Report on the Joint Project between the General Prosecutor's Office of the Republic of Moldova and NORLAM (The Norwegian Mission of Rule of Law Advisers to Moldova)

EVALUATION OF THE PRACTICAL USE OF TEMPLATES AS MOTIONS FOR PRE-TRIAL DETENTION

EVALUATION REPORT

based upon NORLAM's fact findings in 2010-2012

The Norwegian Mission of Rule of Law Advisers to Moldova
V. Alecsandri str., 50
Chișinău, Republic of Moldova
Tel/Fax: 27-43-30
www.norlam.md

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1. Introduction

In 2008 NORLAM introduced the concept of using standardized forms for prosecutors' motions to instructional judges requesting pre-trial detention.[1] There were prepared several standard templates: one template for each of the specialized reasons for applying pre-trial detention, such as interference with evidences, absconding and re-offending, and, in addition, one template for prolongation of the term of detention. The same year this practice was approved and adopted by the General Prosecutor's Office of the Republic of Moldova, and the forms were implemented in some moderated way throughout the country.

The purpose of changing the then existing practice into standardized forms was to secure that very strict legal demands are all invoked and, most of all, to secure a concrete individualization of each suspect under arrest/detention in a criminal case. The lack of a thorough and concrete assessment of the facts sorted out under each component of the legal demands for pre-trial detention proved to be an obvious shortcoming in the practice of Moldovan prosecutors and judges[2].

For this reason the design of the templates included mandatory sections for individualized facts to be filled in by the prosecutor under each legal component. The mandatory sections were made in form of squares which extended automatically according to the volume of the information added into them. To have these squares filled in was the core element of the templates. The wanted consequences of the increased awareness of the legal safeguards applicable to pre-trial detention was to increase their quality and motivation, and eventually reduce the number of ungrounded motions for pre-trial detention. Moreover, it was important to prevent eventual practice of "automatically applying" pre-trial detention due to general ideas about the degree of severity of the case and what the perpetrator deserves as a reaction. Further on, the improved substantiated motions were expected to give the instructional judges a better foundation for their judicial legality control and better reasoning. The improved and well-reasoned motions would also allow defense attorneys to understand

[1] The first working-group meeting in the joint project "Prevention of Irregularities in the Use of Police Isolators and Pre-trial Detention" took place on 2 November 2007. NORLAM's proposed the following areas of collaboration: 1 Organizing a series of seminars on pre-trial detention for Moldovan prosecutors, 2 Drawing up regulations on inspection powers for prosecutors in connection with police isolators, 3 NORLAM's role as consultative resource, 4 Appointing one prosecutor in each district responsible for prevention of torture and ill-treatment of detainees, 5 Establishing cooperation with police and judges, 6 Development of standard templates of motions to be used when requesting pre-trial detention.

[2] Paladi v. Moldova (A 39806/05), paras 15, 73-75, Stici v. Moldova (A 35324/04), paras 44-46, Becciev v. Moldova (A 9190/03), paras 53-62, 64, Sarban v. Moldova A 3456/05, paras 100-101, Turcan v. Moldova (A 10809/06), paras 40-44, Boicenco v. Moldova (A 41088/05), para 143.

crucial points invoked by the prosecution and to prepare and reply to the instructional judge based on the improved application of the principles of equality of arms and adversarial proceedings.

2. Background

The standardized templates, somewhat simplified but the basic idea maintained, have been used from the time of their initial introduction and exist today as an established practice. Initially, we can state that the introduced templates have increased the efficiency in the daily work of prosecutors. Provided the correct use of these templates, each legal demand should be argued in writing based on the assessment of the *de facto* circumstances of the concrete case.

What unquestionably has been a great improvement is the fact that the templates create a platform for transparency in the application of pre-trial detention. The prosecutor's motions based on the said templates clearly demonstrate and allow supervising the way the national legislation is applied according to individualized concrete facts of the case, as well as the level of legality of the pre-trial detention and professional skills of the prosecutors. The presumption must be that the written assessments in the motion reflect the real circumstances of the case and how these have been invoked as a reason for pre-trial detention.

On the 9th of November 2010, after having had the templates in use for two years, NORLAM suggested to the General Prosecutor's Office to have an evaluation of the practice. By that time we had received information that the application of the templates had tendencies to become standardized, general and abstract when it comes to the grounds invoked, which (if true) would mean that the introduced templates worked to the contrary of the initial purpose.

The project proposal was accepted by the General Prosecutor and the evaluation project was started in cooperation with the Section of Superior Hierarchical Control and Methodological Assistance.

3. Objectives

When it comes to invoking of reasons and grounds for pre-trial detention, the law gives prosecution clear obligations in this respect, cf. the Criminal Procedure Code of the Republic of Moldova, Art. 166 para 7 referring to Art. 307 para 1; *"[…] The motion shall cover the reasons and the grounds for subjecting the suspect to preventive or house arrest […]"*.

However, the mere statement of reasons and grounds is not sufficient. The obligation to give reasons and grounds must be interpreted according to the ECtHR's interpretation of Art. 5 para 1 lit. c) and 3 of the ECHR. Now we see quality demands of the content of the grounds given by national authorities[3].

This is not only a demand for the prosecution, but addresses the instructional judges and the courts further on as well. However, it is the prosecution that represents the first "filter" in the selection of cases for pre-trial detention, and prosecutors have an obvious obligation to act according to national law and international treaties, and, especially, invoke the demands of the ECtHR.

The purposes of this evaluation report go beyond mere statement of what is strictly needed for having the pre-trial detention according to national legislation and minimal standards expressed in international treaties. It is rather aiming at setting the standards introducing the best practice, high prosecution standards and professionalism; therefore, advices are also given in this regard. For this purpose, to improve the situation, there must be an understanding of the fact that we for a great deal will be focusing on the negative findings that, hopefully, will work as illustrations for our recommendations for improvements. In this way, this report may be tilted more towards the negative side compared to what the prosecution may truly deserve. Even though some positive illustrations will be included, we will be careful to introduce phrases as examples of how to do reasoning due to our experiences that this might eventually turn into more standardized motivation of the motions which is exactly what should be avoided.

4. Collection of Materials and Working Method for Assessment

NORLAM's experts were provided with motions for pre-trial detention from 44 territorial prosecution offices, five cases from each office. In the majority of the cases there were

[3] In comparison, the demands for improving the Norwegian domestic practice have been initiated by serious criticism from both the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and the Committee Against Torture (CAT) especially for too extensive use of isolation and imposed restrictions upon persons kept in custody (suffering due to interdiction of visits or correspondence, called for in some of the motions and decided upon by the judge). Further, the UN Human Rights Committee has been reporting a too extensive use of long term custody in some cases, advising amendments in the legislation for improved conformity with Article 9 of the International Covenant on Civil and Political Rights. Other core elements that can be mentioned are the limitation of the use of the initial police arrest and the strict ruling of the General Prosecutor of Norway regarding prohibition of the use of pre-trial detention as a mean of pressure on the suspect for cooperation.

additional motions for prolongation of pre-trial detention. This means that NORLAM has assessed more than 335 motions drawn up by Moldovan prosecutors. That means that we have assessed some 1340 legal checkpoints. The cases concerned different types of crimes, in the range from theft and burglary, economical crimes, bodily harm to rape and homicide.

We assessed each motion based upon the level of quality of individualization under each legal component for pre-trial detention and based upon placing factual circumstances under the correct legal demands. Each motion was given marks on the scale from 1 (for the situation when assessment of the legal component is completely lacking) 2 (for very poor assessment, yet which exists), 3 (some reasoning, but not sufficient), 4 (reasoning that could be improved) to 5 (for good and sufficient reasoning). We used evaluation tables in which we introduced marks given to the assessed motions; these tables had separate columns for "reasonable suspicion", "special reasons for pre-trial detention", "proportionality principle" and "document references", so that all these categories were assessed separately in each motion.

