

**AMERICAN UNIVERSITY OF ARMENIA**

**INDEPENDENT STUDY**

# **Preventing unlawful detention in Armenia**

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### **Terms and abbreviations used in Article**

1. Council of Europe - CoE
2. European Convention for the protection of human rights and fundamental freedoms – ECHR
3. European Court of Human Rights – Eur. Ct.H.R
4. Code of Criminal Procedure – CCrP
5. Armenian Law of RA on Treatment of Arrestees and detainees –TADL
6. Armenian Law of on Legal Acts – LAL

Human rights protection is high on the agenda in the area of legal reform in Armenia. That is the reason why Armenia has signed and ratified numerous international treaties concerning human rights protection. And moreover, the Constitution of the Republic of Armenia stipulates that human rights are the highest law of the land and that the state is under the positive obligation to protect human rights by both the Constitution and the laws of the Republic of Armenia. Besides, through ratification, Armenia is obliged to implement international treaties in the national legal system which means that some norms and rights should be interpreted in new light in order to achieve the global goal for human rights protection.

It is not a secret that human rights protection is especially important in the area of criminal law, because in this area people are particularly vulnerable. This often leads to human rights violations or incomplete protection of those rights.

On 25 January 2001 Armenia became a member of the Council of Europe (CoE). On April 26, 2002 the National Assembly of the Republic of Armenia ratified the "European Convention for the Protection of Human Rights and Fundamental Freedoms". The freedom of individuals is one of the fundamental values protected by the ECHR, warranting close scrutiny on the part of the Eur.Ct.H.R. concerning any measure infringing on this right.<sup>1</sup>

The right to liberty and security is an unalienable<sup>2</sup> right, which no one can waive or renounce, and its guarantees concern all the persons, including those who are kept in detention.<sup>3</sup>

In this article we will focus on only one of the problems that exist in this area, in particular, a contradiction between Armenian law and the ECHR concerning detention. Through analyzing Armenian legislation and the case law of the Eur.Ct.H.R., we will interpret Armenian law in light of the requirements of the norm and the jurisprudence of the Eur.Ct.H.R.. By comparing and contrasting the Armenian legal framework with others reviewed and found lacking by the Eur.Ct.H.R., we will identify the essential points of contradiction between Armenian and European norms as well as some of the alternatives for addressing and eliminating this contradiction.

The practice of other post-soviet CoE Member states is particularly apt and instructive, since they have a similar past and are similarly situated in this respect to Armenia, i.e. they are also members of the CoE and have undertaken the same obligation to conform their national

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<sup>1</sup> Eur.Ct.H.R. – De Wilde, Ooms and Versijp v. Holland, 18.06.1971

<sup>2</sup> Rights which are not capable of being surrendered or transferred without the consent of the one possessing such rights. *Morrison v. State, Mo. App.*, 252 S.W.2d 97, 101. You can surrender, sell or transfer inalienable rights if you consent either actually or constructively. Inalienable rights are not inherent in man and can be alienated by government. Persons have inalienable rights. Most state constitutions recognize only inalienable rights.

<sup>3</sup> Marius-Mihai Ungureanu, A comment on one of the cases in which a person may be deprived of liberty (Art.5, para.1 of the European Convention on Human Rights)

law and practice to the ECHR. In some cases the contradiction between national legislation of those countries and their international legal obligations have led to adversary rulings against post soviet states. The system of ECHR requires that Member States bring their domestic legislation into compliance with the provisions of the ECHR before any complaint is brought against it. Also, the CoE highly recommends that if there exist a judgment against one of the Member States, the others make legislative amendments in order to create a uniform legal system in the area covered by the ECHR.

In this study, we will propose legal reform in order to avoid judgments against Armenia on this count. Our purpose in writing this article is to raise awareness among lawyers regarding problems of our domestic law in protecting human rights and fundamental freedoms and help our country avoid violating human rights, suffering censure in the Eur.Ct.H.R., and paying monetary damages from the state budget for violations of human rights.

### **The lawfulness of the detention**

Article 5 (1) of the ECHR requires that any deprivation of liberty be **in accordance with a procedure prescribed by law**. Each sub-paragraph requires that any deprivation of liberty be **in accordance with law**. The requirement of lawfulness has been interpreted to refer both to procedure and to substance. Moreover, lawfulness is understood to mean that any detention must be in accordance with the national law and the ECHR and must not be arbitrary.<sup>4</sup> “The requirement that any deprivation of liberty must be in accordance with a procedure prescribed by law means not only that there must be compliance with domestic substantive and procedural rules, but also that the domestic law provides clearly defined pre-conditions for detention and its application is foreseeable.”<sup>5</sup>

This provision has been the subject of a number of challenges to domestic laws of post-soviet countries. The leading cases are:

1. Baranowski v. Poland, No. 28358/95, 28.3.00,
2. Ječius v. Lithuania, no. 34578/97, Eur.Ct.H.R. 2000-IX,
3. Khudoyarov v. Russia, No. 6874/02, 8.11.05.

