of the judicial and investigative practice and does not intend to pass judgment or opinion on the fairness of the judicial decision, respecting the important principle of the independence of the judicial system.

7.2 Respect for the formal and procedural aspect of the publication of the decision

Based on article 383, item 1 of the Criminal Procedure Code, the decision of the court contains some elements that should be respected in the procedural and formal aspects: a) the court that rendered it; b) generalities of the defendant or other personal data that are useful for identifying him/her, as well as the generalities of other private parties; c) the charge; ç) the summarized presentation of the circumstances of the fact and the evidence on which the decision is based, as well as the reasons for which the court considers opposing evidence unacceptable; d) the disposition, indicating the applied articles of the law; dh) date and signature of the members of the panel of judges.

Decision No. 262/2 of the HCJ establishes the “criterion of drafting clear decisions” among the criteria of evaluation for the general activity of the judges. This criterion tests the capabilities of a judge in preparing judicial decisions in a clear and simple manner, in order for the decision to be

simple so all can understand it. Also, this criterion helps evaluate the capability of the judge to manage due legal process, to orient and direct the legal debate and for expressing himself/herself clearly with regard to the requirements of the law and legal ethics. It also requires the evaluator to assess the competence of the judge to create and organize a judicial file in a way that makes it ready for use.

The sample of researched judicial decisions shows that the tendency of the court is to not present a summarized overview of the adjudicated case and in particular of the procedural circumstances of the case, the circumstances of the fact, the evidence reviewed in the adjudication, the legal analysis of evidence and the claims of the parties in the process, etc. We found that the judges of the First Instance Court of Serious Crimes wrote more complete and more argued decisions compared to the decisions of the Tirana and Durrës Judicial District Courts. In most cases, this is justified with the caseload of these courts, which is higher than that of the serious crimes court.

The research of the decisions highlights that most of the judicial decisions do not reflect even in a summarized manner the investigative actions that were conducted by the prosecutor's office and the number of investigated persons. Long decisions are not necessarily good ones and vice-versa. This would make court decision-making more transparent before the public and would enable analysts of the field more complete access and as a result more inclusive analysis of the judicial decisions on the punishability of criminal offenses in the field of corruption.

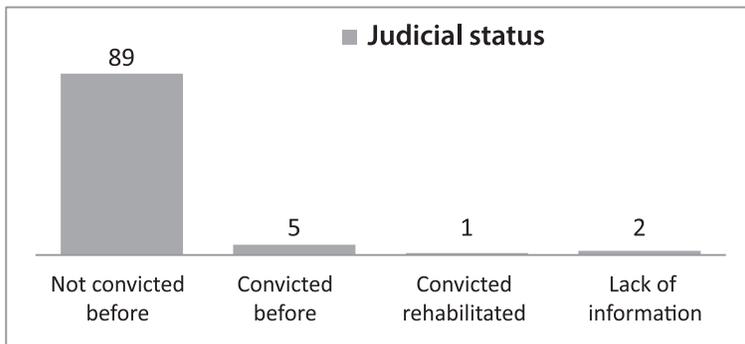
Illustrating example 1: Decision No. xxx, dated 03.04.20xx of the Durrës Judicial District Court, shows that charges of passive corruption of persons exercising public functions were brought against 3 persons and 6 others with charges of exercising unlawful influence. The facts and circumstances reflected in these decisions prove that the charged persons benefited illegally from drivers regarding the technical inspection of their vehicles, which casts suspicions on the commission by the drivers of elements of the criminal offense of active corruption. The decision does not indicate any driver being investigated or tried for active corruption; meanwhile, it is proven according to facts listed in the decision that the accused persons generated material benefits in cash.

In considering these criminal offenses that pose a high level of threat, what is and should be of importance to the court and the prosecutor's office during the investigation process as well as during the adjudication process of the criminal offenses of corruption is the obtaining and reflection in the decision of information whether the accused has prior criminal precedents for the commission of the same criminal offenses. After researching the decisions, we found that such information was not in any of them. It

appears that a total of 6 defendants are recurring ones, although there is no specification on whether the defendant was convicted or not for criminal offenses in the field of corruption.

7.3 Judicial status of the defendants

Based on the processed data, it appeared that the judicial status of defendants tried for charges of criminal offenses in the field of corruption in the public sector, and of criminal offenses related to them, is as follows: 89 not convicted before; 5 defendants convicted before; 1 defendant rehabilitated; and lack of information on 2 defendants.

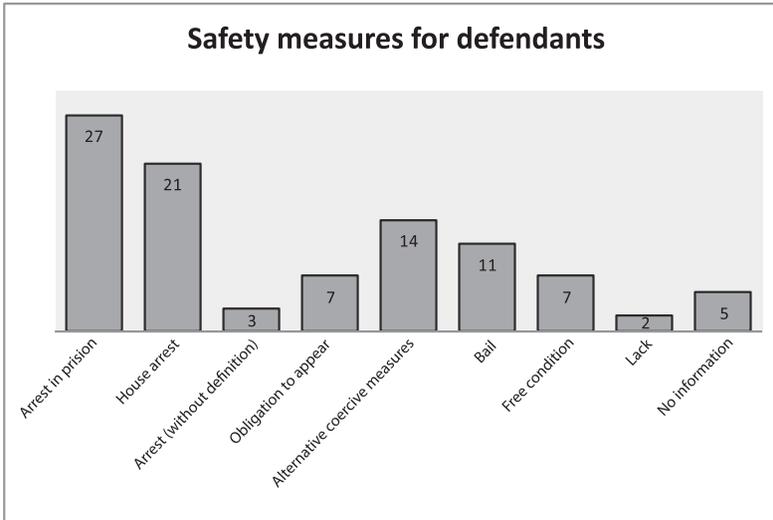


Graphic presentation No. 3 – Judicial status of defendants tried for the criminal offenses of corruption for judicial decisions of the period 2013 – 2014

With regard to data on whether the defendants had been previously convicted for criminal offenses of corruption, as mentioned earlier in this report, the information was not reflected in the judicial decisions.