The two Norwegian prosecutors and our two national legal consultants have carried out the assessment. The work has been time consuming and has been carried out between November 2010 and January 2012.

5. Fact Findings Concerning Legal Components

Pre-trial detention calls for assessment of legal standards or legal terms that must be interpreted strictly. It must be understood that the concept of pre-trial detention represents the most serious intervention in, but not an exception from the fundamental principle of the presumption of innocence anchored in Art. 6 para 2 of the ECHR. In light of this, it is understandable that the ECtHR demands not only correspondingly strict national legislation, but also a proper reasoning of pre-trial detention confirming that a thorough assessment of the *de facto* situation has been made according to the legislation. If not, the conclusion will be a prevailing presumption of falling short of these demands, resulting in the conviction of the state in Strasbourg. Therefore, it is crucial to invoke true factual circumstances for all demands: reasonable suspicion, at least one of the special reasons (absconding, hampering investigation or reoffending) and the proportionality principle, including an explanation of why less coercive measures are not applicable, followed by the final conclusion that the pre-trial detention is absolutely necessary.

6. Reasonable Suspicion

The previous misconception which used to be spread among some practitioners that reasonable suspicion did not belong to the legal components that should be reviewed by a judge, does not exist anymore[4]. In general, this basic legal demand is the one that was appreciated with the highest score (3.23) in our evaluation. The motions that received low score are the ones only stating what has been carried out of the investigation so far, without description of core factual circumstances or any key points of what really supports the fulfillment of the demand for reasonable suspicion[5] This means that we still come across standard phrases limiting the reasoning to simply stating that the reasonable suspicion is confirmed, for example, by the victim, witnesses or the forensic report, which gives the score of "2" in our evaluation. To give the highest score, we looked for key factors such as, for instance, "*the witness NN saw the suspect running away from the scene of crime, the suspect is recognized by the victim, or the suspect was seen by NN when hiding the weapon, the suspect was caught shortly after the deed with blood stains on his clothes*", etc. In petitions

[4] Exception: two prosecution offices did not include this demand in their motions.

[5] The legal demand of "reasonable suspicion" is neither established nor debated in the domestic Moldovan practice. The situation is different in Norway, where the Supreme Court has established the domestic understanding of this demand as "*more likely than not*", in other words, it should be more than 50 % likely that the suspect committed the imputed offence.

where circumstances like these are invoked, there is a good indication that the legal demand for reasonable suspicion is fulfilled, as well.

In practical life it may happen that some sole circumstances taken alone are not sufficient to substantiate reasonable suspicion, but may qualify as sufficient when seen and assessed all together. Unfortunately, during our evaluation we hardly saw any motions that would make use of this approach of "puzzling together" different evidences in order to reach the demanded level, which surprises us in our fact findings compared with the Norwegian prosecutorial practice.

We have noticed some examples of unfortunate wordings made by some prosecutors in their motions when arguing reasonable suspicion, such as using the phrase *"guilt is proven by…"*. This indicates a misconception of the term *"reasonable suspicion"* being equal to the standard of proof necessary for a conviction. Moreover, such a conclusion is by far too premature at this stage of investigation.

6.1. Conclusions and Recommendations

"Reasonable suspicion" is the basic demand for pre-trial detention and must be invoked regardless of how obvious it seems to be fulfilled for the prosecution. We also observed that the quality of many motions is very close to being satisfactory and could be greatly improved if only some minor pieces of information were added in order to illustrate the concrete characteristics of the reasonable suspicion in the case in question.

Below are several examples of how concrete facts are invoked in practice:

> *"The reasonable character of the suspicion is proven by the following factual circumstances, namely: statements of the injured party A.A., statements of the witness B.B. who directly pointed to C.C. as being the person who had sold him the mobile phone Nokia (model no. ...), minutes from recognizing the person according to photos, where the injured party clearly pointed at him".*[6]

> *"..... is proven by the following: statements of the injured party A.A., the statement of the witness B.B. who specified that he knew that C.C. had openly stolen a golden necklace from an unknown person, and he had seen that necklace, then he was asked to give (C.C.) clothes to change. However, in the citizen B.B.'s home, situated on the*

[6] This illustrates an appropriate example of substantiating the reasonable suspicion; however, according to the proportionality principle we question whether theft of a mobile phone should qualify for pre-trial detention.

street XXX there were found the clothes of the accused C.C. […] Also, during the criminal investigation, and, namely, when she had to recognize the person according to photographs, the injured party recognized the person under no. 4 as being the one who had stolen her golden necklace".

These are good examples of how to sufficiently substantiate reasonable suspicion. Yet, in order to reach highest standards of reasoning, the prosecutor could also differentiate between various arguments depending on the degree of their value for fulfilling the legal demand and state what is decisive for the conclusion. This is even more important in cases with relevant exculpatory evidences, e.g. evidences that give the accused alibi for the time of the committed crime; then it must be expected that the prosecutor illustrates that such evidences have been taken into consideration and states that other invoked evidences out-weight the evidences that are in favor of the accused. If the exculpatory evidences are not dealt with in the motion, this will easily result in a presumption of not being taken into consideration. This, in its turn, will lead to the situation where the Court in Strasbourg must assume that national authorities have considered them as irrelevant, resulting in a new conviction of the state.

7. Special Reasons for Application of Pre-Trial Detention

The templates include space for elaboration of the demand that at least one of the three special reasons must be fulfilled. Almost all motions assessed have this space filled in. The average score in our assessment is rather low – 2.96. Unfortunately, we often noticed the use of standard phrases mixed together for all the three alternatives without anchoring any of them into concrete circumstances. This is not a problem of lack of words; this is a problem of lack of content in what has been invoked. We saw wordings apparently formulated in a professional language that could be used in all criminal cases, but in reality these are not able to illustrate more than hypothetical possibilities and speculations of what "might happen", which is clearly not sufficient. We add two examples here that are typical:

"the criminal investigation body indicates that the accused may abscond from the criminal investigation body, impede the establishment of the truth in the criminal investigation through different illegal methods, influence the criminal investigation body in order to delay and unjustly examine the case" (and nothing more…)

> *"according to the initial data collected during the criminal investigation, it has been established that the lifestyle of the suspect allows to suggest that he might negatively influence the completeness and objectiveness of criminal investigation process, including that he may abscond from the criminal investigation authority, by leaving the Republic of Moldova. In this case the preventive measure in form of pre-trial detention may positively influence the criminal investigation process and the process of obtaining of evidences in the case, as well as objective investigation of the suspicions of the criminal investigation authority regarding the suspect's co-participation in other criminal acts"*

The next step up from this is when all three special reasons are invoked at once, but relevant factual arguments only refer to one or two of them. As the above examples also illustrate, there is a clear tendency to mix these three independent special reasons into one assessment. In situations in which only one special reason is really relevant and well-argued and supported by relevant facts, we still experience the unfortunate practice when the prosecutor still adds the two remaining ungrounded special reasons, apparently as an additional support. For example, after having argued the risk of tampering with evidence, the prosecutor also simply adds that the suspect may also abscond and reoffend.

We also see from this typical approach that the conclusion is not given to each and one of the special reasons, but follows as a joint conclusion, making it sometimes difficult to understand what components are decisive for each of the legal requirements.

It is, of course, true that the special reasons constitute a prediction of what may happen if pre-trial detention is not applied. However, in all cases it is possible to suppose that the suspect may commit some unfortunate acts. This way of assessing it with only "*may commit*" gives the impression of speculations (hypothetical or abstract) without any further value, especially when it is only superficially dealt with further on in the motion.