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<sup>4</sup> Monica Macovei, A guide to the implementation of Article 5 of the Eur.Ct.H.R., Human Rights handbooks, No. 5

<sup>5</sup> Baranowski v. Poland, No. 28358/95, 28.3.00, para.52

However, although compliance with the “letter” of the domestic law is necessary, it is not sufficient to satisfy the ECHR standard for deprivation of liberty. The Court must in addition be satisfied that detention during the period under consideration was compatible with the purpose of Article 5 (1) of the ECHR which is to prevent persons from being deprived of their liberty in an arbitrary fashion. The Eur.Ct.H.R. must moreover ascertain whether domestic law itself is in conformity with the ECHR, including the general principles expressed or implied therein.

For a deprivation of liberty measure to accord with the ECHR, the application of such a measure must be regulated by domestic law, assuring foreseeability and sufficient guarantees of individual rights to challenge such a decision. Thus, domestic law must state the essential terms and conditions of any such decision, as to content and form. Furthermore, the law must be accessible to all the persons and predictable, i.e., the person in question must be able to deduce from the content of the law what prohibited behaviour means and what consequences his actions/inaction may entail in the form of enforcement by the authorities.<sup>6</sup>

The Court stresses that, “where deprivation of liberty is concerned, it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of **lawfulness** set by the Convention, a standard which requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.”<sup>7</sup> “A deprivation of liberty will be found objectionable where this is effected either as a means of interfering with other rights and freedoms guaranteed by the ECHR or through a law which is applied in an arbitrary fashion or whose very character is to be regarded as deficient. There exist different judgments of the Eur.Ct.H.R. that can serve as a practice to the abovementioned theory.”<sup>8</sup> For instance, in *Butkevicius v. Lithuania*, the Eur.Ct.H.R. found violation of Art. 5 of ECHR, because there was no judicial order authorizing the applicant’s pre-trial detention for specific periods, and there was no other lawful basis for the detention.<sup>9</sup>

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<sup>6</sup> Marius-Mihai Ungureanu, A comment on one of the cases in which a person may be deprived of liberty (Art.5 (1) of the ECHR)

<sup>7</sup> Ječius v. Lithuania, no. 34578/97, § 56, Eur.Ct.H.R. 2000-IX

<sup>8</sup> Marius-Mihai Ungureanu, A comment on one of the cases in which a person may be deprived of liberty (Art.5 (1) of the ECHR), page 12

<sup>9</sup> *Butkevicius v. Lithuania*, No48297/99, 26.3.02

In *Benham v. the United Kingdom* the Eur.Ct.H.R. reiterates that a period of detention will in principle be lawful if carried out pursuant to a court order. A subsequent finding that the court erred under domestic law in making the order will not necessarily retrospectively affect the validity of the intervening period of detention. For this reason, the ECHR has consistently refused to uphold applications from persons convicted of criminal offences who complain that their convictions or sentences were found by the appellate courts to have been based on errors of fact or law.<sup>10</sup>

In *Pantea v. Romania*, the Eur.Ct.H.R. found that provisions of ECHR, Art. 5 (1) (c), have been breached, when the plaintiff was kept in detention after the time when the arrest warrant had expired, this deprivation of liberty being declared illegal even by the domestic court, in the absence of the extension of the preventive measure by the court of law competent to pronounce upon its legality.<sup>11</sup>

The bringing of the individual deprived of his liberty before an authority with legal power, i.e. to bring a person before a court or other judicial authority, to impose such a measure must take place without undue delay and effectively. In applying this rule, the Eur.Ct.H.R. decided that extension of detention cannot automatically be applied when a case moves from the pre-trial investigatory stage to the actual trial on the merits in the court with jurisdiction over the case. It requires separate consideration and must be separately justified.<sup>12</sup>

Violations of Article 5 have been also found by the Eur.Ct.H.R. in cases where the domestic authorities relied on longstanding practices the legality of which had not previously been questioned. Thus, in *Baranowski v Poland*, the applicant had initially been properly arrested and then detained on remand in connection with fraud charges. His detention, however, ceased to be reviewed once the prosecutor filed the bill of indictment with the court. In this case the Eur.Ct.H.R. condemned the Polish practice of placing a detainee “at the disposal of the court” without further judicial decision on detention as a violation of Article 5 (1), because it was seen as lacking foreseeability and certainty and posed a risk of arbitrariness. A violation of Article 5 (1) for these reasons in respect of the same practice has also been found in *Kawka v Poland*.

