

THE LAW
AND
THE PRACTICE
OF RESTRICTIVE MEASURES:
THE JUSTIFICATION
OF CUSTODY
IN BOSNIA AND HERZEGOVINA
RESTRICTIVE
MEASURES

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1. INTRODUCTION

a) Background

The rights to liberty and security of person are among the human rights explicitly protected in Bosnia and Herzegovina's Constitution. Bosnia and Herzegovina's criminal procedural law and other relevant legislation incorporate these rights. As a result, only the judiciary can authorise limitations on the liberty of a person, something that requires a grounded suspicion. Judges thus act as the ultimate guarantors of freedom from arbitrary interference. The Criminal Procedure Code of Bosnia and Herzegovina foresees a single procedure for measures that restrict any of these rights when someone is subject to criminal investigation.* It also requires that the judge not resort to more restrictive limitations than those necessitated by the exigencies of the situation.

There are, however, inconsistencies in the application domestically of these codes and laws. These inconsistencies have prompted concerns for the respect for the rights of the defendant. This report examines these inconsistencies. It also examines five interrelated aspects of domestic custody procedure. These are: the grounded justification of suspicion; the use of less restrictive measures; the understanding of the specific grounds for custody; the proper reasoning of decisions; and the role of the defence counsel. A review of these aspects points to practices in Bosnia and Herzegovina that do not fully observe the need to provide adequate justifications for limitations placed on the right to liberty or to freedom of movement.

b) The Purpose and Scope of the Report

The purpose of this report is to foster consideration of custody procedures that better protect and more closely adhere to commonly accepted international standards. It includes a brief review of relevant

* This Report was written before entering into force of the Law on Changes to the Law on the Criminal Procedure of BiH ("Official Gazette of BiH", No. 58/08) and therefore it does not take into account provisions therein.

international law as well as examinations of the need to establish grounded suspicion; the use of less intrusive measures; the standards and practice regarding four custody grounds; the need for well-reasoned decisions; and the role of defence counsel. It concludes that once grounded suspicion has been established all relevant circumstances of the case should be considered before the judiciary takes up the question whether the circumstances speak to a risk that a suspect might not appear for trial or might interfere with the course of justice. If this is the case, the judiciary should then deliberate upon what measures become necessary and sufficient for the successful continuation of the proceedings.

2. INTERNATIONAL LEGAL FRAMEWORK

a) Substantive Issues

International fair trial standards carry a strong presumption in favour of liberty. They require the application of measures less intrusive than custody whenever possible and, in any case, they require refraining from imposing custody as a punitive measure. The European Convention on Human Rights (ECHR), to which Bosnia and Herzegovina is a State party, sets the following standards:

ECHR Article 5.1 – Right to liberty and security of person

Everyone has the right to liberty (...). No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- c the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is necessary to prevent his committing an offence or fleeing after having done so;

ECHR Article 8 – Right to respect for private and family life

Everyone has the right to respect for his private and family life, his home and correspondence.

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

ECHR Protocol IV, Article 2 – Freedom of movement

Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

Everyone shall be free to leave any country, including his own.

No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The ECHR recognizes that rights come with obligations. Limitations on liberty may therefore be permissible in cases when individual conduct fails to respect such obligations. These limitations should not, however, affect the rights of others or interfere with the interests of justice. Furthermore, states should set out in their legislation the conditions determining when limitations may be invoked.

Limitations on liberty in the ECHR differ from those on privacy and freedom of movement. The latter two are almost identical in language and substance. Article 5, by contrast, establishes stricter criteria and requires well-grounded suspicion of the commission of an offence. These provisions also establish that even when conditions permitting limitations on movement or privacy exist they do not automatically justify a limitation on liberty. Limitations under Article 8 and Article 2 of Protocol IV are permissible when the continued enjoyment of liberty would entail a risk of jeopardising appearance for trial or would interfere in some way with the investigation or other stages of a trial. ECHR jurisprudence and other international standards suggest that a common understanding of permissible grounds for limitations on liberty include the following:

- a) risk of absconding;
- b) risk of the commission of a serious offence;
- c) risk of interference with the course of justice;
- d) risk of posing a serious threat to public order.

Even when grounds for the deprivation of liberty do exist, however, nothing precludes the resort to less intrusive measures that affect instead freedom of movement or of privacy.

b) Recommended Procedures

Upon ratification of the ECHR, a State party needs to enact legislation that reflects the limitations permissible under the Convention in its domestic legal order. Its criminal procedures must, in other words, become compliant with its ECHR obligations. The ECHR also places a general requirement on States to adopt all measures necessary for protecting rights. The development of custody procedure is one such measure.

The Council of Europe's Committee of Ministers adopted comprehensive recommendations on the implementation of these three ECHR standards in 2006.¹ Though not binding, these recommendations are based on a codification of ECHR jurisprudence, on country reports by the European Committee for the Prevention of Torture, and on opinions by the United Nations Human Rights Treaty Bodies.² They therefore form an interpretative guide to pertinent international standards.

In this recommendation, the Council of Europe's Committee of Ministers has suggested that before considering custody the judiciary should explore the availability and adequacy of less restrictive measures. Relevant circumstances according to the Committee are:

- a) the nature and seriousness of the alleged offence;
- b) the penalty likely to be incurred in the event of conviction;
- c) the age, health, character, antecedents, and personal and social circumstances of the person concerned, and in particular his or her community ties; and
- d) the conduct of the person concerned, especially in fulfilment of any obligations that may have been imposed on him or her in the course of previous criminal proceedings.

3. GROUNDED SUSPICION

a) International and Domestic Legal Standards

Article 5.1(c) of the European Convention on Human Rights requires the existence of reasonable suspicion prior to any arrest or detention. In a case against the United Kingdom in 1990, the European Court of Human Rights (ECtHR) explained the notion of reasonable suspicion as follows: "[t]he existence of facts or information that would satisfy an objective observer that the person concerned may have committed the offence."³ The facts or the information on which the judge relies should suffice to justify at least the initial arrest by the police, the continued investigations, and the deprivation of liberty by the prosecutor. An indictment is not a formal requirement.

Article 132.1 of the Criminal Procedure Code of Bosnia and Herzegovina also requires reasonable suspicion before any of the specific grounds for custody are considered. In domestic law, "grounded suspicion" is explained as "[...] a higher degree of suspicion based on collected evidence leading to the conclusion that a criminal offence may have been committed."⁴ In a critical decision on this point by the Supreme Court of the Federation of Bosnia and Herzegovina, the notion was further elaborated:

[...] grounded suspicion has to exist not only at the time of ordering custody but also for the complete duration of custody... the court is obliged to assess the existence of that condition for custody and not only based on evidence and information that existed at the time of ordering custody, but also those obtained during the investigation.⁵

Furthermore, the prevalence of grounded suspicion is one of the aspects of the lawfulness of detention that must be taken into account when assessing the justification of decisions in the course of appellate review. ECtHR case law developing the right to challenge the lawfulness of detention encompasses the right to challenge the existence of reasonable suspicion. Ever since the case of *Brogan v. UK* in 1988, the European Court

has consistently held that the provisions of Article 5.4 of the European Convention on Human Rights, which states that “Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful,” mean that

...in the instant case, the applicants should have had available to them a remedy allowing the competent court to examine not only compliance with the procedural requirements [...] but also the reasonableness of the suspicion grounding the arrest and the legitimacy of the purpose pursued by the arrest and the ensuing detention.⁶

b) Domestic Practice

A review of custody decisions in Bosnia and Herzegovina suggests that the assessment of grounded or reasonable suspicion is often cursory. Many decisions shed little, if any, light on how the judge has assessed the available evidence or on any other circumstances that would justify the decision. Although some judges do include the evidence establishing grounded suspicion in their custody decisions regardless of the procedural stage of the case, many others render decisions that simply state that by having reviewed the documentation submitted with the custody proposal they have indisputably established grounded suspicion. Such decisions tend to make no reference to specific evidence or to how the evidence reviewed links the suspect to the criminal act. Such cursory and sometimes inadequate assessment of grounded suspicion occurs in all jurisdictions in Bosnia and Herzegovina.

In rulings on grounded suspicion in cases where the indictment has already been confirmed, appellate courts tend to cite their lack of competence to review this. The Supreme Court of the Republika Srpska, for instance, in its ruling on an appeal lodged by a defence counsel against a custody decision, confirmed the position of the District Court that it lacked competence to review the issue of grounded suspicion. The Court reasoned that neither the lower court nor the Supreme Court was

competent to review the existence of grounded suspicion once the preliminary hearing judge had confirmed the indictment. Likewise, in a decision in 2006 wherein the defence counsel appears to object to the existence of grounded suspicion the Federation Supreme Court found:

However, stating such allegations in the appeal, the defence attorneys ignored the fact that by confirmation of the indictment the existence of grounded suspicion that the accused had committed the criminal act he is charged with was confirmed. This Court has no authority to question such established existence of grounded suspicion while deciding on appeal against the refuted decision.⁷

Appellate panels in Cantonal and District Courts have also refused to assess whether grounded suspicion exists if an indictment has already been confirmed. Such an approach contradicts the right to challenge all aspects of the lawfulness of detention as provided for in Article 5.4 of the ECHR. In a European Court case relevant to this discussion, Bulgarian appellate panels refused to examine the element of grounded suspicion when raised on appeal during a trial, arguing that to do so would pre-judge the merits of the case and render the judges partial. The European Court disagreed, noting that the authorities' concern to provide effective protection for the principle of impartiality could not justify the limitation imposed on the applicant's right under Article 5.4 of the Convention. Although appellate panels in Bosnia and Herzegovina have not asserted the same reason for refusing to consider arguments against reasonable suspicion following the confirmation of an indictment, the European Court's message equally applies. Because reasonable suspicion is a fundamental element of judicial control of the lawfulness of detention, judicial systems must organise themselves in a manner that allows for examination of this element, even when raised during main trial proceedings.⁸

4. NON-CUSTODIAL MEASURES

a) International and National Legal Standards

ECtHR case law holds that State parties should first consider less restrictive measures when deciding whether a person should be detained.⁹ In a recent case, the European Court found a violation of Article 5.1 of the European Convention on Human Rights because the authorities had failed to consider applying any of the less severe measures available, even though their national law required that the least severe measure be applied. The detention was therefore deemed unlawful.¹⁰

The Council of Europe's Committee of Ministers' instrument of 2006 makes clear that states have an obligation to make a wide range of non-custodial measures available in law and practice.¹¹ It also recommends that before ordering custody based on one of the permissible grounds one ought first to establish that there is no possibility of using any of the less restrictive measures to counteract the risk of flight, the risk of re-offending, the risk of interfering with the course of justice, or the disruption of public order.¹² Finally, it says, any decision ordering non-custodial measures or detention must be reasoned.¹³

Article 123 of the Criminal Procedure Code of Bosnia and Herzegovina regulates the measures available when appearance for trial or successful conduct of proceedings is at stake. These are: summons, apprehension, prohibiting measures,¹⁴ bail, and custody. This article further requires that the authorities apply the least severe measure.¹⁵ Article 123.3 also requires that any measure imposed "shall be replaced with a less severe measure when the conditions for it are created." This imposes an obligation on judges to assess continuously whether it is possible to replace custody with a less restrictive measure.

Articles 126, 126a-g, 127, and 131 of this same criminal procedure code further define the specific conditions required for the imposition of non-custodial measures. They reinforce the idea that custody can only be ordered if the same purpose cannot be achieved by another measure.

Until a recent legislative intervention by the Office of the High Representative, the two provisions defining the available less-restrictive measures—Article 126 on *Prohibiting Measures* and Article 127 on *Conditions for Posting Bail*—limited the use of these measures to only those circumstances that indicated a risk of flight. The prevailing interpretation was that these provisions did not provide a sufficient and clear legal basis for employing non-custodial measures when other grounds were at hand, such as interference with the course of justice or the need to prevent crime. This interpretation was at variance with the European Court’s interpretation of the European Convention, since its jurisprudence promotes the availability of a broad range of non-custodial measures as alternatives to custody.

OHR’s amendments of 9 July 2007 to the Criminal Procedure Code of Bosnia and Herzegovina introduce one important improvement: they allow certain prohibiting measures to be imposed for each custody ground.¹⁶ Hence, when circumstances indicate that the defendant might flee, continue with criminal activities, or interfere with the course of justice, the judiciary is obliged to consider the appropriateness of available measures less restrictive than custody. This is to be carried out *ex officio* by the judge when deciding on custody or upon a proposal from any of the parties. These amendments also enhance enforcement of these measures by spelling out more clearly the responsibilities of law enforcement agencies. On the other hand, house arrest and travel ban remain applicable exclusively to cases concerning risk of flight, even though there is no policy or human rights reason for such limitation. The amendments do not address at all the resort to bail.

b) Domestic Practice

Resort to Non-custodial Measures

In the wake of these amendments to the State Criminal Procedure Code, prosecutors and judges working in the State Court have increased their use of non-custodial measures. Entity and Brčko District prosecutors and judges, however, still tend to conclude that prohibiting measures and bail can only be applied when the sole ground for custody is the risk of flight.

As a result, the use of less restrictive measures is rare. Such measures probably would not be considered at all were it not for persistent defence counsel. Even in cases where bail was applied, the underlying custody ground remained the same—the risk of flight.

There seem to be many reasons behind the infrequent use of less restrictive measures. The entity and Brčko District Criminal Procedure Codes still do not explicitly permit any less restrictive measures when custody is considered for reasons other than the risk of flight. Different practices have emerged as the result of inconsistencies in approach to this issue among practitioners and courts. By-laws or other instruments that would allow for the efficient enforcement and supervision of measures less restrictive than custody are also missing.

In contrast, even prior to the July amendments, some State Court Panels issued compulsory residence and house arrest orders regardless of the custody ground asserted by the prosecution, reasoning that Article 126 must be read in light of other provisions of the Criminal Procedure Code and of the European Convention. In other words, they concluded that the measures provided for in domestic law should be applicable in any of the circumstances warranting custody, even when there is no risk of flight.¹⁷ For example, in November 2006, when the prosecutor proposed the extension of custody for a person accused of war crimes based on the threat to public safety or property under Article 132.1(d), the appellate panel, citing Article 126, released the accused from custody. In another case in 2007, this one involving organised crime, the accused was prohibited from leaving his home, even though he had previously been detained in connection with the risk of interfering with the course of justice and the risk of repeated criminal activity. Upon his release into house arrest, the State Court imposed bail in order to diminish the opportunity for flight that house arrest might create.¹⁸ With these decisions some judges at the State Court demonstrated, even prior to the OHR amendments, a desire to change the standards surrounding the use of alternative measures to custody.