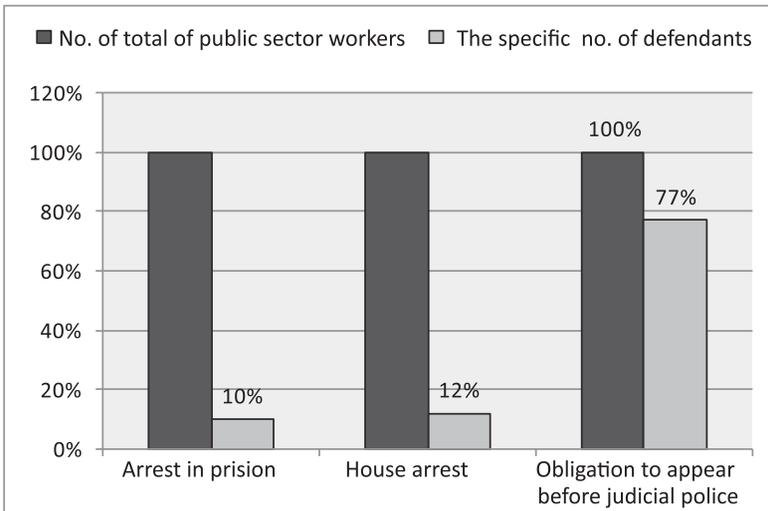
7.4 Coercive measures for the defendants

Coercive measures that were applied on all defendants, in the criminal cases whereby one or several of them were accused of the criminal offenses in the field of corruption in the public sector, appear to vary. Coercive measures that were most applied were “arrest in prison,” followed by “house arrest,” alternative coercive measures or bail. The least applied security measure is that of “obligation to appear before judicial police” and the rest of the defendants were tried at large. Referring to article 232 of the Criminal Procedure Code, there was no application of other coercive measures envisaged by this provision, namely “prohibition of traveling abroad,” “prohibition and obligation to remain in a defined place,” “temporary hospitalization in a psychiatric hospital.”



Graphic presentation No. 4 – Coercive measures for defendants in judicial decisions of the period 2013 – 2014

If we compare these to the study of decisions of the years 2007 – 2012, it appears that most of the defendants were tried while at large, and those tried under security measures of “arrest in prison” or “house arrest” appear to be the fewest. However, this comparative analysis is not done in the same conditions because of the much higher number of criminal offenses of corruption included in the research of the 2007 – 2012 period. Graphic presentation below:



Graphic presentation No. 5 – Coercive measures for defendants (employees of the public sector) in judicial decisions issued during the period 2007 – 2012

7.5 Subjects that set the criminal process in motion

Provisions of article 280 of the Criminal Procedure Code envisage that the prosecutor and police become aware of the criminal offense upon their own initiative and upon notification by others, while article 281/1 of the CC, "Public officials who in the course of exercising their duties or their service become aware of a criminal offense that may be prosecuted by initiative, are obliged to file a written criminal referral even when the person that the criminal offense is attributed to is not individualized."

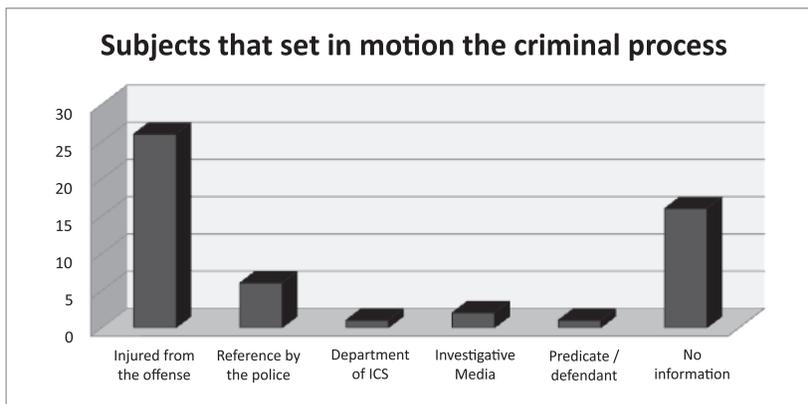
Referrals by initiative are done by damaged parties. As a general problem, we noticed that the quality of referrals or reporting of criminal offenses of corruption is poor.

The study of judicial decisions has shown that in a series of criminal proceedings, the subjects that set in motion the criminal process were persons that were denied a right envisaged by the law. These subjects were requested unlawful rewards for the exercise and enjoyment of the rights in order to obtain unlawful rewards.

A number of decisions indicate that the referral is done when the damaged person and the defendant do not agree on the amount of the reward or when they are financially incapable of paying it. There are cases when the damaged person filed a referral after paying part of the material benefit of the criminal offense while the subjects of the offense requested a higher sum.

We also found that compared to the previous study, in some criminal proceedings, the subject that set in motion the criminal process through public denunciation of unlawful actions of officials for the criminal offenses of corruption was investigative journalism, namely TV programs realized by such journalism.

Statistical data on subjects that set in motion the criminal process appear in graphic form as follows:



Graphic presentation No. 6 – Subjects that set in motion the process in judicial decisions of the period 2013 – 2014

As a general conclusion, we highlight that the largest number of criminal proceedings began with a referral by citizens who suffered damage. There are few cases reported by officials or referred by the police, and there was almost no case in the researched decisions of the prosecutor's office taking the initiative to start proceedings.

Considering the fact that this analysis places special emphasis on the content of decisions for research purposes, below are illustrations of examples highlighting the findings presented in this research report.¹⁹

Illustrating example 1: In a case heard by the Serious Crimes Court in Tirana, for passive corruption of a judge,²⁰ we notice that the damaged party admits in statements before police that it would accept the sum requested by the judge so he could give up hearing a civil case where it was a party, but the damaged person did not have money.

Illustrating example 2: Based on decision no. xx, dated. 21.xx.20xx, of the First Instance Court of Serious Crimes, where the chairman of a commune in the district of Tirana and his employee were declared guilty of passive corruption of senior functionaries, we noticed that the criminal referral was filed by the damaged person who wanted to obtain a piece of land for use from this Commune, after paying a bribe of 1.000 Euro, while he was also requested another 3500 Euro.

Illustrating example 3: According to the decision of the Durrës Judicial District Court no. Xxx, dated 24.xx.2xxx, the prosecutor's office send for adjudication as a

¹⁹ In order to implement legal provisions on the protection of personal data, part of the decisions will be given as illustrating examples, using codes for the names, decision numbers and decision dates.

²⁰ Decision no. dated 1x. xx.201x, First Instance Court of Serious Crimes, Tirana

defendant the lawyer of the Durrës Local Office for the Registration of Immovable Properties and the person who filed the criminal referral, after being equipped with an ownership certificate by the defendant against an amount of money. The reason for the referral was because the obtained certificate was on a different piece of land than the requested one. In the analysis of evidence on the guilt of the defendants, the Court deems that the defendant filed the referral on the occurred criminal fact, but the time of the referral belongs to the period after the defendant was equipped with the ownership certificate. In his criminal referral, the purpose was not to protect the interests of the state from criminal actions, but the correction of his juridical situation and the elimination of the economic consequences that ensued.