In case of *Khudoyarov v. Russia*<sup>13</sup> the Eur.Ct.H.R. struck down a decision, because Supreme Court had failed to give reasons for its decision in a case where the applicant had

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<sup>10</sup> Benham v. the United Kingdom, judgment of 10 June 1996, Reports 1996-III, § 42

<sup>11</sup> Eur.Ct.H.R.-Pantea v. Romania, 03.06.2003

<sup>12</sup> Eur.Ct.H.R.-Jecius v. Lithuania, 31.07.2000

<sup>13</sup> Khudoyarov v. Russia, No. 6874/02, 8.11.05, para. 146

already spent two years and six months in custody without a valid judicial decision setting out the grounds for his detention in detail.

In *Ursu v. Moldova*<sup>14</sup> the applicant argued that between 3 August 2004 and 21 December 2004 he had been detained illegally since no detention warrant had been issued by a judge for that period. The Eur.Ct.H.R. found a violation of Article 5 (1) of the ECHR, stating that the applicant's detention pending trial after 3 August 2004 had no basis in domestic law, which means that there was no legal provision regulating that issue in domestic legislation.

In *Jecius v. Lithuania* the applicant – a murder suspect – continued to be deprived of liberty after a period of detention on remand authorized by the deputy prosecutor general had expired. This was apparently a regular practice in Lithuania; however, it runs afoul of the ECHR. The Eur.Ct.H.R. held that “the applicant’s deprivation of liberty had been incompatible with the principles of legal certainty and the protection from arbitrariness”<sup>15</sup>. Legal certainty is particularly important in the context of detention. The rationale here is that prospective detainees should be protected from arbitrary action. This also means that there must be conformity with the purposes set forth the relevant sub-paragraph of the Article 5.

In case of *Khudoyarov v. Russia*<sup>16</sup> the Eur.Ct.H.R. held that the practice of keeping defendants in detention without a specific legal basis or clear rules governing their situation – with the result that they may be deprived of their liberty for an unlimited period without judicial authorisation – is incompatible with the principles of legal certainty and protection from arbitrariness. In short, not only must the detention be in conformity with domestic law, but the domestic law and its application must be in conformity with the requirements of the ECHR, which requires:

1. a separate, reasoned decision for any detention or “protection from arbitrariness”
2. predictability or “the principle of legal certainty.”

### **The Armenian Domestic Legal Framework for Detention**

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<sup>14</sup> Ursu v. Moldova, No. 3817/05, 27.11.07, para. 26

<sup>15</sup> Eur.Ct.H.R.-Jecius v. Lithuania, 31.07.2000

<sup>16</sup> Khudoyarov v. Russia, No. 6874/02, 8.11.05, para. 136-137

The legal system of Armenia provides that the Constitution of the Republic of Armenia is the fundamental law of the land. Art. 6 of the Constitution states that the international treaties that have been ratified are a constituent integral part of the Armenian legal system.

Under Armenian law, the process of detention involves a number of players: the court, prosecutor, police, detainee – and several legal acts. In this section, we will examine the rights and obligations of each of the players and give an analysis of the laws as written and applied.

Detention is regulated by the ECHR Article 5, the Armenian Constitution (1995, as amended in 2005), the Armenian Code of Criminal Procedure (CCRP) (01.07.1998) and the Armenian Law on Treatment of Arrested Persons and Detainees (06.02.2002).

The Armenian CCrP states that it is based on the following principles: legitimacy (Art. 7), equality of all before the law (Art. 8), respect for the rights, freedoms and dignity of the individual (Art. 9). Authorities are obliged to take all the necessary measures to prevent and to protect any human rights violations.

In the Armenian legal system the Criminal Procedural Code is not the only legislative act regulating the issues connected with the rights and duties of detainees and the Administration. In addition to the Armenian CCrP, detention is regulated by the Armenian Law on Treatment of Arrested Persons and Detainees.

The Armenian TADL stipulates that the law shall define the general principles, conditions and procedures for keeping of arrested persons or detainees under arrest or detention in accordance with procedures set out in the Armenian CCrP as well as the rights of arrested persons and detainees, guarantees for ensuring their rights, their responsibilities, and procedures for releasing these persons from arrest or detention (Art. 1).

According to the Armenia TADL arrested persons and detainees shall be kept under arrest or detention on the basis of principles of legality, equality of arrested persons or detainees before the law, humanitarianism, **respect for human rights**, freedoms and dignity, and in compliance with the Armenian Constitution, the Armenian CCrP and the well-known principles and norms of international law (Art. 2). The Law also provides the grounds for keeping a person in places of arrest or detention. Art. 3 stipulates that a court decision on choosing detention as a means of preventive measure, passed in accordance with the CCrP, shall serve as a ground for keeping a person in places of detention. It shall be forbidden to admit and keep a person in places of arrest and detention in the absence of the grounds described in the first or the second paragraphs of this article. Art. 8 of the same law provides that the timeframes for keeping persons under arrest or detention **shall be defined** by the

CCrP. However, CCrP does not provide the timeframe for detention after the case is being submitted to the court.