The Need to Inform Suspects and the Accused

Suspects and the accused should be made aware that they may have alternatives to the imposition of custody—such as the right to bail. Although the prime responsibility for passing this information along falls to defence counsel, prosecutors and judges should also not underestimate the responsibility they bear for informing defendants of their legal options; defence counsel is, after all, not mandatory at the first custody hearing. Even when defence counsel is present, many suspects have not had time to discuss their case prior to the hearing. Nevertheless, it appears quite rare in both state and entity practice for prosecutors or judges to inform defendants of the possibility of submitting a proposal for bail. Suspects often do not seem even to understand the other instructions regarding their basic rights, such as the right not to answer questions and the right to defence counsel. A comprehensive explanation of less restrictive measures should form part of any full dialogue with suspects about the various rights that they may call upon at any given stage of the proceedings. If prosecutors were to inform suspects about the bail mechanism and indicate whether the prosecution would agree to bail if an appropriate amount were offered, it would allow such matters to be resolved promptly at the first appearance before the judge.

Due Consideration of Proposals

Uncertainty also exists, however, within the judiciary as to how to respond appropriately to such requests. For instance, in a municipal court case where the suspect's counsel proposed either bail or the imposition of less restrictive measures, the preliminary proceedings judge denied these requests by noting that the suspect was registered in the unemployment office. This decision seemed premised on the presumption that since the defendant did not have a regular source of income ordering bail would only strain his financial circumstances further. The judge, however, never made a thorough assessment of the suspect's actual means nor were any details regarding his and his family's actual financial situation established in spite of an explicit request. Consequently, this response failed to consider tailoring the bail request to the person's financial circumstances as required by the ECtHR.¹⁹ Later,

at a custody extension hearing, when the suspect again requested bail, this was neither brought to the attention of the prosecutor, who was not present at the custody hearing, nor did the panel address the bail proposal in the written decision extending custody.

In another example from a municipal court, a suspect's defence counsel, in requesting bail, submitted a mortgage on the suspect's house as well as documentation concerning the suspect's personal bank accounts. The preliminary proceedings judge stated that it was not possible to consider the bail request at the time of the initial custody order; rather, he could only consider the prosecutor's proposal. In fact, domestic legislation does not prevent consideration of alternative measures to custody at any stage of the proceedings, either *proprio motu* or upon defence counsel proposal. This is consistent with European Court case law, which provides that if a bail motion is put forward it must be considered in a timely manner regardless of the procedural stage.²⁰ In deciding upon an appeal against its previous custody decision, a Supreme Court panel ruled that it could not consider the suspect's bail proposal. Instead, the panel limited its assessment to the legitimacy of the general and the specific grounds for custody.²¹ It did not therefore consider the detainee's application for bail. The case did not need to turn out this way. The Supreme Court can refer bail proposals to the first instance court for consideration.

The domestic legal framework does not, as required by international standards, promote the imposition of non-custodial measures in all situations. The ECHR clearly requires that alternative measures to custody be considered for grounds other than the risk of flight and that the type of measures should be determined by the particular circumstances of the case.²² Too often, judges do not even consider the defence's proposals for the application of bail and other non-custodial measures, much less grant them when appropriate. In addition, judges in the course of custody procedures rarely provide sufficient guidance to the defendants in matters concerning their rights, especially in relation to the use of less restrictive measures.

5. SPECIFIC CUSTODY GROUNDS

a) Risk of Flight

International and National Legal Standards

Although there is no precise international formula to help establish whether a suspect might abscond, the European Court has held that a number of factors must be assessed. These may include the severity of the sentence, the evidence of prior instances of absconding after being charged with a criminal offence, and specific evidence of plans to flee. The judiciary should consider the defendant's character, morals, home, employment, financial assets, family ties, and contacts abroad or lack of ties to the country where prosecution is pursued.²³

Cases sometime involve defendants who have dual or foreign citizenship. In a case involving two foreigners in Spain, the United Nation's Human Rights Committee, which monitors fealty to the International Covenant on Civil and Political Rights, found that custody based on the risk of flight was unsupported. It held this to be in violation of the Covenant's standards on liberty, since foreign citizenship alone cannot be a sufficient reason for custody.²⁴ What is more, in a case concerning a person without a permanent address, the European Court held that lack of fixed residence does not give rise to danger of flight.²⁵ In addition, as is the case with all of custody grounds, this reason for resorting to custody diminishes over time because the length of pre-trial detention will normally be included in any eventual sentence imposed.²⁶ If the risk of flight is invoked as the only remaining reason for custody, the European Court has held that release pending trial must be ordered if it is possible to obtain guarantees of appearance for trial.²⁷

Domestic Practice

In domestic legislation, the risk of absconding from criminal proceedings is a well-accepted reason for pre-trial detention. Article 132.1(a) of the State Criminal Procedure Code, for instance, provides that detention may be ordered:

[...] if he hides or if other circumstances exist that suggest a possibility of flight.

The risk of flight to countries of the former Socialist Federal Republic of Yugoslavia is often invoked as a ground for pre-trial detention. Many citizens of Bosnia and Herzegovina possess citizenship of and other ties to neighbouring countries that were once Yugoslav republics. The constitutions of Croatia, Montenegro, and Slovenia contain provisions preventing the extradition of their nationals for ordinary crimes. Emigration to and refuge in countries outside the region have also increased the number of dual citizens. The mere fact of possession of dual citizenship or foreign citizenship, however, cannot be used as the sole reason to prescribe pre-trial detention.

A suspect, for instance, was once detained on the grounds of risk of flight and risk of tampering with evidence even though he had gone from Ploče, in the Republic of Croatia, to a police station in Mostar for further police interviews and a polygraph test. The court, noting that the suspect had Croatian citizenship and owned an apartment in Ploče, concluded that that these circumstances indicated the risk of flight. It offered, however, no supporting evidence for this conclusion and nothing in the suspect's conduct indicated that he was not going to obey police and court orders in the future.²⁸ In another case before a municipal court, two people suspected of committing malicious mischief were detained on remand, on the grounds that they had tampered with evidence and were at risk of flight. The justification for this decision held that:

[...] circumstances indicate that the suspects, if released, would abscond, that is leave BiH, and in that manner be unavailable to the BiH judiciary and prevent judicial proceedings. Specifically, the suspect NN is a citizen of BiH and the Republic of Croatia, and as both suspects are single they are not linked to this territory so the reasons contained in [the BiH CPC Article 132.1(a)] are well-founded.²⁹

Such examples indicate that the fact of dual citizenship, or even an indication thereof, tends to lead to pre-trial custody even as other criteria for the use of this ground are not taken into account.

On the other hand, on at least one occasion a prosecutor's proposal has referred to a previous case in which the accused had fled when the first instance verdict was issued, and the State Court has rejected ordering custody. The panel found that it was bound to decide on the issue based on the case file and facts before it and on the outcome of another case.³⁰ This decision suggests that the unfortunate outcome of one custody decision cannot dictate other decisions. It is also relevant for the development of a practice in custody proceedings whereby dual citizenship does not automatically serve as an indicator of custody but rather only as a starting point for a specific and thorough assessment of the underlying circumstances.

b) Risk of Interference with the Course of Justice

International and National Legal Standards

The risk of interference with the course of justice is a widely accepted custody ground that is invoked in order to prevent the defendant from taking actions that could severely jeopardise the proceedings. These actions may include pressure on or intimidation of witnesses, warnings or collusion with other potential co-conspirators, and the destruction of evidence or documents. In the view of the European Court of Human Rights, however, this provides a justification for pre-trial detention only when there are clear indications or factual circumstances supporting its use. For example, in a case where the defendant was suspected of attempted manslaughter, robbery, and rape, the respondent state's judiciary's mere assertion that the accused would collude with a co-accused who had not been detained was deemed insufficient to support continued custody.³¹ Furthermore, the relevance of this ground diminishes over time and disappears completely once the prosecution has secured sufficient evidence, which usually coincides with the completion of the investigation.³²

Similarly, Article 132.1(b) of the State Criminal Procedure Code provides that custody may be ordered if:

[...] there is justified fear to believe that he will destroy, conceal, alter or falsify evidence or clues important to the criminal

proceedings or if particular circumstances indicate that he will hinder the inquiry by influencing witnesses, accessories or accomplices.

Paragraph 2 then provides that once the evidence for which custody was ordered is secured, custody shall be cancelled. This places a burden on the prosecutorial service to conduct the necessary investigative actions quickly and efficiently in order to relieve the defendant from further confinement as well as on judges to ensure that the defendant is not needlessly detained because of prosecutorial or organisational inefficiencies.

Domestic Practice

Pre-trial detention based on the risk of interference with the course of justice is used extensively as a justification for custody in Bosnia and Herzegovina. The international standards cited above stipulate that it be applied in a consistent manner. Custody decisions, in other words, should explain whether there are particular circumstances that justify the fear that the person in question would, if left at liberty, improperly influence witnesses or accomplices. Prosecutors in Bosnia and Herzegovina often fail to do this.

In seeking detention on these grounds, some prosecutors from the State Prosecutor's Office argue that once an indictment is confirmed the accused will know the names, personal details, and addresses of witnesses, thereby creating the risk that the accused would have access to and potentially influence these witnesses before they testify during the main trial. State Court judges have rejected this particular line of reasoning. More generally, in many cases before the state and entity courts, judges and panels have rejected prosecutorial motions based on insufficient evidence. A cantonal court judge, for example, stated the following in rejecting a motion for custody:

The preliminary proceedings judge did not agree with the [prosecutor's] proposal that custody be ordered against the suspects based on [Article 132.1(b)] because the prosecutor only paraphrased and stated that the suspects could influence the witnesses if they were released, not citing what were the clear and

concrete circumstances pointing to this; instead, the prosecutor alleges and assumes it in an abstract manner.³³

In some cases, however, custody on this ground has been limited to a short time and cancelled once the evidence was secured or the witnesses questioned. Some courts have limited custody to a period as brief as ten days, while others have mandated a thirty-day period. Even so, the judicial use of this ground has nevertheless been questionable at times, especially in determining whether “particular circumstances” indicate that the person will influence witnesses.

Practitioners disagree whether this ground can be invoked during the main trial proceedings. Some who argue against its invocation point out that all of the evidence should already have been obtained or secured by the commencement of the main trial. But proponents note that witnesses still have to present their testimony orally at trial. Some judges therefore order custody on this ground even during main trial proceedings. Their reasoning runs more or less as follows: If released, the accused would return to his pre-war home where at least some of the victims or witnesses live. There he would have the opportunity to interact with the witnesses and influence their oral testimony.³⁴ (This phenomenon is most prevalent in cases involving war crimes, trafficking in human beings, and organized crime.) *The Commentaries to the Criminal Procedure Code of Bosnia and Herzegovina*, which have codified past and present practice, explain the specific criteria applicable for the use of this ground. Judges and prosecutors might therefore make greater use of them and apply the advice therein to a greater extent than is currently the case.³⁵

c) Need to Prevent Crime

International and National Legal Standards

The need to prevent the suspect or the accused from committing serious crimes can be a legitimate basis for ordering pre-trial custody. This is, however, not an undisputed notion; some human rights experts argue that its use violates the presumption of innocence.³⁶ For this very reason it becomes important for judges and prosecutors to bear in mind that custody is not a punitive measure, but rather something designed to

prevent occurrences that may hinder the proper conduct of a criminal proceeding or the protection of rights of others.

European Court case law supports the use of this ground when there is a real danger of the repetition of serious criminal activity. The circumstances of the case and the past history and personality of the suspect or accused must, of course, support such a conclusion. For example, in a case before the court concerning a suspect involved in organised crime, it was argued that the suspect might have abused his liberty by maintaining his existing network of contacts and providing invaluable assistance to his collaborators. The European Court found that such circumstances justified detention based on the fear of the repetition of offences.³⁷ The number and nature of criminal offences therefore become relevant, as they may indicate a risk of the commission of further such crimes in the course of proceedings.

This is not always, however, the case. In a matter of suspected murder and arson, for instance, the European Court noted that previous convictions of a less serious nature—attempted aggravated theft and desertion—may not necessitate custody based on fear of repetition of offences.³⁸ Although case law has not set benchmarks concerning the relevance of other investigations underway for similar crimes, it does seem clear that if similar crimes were committed after the opening of the investigation for the alleged offence in question then this would justify detention.³⁹ Article 132.1(c) of the State Criminal Procedure Code takes a similar stance, stating that custody may be ordered:

[...] if there is justified fear to believe that he will repeat the criminal offence or complete the criminal offence or commit a threatened criminal offence, and for such criminal offences a prison sentence of five (5) years may be pronounced or more;

Domestic Practice

Concerns related to the use of this ground for detention fall into four distinct categories. The first includes cases with errors of a technical nature, where the requirement for a sentence of five years or more was not met. Any violation of national law renders detention unlawful, for the ECHR requires strict compliance with the national legal framework.⁴⁰

Second, some cases lack a comprehensive assessment of whether the particular circumstances justified a fear of the commission of a criminal offence. For example, several cases involved detention for significant periods of time based on threats that might have been made in the heat of the moment. Judges ordered custody without assessing the degree to which the threat was real and persistent, thereby calling into question whether the detention was adequately justified. Third, some cases deviate from a well-established practice whereby the prosecutor or the judge ensures that the suspect's official criminal record is at hand and becomes an integral part of the risk assessment. Finally, the language used in some custody decisions appears to conflict with the presumption of innocence. For example, in a decision rejecting an appeal against a custody decision, a panel ruled that, "... the manner and circumstances in which he committed the criminal offence of aggravated theft in this court's jurisdiction unambiguously leads the court to the conclusion that..." Such a statement in a judicial decision on custody, in which the panel appears not to have granted the suspect the presumption of innocence, gives the impression that custody was a punitive rather than a prohibitive measure.⁴¹

d) Need to Preserve Public Safety or Property

International and National Legal Standards

The European Court has recognised the need to maintain public order as justification for detention on remand within a very limited scope. In one of the few cases involving this justification, the European Court held that it can be used only when the facts demonstrate that the defendant's release would actually disturb the public order.⁴² Additionally, in *I.A. v France*, the European Court clarified that mere reference in an abstract manner to the nature of the crime concerned, the circumstances of its commission, and the possible reactions of the victim's family are not sufficient.⁴³

Although the European Court permits the use of this ground in a restricted fashion, there is widespread scepticism as to its propriety. A few countries have never had such a custody ground, while other States

have more recently sought to remove it from their legislation.⁴⁴ In its Explanatory Memorandum on the use of remand in custody, the Council of Europe's Committee of Ministers notes that public order may be used as a custody justification only "[...] where there is substantial evidence of a reaction to a grave crime such as murder..." The Committee further notes that only the emergence of an exceptional situation can necessitate custody based on this ground, adding that the release of most suspected offenders could not be expected to engender such situation.⁴⁵

The fourth and final ground for permitted custody in the Criminal Procedure Code of Bosnia and Herzegovina, as laid down in its Article 132.1(d), may appear to incorporate the notion of threats against public order:

[I]f the criminal offence is punishable by a sentence of imprisonment of ten (10) years or more, where the manner of commission or the consequence of the criminal offence requires that custody be ordered for the reason of public or property security. If the criminal offence concerned is the criminal offence of terrorism, it shall be considered that there is an assumption which could be disputed, that the safety of public and property is threatened.