One of the standard phrases we most often see invoked clearly illustrates by its own wordings the general and hypothetical character of the argument:

> *"... it has been established that the lifestyle of the accused allows to consider him as a person that eventually may be involved in other offences"*

To speculate about other eventual offences that the accused may already be involved in, is not a part of the charges that must be substantiated with reasonable suspicion to have relevance. Further on, it is impossible to defend oneself against such unspecific accusations. The idea that there may exist other offences in which the person may eventually be involved cannot be invoked like this.

We also experience that relevant factual circumstances are invoked to a higher degree. Thus, the tradition from earlier years to merely refer to the legal demands has been improved. Further, we notice that good factual arguments to a higher degree find their places under correct legal alternatives. We will give examples under each of the special reasons.

7.1. Risk of Absconding

We understand that absconding from very serious crimes is a highly relevant special reason in Moldova, taken into account the local geographical conditions and the tradition to go abroad to seek increased income. Many are on the brink to go or at least consider this as an actual option. Given this background, a serious accusation can easily result in fleeing the country. In addition to the severity of the alleged crime, we have noticed the good and necessary prosecutorial practice to assess in the motions the local/national domestic boundaries of the suspect and boundaries and relations he/she has abroad.

When it comes to the interpretation of the risk of absconding by the ECtHR, it must be understood that, in general, it is not sufficient to simply state that a criminal case has been initiated against the suspect or that a person is subject to a very serious accusation[7]. Even though Moldova seems to be facing special challenges, it is our opinion that this approach counts for Moldova, as well. As an illustration of arguments which are not sufficient in themselves, two examples can be quoted:

> *"currently, the suspect, knowing for sure that criminal investigation has been started against him, is absconding from the criminal investigation authorities. This suspicion is proven by the factual situation of the suspect and, namely, he is accused of a crime against property - robbery"*

[7] See, e.g. case Shishkov v. Bulgaria application No. 38822/97, 9 January 2003, 61-67

> *"because the sanction for this crime is imprisonment, this leads to the conclusion that the accused could take all measures to avoid criminal liability*"

It should also be mentioned that we have seen some examples of highly relevant circumstances invoked for the risk of absconding that in addition to the life conditions of the suspect, as mentioned, substantiate the relevance and probability of absconding in a good way, e.g. that the suspect was arrested after buying bus tickets to Moscow, that he was hiding in another village where he has his permanent residence, and that he was arrested with his suitcases and passport packed ready to leave home.

7.2. Tampering with Evidences

The risk of tampering with evidences is often invoked only with standard phrases, which are not able to illustrate more than what could be claimed in all criminal cases of some graveness. Especially, after witness statements have been collected, the question must be how it can still be relevant that the suspect will take the risk to try to influence witnesses; has the suspect proven to be especially violent and spreading fear among the witnesses? Does he have a history of being violent? How old is the suspect? Does he belong to a gang of criminals or have accomplices that can support him in such an influence? Very often this is not properly elaborated; sometimes there may be a standard phrase that the suspect is "a socially dangerous person" without any explanation why he deserves this characteristic from the prosecution. A typical standard reasoning for the risk of hampering the investigation is:

> ***"****...by influencing the witnesses or taking other steps to impede the establishment of the truth in the criminal investigation"*

It should be mentioned that we have seen some good examples of how the risk of interference with evidences is exemplified in a concrete and proper manner, illustrating the right understanding of the demands for relevance and probability of this special reason needed for the protection of the investigation, e.g. that, according to the victim, the suspect has already threatened her by saying that he will seriously harm her if she tells anything to the police or gives her statement, that all accomplices of the crime have not been identified yet and stolen goods have not been found, that the accused is very violent and the witness statements have not been obtained yet.

7.3. The Risk of Re-Offending

The risk of re-offending is very often added indirectly, as we understand it, by means of such phrases as *"he is a socially dangerous person"* or *"he misuses alcohol and does not have a regular occupation that can characterize him positively"*. Further on, we have noticed that the risk of re-offending is very often invoked together with the risk of tampering with evidences based on the thinking that tampering with evidences is a crime in itself (e.g. threatening witnesses) and for this reason the suspect is likely to re-offend if not kept in pre-trial detention. This way of thinking is not without substance when the prime crime is severe violence and threats directed especially against family members (domestic violence), but this calls for reasoning in the motions, for instance:

> *"…on several occasions the suspect has beaten up his wife and children when being drunk, and, according to the witness NN, he regularly misuses alcohol and the danger of re-offending in these situations is obvious…"*

However, re-offending is in most cases invoked only as an additional unsupported argument, which does not give corresponding further value to the argumentation.

It should be mentioned that we also see arguments relevant for re-offending even though they rarely appear as something more than a mere support in a kind of mixed argumentation. For instance, it is invoked that the suspect has been previously convicted for committing the same deed, or that the suspect has committed the same type of crime shortly after being released from prison in his probation period. Due to the other concrete circumstances these arguments may not be sufficient in themselves, but they are for sure highly relevant in the deliberation of the legal term "re-offending".

We can illustrate a well-reasoned example of the risk of re-offending by the following quote from one of the motions:

> *"As it was established during the investigation, there are more than sufficient grounds to believe that being at liberty, the accused NN, may continue to commit violent actions against the members of his family in the form of causing moral suffering, as well as apply physical violence. By his actions, the accused may exert pressure on the aggrieved parties, continuing to live in the same household, thus*

hampering criminal investigation and hindering the establishment of objective truth in the criminal proceedings.

According to the materials of the criminal case, NN has not been working for many years, abuses alcohol and systematically subjects his family members to moral and physical violence.

On the date xx.xx.xxxx, based on the motion of the prosecutor, the XX court issued ruling no. XX whereby provided Mrs. NN and her family members with a protection order according to which the accused NN shall temporarily leave and not approach the common household, not threaten Mrs. NN and her family members and not approach them closer than 200 meters.

However, these protection measures did not lead to positive results and on the date xx.xx.xxxx NN again committed a violent act by applying physical violence towards his family members.

Thus, there are sufficient grounds to believe that being at liberty, the accused NN will continue to commit crimes against his family members".

Compared with our domestic use of the special condition of re-offending, in Norway we apply it similarly to the above example concerning domestic violence. Further, we use it especially when the person needs to be stopped from committing a series of crimes and is not willing to leave this track due to narcotic problems or simply due to being a notorious criminal. The wicked circle must be broken. The protection is ensured not for investigation, or criminal proceedings, but for the citizens' and society's values. We have seen some cases with charges containing a long list of counts for burglaries and thefts, even recently committed, where a Norwegian prosecutor would have applied the alternative "re-offending" to a greater extent than it is done in Moldova.

7.4. Social Mass Disorder/Public Unrest/Public Reactions

On several occasions, we have found references to ECtHR concerning public unrest as an additional legal support to the three other special reasons for applying pre-trial detention, for example, from some motions it can be quoted:

> *"Some certain crimes through their severity and due to public reactions towards them can provoke mass disorders that are capable to justify pre-trial detention at least for some time"*

In a similar manner, there was one motion giving reference to ECtHR regarding Art. 5 para 3 (without further specifications), stating:

> *"Certain crimes by their graveness and due to the public's reaction to them, may result in public unrest capable to justify pre-trial detention, at least for some time"*

There is no doubt that ECtHR has accepted this circumstance as a fourth justification within some strict limits. However, at the same time Art. 5 para 1 c) and para 3 strictly demand that the pre-trial detention must be lawful. This means "lawful" according to national legislation. Further, this is a demand of having the conditions for pre-trial detention anchored in national legislation. The basic decision of ECtHR in this sense is the Letellier judgment (Letellier v. France, app. no. 12369/86). The court assessed the national French Criminal Procedure Code § 144 para 2, according to which *"...detention on remand may be ordered or continued ... where this detention is necessary to preserve public order from the disturbance caused by the offence*"

The Moldovan legislation does not contain this alternative, in spite of the fact that it is sometimes invoked in practice. For this reason, it is incorrect to invoke "public unrest" as a special condition for justifying pre-trial detention in the national practice as long as it does not exist in the national legislation. For the same reason, it is problematic to apply it as a supporting argument. NORLAM has on several occasions launched the idea to have this alternative implemented in the Moldovan CPC, though under the same strict conditions as established by the ECtHR. An informative note on the respective solution in the Norwegian CPC § 172 was handed over to representatives of the Moldovan GPO in 2008.