7.6 Analysis on the acceptance of requests for abbreviated adjudication

What we notice from the study of the decisions is that the number of defendants tried through abbreviated adjudication for the criminal offenses that are the subject of this research study is quite considerable. The analysis of judicial decision showed that in 69% of the *adjudications* (including other cases of some defendants on trial), these were abbreviated, which is a special adjudication according to the Criminal Procedure Code.

In their Unifying Decision no. 2, dated 29.01.2003, the Joint Colleges of the High Court, in order to unify judicial practice, considered that, *“Abbreviated adjudication is of value for an economic conduct of adjudication because it simplifies and shortens procedures, increases the speed and effectiveness of the adjudication and, as a result, produces a benefit for the defendant in reducing by 1/3 the level of the sentence and the non-application of the life imprisonment sentence. It is important to emphasize the fact that this benefit should not be detrimental to the delivery of justice. Therefore, the request of the defendant or his/her defense lawyer should only be accepted by the court when it is convinced preliminarily that it may conclude on the case in view of the condition of the acts, without the need to subject them to judicial review.”*

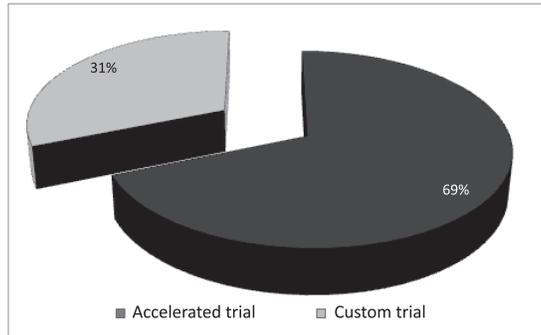
The researched judicial decisions did not make it possible to conduct an analysis on the preliminary conviction of the court with regard to granting abbreviated adjudication. This was the case because in a sample of 15 decisions of the Tirana Judicial District Court, 3 decisions of the First Instance Court of Serious Crimes, and 3 decisions of the Durrës Judicial District Court, we noticed that in more than half of these decisions no arguments were provided about the conviction of the court on whether the case could be concluded given the condition of the acts of the prosecutor’s office, without the need to subject them to judicial review. During the round table discussion held with actors of the justice system and representatives of institutions interested in the consultation of these findings, some of those

present noted that the court does not have an obligation to argue or provide reasons for granting abbreviated adjudication.

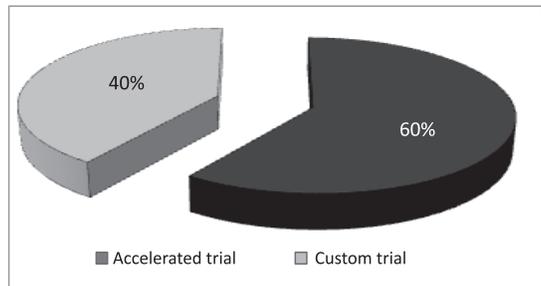
The previous publication of AHC on the research study of judicial decisions of the period 2007 - 2012, we find that 60% of the cases have been tried through abbreviated adjudication. Comparatively speaking, we notice an increase of 9% in the cases of abbreviated adjudication in the sample of decisions researched for this report.

Abbreviated adjudication is applied in criminal cases without making any distinction between the different offenses. During the round table discussion on this report, experts of the field noted that at a national scale, abbreviated adjudication is applied for 80% of the criminal cases and what is most noted in these cases is that the quality of investigation is not at the proper level. As a result, the quality affects also the evidence obtained during the investigation, which are also the ones that the court should rely on in rendering a decision. What we wish to present for discussion in this report is that investigative and judicial practice and statistics have dictated a need for amendments to our procedural legislation in order to exclude from abbreviated adjudication some persons or criminal offenses that pose a serious threat and not allow the court extensive discretion. In the circumstances in which the court does not have an obligation to present the reasons for accepting such a decision, this further strengthens the thesis that the proposed changes need to be made.

In some decisions, we have noticed that when there are more than one defendant and one of them has requested abbreviated adjudication, the court has decided to separate the case for the defendant who requested abbreviated adjudication. It has done so with the argument that the case



Graphic presentation No. 7 – Judicial processes with abbreviated adjudication in the study of judicial decisions from the period 2013 - 2014



Graphic presentation No. 8– Judicial processes through abbreviated adjudication in the study of judicial decisions of the period 2007 - 2012

for this defendant can be resolved in the present condition of the facts, and the verification of the facts is not damaged for the other defendants, thus increasing the speed of the adjudication and proceeding with abbreviated adjudication by deciding to separate the case for the defendant who requested it.

In some other case, the court decided to reject the request of the defendant for abbreviated adjudication, deeming that in the condition of the facts, it was not possible to proceed with that kind of adjudication, because of the absence of documental acts that verified the functional duty of each of the defendants in the pertinent state bodies, which is closely related to judicial investigation. This has been encountered even in those cases when one of the other defendants in the same criminal case, also because of the trial going on while the other defendant was at large, adjudication would proceed in the normal manner, referring to the unifying practice of the High Court.

As a general conclusion we may say that in spite of a unifying practice of the High Court for abbreviated adjudication, there are still different practices in the adjudication and arguments for the acceptance or rejection of requests for such a procedure.

7.7 Causes for the dragging out of judicial hearings for cases that lasted more than average

Based on the study of the schedule of criminal cases of corruption, we find that the judicial process in some cases took place beyond the average deadlines envisaged for the adjudication of such cases. Meanwhile, the number of judicial hearings in some of these cases appears to be excessively high. The schedule of these cases, but also the researched judicial decisions, do not appear to indicate whether the causes for the postponement are justified and legitimized according to the Criminal Procedure Code. This is partially also due to the methodology pursued for carrying out this analysis, which did not intend the files and documents of the adjudication, but only the final judicial decisions.

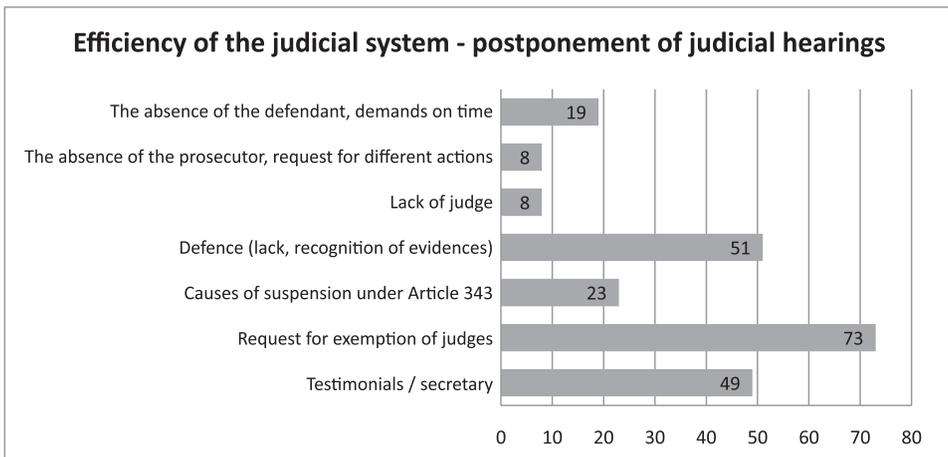
For the most part, judicial processes were dragged out because of the postponement of judicial hearings. The postponement of judicial hearings were the result of the absence of the panel of judges, the prosecutor, the defendant, the defense lawyer, the witnesses, etc. However, we also found that a number of judicial hearings were postponed because of requests by the defendants and their defense lawyers to have time for the evidence, for becoming familiar with acts, for lack of notification of the different parties in the process, the nonfunctioning of the address system, etc.