The Commentaries on the Criminal Procedure Code of Bosnia and Herzegovina and court practice throughout the country suggest, however, that the concept of public or property safety is not being interpreted as safeguarding public order. Although *The Commentaries* explain that the primary goal of the introduction of this ground was to enable the preservation of "security," they fail to identify its particular procedural effects. If the concept of public or property safety does not correspond to the protection of public order, then the former ground is wholly outside any of the accepted grounds in international human rights standards for justifying custody. The use of other existing grounds for custody, especially the risk of continued criminal activity, may therefore suffice to ensure such order.⁴⁶

Article 132.1(d) also does not, unlike paragraphs (a) to (c) of this article, explicitly task the judiciary to assess the future impact of the

circumstances and does not, as a result, conceptually resemble the other preventive measures. For instance, in the case of custody based on ground (c)—that is, continued criminal activity—the law requires that the circumstances indicate a future risk. Likewise, the risk of flight is inherently a forward-looking assessment, as is interference with the course of justice. Finally, domestic legislation further includes a presumption that public or property safety is threatened when any terrorist act is suspected, an assumption that reverses the burden of proof on the suspect or the accused to show that he or she would not threaten public safety. A nearly impossible task to achieve in any case, this also violates the presumption of release in Article 5 of the European Convention on Human Rights.⁴⁷

Domestic Practice

The lack of clarity about the meaning of the term “public order” and the use of custody as a preventive rather than punitive measure have adversely affected domestic judicial practices. In many cases involving this justification for custody, the reasoning has run roughly as follows: Noting that the crime is potentially punishable by a sentence of ten years’ imprisonment and bearing in mind the manner—e.g., the use of hammer, saw, gun—and the consequences of the crime—e.g., the loss of property, severe injury, death—the court finds that this crime requires the detention of the suspect for the sake of the safety of the citizenry. Such a chain of reasoning does not incorporate the more all-encompassing concept of public order but rather revolves around a past threat to public safety owing to the manner of commission or the consequences of the alleged crime. It also fails to provide specific facts indicating that there is a continuing threat to public security or property that rises to the level of a public order concern. It thus places the focus more on the manner of the commission of the alleged offence than on any possible consequences for the future if the defendant is not placed in custody.

The degree to which domestic practitioners rely on this ground suggests that it has become a substitute for the mandatory detention provision enshrined in the previous criminal procedure codes when the possible sentence was 10 years or more.⁴⁸ This ground is used liberally whenever

the possible sentence is a “minimum of five years” or “one to ten years.” Prosecutors and judges also often invoke reasons for the use of this ground for detention that in fact correspond to one of the other grounds for custody, such as the risk of continued criminal activity or the need to protect witnesses from intimidation. For example, a cantonal court has reasoned as follows:

Taking into account that the suspects are charged with the criminal act of aggravated robbery under FBiH CC Article 289.2 for which an imprisonment term of 10 years or more can be pronounced, and owing to the manner of committing the criminal act (by using a weapon in a jewellery store where jewellery or money can always be found) ordering custody is proven to be necessary for the sake of citizens’ safety and accordingly there are grounds for custody in line with FBiH CPC Article 146.1(d) too.⁴⁹

This cantonal court has essentially reasoned, in other words, that it is the risk of continued criminal activity that justifies detention and not the threat to public order.

Of course, courts do sometimes refuse custody on these grounds. For instance, upon confirming the indictment in a case against four defendants, a State Court judge rejected the custody motion under Article 132.1(d), stating that

[T]he reason for this is that the massive nature of the crime or the assumption that the release of the accused persons would disturb the public order because of a distrust in the judicial system, or that the manner of commission and the consequences caused in the instant case are not sufficient for custody.⁵⁰

Similarly, in a case before a municipal court, the panel extending custody against the accused at the time of sentencing found that the justification for this request based on Article 132.1(d) was unsupported and released the accused, stating:

Therefore it would be inappropriate to extend duration of custody on the basis of the fear for security of citizens when there is no objective and concrete evidence for that, as such detention would

be arbitrary. Namely, as the time passes so does the *sensibility* of the public in respect to events from the past fade too. It is necessary to prove that the brutality demonstrated in the criminal act, notwithstanding revenge as a motive and the fact that it was committed in a public place, and recalling the concrete phase of the criminal proceedings (here three months after committing crime and at the time of sentencing the defendant), causes insecurity to citizens for their personal integrity and property.⁵¹

The panel further found that no specific facts or evidence were asserted to show that the public would be disturbed by the release of the accused. This reasoning most closely resembles the evidentiary standard required by the European Court when a custody ground such as public order is in question.

Some decisions, too, appear to rely on a subjective sense of insecurity among the citizenry, while others discuss the sense of safety only for the victims and their families.⁵² A feeling of fear and repulsion upon hearing of violent crimes may be a natural human reaction, but it is not necessarily an adequate justification for holding suspects in pre-trial detention. In the case of *I.A. v France*, the European Court, discussing a “social disturbance” capable of justifying pre-trial detention and the decisions in that case citing the manner and nature of the crime committed, deemed the circumstances of its commission and the reactions of the victim’s family insufficient to order custody based on the need to preserve public order.⁵³ Custody based on a general notion of public safety must be explicitly supported with evidence showing that the release of the defendant would result in widespread and persistent prejudice to public safety in the sense of public order. Domestic defence attorneys, however, often fail to provide cogent arguments on behalf of their clients when this ground for custody is asserted. Because of the entrenched use of this ground in Bosnia and Herzegovina, defence counsels would be well advised to go beyond the borders of customary court practice in the country to invoke European Court case law.⁵⁴

In addition, the national authorities might consider deletion of the public security or property custody ground or, failing that, modification of the

provision in order to establish more precise criteria for its application. Possible language might include the following:

...if the release of the suspect or accused would cause an exceptional and persistent disruption of public order owing to the manner of commission or consequence of the criminal offence, and the criminal offence is punishable by a sentence of a minimum of ten (10) years...⁵⁵

Such language might clarify not only the ground itself but also how it is intended to be used. Still, the possibility remains that even such amended language might create new problems or produce unintended consequences. This is perhaps the most compelling argument for complete deletion of this ground for custody from the criminal procedure codes of the country. Its deletion would have little impact on the ability to detain people in pre-trial custody generally, but would instead simply require that judges and prosecutors set out more carefully and precisely the real reasons necessitating such detentions. For example, at the State Court, where arguably many of the most sensitive cases are tried, pre-trial custody in war crimes cases is almost never based exclusively on ground (d), but rather done in combination with other custody grounds.⁵⁶

6. WELL-REASONED DECISIONS

a) International and Domestic Legal Standards

The European Court has held in many cases that national judicial systems must organise themselves in a manner that allows compliance with the custody standards of Article 5 of the European Convention on Human Rights. Hence, judges must be thorough in explaining why custody is a necessary measure in a given case and how the ground invoked applies to a particular individual.⁵⁷ Rote citation of legal provisions on custody without explaining and applying the law to the specific facts of the case is not sufficient.⁵⁸ The European Court has often found violations of Article 5.3 when relevant and sufficient reasons were not asserted in justifying custody.⁵⁹

Article 5.4, which guarantees the right to take proceedings to challenge the lawfulness of detention, also requires that the reasons justifying detention are clearly set forth in order to enable fair appellate proceedings. The European Court finds violations of this provision when decisions ordering pre-trial detention are issued in a stereotypical fashion without taking into account the arguments of the parties.⁶⁰ The case law also insists that the specific circumstances that prompted custody may change and hence that the initial reason for custody may diminish over time or can disappear altogether. Thus, examination at regular intervals of the reasons for detention is required.⁶¹

Bosnia and Herzegovina's Criminal Procedure Code deems it an essential violation of the provisions if the reasoning of a verdict is "incomprehensible, internally contradictory (...) or did not cite reasons concerning the decisive facts."⁶² This provision reflects a general legal principle, one inherent in administrative, civil, and criminal proceedings alike. Though particularly strong when it comes to verdicts, it applies to custody decisions, which must be supported by decisive facts as a guarantor of judicial fairness and independence, as well.⁶³

Article 134 of the BiH Criminal Procedure Code specifies that custody decisions must include, among other things, the legal basis for the

decision along with an explanation. The commentaries to it provide the following admonishing observation on this point: “The explanation has to emphasize the concrete facts that justify custody, often lacking in practice such that the explanation is mostly reduced to re-phrasings or even citing a legal text.”⁶⁴ Decisions ordering prohibiting measures should also be well-reasoned.⁶⁵

b) Prosecutorial Proposals

Prosecutors carry the burden of proof to show that custody is a necessary measure. Custody may only be considered following a written prosecutorial proposal, which should, as noted above, be well-reasoned. As the essential written document according to which custody is considered, the prosecutorial proposal must establish relevant material facts indicating the need for pre-trial detention. Prosecutorial proposals often, however, fail to meet this standard. They tend instead to make bald assertions without including relevant and sufficient material facts. For example, in one proposal requesting custody based on potential witness intimidation, the explanation provided:

At this moment the investigation is ongoing against the suspects, and all witnesses have not yet given their statement before the Prosecutor, which objectively indicates that if the suspects were released they would impede the investigation by intimidating the witnesses, such that the conditions for custody ground [the BiH CPC Article 132.1(b)] are practically fulfilled.⁶⁶

This proposal does not contain an individualised evaluation as to whether the suspects would actually abuse their liberty and influence the witnesses who have not yet been questioned. This proposal, which is contrary to the spirit of the legislation regarding custody proceedings, also does not present the decisive facts and could therefore not be a sufficient basis for the justification of custody.⁶⁷ Rather, to someone who is not familiar with the case, the use of the word “objectively” by the prosecutor suggests that he believes it to be the rule that suspects interfere with witnesses regardless of the circumstances.

c) **First Instance Decisions and Reviews**

Judges decide whether custody is warranted. To ensure that the deprivation of liberty is lawful, their decisions must provide relevant and sufficient reasons for each decision. To achieve this, a judge must be able to rely on the information submitted by the prosecutor, on the suspect's own statement at the custody hearing, and possibly on the submissions of the defence counsel as well. In Bosnian-Herzegovinian courts today, decisions ordering or extending custody are seldom fully supported with specific explanations why this stricter measure is necessary. Furthermore, decisions extending custody during an investigation or the official review of custody at the time or after the confirmation of the indictment often appear to be rubber-stampings of previous decisions, with similar wording and findings appearing in each custody decision.

This calls into question whether rigorous examinations of the need for custody are actually undertaken in practice. In principle, a substantive assessment should always be conducted before each decision ordering or extending custody or upon review of the lawfulness of custody. Any extension of custody or review of the lawfulness of custody should also take into account things such as the passage of time and any changes in the circumstances relevant to the ordering of custody in the first place. Prosecutors and judges tend to pay more attention, however, to the general nature of the crimes and circumstances than to the specific instances of each case. They usually propose or order pre-trial detention for criminal offences such as war crimes, attempted murder or murder, rape, aggravated theft and robbery, and drug trafficking. In one case, the prosecutor even drafted the custody proposal before questioning the suspect. Such practices comport neither with the requirement to tailor the custody proposal and custody decision to the particular facts and circumstances of each case nor with the basic principle that custody is a protective measure and not a punitive one.

When bail or other measures is specifically requested, custody decisions often fail to provide the reasons why these measures were not used. When, for example, upon extending custody, a municipal court found there was "a great risk of flight" and then stated that alternative

preventive measures cannot be applied at this stage of the proceedings, its decision did not explain how the judge had arrived at this conclusion nor why a compulsory residence or house arrest order would not have been effective measures instead.⁶⁸

d) Appellate Review

Appellate proceedings should consider arguments and facts that could affect the existence of conditions essential to establish the lawfulness of custody.⁶⁹ During their review of defence counsel motions against custody, appellate panels have a special role to play in providing oversight and guidance and in remedying decisions that lack proper justification or are otherwise unfounded. Often, however, appellate panels do not adequately assess whether custody grounds were sufficiently justified and do not give due consideration to the arguments of the defence. For example, in an appeal the defence counsel asserted that although her client had permanent residence in one location and worked with livestock in another relatively near this did not establish that her client might flee. She then requested that her client be released from custody. The District Court panel responded as follows:

The Panel of this Court believes that the Preliminary Proceedings Judge correctly evaluated all circumstances related to ordering custody and consequently acted correctly in the case by ordering detention for the suspect for the reason under [Article 132.1(a) of the State Criminal Procedure Code].⁷⁰

The appellate panel did not explain why the first instance decision was correct in establishing the ground for custody. It left the defendant's arguments unaddressed. It thus also left unclear whether sufficient reasons supported the custody ground.

7. THE ROLE OF THE DEFENCE COUNSEL

a) Professional Duty

Defence counsel should seek to ensure that fair trial standards are upheld during criminal proceedings. When a right such as a person's personal liberty is at stake, the importance of this is amplified. Defence attorneys are thus obliged to represent their clients with diligence, integrity, and the highest level of professionalism. Domestic legislation, in fact, states that defence counsel must, "take all necessary steps aimed at [...] protection of his client's rights."⁷¹ In practice, however, both court-appointed and privately-engaged defence counsels have failed to represent their clients' interests fully during custody proceedings, particularly when it comes to contesting custody decisions.

b) The Need to Support Motions with Facts

Although defence counsels often challenge the existence of grounded suspicion or the grounds for custody, they sometimes do not base such arguments on an analysis of the evidence submitted. Oral and written motions against custody decisions do not always cite the relevant factual circumstances that judges should take into consideration. Defence counsels often appear not to have studied the evidence at hand. Even when they have identified facts and arguments that could justify the use of measures other than custody, they also often appear to assume that these are self-evident and thus do not sufficiently argue their case. For instance, in a case where custody was ordered based on the risk of flight, the motion states:

It is alleged in the explanation of the contested decision that the suspects are citizens of Serbia and Montenegro with permanent residency in Kosovo and that the mere fact that they are foreign citizens is a circumstance supporting the risk of flight. Such a position of the Court is groundless and erroneous. Owing to the fact that their residency and addresses are known, as well as to their readiness to respond to the Court summons, the ordering of custody is not justified for the above reasons.⁷²

In another case, where the suspect was detained for fear of repeated criminal offences, neither the prosecutor nor the judge had any specific information about the suspect's criminal record other than the suspect's own statement that some proceedings had been opened against him two years previously. The defence attorney's entire argument against the use of this ground in his written appeal consisted of the following: "There is also no fear that he will repeat the criminal act because there is no information that he had previous convictions." If the defence counsel had argued instead that the circumstances known to the judge would not suffice to establish the required level of fear, he could also have underlined that the court had ordered custody without determining whether or not the accused in fact had a criminal record. This would then support the conclusion that the requirement for particular circumstances that justify the fear of a repetition of criminal activities had not been met.

c) The Need to Request Alternatives to Custody

Defence counsels often fail to request less intrusive measures, such as bail, house arrest, or other prohibiting measures as well. Even when the counsel has presented such requests, however, they often do not support these requests with the necessary documentation. This affects the ability of judges to consider such requests and can also slow down the process while additional information is obtained.

d) The Need to Support Motions with Fair Trial Standards

In general, written submissions by defence counsels in Bosnia and Herzegovina fail to incorporate international fair trial standards into their arguments. Motions contesting custody decisions rarely if ever make mention of international human rights standards regarding the use of custody or other less intrusive measures, of the case law of the European Court, or of the commentaries or other sources of relevant court practice. If defence counsels as a rule avoided unsupported objections and increased their reliance on international fair trial standards as well as on other relevant national and international practice, such as references to the case law of the European Court, as a means to strengthen their arguments, they would in fact be of assistance to the court as it rules on motions.