7.5. Conclusions and Recommendations

NORLAM wants to point out some aspects of motions for pre-trial detention that should be improved in order to be in line with the best practice.

It is our impression that the previous practice of presenting factual arguments in a standardized, abstract and general manner has been addressed and somewhat diminished, but

it is still challenging. This has been a problem not only for Moldova, but for many countries. Especially, when an assumingly relevant argument stands merely alone without further considerations it creates a presumption of lack of thorough assessments for being applied in a lawful manner and it does not fulfill the strict demands for concrete deliberations of the factual situation as a legal safeguard for the suspect according to ECtHR (for example, *"he is a socially dangerous person", "he may abscond").*

On many occasions, we have noticed the above-mentioned phrases without any further explanation. This practice should be abandoned due to shortcomings in the assessment which represents a general, abstract and speculative conclusion applicable to anyone accused of a crime (please, see, for instance, *Smirnova v. Russia*, nos. 46133/99 and 48183/99, § 63).

We can also give some appropriate examples found in our study, which illustrate the deliberation of the specifics of the case (even though a clearer division of the legal alternatives would improve the structure of the motion):

> *"...proven by the factual situation of the accused, and, namely, by his leaving the territory of the Republic of Moldova and the fact that he committed again a new serious crime, being on probation. Currently, the criminal investigation body does not know all the circumstances that contributed to the commitment of the offense, and, namely, the persons involved, the facts and conditions which are known only to the accused, who, if is at liberty, may conceal traces of the crime or inform accomplices about the danger of criminal liability"*

We can also add an example that gives a concrete explanation of what is meant by the phrase "*a (socially) dangerous person*":

> *"Also, according to the data of the investigation, it was established that the lifestyle of the accused allows us to consider him a dangerous person, because within a short period of time, while on probation, he committed a robbery twice, which brings us to the idea that being at liberty he could re-offend".*

Thus, we would recommend introducing a better systematic order in the deliberation of the invoked alternatives, one by one. Moreover, no alternative should be invoked without a sufficient explanation.

8. Principle of Proportionality

When it comes to the principle of proportionality, Art. 176 para 3 of the Moldovan CPC contains a list of checkpoints that are reflected in the standardized templates of motions, as well. We have experienced that this checklist is invoked, e.g. the severity of the crime and necessity of applying pre-trial detention are balanced up against health conditions, family situation, regular residence, working situation etc. When it comes to the principle of proportionality, the average score in our survey is rather low – 2.71.

It is clear that the necessity of applying pre-trial detention requests a broad assessment of many circumstances connected to the suspect. However, we often experience that when reasoning the principle of proportionality, prosecutors tend to use arguments that do not refer to the balance between the strain on the suspect on the one hand, and the necessity of applying pre-trial detention on the other, for example, arguments regarding the image of the law enforcement body and some unsubstantiated probabilities of what the suspect "might do" if at liberty. The example below illustrates such an inadvisable practice:

> *"When submitting the motion for application of pre-trial detention in regards of NN, the prosecutor took into account the nature of the imputed offence and the degree of its harmfulness, as well as the personality of the accused. Thus, the conclusion is that the accused might abscond from the investigation body and court, which would hamper the good course of the investigation and examination of the case in court. It is also possible that the accused NN may impede the establishing of truth by influencing the witnesses.*
>
> *At the same time, the crime committed by NN is an exceptionally grave crime, and her release from custody may lead to resentment of the population and damage the image of the law enforcement authorities".*

We will especially mention two arguments that are sometimes invoked in practice and that we find irrelevant for the argumentation of the proportionality principle.

Firstly, we refer to the argument that it is best for the assumed perpetrator to stay in prison, due to the fact that reaction of the victim and his/her relatives is unpredictable and it might turn into a vendetta. Therefore, the suspect should be protected by means of pre-trial detention even against the suspect's will. The following example can be quoted:

"there are grounds to believe and consider that the accused, being at liberty could be aggressed by the victim's relatives"

The second argument we will point out concerns the protection of the proceedings more than the proportionality assessment. The wording of this argument is also presented from the perspective of ensuring the suspect's showing up in the main hearing. The following example can be quoted:

"the lifestyle of the accused can create difficulties in presenting himself before the criminal investigation bodies and ensuring his procedural obligations"

Further on, we would like to point out some standard phrases often used as arguments without further explanation or with insufficient explanation. For instance, there are many references made to the "personality" of the suspect without explaining what exactly the prosecution means by this word. As mentioned, standard phrases should be avoided because they can be applied in respect of all suspects. Moreover, standard phrases illustrate the presumption of lack of thorough assessments, and in lack of a concrete anchoring in facts of the case these statements represent abstractions against which the suspect cannot defend himself. The following examples can be quoted:

"…he is a socially dangerous person …"

"…is negatively characterized at his place of residence…"

"…the accused does not have a permanent occupation that would positively characterize him…"

This approach gives the impression of dividing citizens into good and bad characters and implying that "the suspect gets what he deserves", which is not a relevant argument for pre-trial detention.

According to the practice of ECtHR, hypothetical arguments represent one of the mostly wide-spread wrongdoings, and, unfortunately, we have displayed many such arguments in our findings, as well. An example:

> *"the investigation body's suspicions about the accused's co-participation in other criminal acts"*

This argument must be substantiated under *reasonable suspicion* according to the charges and, eventually, when it comes to the activity level of the suspect under the special reason of *re-offending*. It can also be invoked under charges of organized crime, and the necessity for protection of the investigation concerning the extent of the criminal activity, but then it has to be supported with factual particularities of the case illustrating why the investigative body has this suspicion. It is not acceptable to have the above-quoted unsubstantiated statement only as a supporting sentence under the *proportionality*.

8.1. The Principle of Proportionality and Less Coercive Measures

It is a mandatory demand for applying pre-trial detention that less coercive measures have been assessed and not found applicable. In other words, pre-trial detention should still be viewed as necessary after other and less intrusive solutions have been considered.

In the motions it must be explained why less coercive measures are not sufficient to replace pre-trial detention. This is an important and compulsory part of the proportionality principle, cf. the Moldovan CPC Art. 175 para 3 nos. 1) to 11). We have observed that this issue is often dealt with in a too complicated manner. The decisive point is simple: whether or not a less coercive measure can replace pre-trial detention, and, if not, it must be at least explained in a sentence or two. If the accused invokes arguments against pre-trial detention including less coercive measures, this must be dealt with, for instance, guarantees offered by third parties. This can be illustrated by the case *Becciev v. Moldova*, application no. 9190/03, paragraph 61 and 62:

"61. ...[the applicant] referred to the fact that the proceedings had been pending since 2001 and that he had not obstructed in any way the investigation. He had travelled abroad on many occasions since the opening of the proceedings against him and had always come back and his conduct regarding the investigation had always been considered to be irreproachable. He had a family and many reputable persons ... were prepared to offer guarantees to secure his release in accordance with the provisions of the Code of Criminal Procedure. The applicant was also willing to give up his passport as an assurance that he would not leave the country

62. The domestic courts gave no consideration to any of these arguments, apparently treating them as irrelevant to the question of the lawfulness of the applicant's remand. Nor did the courts make any record of the arguments presented by the applicant and limited themselves to repeating in their decisions, in an abstract and stereotyped way, the formal grounds for detention provided by law without any attempt to show how they applied to the applicant's case. [...]Finally, they gave no consideration to the guarantees offered by third parties in the applicant's favour"..