The study of the schedule of judicial cases highlighted that the length of judicial processes for the adjudication of defendants for the 6 criminal offenses of corruption varies on average from 10 days (in one case) up to 250 days. There were also cases when judicial processes in one instance of the adjudication lasted for 400 – 500 days, or in some case even more than 1000 days.

In some cases, we found that the prosecutor is absent from almost half the judicial hearings, thus becoming a cause for the consecutive postponement of judicial hearings. In the criminal case no. x11, tried by decision no. 2xxx, by the Tirana Judicial District Court, in 22 hearings that were held, 10 of them were postponed for reasons that had to do mainly with the absence of the case prosecutor.

However, we also found cases that were openly in violation of the procedural aspects of the conduct of a judicial hearing, when the postponement had to do with the time that the panel of judges needed in order to announce the final verdict and then, the following hearing was also postponed before announcing the final verdict in order to give the prosecutor time to make available to the panel of judges the defendant’s judicial status certificate.

The study of the schedules of criminal cases on corruption for a sample of 15 decisions of the Tirana Judicial District Court and 3 decisions of the First Instance Court of Serious Crimes, it appears that the postponement of judicial hearings was done for the following causes, by category:



Graphic presentation No. 9 – Causes of the postponement of judicial hearings in a sample of 15 cases.

Comparing the problems highlighted in the research study on judicial decisions of the period 2007 – 2012, data indicate that the study of relevant decisions for the period 2013 – 2014 shows no improvement. This means that the efficiency of the courts is at low levels, thus violating the right of defendants to a trial within a reasonable time and increasing court costs and the costs of the penitentiary system. The consequences for the defendant are serious ones, particularly when the person is tried while remanded to “arrest in prison.”

Considering the fact that this analysis contains special emphasis on the content of decisions, below are some illustrating examples that highlight the findings presented in this part of the report:

***Illustrating example 1:** In the judicial case where the defendant is a judge accused of passive corruption (319/a), following his continued requests to replace the panel of judges and the dragging out of the court to take a reasoned decision as soon as possible, one of the judicial hearings was postponed because the panel of judges asked the court chairman to accept their resignation from the case. According to the schedule of this case, the request of the panel of judges is based on an indirect request of the defendant for replacement. The schedule of the case indicates that the panel of judges supports his request for resignation based on article 17 of the CPC, in order to avoid doubts of the defendant about impartiality.²¹ AHC’s analysis highlights that the request of the panel of judges is not based in any of the reasons envisaged in article 17 of the CPC. We need to specify that this provision does not envisage resignation simply because of requests of defendants, but only if there are important causes for bias. 51 hearings were held for this case and the court decision was taken after three years and two months, showing an innocent verdict for the two defendants, including the judge suspected of corruption. About 40% of the hearings of this case were postponed due to causes related to the prosecutor, which in most cases do not appear to be justified according to the schedule of cases. In those cases when the prosecutor argues for the postponement of hearings, it appears that the motive is the same and that it does not represent a justification for the frequent postponement of hearings. The same finding is valid for cases when hearings were postponed upon request of the defendant who requests continuously the replacement of the panel of judges, which as a result is sufficient grounds for the panel of judges to postpone the judicial hearings.*

7.8 Reasoning for judicial decisions

a) *Arguments for evidence in judicial decisions.*

According to article 142 of the Constitution, judicial decisions should be reasoned. Decision no 100, dated 1.2.2011, the Penal College of the High

²¹ Decision of the Tirana Judicial District Court, no. xxx, dated 08.07.20xx.

Court accepted the appeal of tried person F.A., tried by the Shkodra Judicial District Court and overturned the decision of that court, arguing, *“The court should abide by the requirement of the court with regard to the content of the decision, meaning its composing elements...One of them is the obligation of the court to present in its decision, in a summarized manner, the circumstances of the fact and the evidence on which the decision is based, as well as the reasons for which the court considers opposing evidence unacceptable. Both the decision of the district court and the decision of the appeals court do not present these elements for an episode of the crime.”*

Evidence referred to in the decision to prove the guilt of defendants are usually those obtained through recordings in public premises, wiretapping of telephone conversations, secret photographic, film or video pursuits, the commission of simulating actions, exercise of personal searches, residence searches.

Some of the judicial decisions show that evidence secured during the investigative process and administered during adjudication were not contested because of their validity. The court deemed that the results of these pieces of evidence are unusable with the argument that they were obtained in violation of the law. AHC underscores that in these cases when the evidence is contestable, the prosecutor's body should have conducted more complete, effective and comprehensive investigations. The declaration of evidence secured during investigation as unacceptable in some of the decisions that were researched in this study questions the quality of investigations of criminal offenses in the field of corruption.

In some cases, the court does not analyze even in a summarized manner the evidence on which the facts referred to in the judicial decision are based, sufficing in some cases with the quoting of documental evidence and the testimonies of citizens questioned by the prosecutor's office but without making any references of facts on which these pieces of evidence shed light.

In spite of the fact that every case has its own specifics and complexity, what stands out clearly, is that every studied decision represents a specific case in the manner of reasoning of the review of the legitimacy of obtaining the evidence and the manner of proving guilt based on them. For research purposes, in this research report we will address some cases (with coded data), without having any purpose of passing judgment on the fairness of these decisions or the guilt or innocence of the defendants. These cases only serve to highlight in general the problems displayed by investigative and adjudication practice from our standpoint.

Illustrating example 1 - *In a criminal case tried by the Tirana Judicial District Court, the defendant, an eye doctor by profession, was tried for charges raised by*

the prosecutor's office for committing the criminal offense of "Passive corruption of persons exercising public functions."