8. CONCLUSIONS

The application and use of pre-trial detention and alternative measures in Bosnia and Herzegovina are often at variance with international human rights standards. The required independent evaluation of the prevalence of grounded suspicion prior to ordering and extending custody or on appeal is often inadequate. In addition, the domestic legal framework does not promote the imposition of non-custodial measures. As a result, practices differ throughout the country and pre-trial custody too often appears to be the norm rather than the exception.

The application of each of the four grounds for custody foreseen in the Criminal Procedure Code of Bosnia and Herzegovina also evokes concerns. Custody decisions based on the ground of fear of flight often fail to offer sufficient reasons for such a determination. A tendency has also manifested itself within the judiciary to consider dual citizenship as automatically evincing a risk of flight. This results in the mechanical imposition of custody without considering the other individual, factual, and legal circumstances of the case.

Prosecutorial motions justifying custody on the ground of interference with the course of justice tend to be insufficiently substantiated by specific factual and legal circumstances. As a result judges frequently reject such motions. In some cases, too, judicial decisions on custody have also lacked reference to specific circumstances justifying the application of this ground.

In decisions basing pre-trial detention on the need to prevent further serious criminal activity, judges and prosecutors do not always make a thorough assessment of the particular circumstances establishing a fear of future criminal activity. Instead, an individual's past criminal records or the suspicion of prior criminality may prompt custody for apparently punitive reasons.

The use of the ground for custody based on a threat to public or property safety is in serious need of reassessment. The conditions and criteria deriving from court decisions are not in accordance with the practice of the European Court of Human Rights on justifications for detention. The

reasons asserted in prosecutorial proposals and custody decisions fail to indicate how a defendant's release imperils public security. Indeed, the United Nations Human Rights Committee has recommended that Bosnia and Herzegovina consider removing this ground from its legislation, pointing to the vagueness of the concept of public security.⁷³

International human rights standards mandate that any deprivation of liberty must be supported with sufficient material facts throughout the period of deprivation of liberty. In Bosnia and Herzegovina, judicial authorities have argued informally that their case load and time constraints prevent them from issuing custody proposals and custody decisions fully in compliance with the ECHR and national law requirements. These reasons do not, however, absolve judges and prosecutors from performing their judicial duties properly.

Finally, defence counsel motions tend to be insufficiently reasoned. They often appear to presume that their analysis and reasoning is implicit in their argumentation. Their motions therefore lack references to factual circumstances and to deficiencies in prosecutorial proposals and judicial decisions. They rarely include the international or domestic standards that would favour the defendant's liberty.

9. RECOMMENDATIONS

The following recommendations are offered in order to assist practitioners and legislative authorities in fostering a more human rights-compliant application of pre-trial custody and alternative measures to custody.

TO THE MINISTRIES OF JUSTICE, THE STATE PARLIAMENTARY ASSEMBLY, THE HIGH JUDICIAL AND PROSECUTORIAL COUNCIL, COURTS AND PROSECUTORS' OFFICES

Ministries of Justice should, in co-ordination with the High Judicial and Prosecutorial Council (HJPC), the courts, and prosecutors' offices, develop comprehensive guidelines to assist the judiciary in the correct and effective use of the most appropriate measure to ensure the presence of the accused during proceedings. The guidelines should include a list of essential factual questions to be answered prior to the identification of the appropriate measure and should recommend that such an assessment systematically review each measure, beginning with the least intrusive. These guidelines should clarify the procedural and technical aspects of the application of non-custodial measures as well as indicate circumstances where such measures are warranted.

They should also consider two possible solutions to the problems with custody ordered on the basis of the need to preserve public safety or property identified in this report—that is, amendments to or deletion of the ground (d) in Article 132.1. Deletion would not greatly impinge upon the possibility to detain persons in pre-trial custody. Instead, it would simply require judges to take more care in stating the reasons necessitating custody. If amendment rather than deletion is the chosen course, any amendments should take into account international human rights standards and seek to establish the precise criteria by which pre-trial detention based on disturbance to public order may be ordered. The *Commentaries to the Criminal Procedure Code of Bosnia and Herzegovina* would then need to be revised to provide guidance.

TO JUDGES AND PROSECUTORS

The right to release pending trial and the obligation to apply the least

severe measure to secure the defendant's presence and the successful conduct of proceedings should underpin all prosecutorial and judicial decisions pertaining to pre-trial custody. Judges and prosecutors have a duty to consider the application of less restrictive measures first. They also have a duty to inform defendants at the earliest possible stage about the possibility of applying for measures other than custody. Judges and prosecutors should additionally be aware of the following:

- The risk of flight: dual citizenship, lack of properly registered permanent residency, and imprecisely established summons receipt must not automatically indicate a ground for ordering custody.
- The risk of interference with the course of justice: generally, the risk of interference with the proceedings is normally considered to cease with the receipt of the confirmed indictment. The risk that the defendant will try to intimidate witnesses must be supported by specific facts. Evidence, such as witness statements, should be presented whenever this ground is used during the main trial.
- The risk of repeating a criminal offence: judges and prosecutors should analyze the totality of circumstances, especially the seriousness of the nature and degree of the alleged crimes, in order to ensure that there is evidence supporting a likelihood of repeated criminal activity. The criminal record of the defendant should be officially obtained and formally established before ordering or extending custody on this ground.
- The need to preserve public safety or property: judges and prosecutors should reassess their use of item d of Article 132 (1) of the BiH Criminal Procedure Code, limiting it only to cases where there is clear evidence that public safety in the sense of public order will be threatened if the defendant is released. If it is invoked, the judiciary should apply the same criteria as used by the European Court. The entity Supreme Courts and the BiH Constitutional Court should specify the very limited application of this ground and require that the facts demonstrate a clear and continuing disturbance of public safety.

Prosecutorial custody proposals must contain accurate, timely, and relevant material facts and other information to enable judges to make well-informed decisions as to whether such facts sufficiently support any of the grounds for custody and, if so, which measure would most appropriately address the prosecutor's concern and serve to accomplish the purpose for which the measure is sought.

Judges must ensure that custody decisions, regardless of the procedural stage, are fully explained and supported by adequate facts and evidence. Judges should seek to provide a substantive review of the reasons supporting custody at every extension and review of custody. They must also adequately address any arguments to the contrary put forward by defendants and counsel orally and in writing.

The Supreme Courts and the Court of Bosnia and Herzegovina should, through sessions of the courts' collegiums and adoption of joint conclusions, seek to provide greater guidance to the judicial authorities as to whether contested decisions contain facts and evidence sufficient to support each custody decision or less restrictive measure applied.

TO THE JUDICIAL AND PROSECUTORIAL TRAINING CENTRES AND THE JUDICIAL COMMISSION OF THE BRCKO DISTRICT

The Judicial and Prosecutorial Training Centres should incorporate all relevant fair trial standards concerning custody and alternatives to custody into written training materials. Training materials should emphasize the need for well-reasoned decisions on custodial and non-custodial measures that incorporate fair trial concepts. In particular, these materials should spell out the rights flowing from the need to respect the right to liberty guaranteed under Article 5 of the European Convention on Human Rights.

TO ENTITY BAR ASSOCIATIONS

Entity Bar Associations should prepare training materials and organize training sessions designed to strengthen the abilities of defence counsels to prepare written and oral motions to dispute prosecutorial proposals and judicial decisions on custody in a manner consistent with international and domestic fair trial standards. Such courses should emphasize the utility and applicability of ECtHR case law and standards.

ENDNOTES

- ¹ Recommendation (2006)13 of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse. See Annex.
- ² Additionally, there are a number of other non-treaty standards of relevance, such as the United Nations *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* or the United Nations *Standard Minimum Rules for Non-custodial Measures* (Tokyo Rules).
- ³ *Fox, Campbell and Hartley v United Kingdom*, ECtHR judgment of 30 August 1990, para. 32.
- ⁴ Although this definition lacks an explicit reference to the suspected person's affiliation with the crime, this does not appear to have had an impact on practice.
- ⁵ See decision of the Supreme Court of the Federation of Bosnia and Herzegovina, KŽ-526/03, 29 October 2003 in *Commentaries on the Bosnia-Herzegovina Criminal Procedure Code*, Hajrija Sijerčić-Čolić, Malik Hadžiomerađić, Marinko Jurčević, Damjan Kaurinović and Miodrag Simović, (Sarajevo, Council of Europe/European Commission, 2005) Article 132, p. 414, unofficial translation.
- ⁶ *Brogan and Others v UK*, ECtHR judgment of 29 November 1988, para. 84; see also *Ilijkov v Bulgaria*, ECtHR judgment of 26 July 2001.
- ⁷ Decision 070-0-KŽ-06-000445 of 23 August 2006.
- ⁸ *Ilijkov v Bulgaria*, ECtHR judgment of 26 July 2001, paras. 93-98.
- ⁹ *Jablonski v Poland*, ECtHR judgment of 21 December 2000, para. 83
- ¹⁰ *Ambruszkiewicz v Poland*, ECtHR judgment of 4 May 2006, paras. 32-33.
- ¹¹ See Recommendation (2006)13 of the Committee of Ministers, Section I.4 and Explanatory Memorandum Section 1.4.
- ¹² See Recommendation (2006)13 of the Committee of Ministers, Section II.7.
- ¹³ See Recommendation (2006)13 of the Committee of Ministers, Section II.14 [1].
- ¹⁴ These are house arrest and travel ban as provided for in Article 126 of the BiH CPC, and prohibition from performing certain business or official activities, prohibition from visiting certain places, prohibition from meeting certain persons, order to report to a specified body, and temporary withdrawal of driver's license, as provided for in Article 126a.
- ¹⁵ Article 123(2) of the BiH CPC.
- ¹⁶ These are the measures in Article 126a, see endnote 14 above. The High Representative's decision was published in Official Gazette 53/07 of 16 July 2007.
- ¹⁷ Decision KRN/06/234 of 29 November 2006.
- ¹⁸ Decision X-K/06/181 of 29 January 2007.
- ¹⁹ Any measure must be tailored to the person's situation, including setting an amount of bail in line with the person's financial situation. *Neumeister v Austria*, ECtHR judgment of 27 June 1968, As to the Law, para. 14.

- ²⁰ *McKay v United Kingdom*, ECtHR judgment of 3 October 2006, para. 47.
- ²¹ Decision KŽ-I-10/03 of 19.12.2003.
- ²² Recommendation (2006) 13 of the Committee of Ministers, para. 2.
- ²³ See *W v Switzerland*, ECtHR judgment of 26 January 1993, para. 33, and *Neumeister v Switzerland*, ECtHR judgment of 27 June 1968, as to the Law, paragraph 10.
- ²⁴ *Michael and Brian Hill v Spain*, Human Rights Committee Communication No. 526/1993, paragraph 12.3.
- ²⁵ *Sulaoaja v Estonia*, ECtHR judgment of 15 February 2005, para 64.
- ²⁶ *Neumeister v Austria*, ECtHR judgment of 27 June 1968, As to the Law, para. 11.
- ²⁷ *Wemhoff v Germany*, ECtHR judgment of 27 June 1968, As to the Law, para. 15.
- ²⁸ The *Commentaries on the Criminal Procedure Code of Bosnia and Herzegovina* also cite a Supreme Court Decision from Serbia involving appearing before the authorities: “The fact that the accused, after committing murder, handed himself in is a circumstance that does not suggest the danger of him fleeing.” Hajrija Sijerčić-Čolić, Malik Hadžiomerađić, Marinko Jurčević, Damjan Kaurinović and Miodrag Simović (Sarajevo, Council of Europe/European Commission, 2005) Article 132, p. 419, unofficial translation.
- ²⁹ Decision Kpp 23/05 of 17 September 2005.
- ³⁰ Decision X-KR/06/290 of 9 January 2007.
- ³¹ *Trzaska v Poland*, ECtHR judgment of 11 July 2000, para. 65.
- ³² *Kemmache v. France*, ECtHR judgment of 22 October 1991, para. 54.
- ³³ Decision 009-0-Kv-000 287 of 18 October 2006.
- ³⁴ Decision X-KR-05/16 of 16 September 2005.
- ³⁵ Hajrija Sijerčić-Čolić, Malik Hadžiomerađić, Marinko Jurčević, Damjan Kaurinović and Miodrag Simović, *Commentaries on the Criminal Procedure Code of Bosnia and Herzegovina* (Council of Europe/European Commission, Sarajevo, 2005) Article 132.1(b) pp. 420-422.
- ³⁶ Stefan Treschel, *Human Rights in Criminal Proceedings* (Oxford, Oxford University Press, 2005) p. 526.
- ³⁷ *Contrada v Italy*, ECtHR judgment of 24 August 1998, para. 58.
- ³⁸ *Clooth v Belgium*, ECtHR judgment of 27 November 1991, para. 40.
- ³⁹ *Assenov v Bulgaria*, ECtHR judgment of 28 October 1998, para. 156.
- ⁴⁰ *Baranowski v Poland*, ECtHR judgment of 20 March 2000, para. 50.
- ⁴¹ In the case of *Matijašević v Serbia*, the European Court found a violation of the presumption of innocence with respect to the language used in a custody decision when the Novi Sad court wrote that the suspect had “committed the criminal offences which are the subject of the prosecution” and concluded that if released he would repeat the offences (ECtHR judgment of 19 September 2006, paras. 7 and 48).