8.2. The Principle of Proportionality and the Pre-Trial Detention's Impact on Third Persons

Sometimes a third party may suffer or face serious problems as a result of pre-trial detention. This is an argument that must be considered under the proportionality principle and it also follows from the Moldovan CPC Art. 176 para 3 no. 5 (*family situation and persons supported*) and no. 8 (*other essential circumstances*). In certain situations it can be necessary to take initiatives in order to offset these disadvantages. Under the Moldovan CPC Art. 189 no. 1 it is stated that should a detainee or arrested have under his/her protection juveniles, persons declared disabled, persons under tutelage or persons who due to their age, health or any other reasons need help, the competent authorities shall be notified thereof so that protective measures are offered to these persons. The body that detained or preventively arrested a person shall be obliged to notify the authorities about the need for protective measures.

The success of establishing intermediate solutions for third parties may, in some cases, be decisive for the conclusion regarding the proportionality principle and, by this, the lawfulness of the detention. However, it may be that the suspect has already shown through his behavior that he has neglected his obligations according to third persons. We can

illustrate this by quoting what is, in our opinion, an adequate argument found in one of the assessed motions:

> *"At the same time, we consider that the information that NN is married and has to provide for one minor child does not impede application of this preventive measure because in these exact circumstances NN abandoned his home, the imputed offence being illegal crossing of the state border of the Republic of Moldova, and according to the data provided by the operative officer […] NN has been absent from the village for three months. It should also be mentioned that there is no information on any medical contraindications against pre-trial detention, i.e. at this stage the investigative body has not established any physical or psychical deficiencies that would prohibit application of the requested preventive measure".*

8.3 Juveniles and the Principle of Proportionality

In most legal systems there is an additional threshold to pass for applying pre-trial detention to juveniles[8]. This can be viewed upon as an additional legal demand under the principle of proportionality. The idea is, of course, that when a mature adult person could be kept in pre-trial detention, it can be too much of a strain for juvenile due to juveniles' vulnerable position and the high risk of a devastating impact of such detention for the rest of his or her life.

According to the Moldovan CPC Art 477, a juvenile can be subject to pre-trial detention only in exceptional situations when serious crimes involving violence, especially serious crimes, or exceptionally serious crimes were committed.

It must be understood that it is not enough that the crime in question has the sufficient degree of graveness. Due to the understanding of the wording, we talk about the exceptional

[8] The Norwegian CPC § 174: "*Persons under 18 years of age should not be arrested unless it is especially necessary*" and the Working Code Instructions for the Prosecution § 9-2 with the headline "*Arrest and pre-trial detention of young persons*" states that: "*Persons under 18 years of age should not be arrested or subject of motions for pre-trial detention unless it is especially necessary. For persons under 16 years other coercive measures should be tried out firstly, e.g. temporary placement in a suitable institution under the supervision of the children welfare system when it is possible. If it is actualized to file a motion for pre-trial detention of a person under 18 years, the children welfare institution in the municipality must be notified if possible*". The legal term "*especially necessary*" will be interpreted very strictly, in light of the preparatory works to the law where both the Committee for the amendments, the Ministry of Justice and the Ministry of Social Welfare all agreed upon the fact that pre-trial detention "*must, as far as possible, be avoided*", which harmonizes with the UN Convention and the practice of ECtHR.

situations that represent a relatively small percentage of cases, marking them as cases clearly out of the mainstream. Further on, the interpretation must be in conformity with the ECtHR. Let us refer to the case Nart v. Turkey (2008) no. 20817/04, and quote from paragraph 31:

> *"…. that pre-trial detention of minors should be used as a measure of last resort; it should be as short as possible and, where detention is strictly necessary, minors should be kept apart from adults"*

And, in the same line, the United Nations Convention on the Rights of the Child, Article 37 states that *"The arrest, detention or imprisonment of a child shall be … used only as a measure of last resort and for the shortest appropriate period of time"*, and that when deprived of liberty, every child *"…shall be separated from adults … shall have the right to maintain contact with his or her family"*.

Our concern is that a practice seems to be established according to which the crime has the sufficient degree of graveness, this automatically qualifies for pre-trial detention like a mandatory solution without further deliberations of why the situation is exceptional. If this observation is true, this is not a correct application of the law. Further on, we have not seen the legal standard *"exceptional"* being grounded either in the motions or in the court's rulings, which means that if a case like this is brought to ECtHR, there will be a presumption that no requested assessment has been done, which may presumably result in a failure.

8.4. The Requested Term's Impact on the Proportionality

With a few exceptions, we have not seen the prosecution use the possibility to request shorter terms of pre-trial detention in order to avoid situations challenging the proportionality principle. In other words, the standard term of 30 days seems to be the solution regardless of the situation, and the same goes for prolongations. In comparison, prosecutors in Norway are more flexible and in many situations ask for shorter intervals. For instance, when the detainee has difficult supporting obligations for his/her small children, in some cases one week will not violate the proportionality principle, while 30 days would.

8.5. Proportionality Due to the Detainee's Health Condition and Cell Conditions

We have noticed that health conditions of the detained are concretely assessed in most of the motions that we have studied. This uniform practice deserves a compliment.

On the other hand, we have not noticed the cell conditions being mentioned as a challenging factor for the detainees' health. As we understand it, the commonly accepted opinion seems to be that the prosecutor cannot be responsible for the standards of the cell conditions. This may be correct. However, what is the prosecutor's responsibility is the situation of the detainee in the case for which the prosecutor is responsible, ensuring that the detainee's situation does not make detention a disproportional measure, because, if so, the detention itself becomes unlawful. We have not seen examples of motions addressing health problems which would be due to poor material conditions in the cell, yet the prosecutor's responsibility is very strict in this domain. The debate on this issue has been somewhat confusing, it seems that no distinction is made between the prison conditions, in general, and the conditions for the concrete detainee with his/her distinctive features in question. There should also be awareness of the fact that if a detainee does not have the medical support he or she needs at all time or if the conditions in the cell put his/her health or life at risk, this will not only be a violation of the proportionality principle but also easily become a violation of Art. 3 of the ECHR [9]. If the situation calls for it, tailor-made solutions must be established, which means everything: from having extra access to a doctor to being detained in a hospital under constant medical surveillance. This is the responsibility of the prosecutor dealing with the concrete case. If the prosecutor cannot make the necessary adjustments and the detainee suffers, release from detention is the only solution.

8.6. Conclusions and Recommendations

The severity of the crime and necessity of applying pre-trial detention must be balanced up against health conditions, family situation, regular place of residence, working situation and other unfortunate effects on the suspect being subject to pre-trial detention. Arguments regarding the need to protect the suspect from revenge and to facilitate his/her presence in court hearing are not adequate arguments.

It must be explained why less coercive measures are not sufficient to replace pre-trial detention. This is an important part of the proportionality principle, cf. the Moldovan CPC Art. 175 para 3 nos. 1) to 11). We have noticed that this question is addressed in an overly complicated manner in the motions. The decisive issue is whether or not a less coercive measure can replace pre-trial detention, and, if not, this must be explained in a sentence or two.

Such arguments as *"he is a socially dangerous person", "can be negatively characterized",* or *"cannot be positively characterized"* should not be used without being substantiated by concrete facts.