Article 135 of the Armenian CCrP states that pre-trial detention/ detention on remand shall be applied by the court, prosecutor or police only when the material obtained for the criminal case provides sufficient reason to assume that the suspect or the accused may:

- 1) absconds from the criminal proceeding;
- 2) obstruct the pre-trial investigation or court proceeding in any way, particularly by means of illegal influence on persons involved in the proceeding, concealment and falsification of the materials relevant to the case, negligence of a subpoena without any reasonable explanation;
- 3) commit an action forbidden by criminal law;
- 4) avoid the responsibility and the imposed punishment;
- 5) oppose the execution of the judgment.

This means that the court, prosecutor or the police should present sufficient evidence to conclude that there is no less restrictive manner than deprivation of liberty (detention) to assure that the legitimate state interest in prosecuting the crime could be achieved.

Article 138 of the Armenian CCrP states that pre-trial detention terminates when the prosecutor forwards the case to the court for trial or when the accused and his attorney familiarize themselves with the materials of the case, or when the decision about the execution of the arrest becomes annulled.

As you can see, the TADL provides that detention duration should be regulated by the CCrP, but at the same time CCrP has no provision regulating the timeframe for detention after the case is being submitted to the court.

Article 9 of the TADL also provides that the staff of arrest or detention facilities shall be responsible for ensuring that the regulations are implemented; the staff shall be held accountable for not performing their duties or not performing them to the fullest.

According to the Art. 12 of the TADL the rights and personal safety of arrested persons and detainees and the legality of applying coercive measures toward them during arrest or detention **shall be ensured by law**. Guarantees of protection of the rights and freedoms of arrested persons and detainees shall be defined by this law and internal regulations. While exercising their rights and freedoms, arrested persons and detainees shall be required to

observe the procedures and conditions for keeping arrested persons under arrest and detainees under detention, as well as the rights and legal interests of other persons.

Art. 41 of the TADL provides the grounds for releasing arrested persons and detainees from arrest and detention according to which the arrested persons and detainees shall be subject to release from arrest and detention on grounds specified by the legislation of Armenia.

Art. 42 of the TADL stipulates that arrested persons ***shall be released immediately*** from arrest by the head of the arrest facility on the basis of decisions by the body conducting the criminal proceedings or the investigative body, or when the ***maximum period*** of arrest set out by the law ***has expired***. Detainees shall be released immediately from detention by the head of the detention facility on the basis of a decision by the body conducting the criminal proceedings. In some cases specified by the law, the head of the detention facility may also take a decision to release a detainee from detention.

The administration of detention facilities shall submit a report to the court on the detaining of the particular detainee. The court shall examine any complaints by arrested persons or detainees against any actions by the administrations of places of arrest or detention in cases and in accordance with procedures set out by law (TADL Art. 44).

Article 141 of the Armenian CCrP sets forth the responsibilities of the detainment unit and states that the unit ***is obliged*** to release ***immediately*** those persons being detained without a court decision as well as upon the expiration of the detainment period prescribed by the court. Article 142 of the Armenian CCrP provides that the accused shall be released on the basis of a decision of the relevant law-enforcement body (local or national branch of the police, prosecutor, court) which carries out the criminal proceeding when the deadline for the arrest ***has expired and has not been extended***.

The interpretation of the articles noted above shows that there is a 'gap' in the TADL and CCrP, because:

- Article 9 of the Armenian Law on Legal Acts, (2002) (“LAL”) provides that all the legal acts of Armenia are in subordination to each other, which means that certain legal acts prevail to others and in case of contradiction between them one should supersede. According to LAL the Constitution of Republic of Armenia is the supreme law of the land. All laws of Armenia should be in accordance with the Constitution and decisions of Constitutional Court (Art. 9). Article 6 of the Constitution provides that international

treaties that have been ratified are a constituent part of the legal system of Armenia. Article 21 of the LAL provides that if there is a contradiction between international treaties ratified by National Assembly and the laws of Armenia, the treaty should prevail. Besides, the LAL provides that the laws may be adopted in form of Codes (Art. 9 (5) LAL). Code is a type of legislation that purports to exhaustively cover a complete system of laws or a particular area of law as it existed at the time the code was enacted;

- according to Article 9 (6) of the LAL, in the area of law covered by a Code, all other laws must be in compliance with that Code. It means that a Code has superiority over other laws in the given legal area.