- ⁴² See *Letellier v France*, ECtHR judgment of 26 June 1991, para.51.
- ⁴³ See *I.A. v France*, ECtHR judgment of 23 September 1998, para.104.
- ⁴⁴ For instance Scandinavian countries such as Sweden and Norway do not have such a custody ground, while Italy and Poland have now done away with it.
- ⁴⁵ Explanatory Memorandum to Recommendation (2006) 13 of the Committee of Ministers to the member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse.
- ⁴⁶ Hajrija Sijerčić-Čolić, Malik Hadžiomerađić, Marinko Jurčević, Damjan Kaurinović and Miodrag Simović, *Commentaries on the Criminal Procedure Code of Bosnia and Herzegovina* (Council of Europe/European Commission, Sarajevo, 2005) Article 132.1(d) p. 426, unofficial translation.
- ⁴⁷ See *Rokhlina v Russia*, ECtHR judgment of 7 April 2005, para. 67
- ⁴⁸ Article 191(1) of the Law on Criminal Procedure, Official Gazette of the Socialist Federal Republic of Yugoslavia nos. 26/86, 74/87, 57/89, 3/90, and Official Gazette of the Republic of BH, nos. 2/92, 9/92, 16/92 and 13/94).
- ⁴⁹ Decision 002-0-Kpp-000-001 of 2 March 2006.
- ⁵⁰ Decision X-KR/06/236 of 22 December 2006.
- ⁵¹ Decision K 37/05 of 21 September 2005.
- ⁵² Decision KŽ-510/05 of 20 October 2005.
- ⁵³ *I.A. v France*, ECtHR decision of 23 September 1998, para. 104.
- ⁵⁴ Even the Constitutional Court has affirmed lower court use of this ground in several decisions, such as AP 805/04 A.K. where the applicant asserted that the equivalent ground in the FBH CPC (Article 146.1(d)) violates Article 5.1(c) ECHR. The Constitutional Court found that the Cantonal Court's use of this custody ground was appropriate in the case, although the Constitutional Court decision doesn't contain details about how the ground was precisely reasoned by the lower court.
- ⁵⁵ This formulation places the emphasis on the public order disruption requirement, and also underlines that this ground can only be used for the most serious crimes, where the possible sentence is a **minimum** of ten years. Criminal offences which fall into the category in the Criminal Code of Bosnia and Herzegovina are the following: Article 167 *Assassination of a Representative of the Highest Institutions of BH*, Article 169 *Punishment for the Gravest Criminal Offences*, Article 171 *Genocide*, Article 172 *Crimes Against Humanity*, Article 173 *War Crimes Against Civilians*, Article 174 *War Crimes Against the Wounded and Sick*, Article 175 *War Crimes Against Prisoners of War*, Article 177 *Unlawful Killing or Wounding of the Enemy*, Article 179 *Violating the Laws and Practices of Warfare*, Article 186(3) *Trafficking in Persons*, Article 189(5) *Smuggling of Persons*, Article 191(3) *Taking of Hostages*, Article 192(3) *Endangering Internationally Protected Persons*, Article 197(3) *Hijacking an Aircraft or a Ship*, Article 198(7) *Endangering the Safety of Air Traffic and Maritime Navigation*, Article 201(3) *Terrorism*, Article 246(c)(5) and (7) *Resisting a Superior*, Article 246(f)(4) *Assault against a Military Person Discharging Official Duty*, and Article 250(3) *Organised Crime*.

- 56 In only one post-indictment war crime case at the State Court has an accused person been held in custody for short periods based on ground 132.1(d) alone. Upon issuance of the first instance verdict, he was released from custody with the imposition of certain prohibiting measures.
- 57 *Lettellier v France*, ECtHR judgment of 26 June 1991, para. 35.
- 58 *Svipsta v Latvia*, ECtHR judgment of 9 March 2006, para. 109.
- 59 See, for example, *Mansur v Turkey*, ECtHR judgment of 8 June 1995, paras. 55-57; *Lettellier v France*, ECtHR judgment of 26 June 1991, para. 52.
- 60 *Svipsta v Latvia*, ECtHR judgment of 9 March 2006, paras. 130-134.
- 61 *I.A. v France*, ECtHR judgment of 23 September 1998, para. 111.
- 62 Article 297(1)(k) BiH CPC.
- 63 Office of the High Commission for Human Rights, *The Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, Chapter 4.5.8, page 133.
- 64 Hajrija Sijerčić-Čolić, Malik Hadžiomeragić, Marinko Jurčević, Damjan Kaurinović and Miodrag Simović, *Commentaries on the Criminal Procedure Code of Bosnia and Herzegovina* (Sarajevo, Council of Europe/European Commission, 2005) Article 134, p. 432, unofficial translation.
- 65 Prohibiting measures include such measures as house arrest or compulsory residence orders. Article 126.1 of the State CPC on prohibiting measures provides: “*In a reasoned decision, the Court may place the accused under house arrest....*” In *Nikolova v Bulgaria* (No. 2) the European Court held that decisions ordering house arrest must be justified in a similar manner as custody decisions (ECtHR judgment of 30 September 2004, para. 67).
- 66 Custody proposal number KT 87/06 of 2 March 2006.
- 67 This custody proposal also describes how the suspects confessed to the alleged crime, which actually would point away from the conclusion that the suspects would have a real interest in influencing the witnesses.
- 68 Decision KV 30/05 of 22 September 2005.
- 69 *Ilijkov v Bulgaria*, ECtHR judgment of 26 July 2001, para 94.
- 70 Decision Kv-429/05 of 27 December 2005.
- 71 Article 50.1 of the State CPC.
- 72 Appeal dated 25 April 2006.
- 73 Concluding observations of the Human Rights Committee on Bosnia and Herzegovina (CCPR/C/BIH/CO/1), paragraph 18.



Recommendation Rec(2006)13

of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse

*(Adopted by the Committee of Ministers on 27 September 2006
at the 974th meeting of the Ministers' Deputies)*

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe

Considering the fundamental importance of the presumption of innocence and the right to the liberty of the person;

Aware of the irreversible damage that remand in custody may cause to persons ultimately found to be innocent or discharged and of the detrimental impact that remand in custody may have on the maintenance of family relationships;

Taking into consideration the financial consequences of remand in custody for the state, the individuals affected and the economy in general;

Noting the considerable number of persons remanded in custody and the problems posed by prison overcrowding;

Having regard to the case law of the European Court of Human Rights, the reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and the opinions of United Nations human rights treaty bodies;

Taking into consideration Recommendation Rec(2006)2 of the Committee of Ministers on the European Prison Rules and Recommendation No. R (99) 22 of the Committee of Ministers concerning prison overcrowding and prison population inflation;

Considering the need to ensure that the use of remand in custody is always exceptional and is always justified;

Bearing in mind the human rights and fundamental freedoms of all persons deprived of their liberty and the particular need to ensure that not only are persons remanded in custody able to prepare their defence and to maintain their family relationships but they are also not held in conditions incompatible with their legal status, which is based on the presumption of innocence;

Considering the importance attaching to the development of international norms regarding the circumstances in which the use of remand in custody is justified, the procedures whereby it is imposed or continued and the conditions in which persons remanded in custody are held, as well as of mechanisms for the effective implementation of such norms;

Recommends that governments of member states disseminate and be guided in their legislation and practice by the principles set out in the appendix to this recommendation which replaces Resolution (65) 11 on remand in custody and Recommendation No. R (80) 11 of the Committee of Ministers to member states concerning custody pending trial.

Appendix to Recommendation Rec(2006)13

Rules on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse

Preamble

The present rules are intended to:

- a. set strict limits on the use of remand in custody;
- b. encourage the use of alternative measures wherever possible;
- c. require judicial authority for the imposition and continued use of remand in custody and alternative measures;
- d. ensure that persons remanded in custody are held in conditions and subject to a regime appropriate to their legal status, which is based on the presumption of innocence;

- e. require the provision of suitable facilities and appropriate management for the holding of persons remanded in custody;
- f. ensure the establishment of effective safeguards against possible breaches of the rules.

The present rules reflect the human rights and fundamental freedoms of all persons but particularly the prohibition of torture and inhuman or degrading treatment, the right to a fair trial and the rights to liberty and security and to respect for private and family life.

The present rules are applicable to all persons suspected of having committed an offence but include particular requirements for juveniles and other especially vulnerable persons.

I. Definitions and general principles

Definitions

1. [1] 'Remand in custody' is any period of detention of a suspected offender ordered by a judicial authority and prior to conviction. It also includes any period of detention pursuant to rules relating to international judicial co-operation and extradition, subject to their specific requirements. It does not include the initial deprivation of liberty by a police or a law enforcement officer (or by anyone else so authorised to act) for the purposes of questioning.

[2] 'Remand in custody' also includes any period of detention after conviction whenever persons awaiting either sentence or the confirmation of conviction or sentence continue to be treated as unconvicted persons.

[3] 'Remand prisoners' are persons who have been remanded in custody and who are not already serving a prison sentence or are detained under any other instrument.
2. [1] 'Alternative measures' to remand in custody may include, for example: undertakings to appear before a judicial authority as and when required, not to interfere with the course of justice and not to engage in particular conduct, including that involved in a profession or particular employment; requirements to report on a daily or periodic basis to a judicial authority, the police or other authority; requirements to accept supervision by an agency appointed by the judicial authority;

requirements to submit to electronic monitoring; requirements to reside at a specified address, with or without conditions as to the hours to be spent there; requirements not to leave or enter specified places or districts without authorisation; requirements not to meet specified persons without authorisation; requirements to surrender passports or other identification papers; and requirements to provide or secure financial or other forms of guarantees as to conduct pending trial.

[2] Wherever practicable, alternative measures shall be applied in the state where a suspected offender is normally resident if this is not the state in which the offence was allegedly committed.

General principles

3. [1] In view of both the presumption of innocence and the presumption in favour of liberty, the remand in custody of persons suspected of an offence shall be the exception rather than the norm.
[2] There shall not be a mandatory requirement that persons suspected of an offence (or particular classes of such persons) be remanded in custody.
[3] In individual cases, remand in custody shall only be used when strictly necessary and as a measure of last resort; it shall not be used for punitive reasons.
4. In order to avoid inappropriate use of remand in custody the widest possible range of alternative, less restrictive measures relating to the conduct of a suspected offender shall be made available.
5. Remand prisoners shall be subject to conditions appropriate to their legal status; this entails the absence of restrictions other than those necessary for the administration of justice, the security of the institution, the safety of prisoners and staff and the protection of the rights of others and in particular the fulfilment of the requirements of the European Prison Rules and the other rules set out in Part III of the present text.

II. The use of remand in custody

Justification

6. Remand in custody shall generally be available only in respect of persons suspected of committing offences that are imprisonable.
7. A person may only be remanded in custody where all of the following four conditions are satisfied:

- a. there is reasonable suspicion that he or she committed an offence;
and
 - b. there are substantial reasons for believing that, if released, he or she would either (i) abscond, or (ii) commit a serious offence, or (iii) interfere with the course of justice, or (iv) pose a serious threat to public order; and
 - c. there is no possibility of using alternative measures to address the concerns referred to in b.; and
 - d. this is a step taken as part of the criminal justice process.
8. [1] In order to establish whether the concerns referred to in Rule 7b. exist, or continue to do so, as well as whether they could be satisfactorily allayed through the use of alternative measures, objective criteria shall be applied by the judicial authorities responsible for determining whether suspected offenders shall be remanded in custody or, where this has already happened, whether such remand shall be extended.
- [2] The burden of establishing that a substantial risk exists and that it cannot be allayed shall lie on the prosecution or investigating judge.
9. [1] The determination of any risk shall be based on the individual circumstances of the case, but particular consideration shall be given to:
- a. the nature and seriousness of the alleged offence;
 - b. the penalty likely to be incurred in the event of conviction;
 - c. the age, health, character, antecedents and personal and social circumstances of the person concerned, and in particular his or her community ties; and
 - d. the conduct of the person concerned, especially how he or she has fulfilled any obligations that may have been imposed on him or her in the course of previous criminal proceedings.
- [2] The fact that the person concerned is not a national of, or has no other links with, the state where the offence is supposed to have been committed shall not in itself be sufficient to conclude that there is a risk of flight.
10. Wherever possible remand in custody should be avoided in the case of suspected offenders who have the primary responsibility for the care of infants.

11. In deciding whether remand in custody shall be continued, it shall be borne in mind that particular evidence which may once have previously made the use of such a measure seem appropriate, or the use of alternative measures seem inappropriate, may be rendered less compelling with the passage of time.
12. A breach of alternative measures may be subject to a sanction but shall not automatically justify subjecting someone to remand in custody. In such cases the replacement of alternative measures by remand in custody shall require specific motivation.

Judicial authorisation

13. The responsibility for remanding someone in custody, authorising its continuation and imposing alternative measures shall be discharged by a judicial authority.
14. [1] After his or her initial deprivation of liberty by a law enforcement officer (or by anyone else so authorised to act), someone suspected of having committed an offence shall be brought promptly before a judicial authority for the purpose of determining whether or not this deprivation of liberty is justified, whether or not it requires prolongation or whether or not the suspected offender shall be remanded in custody or subjected to alternative measures.

[2] The interval between the initial deprivation of liberty and this appearance before such an authority should preferably be no more than forty-eight hours and in many cases a much shorter interval may be sufficient.
15. The existence of an emergency in accordance with Article 15 of the European Convention on Human Rights shall not lead to an interval greater than seven days between the initial deprivation of liberty and the appearance before a judicial authority with a view to remanding in custody unless it is absolutely impossible to hold a hearing.
16. The judicial authority responsible for remanding someone in custody or authorising its continuation, as well as for imposing alternative measures, shall hear and determine the matter without delay.
17. [1] The existence of a continued justification for remanding someone in custody shall be periodically reviewed by a judicial authority, which shall order the release of the suspected offender where it finds that one or more of the conditions in Rules 6 and 7 *a, b, c* and *d* are no longer fulfilled.

[2] The interval between reviews shall normally be no longer than a month unless the person concerned has the right to submit and have examined, at any time, an application for release.

[3] The responsibility for ensuring that such reviews take place shall rest with the prosecuting authority or investigating judicial authority, and in the event of no application being made by the prosecuting authority or investigating judicial authority to continue a remand in custody, any person subject to such a measure shall automatically be released.