[9] Cf. the case of Becciev v. Moldova (App. No. 9190/03), paragraphs 40 to 47.

If a third person suffers from the suspect's pre-trial detention, this must be a part of the total assessment and, in some cases, demand the initiation of appropriate measures to compensate for the third person's problems.

When it comes to juveniles, pre-trial detention should be only used as a measure of last resort, only if it is strictly necessary, for as short a period of time as possible, and contact between the suspect and his or her family should be facilitated through correspondence and visits. According to Art. 477 of the Moldovan CPC, it must be explained in the motion why the case in question is *an exceptional situation*.

The standard term of 30 days seems to be requested too extensively. When the circumstances of the case indicate that detention represents an especially heavy load for the accused or for his "third persons", but is still necessary at present time, shorter intervals of detention should be requested in order to make sure that the demand of proportionality is fulfilled continuously.

In cases where the detained person has health problems it is the prosecutor's responsibility in his/her case to initiate and ensure adequate medical support and appropriate detention conditions. Measures taken must be mentioned in the motion under the proportionality principle, and this is especially important in motions for prolongation of the term of detention.

9. Prolongation of Pre-trial Detention

The major problem with prolongations is a very clear tendency to re-use the same arguments as the ones indicated in the initial motion for pre-trial detention, without assessing the status of the case at the time of the new request to the instructional judge for prolongation. The ECtHR's requirement to assess the fulfillment of national legal demands at short intervals should certainly be respected at the time of requesting prolongation of detention[10].

Very often when the special reason of interference with evidences is invoked in the initial motion for pre-trial detention, the need for protection of the investigation is argued because not all witnesses have given their statements, the scene of crime has not yet been searched and eventual accomplices have not yet been identified. It is important to emphasize that the suspect's being in pre-trial detention obliges the investigation body to give priority to the

[10] Cf., for instance, case of Shishkov v. Bulgaria, app. no. 38822/97, 9 January 2003, paragraph 66 "[…] Justification for any period of detention, no matter how short, must be convincingly demonstrated by authorities. That has not happened in this case". Further, case of Labita v. Italy, app. no. 26772/95, 6 April 2000, paragraphs 159-163

case in question in order to secure the evidences and prevent the risk of interference. Presumably, 30 days later there would be some progress and the remaining reason to protect the investigation must be pointed out in the motion if the prosecution requests prolongation on this foundation. The present status of the investigation is rarely explained in the motion. We did notice examples of additional arguments like *"the forensic report is not yet finished"* that, in our opinion, have no real value because it is unlikely that the accused should be able to influence a forensic report that will be based on already collected traces.

Prolongations seem not to be a topic for information to the accused. We can share from our Norwegian practice the demand of informing about how much more time is needed until the detainee can be eventually released before the main hearing. It is a fact that not knowing the plans for finalizing the investigation and the intended date of the main hearing represents a substantial increase of the strain for the detainee. Total uncertainty in this respect should be avoided.

Further, it is highly relevant what has been done in the case during the previous detention period, both concerning the investigation and the proceedings to finalize the case in court. This is not a demand of success for all attempts to achieve progress in the case, but at least a demand for ongoing activities[11]. If there has been no activity and no progress this speaks strongly in the direction of discontinuation of the detention, not only because of the demand of *"reasonable time"* but also because continued pre-trial detention cannot be justified with a convenient storage of the suspect[12].

Health conditions and the detention premises should be especially invoked in case of prolongation of detention because after some time in detention the risk of health complications may increase, which may not be actualized by a first term or a short term of pre-trial detention (see above under principle of proportionality).

9.1. Prolongation After the Case Has Been Submitted to Court

One reason for the unfortunate practice of re-using the same arguments for prolongation may be found in Art. 186 paragraph 9 of the Moldovan Criminal Procedure Code. According to

[11] The Norwegian Criminal Procedure Act, section 185, second paragraph: *"If an application for extended custody is made, the prosecution authority shall state when the investigation in the case is expected to be completed. The date shall be entered in the courts record. The prosecution authority shall also give a brief account of the investigation that has been carried out since the previous court sitting and of what investigation remains to be done"*.

[12] The Norwegian Criminal Procedure Act, section 185, last paragraph: *"If the court at any time finds that the investigation is not proceeding as quickly as it should, and that a continued remand in custody is not reasonable, the court shall release the person charged"*.

the said provision, it seems that once the case has been submitted to court, in exceptional cases the pre-trial detention can be prolonged virtually endlessly, only limited by the duration of the trial, each prolongation not exceeding three months. In other words, this provision can be interpreted in the direction that, provided these circumstances, the other legal demands do not have to be fulfilled.

As we understand it, this solution challenges the demand for strict legality for establishing pre-trial detention as it is understood in light of the presumption of innocence in Art. 6 para 2 of ECHR and the strong demand of reasonableness in Art. 5 para 3 of ECHR and the fact that no one shall be deprived of his/her liberty save in accordance with the concrete reasons in Art. 5 para 1 c) of ECHR[13]. In our opinion, the above interpretation of the Moldovan CPC will not ensure the demanded individual protection. We would advise to consider amending this provision[14].

9.2. Conclusions and Recommendations

Prolongation of pre-trial detention should not be requested by simply copying the same arguments as were invoked in the initial motion. If the arguments are still valid, this must be explained.

A prolongation calls for the same thorough assessment of the legal demands and all of them have to be found fulfilled again.

The concept of prolongation of pre-trial detention must be understood as more limited, as long as it takes place, due to the proportionality principle. Consequently, the need for continuation of detention must be well illustrated in balancing the personal strain of the

[13] Letellier v. France, app.no. 12369/86, 26 June 1991 paras. 159-163
Stogmuller v : Austria, app.no. 1602/62, 10 November 1969, para. 4
De Jong, Baljet and Van Den Brink v. Netherlands, app.no. 8805/79; 8806/79; 9242/81, 22 May 1984, para. 44

[14] In Norway we are not familiar with this solution that a person can be kept in pre-trial detention "as sitting in custody on the submitted case files". However, we have a solution, often spoken about as "sitting on a judgment (conviction)" even though this judgment is not final yet. Section 187 first paragraph of the Norwegian CPC states: *"If the person charged is in custody on remand when an immediate sentence of imprisonment is passed on him or an order is made dismissing an appeal by him against such sentence, he may continue to be held in custody for up to four weeks after the passing of sentence or making of the order unless the court otherwise decides. […]"* This means that the prosecution does not have to submit a motion at this time. However, the convicted can do so for requesting release, and the court will then schedule a court meeting and will assess all legal demands that have to be fulfilled at this time, as well. The demand "reasonable suspicion" could simply be stated as being fulfilled due to the conviction with the far stronger demand of being "found guilty beyond reasonable doubt" but the other demands must be substantiated just as in the pre-trial phase.

detained up against the necessity of applying pre-trial detention due to strong existing reasons, the severity of the case etc.

The defense attorney/detainee and the instructional judge/court handling the motion must always be informed about the planned end of the detention period due to finalized investigation, the scheduling and progress of the main hearing.

The motion should contain a brief summary of what has been achieved and done in the investigation during the previous detention period.

We advise to consider amending Art. 186 paragraph 9 of the Moldovan Criminal Procedure Code.

10. Document References - Recommendations

Already in the initial stage of our survey we realized that, as a rule, the motions lacked document references linked to the case files. This gives us two concerns both connected to the demand for an adversarial process.

Firstly, it is difficult for the defense attorney to figure out what exactly the prosecution refers to when substantiating reasonable suspicion or other circumstances by simply referring to witnesses in general. Even though it is often a very limited number of documents collected during the initial stage of the investigation, it creates uncertainty for the defense attorney if he/she has the relevant material needed in order to counter argue the motion. However, we noticed that a considerable number of motions contain names and dates of the related interrogations.