From the overall interpretation of the legal acts and norms provided above it is obvious that a person can be deprived of the liberty **only** for a specified period of time and based **only** on the decision of the court. No one, not even the authorities have a right to execute preventive measures that are not prescribed by law. However, the interpretation also shows that there is a inconsistency between the TADL and CCrP in regulation of the timeframe and process of the detention. Whereas the TADL stipulates that an arrested person **shall be released immediately** from arrest by the head of the place of arrest on the basis of decisions by the body conducting the criminal proceedings or the investigative body, **or** when the **maximum period** of arrest set out by the law **has expired**, the CCrP on the other hand provides that the detainment unit **is obliged** to release **immediately** those persons being detained without a court decision **as well as upon the expiration** of the detainment period prescribed by the Court.

The problem, which is common for many post-Soviet countries, is that the CCrP does not regulate the issue concerning the detention of persons between the time of expiration of the term of detention under the original, pre-trial warrant and the time the case is submitted to the court for trial. Under ECHR rulings, a person cannot be kept under detention without a reasoned decision authorizing his/her detention, which means once the case is sent to the court for trial, the court is required to make a new ruling on whether to hold the accused. However, due to a gap in post-soviet law, including Armenian law, detention is unregulated by law. Prosecution, detention and judicial authorities can continue to hold a person in detention who is presumed innocent, without any legal basis, out of institutional inertia.

## **Practice of other post-Soviet States and legal reforms required by Eur.Ct.H.R. jurisprudence**

We will now examine the laws of four CoE Member post-soviet and Communist Bloc states (Poland, Moldova, Lithuania, and Russian Federation), illustrating the risk of ECHR violations posed by Armenian law and present some of the solutions applied by these states after having been found in violation of the ECHR.

Hereafter the laws of (1) Russian Federation, (2) Lithuania, (3) Moldova, and (4) Poland will be examined in order to show the similarities with Armenian legislation and possible amendments of Armenian legislation based on practice of those countries.

In each instance, these legal systems will be compared with Armenian law in order to help identifying the problematic provisions and the kinds of amendments that have proved effective to remedy the legislative flaws based on the experience of those States.

### *1. Russian Federation*

The first legislation to be compared with Armenian legislation is that of Russian Federation, because it is very close to Armenian law, as after the collapse of the USSR, the laws were still in force in Russia, as well as in Armenia.

Russian Federation is a successor of the USSR. After the collapse of the USSR, the laws of USSR continued to be effective in Russia, as well as in other post-soviet Republics. Until 1 July 2002 criminal-law matters were governed by the Code of Criminal Procedure of the Russian Soviet Federalist Socialist Republic (Law of 27 October 1960, “the old RF Code Code Criminal procedure). From 1 July 2002 the old CCrP was replaced by the Code of Criminal Procedure of the Russian Federation (Law no. 174-FZ of 18 December 2001, “the new RF CCrP”).

The Codes distinguished between two types of detention: the first being “*pending the investigation*,” that is, while a competent agency – the police or a prosecutor’s office – is investigating the case (a.k.a. pre-trial detention or detention on remand in English), and the second “*before the court*” (or “during the trial”), that is while the case is being tried in court. Although there was no difference in practice between them (the detainee was held in the same detention facility), the calculation of the time-limits was different.

Under the old CCrP, the period of detention “*pending the investigation*” was calculated until the day when the prosecutor sent the case to the trial court (Art. 97 of

the old CCrP, Art. 109 para. 9 of the new CCrP). From the date the prosecutor forwarded the case to the trial court, the defendant's detention was "*before the court*" (or "during the trial").

The Russian Constitution of 12 December 1993 establishes that a judicial decision is required before a defendant can be detained or his or her detention extended (Art. 22). Under the old CCrP, a decision ordering detention on remand could be taken by a prosecutor *or* a court (Art. 11, 89 and 96). When deciding on whether to detain an accused, the competent authority was required to consider whether there are "*sufficient grounds* to believe" that he or she would abscond during the investigation or trial or obstruct the establishment of the truth or engage in further criminal activity (Art. 89 of the old CCrP). Before 14 March 2001, detention was authorised if the accused was charged with a criminal offence carrying a sentence of at least one year's imprisonment or if there were "exceptional circumstances" in the case (Art. 96). On 14 March 2001 the old CCrP was amended to permit defendants to be remanded in custody if the charge carried a sentence of at least two years' imprisonment or if they had previously defaulted or had no permanent residence in Russia or if their identity could not be ascertained. Extensions were authorised by prosecutors of ascending hierarchical levels (under the old CCrP), Before 14 March 2001 the old CCrP set no time-limit for detention "*during the trial.*" Upon receipt of the case-file, the judge must determine, in particular, whether the defendant should remain in custody or be released pending trial (Art. 222 § 5 and 230 of the old CCrP, Art. 228 (3) and 231 § 2 (6) of the new CCrP) and rule on any application by the defendant for release (Art. 223 of the old CCrP). If the application was refused, a fresh application could be made once the trial had commenced (Art. 223 of the old CCrP). However, the timeframe of determining by the court the question of further detention was unclear. No concrete time limits were mentioned requiring the judge to decide whether the defendant should remain in custody or be released pending trial.