18. Any person remanded in custody, as well as anyone subjected to an extension of such remand or to alternative measures, shall have a right of appeal against such a ruling and shall be informed of this right when this ruling is made.
19. [1] A remand prisoner shall have a separate right to a speedy challenge before a court with respect to the lawfulness of his or her detention.
[2] This right may be satisfied through the periodic review of remand in custody where this allows all the issues relevant to such a challenge to be raised.
20. The existence of an emergency in accordance with Article 15 of the European Convention on Human Rights shall not affect the right of a remand prisoner to challenge the lawfulness of his or her detention.
21. [1] Every ruling by a judicial authority to remand someone in custody, to continue such remand or to impose alternative measures shall be reasoned and the person affected shall be provided with a copy of the reasons.
[2] Only in exceptional circumstances shall reasons not be notified on the same day as the ruling.

Duration

22. [1] Remand in custody shall only ever be continued so long as all the conditions in Rules 6 and 7 are fulfilled.
[2] In any case its duration shall not exceed, nor normally be disproportionate to, the penalty that may be imposed for the offence concerned.
[3] In no case shall remand in custody breach the right of a detained person to be tried within a reasonable time.

23. Any specification of a maximum period of remand in custody shall not lead to a failure to consider at regular intervals the actual need for its continuation in the particular circumstances of a given case.
24. [1] It is the responsibility of the prosecuting authority or the investigating judicial authority to act with due diligence in the conduct of an investigation and to ensure that the existence of matters supporting remand in custody is kept under continuous review.
- [2] Priority shall be given to cases involving a person who has been remanded in custody.

Assistance by a lawyer, presence of the person concerned and interpretation

25. [1] The intention to seek remand in custody and the reasons for so doing shall be promptly communicated to the person concerned in a language which he or she understands.
- [2] The person whose remand in custody will be sought shall have the right to assistance from a lawyer in the remand proceedings and to have an adequate opportunity to consult with his or her lawyer in order to prepare their defence. The person concerned shall be advised of these rights in sufficient time and in a language which he or she understands so that their exercise is practicable.
- [3] Such assistance from a lawyer shall be provided at public expense where the person whose remand in custody is being sought cannot afford it.
- [4] The existence of an emergency in accordance with Article 15 of the European Convention on Human Rights should not normally affect the right of access to and consultation with a lawyer in the context of remand proceedings.
26. A person whose remand in custody is being sought and his or her lawyer shall have access to documentation relevant to such a decision in good time.
27. [1] A person who is the national of another country and whose remand in custody is being sought shall have the right to have the consul of this country notified of this possibility in sufficient time to obtain advice and assistance from him or her.
- [2] This right should, wherever possible, also be extended to persons holding the nationality both of the country where their remand in custody is being sought and of another country.

28. A person whose remand in custody is being sought shall have the right to appear at remand proceedings. Under certain conditions this requirement may be satisfied through the use of appropriate video-links.
29. Adequate interpretation services before the judicial authority considering whether to remand someone in custody shall be made available at public expense, where the person concerned does not understand and speak the language normally used in those proceedings.
30. Persons appearing at remand proceedings shall be given an opportunity to wash and, in the case of male prisoners, to shave unless there is a risk of this resulting in a fundamental alteration of their normal appearance.
31. The foregoing Rules in this section shall also apply to the continuation of the remand in custody.

Informing the family

32. [1] A person whose remand in custody is being sought (or sought to be continued) shall have the right to have the members of his or her family informed in good time, about the date and the place of remand proceedings unless this would result in a serious risk of prejudice for the administration of justice or for national security.

[2] The decision in any event about contacting family members shall be a matter for the person whose remand in custody is being sought (or sought to be prolonged) unless he or she is not legally competent to make such a decision or there is some other compelling justification.

Deduction of pre-conviction custody from sentence

33. [1] The period of remand in custody prior to conviction, wherever spent, shall be deducted from the length of any sentence of imprisonment subsequently imposed.

[2] Any period of remand in custody could be taken into account in establishing the penalty imposed where it is not one of imprisonment.

[3] The nature and duration of alternative measures previously imposed could equally be taken into account in determining the sentence.

Compensation

34. [1] Consideration shall be given to the provision of compensation to persons remanded in custody who are not subsequently convicted of the offence in respect of which they were so remanded; this compensation might cover loss of income, loss of opportunities and moral damage.

[2] Compensation shall not be required where it is established that either the person remanded had, by his or her behaviour, actively contributed to the reasonableness of the suspicion that he or she had committed an offence or he or she had deliberately obstructed the investigation of the alleged offence.

III. Conditions of remand in custody

General

35. The conditions of remand in custody shall, subject to the Rules set out below, be governed by the European Prison Rules.

Absence from remand institution

36. [1] A remand prisoner shall only leave the remand institution for further investigation if this is authorised by a judge or prosecutor or with the express consent of the remand prisoner and for a limited period.

[2] On return to the remand institution the remand prisoner shall undergo, at his or her request, a thorough physical examination by a medical doctor or, exceptionally, by a qualified nurse as soon as possible.

Continuing medical treatment

37. [1] Arrangements shall be made to enable remand prisoners to continue with necessary medical or dental treatment that they were receiving before they were detained, if so decided by the remand institution's doctor or dentist where possible in consultation with the remand prisoner's doctor or dentist.

[2] Remand prisoners shall be given the opportunity to consult and be treated by their own doctor or dentist if a medical or dental necessity so requires.

[3] Reasons shall be given if an application by a remand prisoner to consult his or her own doctor or dentist is refused.

[4] Such costs as are incurred shall not be the responsibility of the administration of the remand institution.

Correspondence

38. There shall normally be no restriction on the number of letters sent and received by remand prisoners.

Voting

39. Remand prisoners shall be able to vote in public elections and referendums that occur during the period of remand in custody.

Education

40. Remand in custody shall not unduly disrupt the education of children or young persons or unduly interfere with access to more advanced education.

Discipline and punishment

41. No disciplinary punishment imposed on a remand prisoner shall have the effect of extending the length of the remand in custody or interfering with the preparation of his or her defence.
42. The punishment of solitary confinement shall not affect the access to a lawyer and shall allow minimum contact with family outside. It should not affect the conditions of a remand prisoner's detention in respect of bedding, physical exercise, hygiene, access to reading material and approved religious representatives.

Staff

43. Staff who work in a remand institution with remand prisoners shall be selected and trained so as to be able to take full account of the particular status and needs of remand prisoners.

Complaints procedures

44. [1] Remand prisoners shall have avenues of complaint open to them, both within and outside the remand institution, and be entitled to confidential access to an appropriate authority mandated to address their grievances.
[2] These avenues shall be in addition to any right to bring legal proceedings.
[3] Complaints shall be dealt with as speedily as possible.



Draft recommendation of the Council of Europe Committee of Ministers to member states on the use of remand in custody and its explanatory memorandum (see *CM(2006)122 Addendum*, 30 August 2006).¹

Explanatory memorandum

Rules on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse

I. Definitions and general principles

Definitions

1. 'Remand in custody' is defined in a way that excludes any period in the custody of the police or other law enforcement officers following an initial short deprivation of liberty by them or by anyone else entitled to effect such a measure (e.g., under a power of citizen's arrest) for the purpose of questioning before charge as well as any prolongation of that detention approved by a judicial authority. Remand in custody will thus be ordered by a judicial authority at a later stage in the criminal justice process and it may also be ordered in respect of someone who has not actually been deprived of his or her liberty by the police or other law enforcement officers or anyone else so entitled to act. The need for the imposition of this loss of liberty to be ordered by a judicial authority reflects the combined requirements of Articles 5(1)(c) and (3) of the European Convention on Human Rights. These provisions envisage that the competent legal authority for this purpose should be 'a judge or other officer authorised by law to exercise judicial power'². In some legal systems persons awaiting either sentence or the confirmation of conviction or sentence may continue to be treated as unconvicted persons and the fact that the Convention left such a discretion to High Contracting Parties has been recognised by the

European Court of Human Rights³. It is thus considered appropriate for the rules governing remand in custody to remain applicable to them.

Remand in custody will generally include detention similarly ordered by a judicial authority pursuant to rules (including national implementation measures) for judicial co-operation and extradition (including the European Arrest Warrant) but the provisions of this Recommendation are not intended to prejudice the specific requirements of those rules. Furthermore it is clear that the provisions of the recommendation can apply to cases of international judicial co-operation to the extent that they are pertinent. It may be recalled here that Article 5 (1)(f) of the European Convention of Human Rights expressly refers to extradition proceedings and consequently paragraphs 2 and 4 of Article 5 also apply in such cases.

2. The list of 'alternative measures' is illustrative and not exhaustive and a State is thus free to use any procedures which can facilitate the administration of justice and safeguard public order without involving a deprivation of liberty or an unjustified infringement of the other human rights of the persons concerned. Electronic monitoring is instanced as an example of the ways in which technological advances may afford new means of satisfactorily addressing legitimate concerns about a suspected offender without the need for a deprivation of liberty. It should also be noted that placements with relatives, foster parents or other forms of supported accommodation are specified as alternatives to remand in custody for juvenile suspects in Recommendation Rec (2003) 20 of the Committee of Ministers to member states concerning new ways of dealing with juvenile delinquency and the role of juvenile justice (Article 17). The need to make provision 'for a sufficient number of suitably varied' measures is recognised in Appendix 2 to Recommendation Rec (2000) 22 of the Committee of Ministers to member states on improving the implementation of the European rules on community sanctions and measures. The choice of measures in a particular case is likely to be determined by its circumstances so that, e.g., a restriction on associating with others may be needed to prevent collusion, a reporting obligation may be needed to avert a risk of flight and a bar on continuing in a job or profession may be needed to forestall interference with evidence, the commission of further offences or the outbreak of serious disorder. The importance of account being taken of the circumstances of the person concerned where measures are imposed is recognised in Rule 6 of the European rules on community sanctions and measures (Recommendation No R (92) 16). The inclusion of the possibility

of alternative measures being imposed in co-operation with another State reflects the increase in mutual recognition arrangements being made by States. Although their imposition might not be practicable in the circumstances of a given case, the necessary legal framework for the implementation of agreements permitting this should be adopted so that they can be imposed wherever this would be appropriate.

General principles

3. The insistence on the exceptional character of resort to remand in custody when dealing with persons suspected of having committed an offence before their trial and on it only being imposed in individual cases where this is strictly required by their particular circumstances reflects the effect of requirements in Articles 5(1) and 6(2) of the European Convention on Human Rights, as elaborated by the European Court of Human Rights and the former European Commission of Human Rights. This case law has, in particular, established that a decision to remand someone in custody cannot be based solely on the past record of the suspected offender or the fact that certain offences have allegedly been committed⁴. Encouragement for 'the widest possible use to be made of alternatives to pre-trial detention' is also found in the Appendix to Recommendation No. R (99) 22 of the Committee of Ministers to Member States concerning Prison Overcrowding and Prison Population Inflation (Article 10). The fact that remand in custody is intended to facilitate the administration of justice and to safeguard public order means that it should not be used for punitive reasons. It should thus be noted that Recommendation Rec(2003)20 of the Committee of Ministers to member states concerning new ways of dealing with juvenile delinquency and the role of juvenile justice (Article 17) provides that 'Custodial remand should never be used as a punishment or form of intimidation or as a substitute for child protection or mental health measures'.
4. It is recognised that the objective of ensuring that remand in custody is exceptional and is only imposed when strictly necessary can only be achieved where judicial authorities are in a position to deal effectively with potentially serious risks to the due administration of justice and public order through the use of less restrictive measures relating to the conduct of a suspected offender. This requires a State to establish the widest possible range of alternative measures and to ensure that these can actually be employed where required by the circumstances of a particular case.

5. It is important that the legal status of remand prisoners is fully reflected in the way in which they are treated and managed and in the conditions in which they are held. They are presumed to be innocent until they are found guilty and they are not being held in prison as a punishment. The administrations of remand institutions must ensure that remand prisoners are treated without any unnecessary restrictions and with full recognition of the fact that their presumed innocence may be confirmed when their cases are finally decided by the court. This requires as a minimum the observance not only of the European Prison Rules - both the rules of general application and the ones specifically applicable to untried prisoners - but also of the additional standards set out in Part III.

II. The use of remand in custody

Justification

6. The exceptional character of remand in custody means that the deprivation of liberty entailed by it should generally only be warranted where the offence in respect of which it is sought can itself lead to a term of imprisonment following a conviction. Furthermore it should be noted that in some countries remand in custody is never permitted in respect of offences that are not imprisonable.
7. The conditions in *a. - d.* governing the use of remand in custody reflect the case law of the European Court of Human Rights and are cumulative so that it cannot be imposed or continued if any one of them is absent or ceases to be operative. The requirement of reasonable suspicion entails the existence of evidence objectively linking the person concerned to a suspected offence. It need not be sufficient to secure a conviction but it should be sufficient to justify further investigation or the initiation of a prosecution and the longer that remand in custody lasts the greater should be the difficulty in establishing the reasonableness of a suspicion⁵. Remand in custody cannot be justified where it is clear that a prosecution will not or cannot be pursued⁶. The four concerns instanced in *b.* as potential justifications for remand in custody - which are insufficient in the absence (whether at the outset or after the lapse of time) of a reasonable suspicion⁷ - reflect those recognised in the case law of the European Court⁸. However, there is no requirement that all of them should actually be invoked in a particular State. Concern about public order - which is probably only ever going to be justified where there is substantial evidence of a reaction to a grave crime

such as murder - in particular is not considered a sufficient justification in some States. Although any one of these concerns may justify the use of remand in custody in respect of a suspected offender, the exceptional nature of such a measure necessarily requires consideration first being given as to whether the concerns underlying them can be satisfactorily addressed through the use of measures that do not entail a deprivation of liberty² and an unduly restrictive view of their potential effectiveness will be inappropriate¹⁰. It is thus likely that remand in custody would be a wholly disproportionate response both to the alleged commission of many offences and apprehensions about what the suspected offender might do in the future. Furthermore it needs to be borne in mind that the ground relating to public order envisages a particularly grave situation and is not one which the release of most suspected offenders could be expected to engender. It is essential that remand in custody be a measure that forms part of the criminal process with a trial being the ultimate objective, although this does not mean that the remand in custody will lose its legal validity if the prosecution is eventually for a different offence or if no trial is held since grounds for suspicion may ultimately prove insufficient or unfounded and there may be other reasons why a particular prosecution is not warranted. However, remand in custody cannot be used merely as a preventive procedure unrelated to a possible trial¹¹.