In the judicial decision, the defendant is declared innocent. Based on data from the judicial investigation, it appears that the defendant, when concluding the visits, took money from patients, without documenting them with invoices and on the respective logbook of visits. The court deems that the actions of the police officers are in contravention of Article 294/a of the Criminal Procedure Code "Simulating Actions" that envisages that "A criminal act should not be provoked, by abetting a person to commit a crime, which he would not have committed it if police had not intervened." The court refers as a fact that the decision for the delegation of competences of the prosecutor, it has been concluded that the three corruptive acts for this case are provoked, which again questions the lawfulness and effectiveness of investigative actions carried out by the prosecutor's office.

Illustrating example 2 – Referring to decision no. 1xxx, dated 25.06.20xx, we find that there is no unified position of the court with regard to the use of results of evidence obtained through wiretapping, even when that has been allowed through decision of the prosecution body. In this case, the recorded conversation between the judicial police officer and the defendant, the prosecutor's office claimed that the defendant would smuggle a citizen through the Rinas border crossing point, against a payment of 500 Euro, which he had requested from the citizen through her friend. The court considers that based on the conversation between the defendant, the judicial police officer and the third citizen, it appears that an amount of 500 Euro has been mentioned, but it is not clear who the beneficiary is and what it is for. Based on the facts cited in this decision, AHC experts noticed that the recorded conversation highlights that the sum has been requested in order to pass the citizen to France. With regard to the evaluation of the court that it is not clear who the beneficiary of the sum is, article 259 of the Criminal Code envisages that, "Soliciting or taking, directly or indirectly, by a person who exercises public functions, of any irregular benefit or of any such promise for himself or for a third person, or accepting an offer or promise deriving from an irregular benefit, in order to act or not act in the exercise of his duty, is punishable by imprisonment of from two up to eight years." The interpretation of the provision shows that it is not required to be necessarily specified who the unlawful benefit will go to as long as the "soliciting or taking" is proven.

Illustrating example 3: In the criminal case tried by the Durrës Judicial District Court, register no. xxxx, registration dated 01.08.20xx, the defendants working in the customs point of _____ and the owner of a commercial company in the field of _____ were accused of active corruption of persons exercising public functions and smuggling with goods that excise is paid for, evading from the customs warehouse goods that, at the time of evasion, were not cleared through customs. The prosecutor of the case claimed that the owner of the commercial company promised continuously unlawful benefits for the customs employees of

the customs office of _____, while requesting from them irregular actions or the commission of actions before customs as soon as possible in order to favor his company. He is also accused of asking the supervisors in the customs office to assign to the customs warehouse the customs employees of his choosing. With regard to the defendant, the court deems that he should be declared innocent on both criminal offenses that he is accused of (244 and 172 of the Criminal Code) because the only data on which prosecutors base their claim of guilt are the transcripts of wiretapped telephone conversations, which are not related to any other piece of evidence reviewed by the court.

In this decision of the Durrës Court, the arguments on evidence for the guilt or innocence of the owner of the commercial company and the officers of the customs office of _____ only relies on material from the wiretapping of telephone conversations between defendants. Meanwhile, in the last part of the decision, the court cites other evidence that are not added to the analysis and reasoning of the court, such as "Letter from the customs branch of _____, on violations found by commercial company in the field of _____, the control report and the verification act held by the General Directory of Customs during the control of the warehouse on this subject, the data on financial balance sheets and sale and purchase books of this company, etc. The manner in which the reasoning of evidence administered in this judicial process is done, citing only those of transcripts of wiretapped conversations, does not convey to the public and the professionals of law the conviction about the impartiality of the panel of judges. Also, on the same evidence that the prosecutor's body charges the 4 customs employees and the commercial company representative for passive corruption of persons exercising public functions, abuse of office and smuggling of goods that excise tax is paid on, the court considers that only two of the defendants are found guilty of the criminal offense of smuggling, while declaring the head of the fuel company innocent and dismissing the case for the other defendants.

Illustrating example 4 – *In the criminal case no. X, registered on 30.04.20xx, with defendants being a judge accused of passive corruption, the prosecutor's office presented as evidence a minidisc that contained recordings of conversations between the judge and the family member of a citizen tried for by the accused judge (because of his function). In its decision no. x, dated 08.07.20xx, the Tirana Judicial District Court, considered that the "minidisc with voice recordings" is a non-procedural recording and as such may not be used. Even as a wiretapping obtained in the form of an atypical evidence, it does not meet the conditions required by article 151/3 in order to be accepted as evidence by the Court; in other words, it is not and may not be admitted and used as evidence. At the end of the adjudication, the Tirana Judicial District Court found the two defendants – Elbasan Court judge and the father of the person convicted by the defendant – who was recorded on a minidisc, innocent.*

After studying this case, the Albanian Helsinki Committee notes that:

- a) *The prosecutor's office could have conducted more complete, effective and comprehensive investigations because in the concrete case, a judge has been prosecuted and sent to court with charges of corruption, while in the reality of the county, citizens' perceptions and sensibilities for corruption among the judiciary and impunity in its ranks are viewed as high;*
 - b) *The court deems that the content of the minidisc could not be heard and as a result nor prove the facts, while the contents of the minidisc was transcribed by the prosecutor's office;*
 - c) *The court deems that the minidisc could have been obtained without the will of the persons and as a result harmed their privacy. In fact, article 151/3 of the Criminal Procedure Code envisages as a criterion the fact that the atypical evidence should not violate the freedom of the person's will. The fact that this recording does not appear to have been made with the approval of the recorded persons does not prove that it violated the freedom of their will. The violation of the freedom of will means cases when persons are forced by illegal means and ways to declare facts or evidence that do not correspond to their will. Meanwhile, the right to privacy, just like other rights are not inviolable. Article 17/1 of the Constitution envisages the limitation of these rights only by law for public interest or for the protection of the rights of others.*
- b) ***Reflection of arguments by the defense and the prosecutor in the decision***

The analysis of decisions highlights that in the majority of cases, the legal arguments of the defendant's defense lawyer and the prosecutor's office are reflected in the researched judicial decisions. However, some of these decisions do not feature a complete presentation of arguments, but rather a brief summary that lacks the reasoning as to why the court considers opposing evidence unacceptable.

In this regard, positive practices are scarce and we may mention as a positive example the decision of the First Instance Court of Serious Crimes no. xxx, dated 26.xx.201x, which analyzes in a detailed manner all the claims of defense for the two defendants of the case (*one of which a judge and the other a lawyer*) and the court provides the relevant arguments whether these claims stand or not, juxtaposing them with the conclusions that result from the evaluation of the court on the evidence administered in the process.