The new CCrP requires a judicial decision by a district or town *court* (instead of old CCrP giving the right to decision to prosecutor *or* a court) based on a reasoned request by a prosecutor supported by appropriate evidence (Art. 108 §§ 1, 3-6). The new CCrP reproduced the amended provisions (Art. 97 § 1 and 108 § 1) and added that a defendant should not be remanded in custody if a less severe preventive

measure was available. Extensions must now be authorised by judicial decisions by courts of ascending levels (under the new CCrP). No extension of detention “pending the investigation” beyond eighteen months is possible (Art. 97 of the old CCrP, Art. 109 § 4 of the new CCrP). On 14 March 2001 a new Art. 239-1 was adopted which established that the period of detention “during the trial” could not *generally exceed six months* from the date the court received the file. However, if there was evidence to show that the defendant’s release might impede a thorough, complete and objective examination of the case, a court could – *sua sponte* or at the request of the prosecutor – extend the detention by *no longer than three months* (Art. 255 §§ 2 and 3). However, these provisions did not apply to defendants charged with particularly serious criminal offences.

The new CCrP provides that the term of detention “during the trial” is calculated from the date the court received the file and to the date the judgment is given. Art. 110 (8) provides:

A petition for extending the term of holding in custody has to be submitted to the court at least seven days before the expiry thereof. The judge shall take one of the following decisions in the manner specified in Parts 4, 8 and 11 of Article 108 of the present Code not later than in five days from the day of receiving the application: 1) on an extension of the term of holding in custody until the moment when the accused and his counsel for the defence complete getting acquainted with the materials of the criminal case and when the public prosecutor directs the criminal case to the court, with the exception of the case stipulated by the sixth part of this Art.2) on the refusal in the satisfaction of the investigator's application and in the release of the accused from custody.

RF CCrP, Art. 110(8)

Although the new CCrP has significant changes and improvements in the direction of complying with ECHR requirements, in case *Khudoyarov v. Russia* the ECHR found that the new CCrP inherited from the old CCrP the lack of clear rules governing the detainee’s situation after the case had been sent for trial. This means that in amending Armenian law we need not only to adopt general provisions, but also mention the concrete timeframe for making decisions on detention in order that the detainee not be left unlawfully detained even for a very short period of time.

According to the Eur.Ct.H.R. case law, leaving the detainee in custody without legal decision for a few hours is considered a violation of Art. 5 of the ECHR.<sup>17</sup>

## *2. Lithuania*

The constitution of the Republic of Lithuania provides that a person arrested when committing an offense must, within forty-eight hours, be brought to court for the purpose of determining, in the presence of the detainee, whether detention is appropriate. If the court does not order the detention of the arrested person, he shall be released immediately (Art. 20 § 3). A person whose constitutional rights or freedoms are violated shall have the right to apply to a court (Art. 30 § 1). The former Code of Criminal Procedure provided that no one shall be arrested save by virtue of a decision of a court, or an order of a judge or the authorization of a prosecutor (Art. 10 (in force until 21 June 1996)). Article 9 of the Lithuanian CCrP x (in force until 30 June 1997) stated: "... Having sufficient reasons to suspect that a person may commit a dangerous act, the elements of which are set out in Art. 75 (banditry), 227-1 (criminal association) and 227-2 (intimidation) of the RL Criminal Code, and with a view to preventing the commission of such an act, a chief of police may, by a reasoned decision, with the authorization of a prosecutor order the arrest of the person. Within forty-eight hours, in the presence of the police officer who made arrest and the prosecutor who authorized it, a chairman of district court, a judge of a regional court or a head of division of regional court shall decide on the lawfulness of the arrest. A person detained on the authorization of a prosecutor and whose detention is confirmed by a judge may be so detained for no longer than two months. Art. 104 of the Law no. I-551 of 19 July 1994 (in force until 21 June 1996) stated that detention on remand shall be used only where based on the decision of a court, the order of a judge or the authorization of a prosecutor in the case of offences carrying a statutory penalty of at least one year of imprisonment. In the case of offences specified in Art. 105 (murder with aggravating circumstances) of the Criminal Code, detention on remand (restrictive measure) may be ordered on the ground of the gravity of the offence alone.

Article 104-1 (in force from 21 June 1996 to 24 June 1998) provided that the arrested person shall be brought before a judge within not more than forty-eight hours.

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<sup>17</sup> Eur.Ct.H.R. - Asatryan v. Armenia, N 24173/06, 09.02.2010

The judge must hear the person as to the grounds of the arrest. The prosecutor and counsel for the arrested person *may* take part in the hearing. After having questioned the arrested person, the judge may maintain the arrest order by setting the term of detention, or may vary or revoke the remand measure. After the case has been transmitted to the court, it may order, vary or revoke the detention on remand. Article 106 § 3 (in force from 21 June 1996 to 24 June 1998) stated that for the purpose of extending the term of detention on remand at the stage of pre-trial investigation a judge must convene a hearing to which defense counsel, the prosecutor and, if necessary, the detained person shall be called.