Secondly, there must be no room for suspicion that any selection process might have taken place so that the case file includes only those documents that contain evidences inducing the idea of the suspect's guilt. For this reason, even preliminary witness statements should be mandatorily included in the case file and stay there under the initially assigned numbers. If the same witness gives statements on several occasions during the investigation, all these statements must be included in the file, as it is important for both the prosecutor and the defense attorney to assess the degree of consistency between such statements. For the understanding of how a case develops through the ongoing investigation, existing documents should maintain their initially assigned numbers and new documents should be numbered further on according to the same system, and if some circumstances in a document are invoked as arguments for pre-trail detention the argument should be substantiated by the respective document reference(s).

11. The Prosecutor's Role in Relation to Other Professions – Instructional Judges and Defense Attorneys - Recommendations

In the case of a person whose detention falls within the ambit of Article 5 para 1 (c) of the Convention, a hearing by a judge is required. Although it is outside the scope of this evaluation report to assess the performance of judges, we have frequently looked upon some rulings to see the result of the prosecutor's motion. We are aware of a certain perception that judges have a tendency to be too benevolent to the prosecution's motions. We cannot conclude on this issue, but merely state that we have seen examples of rulings by which motions were rejected, as well as rulings applying a shorter term of detention than requested by prosecution.[15]

We have the impression that prosecutors appeal almost all rulings if the motions are not granted by the instructional judge. This happens even in cases where it is obvious that the judge has passed a correct decision; the following can be quoted from one reasoning of an instructional judge:

> *"Taking into consideration the materials presented, listening to the participants in the hearing, the court found the prosecutor's motion unfounded, and it is to be rejected. Thus, DD. is accused of committing a less serious crime, which does not have a high degree of harm caused. The charge is reasonable, but it is possible to continue criminal investigation without deprivation of liberty.*
>
> *Therefore, the court finds that the prosecutor's arguments are declarative and not based on evidence. Thus, the prosecutor did not present any evidence in favour of the idea that the accused would abscond and no evidence that he would hamper the finding of the truth. He fully admits his guilt, repents sincerely, has a permanent residence, and has three minor children to provide for. It is not clear on which grounds the prosecutor considers that the accused can hide from the criminal investigation body and can hamper the finding of the truth.*
>
> *According to Article 5 para (1) c) of ECHR, everyone has the right to liberty and security. "No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ... the lawful arrest or detention of a*

[15] In 2009 NORLAM arranged two series of seminars on pre-trial detention for all the instructional judges in Moldova.

person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed and offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so".

Taking into consideration the character of the crime, the fact that the accused has a permanent residence, does not have criminal record, fully admits his guilt and repents sincerely, the court finds that it is not absolutely necessary to apply this measure..."

In our opinion, this case obviously should not have been appealed by the prosecutor. It has clear similarities with the case of Shishkov v. Bulgaria (application number 38822/97), cf. paragraphs 45 and 62, and, in our opinion, the judge has correctly invoked the demands established by the ECtHR.

The rights of the accused must be secured in the court hearings giving the possibility for the defense attorney to prepare for the defense in an appropriate manner. In the case Shishkov v. Bulgaria concerning the right of the defense to access documents in the detention proceedings, it can be quoted from paragraph 77:

"[…] The proceedings must be adversarial and must always ensure "equality of arms" between the parties, the prosecutor and the detained person. […] In view of the dramatic impact of deprivation of liberty on the fundamental rights of the person concerned, proceedings conducted under Article 5 § 4 of the Convention should in principle meet, to the largest extent possible under the circumstances of an on-going investigation, the basic requirements of a fair trial".

Further, in the same paragraph, it can be quoted:

"Equality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness, in the sense of the Convention, of his client's detention. The concept of lawfulness of detention is not limited to compliance with the procedural requirements set out in domestic law but also concerns the reasonableness of the suspicion grounding the arrest, the legitimacy of the purpose pursued by the arrest and the justification of the ensuing detention.

The Court acknowledges the need for criminal investigations to be conducted efficiently, which may imply that part of the information collected during them is to be kept secret in order to prevent suspects from tampering with evidence and undermining the course of justice. However, this legitimate goal cannot be pursued at the expense of substantial restrictions on the rights of the defence. Therefore,

information which is essential for the assessment of the lawfulness of a detention should be made available in an appropriate manner to the suspect's lawyer (see, among other authorities, Lamy v. Belgium, judgment of 30 March 1989, Series A no. 151, pp. 16-17, § 29, Nikolova, cited above, § 58, and Garcia Alva v. Germany, no. 23541/94, 13 February 2001, unreported, §§ 39-43)".

In this case the defense attorney was denied access to the full case file, resulting in a situation that was incompatible with the equality of arms requirement of Article 5 § 4 of the Convention, cf. paragraph 80 and 81 of the Shishkov v. Bulgaria case.

By reading motions we have observed a clear indication that the established practice is not in accordance with the above-mentioned demands. It can be quoted from one of the motions:

"…according to the operative investigation data that can be revealed confidentially to the instruction judge only, and from the information collected during criminal investigation, it was established that the accused is not employed and may dodge the criminal investigation body…"

12. Final Conclusion and Recommendations

12.1. Legal Amendments

12.1.1. Article 186 of the CPC of the RM

Art. 186 paragraph 9 of the Moldovan CPC can be understood in the way that the term of pre-trial detention can be prolonged virtually endlessly, as long as the case file has been submitted to the court, only limited as long as the trial lasts and each prolongation not exceeding three months. In other words, this provision can be interpreted in the direction that provided these circumstances, the other legal demands do not have to be fulfilled.

As we understand it, this solution challenges the demand for strict legality when applying pre-trial detention as it is understood in light of the principle of the presumption of innocence contained in Art. 6 para 2 of the Convention and the strong demand of reasonableness in Art. 5 para 3 of the Convention, as well as the fact that no one shall be deprived of his liberty save in accordance with the concrete reasons stated in Art. 5 para 1 c). An interpretation as mentioned above will not secure the demanded individual protection. We recommend to consider a revision of these norms, cf. page 28 above on Norwegian solutions which are assumingly in accordance with the ECtHR demands.

12.1.2. Article 195 of the CPC of the RM

According to Art. 195 of the Moldovan CPC, the prosecution does not have the power to release a person from custody at its own discretion. We suggest to introduce this power in the law. If the legal demands for pre-trial detention are no longer fulfilled according to the prosecutor's new knowledge, he/she should not only be entitled but also be obliged to initiate immediate release of the accused. From now on the authorities have the knowledge that detention is not justified by law, but *"... a detainee should not run the risk of remaining in detention long after the moment when his deprivation of liberty has become unjustified..."* cf. Shishkov v. Bulgaria, paragraph 88. Waiting for the judge's release is time consuming and it makes the unjustified situation last longer. In our opinion, the argument that *"if the detention is approved by a judge then it should also be ceased by a judge"* is more of a "system thinking" than a thinking of what is best for the individual, because there is not the same need for a legality control for simply giving back a detained person his natural born right of freedom.

In such situations the Norwegian legislation provides for the following provision:

> *"A person who is remanded in custody shall be released as soon as the court or the prosecuting authority finds that the grounds for the remand in custody no longer apply, or when the time-limit for the custody has expired"*.[16]

12.1.3. Article 307 of the CPC of the RM

The prosecution must facilitate the defence attorney's possibility for defending the suspect according to general principles such as *adversarial process* and *equality of* arms. This implies that the suspect and his defence attorney must, as a main rule, have right to study the case files in due time before application of pre-trial detention in order to be able to effectively challenge the lawfulness of the detention. However, last sentence of the first paragraph of Art. 307 of the Moldovan CPC merely states that *"The motion shall be accompanied by materials that confirm its grounds"*. This seems to have resulted in an unfortunate practice of limiting the access, if any, of defence attorney to case files and, in any case, the practice of only attaching documents that support the motion and not the documents that contain arguments against it.