We also encountered cases in which judicial decisions do not reflect any of the claims of the parties in the judicial process on criminal offenses in the field of corruption.

c) *Reflection of the analysis of the elements of the criminal offense*

In the majority of the studied judicial decisions, we find that the elements of the criminal offense are reflected. However, the analysis of elements of the criminal offense in the court decisions is important for understanding the manner of reasoning of the court, the qualification of the criminal offense by the prosecutor in presenting the charges, or by the court itself if it renders a different legal classification of the criminal offense.

We find that in the majority of decisions, the analysis of the elements of the criminal offense has been done briefly or has not been done at all. In separate cases singled out as positive examples in this research report, the elements of the criminal offense in the field of corruption, envisaged in the Criminal Code, are done in the spirit of articles of international acts and namely the Convention "On Corruption" (see decision no. xxx, dated 03.04.201x of the Durrës Judicial District Court).

In some cases, we find that the courts do not have the right understanding of the elements of the criminal offenses in the field of corruption. Such cases cause the confidence of the public and particularly of experts of the law to shake with regard to the principle of impartiality of the panel of judges.

Illustrating example 1 – *In the criminal case tried by the Durrës Judicial District Court, register no. xxx, registration date 01.0x.201x, the prosecutor presses charges for an affair between customs officers and a commercial company in the field of fuels. The court considers that in order to reach the point of proving the charges envisaged by article 244 and 25 of the Criminal Code, it needs to be necessarily proven that illegal benefits of any kind were given. In the case in question, we found that the interpretation by the court of article 244 of the Criminal Code was not complete and harmonized as the provision does not necessarily require the giving of illegal profits, but that objectively it may be realized through the direct or indirect promise or proposal of unlawful benefits.*

We also found judicial decisions in which the manner the analysis is done on whether there is a criminal offense does not fully correspond to the elements of the criminal offense of which the defendant is accused.

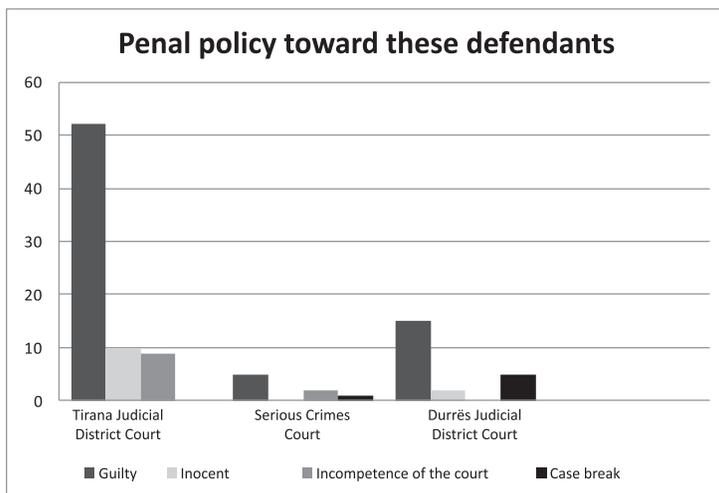
Judicial practice often highlights the need to clarify criminal elements with regard to elements of the criminal offense.

Illustrating example 2 – *Referring to a decision of the Serious Crimes Court, we consider that it is worth discussing more extensively the need to make more precise or clarify the special subjects envisaged in article 319/ç of the Criminal Procedure Code, which sanctions passive corruption of judges, prosecutors and other*

functionaries of justice bodies. Concretely, who will be considered a functionary of justice bodies? The clearer the provision, the more are possibilities for uneven application of the provision in practice minimized. In the judicial decision, when analyzing the special subject of the elements of this criminal offense, the Serious Crimes Court highlights that it is not clearly established what we will mean with "functionaries of justice" and here, in the opinion of the court, we might include judicial secretaries, the secretaries of prosecutors, chancellors. In this decision, the court considers that the defendant, 'lawyer' by profession, shall be considered a functionary of justice bodies on the basis of article 319/ç of the Criminal Code. However, based on systematic and harmonious interpretation of our domestic legal framework, AHC considers that the term "function" primarily refers to high-level functionaries and officials and second, it extends to the public sector. According to the material law on the profession of the lawyer in the Republic of Albania (no. 9109, dated 17.07.2013), it results that advocacy is a free, independent, self-regulated and self-guided profession.

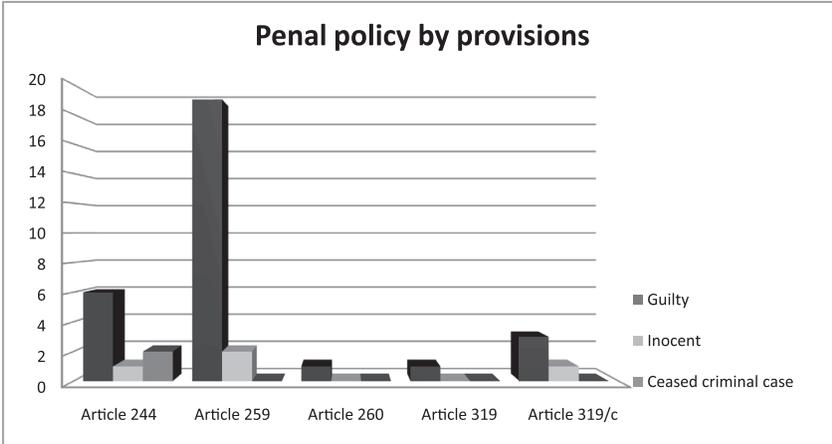
7.9 Position of the court on the legal qualification of the criminal offense and penal policy

Based on the study of decisions, we noticed that high-level functionaries or officials, or functionaries of the justice system, even in those few cases when they are declared guilty, they receive minimal sentences for which the Court orders the suspension of their execution. The penal policy toward high-level functionaries accused of corruption appears different in different decisions of the different courts. The graphic below shows in how many cases defendants were declared guilty and how many were declared innocent by the court that issued the decision.



Graphic presentation No. 10 – Penal policy toward defendants for the criminal offense of corruption

The following graphic presentation shows data on the punishability of criminal offenses of corruption in the public sector, taking as a reference the provisions of the Criminal Code that are the subject of this research:



Graphic presentation No. 11 – Penal policy by provision of the Criminal Code

a) *Main sentences*

The analyzed data indicate that for the criminal offenses of corruption in the public sector, the following main sentences were issued:

- Imprisonment sentence was issued for 26 defendants;
- Fine and imprisonment sentence was issued for 3 defendants.

With the changes of the Criminal Code through the approval of the law no. 144, dated 02.05.2013, there were two specifications in this regard:

First, article 34, paragraph 5 was amended to the following: *“For persons who commit crimes for the purpose of benefiting assets or securing any other kind of material benefit, the court shall decide according to article 36 of this Code, the confiscation of the means for carrying out the criminal offense and the proceeds of the criminal offense or, in their absence, sentence by fine from 100,000 up to 5 million ALL.”*

Second, in all those provisions of the special part of the Criminal Code, the parts envisaging the sentence by fine as a main sentence, besides the imprisonment sentence (including criminal offenses that are the object of this research) were invalidated.