In *Jėčius v. Lithuania* the respondent state submitted that Lithuanian law only required a specific term of detention to be fixed at the stage of pre-trial investigation, and that during the trial the court could only order, vary or revoke detention on remand (Art. 104-1, 249 § 1 and 250 § 1 of the Code of Criminal Procedure then in force). Therefore, the applicant's detention from 24 June 1996 had been justified by the fact that the case had been transmitted to the Panevėžys Regional Court, which had subsequently not been required to extend the term of the applicant's detention or otherwise validate it.

The Eur.Ct.H.R. stated that the expressions “lawful” and “in accordance with a procedure prescribed by law” in Art. 5 § 1 essentially refer back to national law and state the obligation to conform to the substantive and procedural rules thereof. The Eur.Ct.H.R., however, also mentioned that the “lawfulness” of detention under domestic law is not always the decisive element. The Eur.Ct.H.R must be satisfied that detention during the period under consideration was compatible with the purpose of Art. 5 § 1 of the Convention, which is to prevent persons from being deprived of their liberty in an arbitrary fashion.<sup>18</sup>

According to the amended law of Lithuania, since 21 June 1996 arrest warrants may only be authorized by a court or judge. The amended Art. 104-1 (in force since 24 June 1998) provides that the prosecutor and defense counsel must take part in the first judicial examination of the arrested person, unless the judge decides otherwise. The amended provision also permits the court to extend the period of detention on remand before its expiry. The version of the Code in force since 24 June 1998 makes it *compulsory* for the detainee to attend the remand hearings. The law of 21 June 1996

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<sup>18</sup> Jėčius v. Lithuania, 31.07.2000

amending and supplementing the Code of Criminal Procedure stated that detention authorized by a prosecutor prior to 21 June 1996 could thereafter be extended by a court in accordance with the new procedure governing detention in remand.

The amended provision permitting the court to extend the period of detention on remand before its expiry may be effective for resolving the problem of unlawful and arbitrary detention and should be implemented in Armenian law with concrete time limits for the extension.

### 3. *Moldova*

Article 186 of the Code of Criminal Procedure of the Republic of Moldova (“RM CCrP”), states that:

- (2) detention of a person during criminal investigation until sending the case to the court shall not exceed 30 days, with the exception of cases provided by the present Code. Counting the term of pretrial arrest during the penal pursuit ends at the moment when the prosecutor sends the case to the court, the pretrial arrest or the house arrest is annulled or replaced with another non-custodial preventive measure.
- (8) after sending the case to the court all issues regarding preventive measures are solved by the court that examines the case.

Article 345 of the Moldovan CCrP of the CCP provides that:

- (1) Within a term of up to 10 days from the date the case was allocated for trial, the judge or, if the case, the panel of judges, when reading the materials of the file shall set a date for the preliminary hearing. In cases when the defendants are juveniles or under arrest, the preliminary hearing shall be held in order of emergency and priority.

The following matters shall be solved in the preliminary hearing:

...

- 6) preventive and protection measures;

Article 351 (7) stipulates that when setting the case of trial, the court shall dispose on the maintenance, change, revocation or, if the case, dismissal of the preventive measures in accordance with the provisions of the present Code.

Article 186 of CCrP of Moldova states:

....

(6) In case it is necessary to prolong the term of pretrial arrest of the indicted, the prosecutor not later than 5 days before the expiry of the term presents a request to the instruction judge for prolonging the term of arrest.

The last provision that we invoked will be appropriate to implement in Armenian CCrP also adding that the judge shall make decision prolonging the term of detention "X" days before the expiry. It will solve the problem of unlawful detention, as the detainee will not be kept under the detention without lawful judicial decision. When the former decision expires, the new decision will already be in force.

#### 4. *Poland*

Poland, which is not a post-Soviet state, but a communist bloc country, where Soviet laws were pervasive during the Soviet era, also had the same problem.

Under the Polish practice, when a detainee was placed "at the disposal of the court," the previously ordered detention at the investigation stage of a case was prolonged indefinitely. The court was *not obliged*, on its own motion, to make any further decision as to whether the detention fixed at that stage should be extended. This practice has undoubtedly and understandably arisen to fill a gap, but there was a complete absence of any support for it in either legislation or case-law. It is doubtful whether the legality of the practice was ever questioned, since the need for continued detention was undeniable and potentially quite compatible with the ECHR and its development is a good illustration of how the general legitimacy of a course of conduct can lead one into overlooking or failing to question the absence of legality for it.