8. A decision to use remand in custody rather than an alternative measure must be well-founded and for this to be feasible the judicial authority will need to have at its disposal techniques for assessing whether or not there is a risk that one of the four concerns in Rule 7 b would arise if the suspected offender were released (or not remanded in custody) and whether or not it would be impossible to allay them satisfactorily through the use of alternative measures. This entails the elaboration of the factors -both positive and negative- that should be weighed in making an assessment of a possible risk -notably those set out in the following paragraph- and of their relative significance in demonstrating whether or not a particular risk exists and whether or not it can be allayed through the use of alternative measures. Making such an assessment may necessitate the use of some form of objective evaluation in respect of any of the possible factors found to exist as a way of calculating the overall degree of risk. It will also require suitably trained personnel being made available to assist the judicial authority in gathering and evaluating the evidence in a given case in a timely fashion. Amongst the evidence that might be considered relevant will be that provided by the persons affected by the alleged offence and the

community in which the suspected offender lives. In view of the presumptions in favour of innocence and liberty, the responsibility for making a case for remand in custody must lie on the prosecution or the investigating judicial authority. Furthermore, with regard to juveniles, there is a requirement in Recommendation Rec (2003) 20 of the Committee of Ministers to member states concerning new ways of dealing with juvenile delinquency and the role of juvenile justice, Article 18 to 'undertake a full risk assessment based on comprehensive and reliable information on the young person's personality and social circumstances'. It will be impermissible for the prosecution or the investigating judge to be treated as having discharged the responsibility concerning risk assessment by reference only to the gravity of the offence or for the latter to justify a requirement that the suspected offender demonstrate that there was not even a hypothetical danger that could ensue from his or her remaining at liberty or being released¹².

9. In assessing the existence of risk that could justify the imposition of remand in custody certain considerations are identified as particularly weighty but the significance of these is still not such that it should automatically be concluded that such a measure is actually required in a given case. The need to question prejudices about the risks posed by suspected offenders is underlined by the requirement to be open to the possibility that someone is not likely to flee simply because he or she is a foreign national. The fact that he or she has no links with the State where the offence is supposed to have been committed could certainly be a factor that may be taken into account when weighing the risk of flight¹³.
10. Maintaining the bond between parents and infants is likely to be in the best interests of the latter in most cases. Moreover, in at least some instances, the existence of parental responsibility for the care of an infant will be an important consideration militating against the conclusion that there is any sort of risk that could justify the use of remand in custody with regard to the parent. However, where such a risk continues to exist, the need to maintain the parent-infant bond and the best interests of the child may require that the persons remanded in custody be allowed to bring their infants with them into the remand institution.
11. Particular emphasis is placed on ensuring that the approach to the appraisal of the need for remand in custody takes full account of the way in which the circumstances of a case can change¹⁴. An entirely fresh evaluation of the arguments for and against its imposition thus needs to be taken on each

occasion the matter comes before a judicial authority and past justifications for it should not be simply reiterated.

12. Some sanction is likely to be appropriate where the requirements involved in alternative measures are breached but the conditions governing the use of remand in custody should still be observed and this is also recognised in Rule 10 of the European rules on community sanctions and measures (Recommendation No. R (92) 16). A breach of those requirements will, therefore, only justify remand in custody where it is of sufficient gravity to establish that the situation is now such that the use of alternative measures (including different or additional ones to those breached) would no longer be enough to allay legitimate concerns about the person concerned remaining at liberty.

Judicial authorisation

13. In most instances it can be expected that the judicial authorisation required for remand in custody and alternative measures will be provided by a court but the wider term 'judicial authority' is being used as the European Convention on Human Rights recognises that the function can also be performed by other officers so long as they meet the requirements of independence and impartiality as elaborated in the case law concerning Article 6(1). It is also essential that the judicial authority concerned should actually have the power to order the release of a person for whom remand in custody (or its continuation) is not justified¹⁵. Any delay in executing a release decision should be kept to a minimum and be a matter of hours rather than days¹⁶.
14. The specification of a forty-eight hour period for the initial determination of whether custody should be continued or whether alternative measures should be imposed reflects the evolving interpretation of the requirement of Article 5(3) of the European Convention on Human Rights that this occur 'promptly'. However, no particular period has been prescribed by the European Court of Human Rights¹⁷ but one day has been accepted as 'prompt'¹⁸ and such a period is prescribed in some countries¹⁹. Moreover a forty-eight hour limit to the detention of juveniles in police custody, with every effort being made to reduce this time further for younger offenders, is specified in Recommendation Rec (2003) 20 of the Committee of Ministers to member states concerning new ways of dealing with juvenile delinquency and the role of juvenile justice, Article 15. It is also important to appreciate that forty-eight hours is often likely to be the upper limit of delay before it

is feasible to bring a suspected offender before the judicial authority. Just as the individual circumstances of a case may justify a longer period so it should be possible for the appearance to occur much earlier in a particularly straightforward case. It is up to the judicial authority to set a specific time/date for the first habeas corpus hearing, which is sufficiently “prompt” within the limits of the case law of the ECHR and provisions of the national law. It is important to appreciate that the submission to judicial control entailed by this process is quite distinct from the determination of whether there is a sufficient basis for undertaking a prosecution. It is thus possible that it could be justifiably concluded at this stage that remanding someone in custody is appropriate even though it later appears that a prosecution is not warranted²⁰ and there is, therefore, no basis for delaying the appearance until it is considered that a prosecution is likely. Furthermore any delay in the first appearance before the judicial authority is something that can only ever be justified by the particular circumstances of the case; problems affecting the organisation of law enforcement, prosecution and judicial services will never be admissible excuses for non-compliance with the promptness requirement²¹. While factors such as the need to preserve evidence, the health of the suspect, adverse weather conditions and the distance between where a person was initially deprived of liberty by the police or law enforcement officer or other authorised person and the location of the judicial authority (particularly in the case of an arrest abroad) might be relevant to determining whether the promptness requirement was met, their actual impact on time taken before his or her first appearance before a judicial authority will need to be demonstrated²².

15. It is recognised that an emergency situation in accordance with Article 15 of the European Convention on Human Rights may affect the feasibility of bringing someone suspected of an offence before a judicial authority for the first time but the longer deadline specified reflects the period that has generally been considered acceptable by the European Court of Human Rights in such cases²³. However, the character of emergencies can vary and the need for any extended interval before this first appearance before a judicial authority must be capable of being justified.
16. The need for promptness is seen as applying not only to the appearance of the person concerned before the judicial authority but also to the determination of whether the imposition of remand in custody or alternative measures is justified.

17. The recognition that the circumstances of a case can change – see Rule 11 – necessitates a periodic review by a judicial authority as to whether the imposition of remand in custody or alternative measures continues to be justified and the responsibility for initiating such a review is placed on the prosecuting authority or the investigating judicial authority since the burden of proving that there is still a sufficient justification for either measure rests with that authority. Although a monthly interval between such reviews ought to be observed, it is recognised that the objective of such reviews can be fulfilled by the existence of a possibility for a person remanded in custody to apply to a court for release him- or herself at any point during his or her remand. It is also recognised that the authorities may provide for restrictions on the ability to apply for release on account of the shortness of the time elapsing from a previous application or the failure to adduce any new basis for ordering his or her release.
18. Appropriate provision should be made to enable decisions concerning the imposition of remand in custody or alternative measures to be appealed to a higher judicial authority and to ensure that the person concerned is apprised of this possibility so that it can be invoked at the earliest opportunity. Such an appeal could be effected by judicial control that allows all relevant issues to be addressed. This obligation goes beyond the requirements of Article 5 of the European Convention on Human Rights²⁴.
19. The responsibility of the prosecuting authority or the investigating judicial authority for ensuring that there is a periodic review of the imposition of remand in custody ought not to be confused with the independent right that any person deprived of his or her liberty has under Article 5(4) of the European Convention on Human Rights to challenge the lawfulness of such action. This provision is unambiguous in requiring that the challenge be heard and determined by a court. Such a challenge can be more wide-ranging than the existence of grounds justifying remand as Article 5(4) requires that the judicial review encompass all the conditions essential for the lawfulness of the particular deprivation of liberty²⁵. It might even extend to considering the compatibility of the offence which the person concerned is suspected of having committed with either constitutional provisions or rights that he or she may have under the Convention. However, it is recognised that in certain cases the periodic review may be of sufficient scope to preclude the need for a separate lawfulness challenge at a particular time²⁶. Such a challenge should initially be possible within a matter of weeks of the initial detention and thereafter on a periodic basis²⁷.

The possibility of making a challenge will be regarded as having been impeded if the person remanded in custody is kept in total isolation and is not allowed the assistance of a lawyer²⁸. The judicial authority must have the power to order the release of the person concerned if the remand in custody is found to be unlawful²⁹.

20. Although an emergency situation in accordance with Article 15 of the European Convention on Human Rights permits some derogation from the standards applicable in normal conditions, the rights stipulated here are ones that should continue to be available and indeed have been recognised as essential safeguards against the possible misuse of power³⁰.
21. Compliance with the requirement that decisions be reasoned and that these reasons be provided in a timely manner is essential for the effective exercise of the right of appeal against the imposition of remand in custody or alternative measures, as well as for ensuring that the legitimacy of such a measure in a given case can be recognised. Moreover the reasoning must demonstrate that real consideration has been given to the merits of an application for release rather than embody a ritual incantation of a formula³¹. The exceptional circumstances referred to in paragraph 2 could arise in jurisdictions where an application for release made to a court following a decision to remand a person in custody is heard *ab initio* and is not a review of the initial remand decision.

Duration

22. The requirement that remand in custody must be strictly necessary means that if any of the justifications for its imposition cease to be applicable it must be terminated – see Rule 11 – unless some other justification arises. It is the role of the judicial authority to determine whether such a justification continues to exist or has arisen. However, even where remand in custody can be justified, the seriousness of such an interference with liberty and the non-punitive character of such a measure necessitate that its length should not normally be disproportionate to the penalty that can be imposed on the suspected offender concerned. A further limitation on the overall length of remand in custody is the requirement in Article 5(3) of the European Convention on Human Rights to ensure that anyone remanded in custody is tried within a reasonable time and this requires that the proceedings in such cases be handled in an especially expeditious manner. No maximum length of remand in custody has ever been prescribed by the European Court of Human Rights when considering what is ‘reasonable’ – periods of

both under and just over a year have been found objectionable³² while ones in excess of four years have been considered both acceptable³³ and objectionable³⁴ but it is evident from the case law that very special features need to be present for a lengthy period to be justified and that a short duration is all that should be needed in most cases, although the need even for the latter must be convincingly demonstrated. It should also be noted that the Committee of Ministers have recommended that 'When, as a last resort, juvenile suspects are remanded in custody, this should not be for longer than six months before the commencement of the trial. This period can only be extended where a judge not involved in the investigation of the case is satisfied that any delays in the proceedings are fully justified by exceptional circumstances', Recommendation Rec(2003)20 of the Committee of Ministers to member states concerning new ways of dealing with juvenile delinquency and the role of juvenile justice, Article 16. The fact that a period of remand in custody will subsequently be deducted from any sentence of imprisonment that must be served – see Rule 33 - is not relevant to the determination of its reasonableness.

23. Although the fulfilment of the requirements regarding the duration of remand in custody may be facilitated by the specification in legislation of a maximum period of remand in custody, the need to consider the particular circumstances of a given case means that such a period should not be automatically applied to all cases where remand in custody is justified. In many instances the circumstances of a case will be such that it should be possible to bring the case to trial before the expiry of such a period; thus remand in custody for the three-year period allowed by law was found by the European Court of Human Rights to be in violation of Article 5(3) of the European Convention on Human Rights where special diligence had not been shown in the conduct of the proceedings.³⁵
24. The particular responsibility recognised for the prosecuting authority or the investigating judicial authority with regard to the handling of a case, so that remand in custody is continued no longer than is justifiable and so that the bringing to trial of a person remanded in custody is especially expeditious, reflects its unrivalled access to information concerning a case and its capacity to advance its examination by the courts. Many violations of Article 5(3) are attributable to long periods of inactivity in the handling of a case prior to trial³⁶ and the European Court of Human Rights clearly expects an effective response to factors such as the late submission of reports by experts, illness and staffing shortages.

Assistance by a lawyer, presence of the person concerned and interpretation

25. The obligation to inform promptly someone who is actually detained in police custody or is remanded in custody and in an understandable language about an intention to seek or to continue his or her remand in custody and the reasons for so doing is intended to ensure that he or she is in a position to seek appropriate legal advice and to prepare arguments against the imposition of such a measure, as well as to prepare his or her family for the possibility that it might be imposed. It thus goes beyond the similar obligation imposed by Article 5(2) of the European Convention on Human Rights when a deprivation of liberty actually occurs. Such notification should normally be straight after the decision to seek or to continue remand in custody but a longer interval would be justified where the person concerned is not in custody at the time or the assistance of an interpreter is required. The seriousness of the consequences of being remanded in custody makes it essential that a person whose remand in custody will be sought, should be legally assisted and should have a lawyer to be provided at public expense where the person cannot afford one. The requirements concerning the provision of information about the right to be assisted by a lawyer and adequate time for consultation are intended to ensure that this right can be of real benefit for a person at risk of being remanded in custody. This right also entails the detaining and/or prosecuting authority or the investigating judicial authority taking appropriate steps to ensure that the person concerned is actually able to contact a lawyer and this may necessitate making available the details of lawyers so that they can be contacted and using interpreters both to explain the right of consultation and representation and to assist in its exercise. It will also entail appropriate facilities for consultation with a lawyer being made available. The provisions of the present Rule relate to the right of assistance by a lawyer in relation to remand proceedings. They do not relate to the actual presence of a lawyer during investigation. Although an emergency situation in accordance with Article 15 of the European Convention on Human Rights permits some derogation from the standards applicable in normal conditions, the rights stipulated here are ones that should continue to be available and indeed have been recognised as essential safeguards against the possible misuse of power³⁷. However, in an emergency the period of time which may be allowed to elapse before someone should be allowed to have legal advice and assistance for the purpose of arguing against the decision to seek his or her remand in custody will inevitably reflect the delay permitted in Rule 20 before he or she must first be brought before a judicial authority in remand proceedings.