Such a selection of documents that deprives the accused of the possibility to challenge the reliability of the facts and arguments invoked by the prosecution means a violation of the

[16] Norwegian Criminal Procedure Code, paragraph 187 a

Convention. Thus, it is not sufficient to provide the accused only with details about the facts grounding the suspicion against him. [17]

It is NORLAM's recommendation that motions must be accompanied by all documents existing in the case file at the time of the submission to the court, and the documents must contain all factual materials and evidences that are essential to assess the legality of pre-trial detention or house arrest, including evidences and materials with exculpatory capacity. Such an access to the documents would provide the defence attorney with the necessary preconditions in order to produce counter-arguments, but it is the prosecutor's task to deal with exculpatory evidences as well as other circumstances that run contrary to the application of pre-trial detention. If the prosecutor in spite of this information concludes that pre-trial detention is still necessary, he/she must explain in the motion why such information is out-weighted and state decisive facts in favor of pre-trial detention. It is crucial to illustrate that these counterarguments, in fact, have been assessed and not apparently treated as irrelevant.

The grounded motion with the invoked evidences, which the prosecution relies upon, should be substantiated with references to the attached documents.

There is an understanding that in certain special cases there may be a need for an exception from the main rule of granting access to all documents in the case file. We suggest a solution according to which, upon a grounded request from prosecution, the court by its grounded separate decision can keep a part of the collected information confidential for a certain time, if its disclosure is very likely to endanger the security of other people or impede the on-going investigation or if such information contains confidential data pertinent to national security. However, as it is stated in Garcia Alva v. Germany, paragraph 42, even in justified exceptional situations

> *"…this legitimate goal cannot be pursued at the expense of substantial restrictions on the rights of the defence. Therefore, information which is essential for the assessment of the lawfulness of a detention should be made available in an appropriate manner to the suspect's lawyer".*

The conclusion is that the provisions of Art. 307, first paragraph, of the Moldovan CPC, and what seems to be the established practice in this regard, do not give the accused full rights for defence and do not ensure the defence attorney with the possibility to fully assess the lawfulness of the detention on his client's behalf. Therefore, we recommend revising the respective provisions of Art. 307 for purposes of fulfilling this requirement.[18]

[17] Cf. Garcia Alva v. Germany, paragraphs 41 - 43

[18] On 28.07.2010 NORLAM addressed a letter to the Moldovan Ministry of Justice regarding this issue

12.1.4. Article 176 of the CPC of the RM

In certain situations, if a person accused of an exceptionally outrageous deed, e.g. homicide by shooting children in a youth camp, stays at liberty during investigation, it may lead to public unrest. For exceptional cases like the one described above, we raise the question if the risk of public unrest should be introduced in the national legislation as a fourth special reason for pre-trial detention, subject to the very strict limitations established by the ECtHR. As we have mentioned earlier in the present report, public unrest is, to some extent, invoked in practice in spite of the fact that it is not reflected in the Moldovan national law.

12.2. Amendments of the Motions

The introduction of standardized motions for pre-trial detention has proven to be an important innovation. For each prosecutor it secures the checklist of all legal components that have to be fulfilled before requesting pre–trial detention and he/she knows that the legality should be substantiated thoroughly. Presumably, in a longer term this demand will contribute to avoiding unjustified motions.

In our survey we noticed that two prosecution offices did not use the standard templates, but instead had created their own template of the motion. We observed that this approach turned out to be unfortunate. Of course, good reasoning can be done without any pre-established template, but, in our opinion, this illustrates that the simple idea of having mandatory areas that have to be filled in with concrete facts for each legal demand, a strict structure, and a checklist and reminder of the total legality, should not be underestimated.

The use of written standardized templates of motions increases transparency in the prosecutorial work and, *inter alia*, helps to identify problem areas that can be studied by international organizations in advising projects. Moreover, a true insight in the prosecutorial work is also a precondition for the public trust.[19]

Therefore, we strongly advise to continue the established tradition of using the standard templates of pre-trial detention motions.

In our opinion, the idea regarding standardized templates could be developed even further. For example, special templates of motions regarding pre-trial detention of juveniles should be established. When electronic case handling program is introduced, the electronic template

[19] See the Report "Decisions on Arrest by Investigative Judges in the Republic of Moldova. An Assessment from the International Point of View", Soros Foundation – Moldova, Deutsche Stiftung für internationale rechtliche Zusammenarbeit e.V. (IRZ), December 2010.

of the motion can be designed so that additional mandatory demands for pre-trial detention pop up in the motion's structure when the birthdate of the juvenile is introduced. Meanwhile the best approach would be to introduce special templates for this vulnerable group.

In our opinion, standardized motions should also be introduced for situations when prolongation of pre-trial detention is requested, preferably through an electronic case handling program. As long as such software does not exist, initiatives should be launched to improve the motions for prolongation of pre-trial detention by introducing mandatory areas to fill in about, for instance, the progress of the case. The current idea that the prosecutor himself/herself should adjust the standard template in case of prolongation has proven to be ineffective, presumably due to lack of understanding of additional demands for prolongation, such as demand for progress of investigation, planned finalization of the case and proportionality demands.

Within the existing templates most of the structure and checkpoints work well. However, the headline of special reasons is formulated like *"Legal condition of the seriousness of reasons to assume that the suspect could evade the criminal investigation and could impede finding the truth: Art 176, para (1) and Art. 175 para (2) of the CPC".* This headline does not include the risk of *absconding* which is very often invoked. Moreover, it to a certain degree invites to mix the special reasons together instead of making a thorough assessment, one by one, according to the concrete circumstances of the case. This headline could have been shorter and better structured, for instance: 1) tampering with evidences, 2) reoffending and 3) absconding, and the prosecutor must follow the same structure when filling in the motion (although, even one invoked and well-substantiated reason is sufficient).

We also recommend to include in the beginning of the motion the date and the exact time and place of apprehension.

12.3. Prosecution Activities in the Pre-trial Detention Domain

For the prosecution service the standardized motions should continue to serve for internal supervision of the prosecution activities. The reasons for pre-trial detention invoked in the motions should be studied. The prosecution must have a critical approach when it comes to assessing legality in its own activities and some crucial questions that should always be raised are the following: whether pre-trial detention is used too extensively, whether it is used on the right types of crimes, or even whether or not its use should be increased in serious problematic areas. For a modern prosecution service these are always highly relevant questions in the fight against criminality in an ever changing society.

We raise the question if pre-trial detention is still used too extensively, for instance, when it comes to theft. The reasoning on page 10 above is a good example in this respect. The

international understanding of pre-trial detention as an exception from the main rule should always be kept in mind, for instance, as it is expressed in the International Covenant on Civil and Political Rights, Article 9 para 3, second sentence: *"It shall not be the general rule that persons awaiting trial shall be detained in custody*," but release may be subject to guarantees to appear in the further proceedings.

Based on our assessment, the average scores are as follows: 3.23 on *reasonable suspicion*, 2.96 on *special reasons*, 2.71 on *proportionality principle*, and 2.05 on *document references*. The *general average score* in our assessment is 2.74. It is our opinion that these results illustrate that there is still a need for training and further development of prosecutors' skills in the domain of pre-trial detention. We recommend arranging training courses as an annual event. Having in mind that there is always turnover in the prosecution service, the newcomers must especially be addressed to obtain the requested knowledge and skills as a crucial precondition for establishing the best practice.

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