What we find from the study of the decisions is that there has been no case in which the maximum of the sentence has been applied and in most

cases, the minimal sentence has been applied. Of 25 defendants sentenced by imprisonment, it is worth stressing that 22 of them benefited a 1/3 reduction of the sentence because of the application of the abbreviated adjudication. As a result, in some cases, we find that the final sentence is below the minimal limits of the sentence envisaged by the criminal offense.

There is a tendency of Appeals Courts to not change the decision issued by the First Instance Court. Even in those few cases when this decision is changed, the issued sentence is reduced even further, especially for special subjects of the criminal offense who hold senior or important public functions (judges).

b) *Alternative sentences and complementary sentences*

For 13 defendants, the courts issued alternative sentences envisaged by article 59 of the Criminal Code "Suspension of the Execution of the Imprisonment Sentence and Placement of the Convict on Probation," namely for 5 convicts sentenced for article 244 of the Criminal Code, 7 convicts sentenced for article 259 and one convict for article 319/ç of the Criminal Code. In 6 cases, the Court, in parallel with the alternative sentence, also applied article 60, which envisages the obligation of the convict placed on probation, precisely according to items 1 or 9 of this article or both jointly, which envisage "The obligation to exercise a professional activity or taking vocational education or training" and "Non-association with specific individuals, mainly convicts or accomplices in the criminal offense." Alternative sentences are mainly applied in those cases when there is a request by the prosecutor's office and also abbreviated adjudication.

In 4 cases, the court issued also complementary sentences in parallel with the alternative sentence. The defendants given these complementary sentences were sentenced for article 259, namely 3 defendants and article 319/ç, one defendant. These sentences consist in "*Prohibition of the right to exercise public functions,*" envisaged in article 30, item 1 of the Criminal Code and "*Removal of the right to exercise public function,*" according to the deadlines and kinds of the criminal offence for which the defendant was sentenced.

c) *Analysis of criteria for the kind and measure of the sentence*

In issuing the kind and measure of sentence for criminal offenses in the field of corruption, the court takes into consideration the social threat posed by the criminal offense, the threat posed by the defendant, the degree of guilt, the acceptance of the charges and blame by the defendant, his request for

abbreviated adjudication, alleviating circumstances envisaged in article 48/ç of the Criminal Code, the economic and family condition, living style and needs, age, consequence and damage caused as a result of the illegal benefit, as well as the intentional commission of the criminal offense. In some judicial decisions, we find that the elements that have to do with the economic and family condition are not analyzed in the decision and the evidence proving their existence are not referenced.

In most of the decisions, the court does not take into consideration and does not argue as an element in establishing the degree of sentence, the consequence and damage caused by or the value of the reward or benefit that the defendant obtained, mainly as a result of passive corruption. Some decisions point to relatively small amounts of benefit. What is highlighted in different decisions is that there is no proportionality between the degree of the sentence and the value of the bribe taken/given by the defendant. In fact, in some cases, the persons sentenced for passive corruption for relatively small amounts of cash are sentenced the same as persons corrupted for considerable value.

Individual cases highlight atypical interpretations of the court in establishing the sentence, which are not reasoned in the decision as to what evidence they are based on. Thus, the Serious Crimes Court (decision no. xxx, dated 18.xx.201x), found a judge guilty of passive corruption. In providing the arguments for the sentence, the court deems that "unlike the social threat posed by the criminal offense, the defendant is a person with a good personality appreciated in the community he lives in, also appreciated publicly. It is worth mentioning that when it analyzes the degree of threat of the defendants of the criminal offense "passive corruption of judges, prosecutors and other functionaries of justice bodies," the court deems that the threat posed by the defendants is deemed as being not minor.

Positive examples of a full analysis in the studied decisions, with regard to the determination of the kind and degree of the sentence, are scarce. Separate cases highlight that the court, in determining the degree of the sentence, seeks for the defendant to receive a sentence that will be of value for rehabilitation, education or reintegration. In these cases, the court pursues the line of a contemporary and not harsh penal policy. In certain cases, the court takes into consideration the individualization of the sentence, the fact that the criminal offense of corruption is problematic not only because of the effects of the law but also for building the rule of law.

The studied decisions show that mainly the Court tends to give the same level of sentence as requested by the prosecutor's office and this is

mostly seen in the practice of the Tirana Judicial District Court. On other cases, the court eases the position of the defendant/-s by reducing the imprisonment sentence, or applying one of the alternative sentences or by not applying complementary sentences requested by the prosecutor, such as the prohibition of the right to exercise public functions.

In determining alternative sentences, the court argues the same causes as in establishing the imprisonment sentence, by not analyzing the conditions and circumstances that specifically dictate the application of these sentences. Also, for the application of complementary sentences, the court does not always analyze in its judicial decisions the causes or circumstances that are deemed important by the court.

As a general conclusion, we may say that the practice of the First Instance Court of Serious Crimes, in adjudicating those criminal offenses in the area of corruption that are under its material competence, is more unified with regard to punishment, the determination of sentences including complementary ones, and the more complete analysis reflected in these decisions. Based on the material competence of this court, the studied decisions feature as sentenced senior local government officials, judges and lawyers.

8. Recommendations

- i. In order to enable the conduct of more complete, more professional, and more comprehensive research and studies, it is essential and compulsory for public bodies to respect the access to information right envisaged in article 23 of the Constitution and Law 119/2014 "On the right to information," within established legal deadlines, as a function of guaranteeing transparency and the principle of good governance. Referring to the findings of this research, this recommendation is particularly addressed to the prosecutor's office, namely the Prosecutor's Office of the Tirana Judicial District.
- ii. AHC encourages the Prosecutor General's Office and the HSA to conduct more focused and technical-professional research, as well as a more profound and comparative analysis of their activity, with regard to the phenomenon of impunity, related to cases denounced by the HSA, investigated by the Prosecutor's Office and adjudicated by the Courts. We also consider that this analysis should extend to the lawfulness and grounds of denunciations and decisions taken by the prosecutor's office.
- iii. We recommend that investigations on referrals related to corruption or other similar offenses be complete, effective, objective and comprehensive, particularly on referrals for criminal offenses in the field of corruption, abuse of office and other similar criminal offenses.
- iv. Public bodies or institutions of control and auditing should not hesitate when the opportunity arises to denounce high-level officials. The same stance should be taken in investigating and adjudicating these officials, in full respect of the constitutional principle: all are equal before the law.
- v. We recommend to the Prosecutor's Office that decisions to not initiate criminal proceedings and to dismiss criminal cases are argued and, in support of relevant provisions of the Criminal Procedure Code, they are immediately made known to the public bodies or control and audit bodies, or other denouncing persons, and highlight their right to appeal in court.