26. Disclosure of documentation to the lawyer of someone whose remand in custody will be sought (or sought to be continued) is essential for that lawyer to be in a position to respond effectively to submissions as to justifications for the imposition of such a measure³⁸. Although some restrictions on disclosure may be justifiable, particularly in order to secure the administration of justice or to protect national security, they must not have a substantial impact on the ability to make a case against remand in custody³⁹.
27. This requirement seeks to ensure the fulfilment of obligations under Article 36 of the Vienna Convention on Consular Relations and their importance is also recognised in Articles 14-18 of the Appendix to Recommendation No. R (84) 12 of the Committee of Ministers to Member States concerning Foreign Prisoners. The importance of these obligations for non-nationals suspected of offences has been underlined by the International Court of Justice⁴⁰. Although those obligations do not extend to the provision of consular protection for dual nationals with respect to a country whose nationality they hold, it is recognised that the existence of family and property interests in the second country of which they are nationals may make it desirable for access to be granted to the consular officials of that country. The decision about contacting a consul should be taken by the person whose remand in custody will be sought (or sought to be continued), unless he or she is not legally competent to take such a decision when the responsibility for facilitating such contact will lie on the judicial authority in the remand proceedings. This right does not create any obligation for the authorities to seek to prove the nationality of the remand prisoner. A state may choose to consider a person who has the nationality of that state as well as the nationality of another state(s) as being its national.
28. This right reflects the importance of the person whose remand in custody will be sought (or sought to be continued) being in a position to respond to submissions as to justifications for the imposition of such a measure⁴¹. It is recognised that in some instances (particularly security considerations or the distance involved) this objective can be realised without the person concerned actually being physically brought before the judicial authority. However any video link being used must be such that the possibility both of communicating with/by him or her and of assessing his or her physical and mental well-being is just as effective as if he or she were physically present. Moreover being present is a right which some persons may decide they do not wish to exercise.
29. The obligation to provide interpretation recognises that the ability of a person whose remand in custody will be sought (or sought to be continued)

to take part in proceedings may be impeded by language difficulties. However, this obligation only arises where the person's capacity to speak or understand the language of the proceedings is inadequate and does not extend to an entitlement to the use of a preferred alternative where this is not the case.

30. Persons appearing before the judicial authority susceptible to order their remand in custody should be given the opportunity of presenting themselves as well as possible at any appearance before such a judicial authority. In respect of personal hygiene this means that they should have the opportunity to wash before such an event and male remand prisoners should be allowed to shave, unless, of course, such would fundamentally change their normal physical appearance. This requirement reinforces Rules 20.4, 68.2 and 97 of the European Prison Rules.
31. The foregoing requirements are equally applicable to any proceedings in which a decision to continue remand in custody may be taken and they are reinforced by the provisions in Rules 23.1, 23.2, 37.1-4, 98.1 and 98.2 of the European Prison Rules.

Informing the family

32. The imposition of remand in custody will affect the family of the person concerned and the obligation to inform the family reflects the right that both he or she and his or her family members have under Article 8 of the European Convention on Human Rights, as well as the importance of such contact as a safeguard against the possibility of abuse. A delay in informing the family would only be capable of being justified in exceptional circumstances where the administration of justice or national security could be prejudiced (e.g. a risk of collusion). The responsibility that parents have for juveniles could be an instance justifying the disregard of a suspect's wishes as regards informing his or her family. 'Family member' should be understood in the wide sense used by the European Court of Human Rights⁴² rather than by reference to legally prescribed relationships. The family could be informed directly or through the lawyer of the person concerned. The right to have family members informed about forthcoming remand proceedings does not necessarily mean that they will have the right to be present at them.

Deduction of pre-conviction custody from sentence

33. The non-punitive nature of remand in custody requires that the periods so spent should be deducted from any sentence of imprisonment that is

imposed: if at all, deviations from this deduction should be permissible only in isolated cases and for specific reasons, for which the national law allows corresponding discretion in creating exceptions. The character of the regime in the place where the person was remanded should not have any limiting effect in the calculation of the deduction required. As a sentence of imprisonment may not be imposed on a person convicted of an offence after having spent some time remanded in custody, consideration of the possibility of taking that period into account when setting the terms of a non-custodial penalty could also be appropriate. This will be particularly desirable for alternatives to remand in custody that still involve a significant restriction on individual freedom. Thus in Portugal a prison sentence will be reduced where house arrest has been used as an alternative to remand in custody. A number of States also deduct from an eventual prison sentence periods of time spent in custody while awaiting extradition.

Compensation

34. A further consequence of the non-punitive character of remand in custody is that consideration should be given to compensating persons who are not convicted of the offence in respect of which they were remanded for the losses resulting from the deprivation of their liberty. This possibility is distinct from the duty under Article 5(5) of the European Convention on Human Rights to compensate someone remanded in custody where there was no legal basis for the remand. The exception specified in respect of this possibility recognises that in some instances the behaviour of such persons may have had a significant influence on the decision to remand them in custody. However, the Rule also leaves States a discretion as to the other circumstances in which compensation will be required. Although the damage suffered in many cases will require financial compensation, other forms of reparation may be more appropriate where the damage is of a moral character.

III. Conditions of remand in custody

General

35. The European Prison Rules cover all prisoners but it is also recognised that the status of remand prisoners requires the observance of some additional rules.

For the following aspects of remand in custody, the specified rules in the European Prison Rules are particularly relevant:

Admission – 14, 15 and 16;
Clothing and bedding - 20, 21 and 97;
Complaints procedures - 70
Contact with the outside - 17, 24 and 99;
Discipline and punishment - 56-62;
Health care - 15.1e, 15.1f, 16a and 39-48;
Information about rights, regulations and other matters - 15.2, 30 and 38.3;
Inspection and monitoring - 92 and 93;
Nature and size of accommodation - 18.1-7, 18.10 and 96;
Personal hygiene - 19.3-7;
Preparation of defence and access to legal advice - 23 and 98;
Religion and beliefs - 29;
Sanitary arrangements - 19.1-3;
Separation of categories - 11.1, 11.2, 18.8 and 18.9;
Staff - 71-81 and 89
Time out of cell and regime activities - 25, 27 and 101;
Use of establishments other than a remand institution - 10.3b
Welfare assistance - 16d;
Work and education - 26, 28 and 100.

Absence from remand institution

36. The Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (the CPT) is of the opinion that it is preferable for further questioning by the police after a person has been remanded in custody to take place within the remand institution concerned rather than on police premises. The return of remand prisoners to police custody should only occur if they have expressly consented to it or if such removal is absolutely unavoidable and has been authorised by a judge or prosecutor. The duration of such a temporary removal should be clearly specified by the judge or prosecutor. On return to the remand institution, a thorough physical examination should be carried out if the prisoner so requests. The timing of such an examination should always be prompt and will need to be especially speedy if there are any evident signs of injury or ill treatment.

Continuing medical treatment

37. The prison medical officer should make arrangements, as soon as a remand prisoner has been examined on admission, to ensure that he or she can

continue with any necessary medical treatment that was in progress at the time when he or she came into custody. The decision as to the necessity shall be taken by the prison medical officer who shall also supervise the treatment. Similar arrangements should be made in respect of other treatment that was in progress, such as dental treatment, fertility and hormonal treatment, where delay would be highly prejudicial to the remand prisoner concerned. The possibility of being visited by their own doctor or dentist is again a natural consequence of the legal status of remand prisoners and should exist when a medical or dental necessity as determined by the prison doctor so requires. However, it should not be the responsibility of the administration of the remand institution to pay for the attendance of such personnel

Correspondence

38. In general the reasons for which restrictions may be justified ought not to be applicable to the volume of correspondence between remand prisoners and their families and friends.

Voting

39. Since, in accordance with Rule 3, remand prisoners are to be held in conditions appropriate to their legal status and treated without restrictions other than those necessary for the administration of justice, the security of the institution, the safety of prisoners and staff and the protection of the rights of others, there can be no justification for denying them the right to vote in local, national and European elections that occur during the period of remand in custody. A failure to allow remand prisoners to vote may result in a violation of Article 3 of Protocol 1 to the European Convention on Human Rights⁴³.

Education

40. The protection of remand prisoners' education from disruption or interference is in accordance with their legal status and the need to treat them without unnecessary restrictions and the importance of all prisoners having access to education is recognised in Recommendation No. R (89) 12 of the Committee of Ministers to Member States on Education in Prison and Rules 28.3 and 35.2 of the European Prison Rules. Appropriate educational provision for remand prisoners may include making arrangements so that examinations can be taken.

Discipline and punishment

41. Disciplinary punishment procedures should be avoided as far as possible in respect of remand prisoners and it is particularly important that they should not have an adverse effect on a remand prisoner's ability to prepare his or her defence or have the consequence of prolonging the period of remand in custody ordered by a judicial authority.
42. If solitary confinement is imposed as a punishment, the denial of association with other prisoners should be the extent of the punishment. There must therefore be no interference with access to legal representatives and there should be at least a minimum level of contact with the family. Moreover there should be no supplementary punishments, such as inferior bedding or hygiene, shorter exercise, less access to reading material or the denial of meetings with approved religious representatives.

The dispositions of this Rule are not intended to regulate cases where measures are taken to protect the life and health of the person concerned, or other persons; nevertheless, such measures should not result in the remand prisoner being treated in an inferior manner.

Staff

43. This Rule emphasises that working with remand prisoners requires special qualities and training in order to ensure that the different status and different needs of such prisoners are fully recognised and that they are treated in accordance with their status and needs. The training should include instruction in operating a regime with few restrictions, enabling remand prisoners to be out of their cells engaged in purposeful activities for a reasonable part of the day, and assisting with tasks such as making bail applications, finding a lawyer and maintaining family ties. The training should also focus on enabling staff to deal appropriately with special categories of remand prisoners.

Complaints

44. From time to time remand prisoners are likely to perceive an element of unfairness in the way they are treated, either individually or as a group. This will happen even in the best managed remand institution. It is important that there should be a set of procedures, which allow remand prisoners to register any complaints that they have and that this can be done in a manner guaranteed to preserve confidentiality. A speedy resolution of complaints is of particular importance for remand prisoners as their detention should normally be only for a short period.

- Note ¹ This document has been classified restricted at the date of issue. It was declassified at the 974th meeting of the Ministers' Deputies (27 September 2006) (see CM/Del/Dec(2006)974/10.2).
- Note ² See, e.g., *Schiesser v Switzerland*, 4 December 1979, *Huber v Switzerland*, 23 October 1990, *Brincat v Italy*, 26 November 1992, *Nikolova v Bulgaria*, 25 March 1999, *Pantea v Romania*, 3 June 2003 and (in respect of officers in the armed forces) *Hood v United Kingdom*, 18 February 1999.
- Note ³ In *Monnell and Morris v United Kingdom*, 2 March 1987.
- Note ⁴ See, e.g., *Caballero v United Kingdom*, 8 February 2000.
- Note ⁵ See, e.g., *Fox, Campbell and Hartley v United Kingdom*, 30 August 1990, *Murray v United Kingdom*, 28 October 1994, *Erdagöz v Turkey*, 22 October 1997, *Wloch v Poland*, 19 October 2000 and *O'Hara v United Kingdom*, 16 October 2001.
- Note ⁶ See *Gusinskiy v Russia*, 19 May 2004
- Note ⁷ See *Jecius v Lithuania*, 31 July 2000.
- Note ⁸ See, e.g., *Letellier v France*, 26 June 1991, *Assenov v Bulgaria*, 28 October 1998, *W v Switzerland*, 26 January 1993 and *I A v France*, 23 September 1998.
- Note ⁹ See, e.g., *Smirnova v Russia*, 24 July 2003.
- Note ¹⁰ See, e.g., *Iwańcuk v Poland*, 15 November 2001.
- Note ¹¹ See *Ciulla v Italy*, 22 February 1989 and *Jecius v Lithuania*, 31 July 2000.
- Note ¹² See, e.g., *Ilijkov v Bulgaria*, 26 July 2001 and *Shishkov v Bulgaria*, 9 January 2003.
- Note ¹³ See, e.g., *Punzelt v Czech Republic*, 25 April 2000.
- Note ¹⁴ See, e.g., *I A v France*, 23 September 1998 (where the European Court of Human Rights found that it had ceased to be reasonable to suppose that release would give rise to a risk of collusion).
- Note ¹⁵ *T W v Malta*, 29 April 1999.
- Note ¹⁶ See, e.g., *Mancini v Italy*, 2 August 2001.
- Note ¹⁷ See *Brogan v United Kingdom*, 30 May 1989.
- Note ¹⁸ See *T W v Malta*, 29 April 1999.
- Note ¹⁹ Eg, Belgium, Bosnia and Herzegovina, Bulgaria, Cyprus, Denmark, Germany, Luxembourg, Romania and "the former Yugoslav Republic of Macedonia".
- Note ²⁰ See *Brogan v United Kingdom*, 30 May 1989.
- Note ²¹ See *Koster v Netherlands*, 28 November 1991.
- Note ²² See *Ocalan v Turkey*, 12 March 2003.

- Note ²³ See, e.g., *Brannigan and McBride v United Kingdom*, 26 May 1993, *Aksoy v Turkey*, 18 December 1996 and *Demir v Turkey*, 23 September 1998.
- Note ²⁴ See *Grauzinis v Lithuania*, 10 October 2000.
- Note ²⁵ See *Nikolova v Bulgaria*, 25 March 1999.
- Note ²⁶ See *De Jong, Baljet and Van Den Brink v Netherlands*, 22 May 1984.
- Note ²⁷ See, e.g., *Bezicheri v Italy*, 25 October 1989, *Rehbock v Slovenia*, 28 November 2000 and *G B v Switzerland*, 30 November 2000.
- Note ²⁸ See *Ocalan v Turkey*, 12 March 2003.
- Note ²⁹ See *Van Droogenbroeck v Belgium*, 24 June 1982.
- Note ³⁰ See, e.g., *Brannigan and McBride v United Kingdom*, 26 May 1993, *Aksoy v Turkey*, 18 December 1996 and *Demir v Turkey*, 23 September 1998
- Note ³¹ See, e.g., *Mansur v Turkey*, 8 June 1995 and *Smirnova v Russia*, 24 July 2003.
- Note ³² Less than eight months in *Shishkov v Bulgaria*, 9 January 2003 and fourteen months in *Jecius v Lithuania*, 31 July 2000.
- Note ³³ *W v Switzerland*, 26 January 1993.
- Note ³⁴ *Debboub alias Hussein Ali v France*, 9 November 1999.
- Note ³⁵ *Ceský v Czech Republic*, 6 June 2000.
- Note ³⁶ See, e.g., *Clooth v Belgium*, 12 December 1991, *Assenov v Bulgaria*, 28 October 1998 and *Punzelt v Czech Republic*, 25 April 2000.
- Note ³⁷ See, e.g., *Brannigan and McBride v United Kingdom*, 26 May 1993, *Aksoy v Turkey*, 18 December 1996 and *Demir v Turkey*, 23 September 1998.
- Note ³⁸ See, e.g., *Shishkov v Bulgaria*, 9 January 2003.
- Note ³⁹ See, e.g., *Garcia Alva v Germany*, 13 February 2001.
- Note ⁴⁰ In the cases of *LaGrand (Germany v United States of America)*, 27 June 2001 and *Avena and Other Mexican Nationals (Mexico v United States of America)*, 31 March 2004.
- Note ⁴¹ See *Grauzinis v Lithuania*, 10 October 2000.
- Note ⁴² See, e.g., *X, Y and Z v United Kingdom*, 22 April 1997.
- Note ⁴³ See *Labita v Italy*, 6 April 2000 and *Hirst v United Kingdom (No 2)*, 6 October 2005.

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