Prior to the rulings in the *Baranowski* and *Kawka* cases the practice had been put to an end and replaced by one of referring each case where a detention order had been made at the investigation stage to a court in order to obtain a fresh ruling as to whether the detention of the person concerned should continue. This fulfils the ECHR requirements as to lawfulness and judicial supervision.

## **Summary and Comparison with Armenian Law**

The laws and practice of detention by the authorities in the legal systems of the four countries examined above has many parallels with those in Armenia:

1. similar legal formulations,
2. similar practice of detention without an independent, reasoned judicial decision,
3. automatic extensions, often in violation of the letter of domestic law.

This combination of poorly designed laws and practices from the Soviet era violate the letter and spirit of Art. 5(1) of the European Convention in all three elements:

1. domestic law is not drafted in conformity with the European Convention,
2. the law as written and applied violates the “principle of legal certainty,”
3. the law as written and applied violates the “protection against arbitrariness.”

Based on the summary of practice and legal reform of similar post-Soviet legal frameworks, we now apply these to the Armenia context in the form of proposals for legal reform to achieve compliance with ECHR standards on detention.

## **Proposals for the Armenian Legal System**

All four examples presented in the section above are relevant and similar. The best solution for legislation improvement will be choosing the most relevant parts of each example for Armenia and try to create a better option, which can not only be in accordance with the spirit of law, but also easily be implemented into the Armenian legal system. In order to achieve conformity with the ECHR, countries amend their national legislations in order to achieve the goals of the ECHR.

Before presenting the proposed legislative amendments we would like to give a hypothetical example.

Suppose that on 20.01.2009 detention for the period of two months was imposed on a person by a reasoned court decision as a preventive measure.

On 10.03.2009 the court, the motion of the investigator, decides to prolong the detention for another two months, until 20.05.2009.

On 16.05.2009 (4 days before the expiration of the investigatory detention) the investigator submits the criminal case to the court for trial.

Under the procedure we propose to address the shortcomings of Armenian law, if the detention expires on 20.05.2009, and the person or his lawyer have already read the case files, then the prosecutor should submit the case to the court not later than 10 (ten) days before the expiration of the detention, i.e. 10.05.2009. Upon receiving the case, the court must immediately, but not later than 48 (forty eight) hours before the expiration of the detention, make decision whether to accept or dismiss the case and at the same time hold an adversarial hearing and take evidence to decide whether the accused should be kept in detention for the duration of the trial.

According to our legislation in force, there is no procedure for the period of detention time between sending the case to the court and the court's new decision on prolonging the detention. This means that the person whose case had already been submitted to the court may be kept in custody unlawfully, without any legal order from the court until the court's new decision on prolonging or refusing his further detention. This gap in our legislation will finally lead to the judgment of the ECHR against Armenia. Thus it would be better to prevent such a judgment by amending our existing laws in order for them to be in compliance with ECHR requirements.

Below we will propose the necessary amendments to the Armenian CCrP:

#### ***1. Article 55. The Investigator***

In paragraph 4, after point 29 add point 30 after which the text will be as follows:

4. The investigator, in particular, is authorized to conduct the following:

30) to submit the case to the court for trial not later than 10 (ten) days before the period of detention on remand authorized by the court expires, in those cases when the detention is applied as a preventive measure.

#### ***2. Article 53. The Powers of the Prosecutor at the Pre-trial Proceedings of the Criminal Case***

In paragraph 3, after point 11 add point 12 after which the text will be as follows:

3. The prosecutor, during administration of the procedural management, is also entitled to:

12) to demand that investigator provides an information concerning the case submitted to the court for trial not later than 10 (ten) days before the period of detention expires.

### **3. Article 291. Taking the case by court for proceedings**

After the sentence “The criminal case entering the court is taken over by judges, as established by procedure, which is indicated in a ruling”, add the following provision:

***The court must immediately, but not later than 48 (forty eight) hours before the date when the detention period authorized by the court expires, must hold an adversary hearing and make a reasoned decision whether further detention of the person is necessary.***

### Conclusion

With the enactment of the proposed amendments to the Armenian CCrP, the rights of detainees in Armenia would be better protected and the Armenian legal framework would be in compliance with the ECHR, which is an obligation Armenia undertook when it joined the Council of Europe. Of course, even without enactment of the amendments, it is possible, desirable and indeed necessary for Armenian courts and executive/investigatory bodies to bring their practice into compliance with the ECHR, since the ECHR is applicable in Armenia and according to the Armenian Constitution, prevails over contradictory domestic law. However, the enactment of these amendments to domestic law would be an additional measure to assure that Armenian authorities act in compliance with the ECHR. In any event, the adoption of conventions or enactment of laws is not enough. The authorities must exercise good judgment, restraint and self-discipline to assure that these principles and rights are routinely respected by officials and state bodies. As shown from examples in other post-Soviet and European jurisdictions, the laws must be applied to assure that the ECHR policies and rights are duly protected.

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