- vi. We recommend to public bodies, especially institutions of control and auditing, to make denunciations when they are convinced that the non-initiation or dismissal of the criminal case by the prosecutor's office is not founded; they should exercise within the legal deadline the right to appeal in court, taking into consideration that, in the context of justice reform, these decisions are only opposed judicially.
- vii. We suggest to institutions that have the right to a legal initiative to propose amendments to the Criminal Procedure Code, in order for the provisions of this Code to make clear the right of every denouncing public body to appose in court the decisions to not initiate proceedings or dismiss a criminal case.
- viii. During reporting in Parliamentary Committees, we suggest that constitutional, independent institutions or those established by law provide information on the progress of investigations of denunciations filed with the prosecutor's office as well as the reasons for not exercising the right to appeal potential decisions to not initiate or dismiss criminal proceedings.
- ix. We recommend to the lawmakers to take under review the proposal of the HSA to draft and approve the law "On material responsibility" on addressing the financial responsibility of high-level officials and employees of all levels for economic damages caused intentionally or because of negligence, during or in relation to their public duties and functions.
- x. Because of continued delays noticed in the opening of judicial hearings that represent disciplinary violations by judges, there is a need for better internal organization of work by the judges themselves. In accordance with the new law no 98/2016 "On the organization of the judicial power in the Republic of Albania," it is recommended to court chairs to oversee the work discipline of judges in this regard, requesting if needed the start of investigations when disciplinary violations of judges are suspected in the relevant courts.
- xi. The Tirana Judicial District Court has a small number of courtrooms compared to the relatively large number of judges and cases adjudicated by them so that the publicity of court hearings, sanctioned in the Constitution and the European Court of Human Rights, is not violated. We recommend that all courtrooms in this court are used with maximal efficiency. We

also suggest the increase of the judicial budget that would enable the addition of dedicated premises for courtrooms to this court. We recommend to court security officers in courts to guarantee the safety of the conduct of court hearings without violating public access to these hearings.

- xii.** We recommend to existing and new justice system bodies to be created by law no. 115/2016 “On the governing bodies of the justice system,” to conduct continued institutional and thematic inspections on every aspect of the work in court, devoting attention also to respect for the principle of solemnity with regard to the judges’ wearing the robe.
- xiii.** We suggest the improvement and unification of the electronic case management system in all courts of all levels, which would enable online access through the websites of these courts on the subject of cases, their progress, time taken, schedule of cases, etc. Besides the public this would be helpful to researchers and think tank organizations that conduct research studies on the activity of the courts. According to law no.115/2016 “On governing bodies of the justice system,” the competence for establishing rules for the compulsory use of the electronic case management system is with the High Judicial Council, which will establish also rules for the functioning and security of the electronic case management system and the protection of personal data used and protected by the system.
- xiv.** We recommend that the defense level, particularly the one offered by court-assigned lawyers is of better quality, while we recommend to the courts to rigorously enforce the principle of the equality of judicial tools.
- xv.** We recommend that organizational and administrative measures are taken in order to respect the principle of trial within a reasonable time. In particular, we recommend to the prosecutor’s office to take effective internal organization measures in order for adjudication to take place without interruptions and for hearings to not be postponed even when the prosecutor has objective reasons for not showing up, such as workload.
- xvi.** We recommend also to the courts to be active in disciplining parties in the process, avoiding any intentional dragging out by the prosecutor, defense and the defendant. Unjustified delays should be the object of analysis first by the courts, but also by

the prosecutor's office or advocates' self-regulating bodies, if the cause is the prosecutor and/or defense lawyer of the defendant. The governing bodies of the judiciary, the prosecutor's office and the advocates' self-regulating bodies should conduct continued and periodic thematic inspections/monitoring on this very disturbing problem that violates due process. Those responsible for dragging out hearings or for unjustified postponements should be held accountable disciplinarily.

- xvii. We recommend that legal deadlines for the review of cases are the object of discussion during the drafting of amendments to the Criminal Procedure Code. In this regard, we propose the inclusion of very clear adjudication deadlines in the code that would enable the conduct of the process within a reasonable time, while envisaging the extension of these deadlines in certain or complex circumstances that make it impossible to complete adjudication within them.
- xviii. AHC recommends that the court should abide by the requirement of the procedural law regarding the content of the decision, namely its composing elements. Judicial decisions should be announced together with their arguments. In this regard, we recommend to the institutions that have the right to a legal initiative to propose amendments and additions to the Criminal Procedure Code in order to specify better this obligation of the court in article 384 of this Code, except for decisions on particularly complex cases that require time for their arguments, in any case establishing deadlines that do not violate the right of the subjects of the criminal proceedings to an effective appeal against the judicial ruling.
- xix. We recommend that judicial decisions highlight the judicial status of the defendant, specifying whether the defendant has been sentenced in the past for criminal offenses in the field of corruption.
- xx. Meanwhile, we recommend changes to our criminal procedural legislation, namely articles 403 – 405 of the CPC in order to exclude from abbreviated adjudication some criminal offenses and persons who pose high threat and not leaving broad discretion to the court. The High Justice Inspectorate (a new body envisaged in Law no. 115/2016), or until its creation, the chief inspector of the HCJ should conduct thematic inspections with regard to the acceptance of requests for abbreviated adjudication in penal processes.

- xxi.** Court statements in the studied decisions, regarding the unlawful obtaining of evidence during the investigation phase or the non-use of results of evidence obtained through wiretapping, when this has been conducted in accordance with criminal procedure, highlight the need for the prosecutor's office to conduct full, quality and comprehensive investigations and to improve the mechanisms and special techniques to search for evidence in criminal offenses of corruption.
- xxii.** Look at the possibility to amend the Criminal Procedure Code on the expansion of special tools and techniques to find and obtain evidence, especially in complex cases and those that pose a high social threat (organized crime, corruption, homicide, etc.).
- xxiii.** We recommend that the Magistrate School continue training in the continued education program, in cooperation with international or domestic bodies and experts to increase the capacities of magistrates in the Special Prosecutor's Office and Special Court against corruption and organized crime.
- xxiv.** We recommend that there be a broad discussion of the need to specify or clarify special subjects, envisaged in article 319/ç of the Criminal Procedure Code, which sanctions passive corruption of judges, prosecutors and other functionaries of justice bodies. In concrete terms, who will be considered a functionary of justice bodies?

