Organization for Security and Co-operation in Europe
Mission to Montenegro

THEMATIC REPORT:

“Frequency and justification of ordering detention”

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1. INTRODUCTION

The OSCE Mission to Montenegro (hereinafter: Mission), with the support of the contributions kindly provided by the Netherlands, Luxembourg, France, Germany, United Kingdom and United States, in September 2011 launched the Third Phase of the Court Monitoring Project (hereinafter: Project) aimed at contributing to the judicial reform process in Montenegro, by providing recommendations and facilitating implementation of fair trial standards, as well as priority areas of the administration of justice. The Project is implemented in partnership with the NGO Centre for Monitoring (CEMI).

In compliance with the *Memorandum of Understanding* initiating the Second Phase of the Project, which was signed between the Mission and the Supreme Court of Montenegro, The Appellate Court, the Higher Courts in Podgorica and in Bijelo Polje, as well as all basic courts in Montenegro, the monitoring activities have been extended to all courts of Montenegro and to both civil and criminal matters.

This thematic report presents the results of a research undertaken by the Court Monitorin Team, aimed at appraising the frequency of ordering detention and the justification of those decisions in the criminal procedure practice of Courts during 2011 and 2012. The analysis of cases will also provide respective conclusions and recommendations aimed at further improvement of the situation in this area. The Mission has already published thematic reports within the implementation of this Project, while the last thematic Report on frequency and justification of ordering detention was published in 2010, within the Second Phase of the Project.

This Report is consisted of eight parts that include relevant data collected during the research. The first part is introduction, the second part presents the methodology of the research, the third part includes the presentation of the relevant international and domestic legal standards on detention, the fourth part contains findings from the research regarding the frequency of ordering detention; fifth, sixth and seventh part are dedicated to the analysis of the collected and compiled data obtained through the review of case files. The last - eight part is dedicated to conclusions and recommendations for the improvement of the efficiency of court proceedings in this field.

2. METHODOLOGY

The methodology is based on direct insight into the case files. Selection of cases for this study was not being based on category of criminal offences as a criteria rule, and in that sense the both ordinary crimes, but also the serious ones had been analysed. While selecting the cases, the Mission paid attention to choose detention cases from year 2011, and not before, in order to avoid matching with detention cases from previous thematic researches during the previous phases of this project. The main criteria for case selection were that the first detention order was issued in 2011 or in 2012. Standardised questionnaire has been fulfilled with relevant information, which was than analyzed by members of the observers' team. Questionnaire was based on the following questions:

- When has the Court ordered detention?
- On which legal grounds the decision on ordering detention was based?
- Was the decision on ordering detention justified with enough reasonable facts?

The research covered a total number of 316 criminal case files; 95 cases were selected in the Higher Courts in Podgorica and Bijelo Polje and 221 cases in Basic Courts in Montenegro, with exception of the Basic Courts in Kolašin and Žabljak (table 1). It should also be noted that this research included only criminal cases from 01.01.2011 to 01.07.2012.

Table 1. Overall number of analyzed cases per Courts

Court	Number of detention cases analysed
Higher Court Bijelo Polje	47
Higher Court Podgorica	48
Basic Court Bar	30
Basic Court Berane	14
Basic Court Bijelo Polje	14
Basic Court Cetinje	11
Basic Court Danilovgrad	4
Basic Court Herceg Novi	13
Basic Court Kolašin	0
Basic Court Kotor	52
Basic Court Nikšić	8
Basic Court Plav	6
Basic Court Pljevlja	13
Basic Court Podgorica	30
Basic Court Rožaje	10
Basic Court Ulcinj	16
Basic Court Žabljak	0
TOTAL:	**316**

It should be noted that the monitoring team that worked on this thematic research was not been able to analyze all detention cases from 2011 and 2012 because of the fact that a number of cases had been delegated to higher level courts because of the appeal procedures. Data on the overall number of criminal cases per court and the number of detention cases in 2011 and 2012 are presented in Tables 2 and 3.

Table 2: Overall number of detention cases before the Higher Courts

Year	2011			2012		
Higher Court	Admitted in 2011.	Number of defendants	Detention cases	Admitted until 1.07.2012	Number of defendants	Detention cases until 1.07.2012
Bijelo Polje	79	145	98	34	74	24
Podgorica	281	541	155	102	258	47

Table 3: Overall number of detention cases before the Basic Courts

Year	2011		2012	
Basic Court	Admitted in 2011.	Detention cases	Admitted until 1.07.2012	Detention cases until 1.07.2012
Bijelo Polje	527	11	241	11
Nikšic	875	18	675	12
Cetinje	241	10	151	14
Kotor	647	84	258	29
Herceg Novi	238	22	116	4
Bar	429	29	295	9
Ulcinj	288	19	119	6
Kolašin	82	2	66	0
Rožaje	226	9	112	2
Plav	87	6	46	0
Pljevlja	278	3	93	6
Danilovgrad	133	1	65	4
Podgorica	974	61	773	22
Berane	404	16	114	2
Žabljak	70	0	26	0

By analyzing mentioned data, it can be concluded that during 2011 and 2012 - 736 detention cases were in course before the Higher and Basic Courts in Montenegro. Thematic research was carried out by direct insight into the 316 detention cases – which represents about 43% of the total number of detention cases in 2011 and 2012.

In the Basic Courts 221 detention cases were analyzed. This number represents a sample of around 54% of the total number of detention cases in 2011 and 2012 year in basic courts.

In the Higher Courts, 95 out of the 324 detention cases were analyzed, meaning about 30% of the total number of detention cases in 2011 and 2012.

3. DETENTION – INTERNATIONAL AND DOMESTIC LEGAL STANDARDS

3.1 International Standards

According to the Article 9 par. 1 of the International Covenant on Civil and Political Rights: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

The United Nations Standard Minimum Rules for Non Custodial Measures (so called Tokyo Rules) in the rule 6 related to "Avoidance of pre-trial detention" states: "Pre-trial detention shall be used as a means of the last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim".

European Convention in its Article 5, provides that everyone has the right to liberty and security of person, with stating 6 reasons because of which someone can be deprived of liberty. Namely, it does not define reasons for ordering custody, but states exceptions to the right of freedom, which are exhaustively enumerated in the Article 5 of the Convention.

While making the decision on ordering custody, one of the conditions that must exist is a reasonable doubt that certain person have committed a criminal offense, which certainly means that there must be an explanation and that reasonable grounds to doubt existence must be given. Also, the European Court of Human Rights deems that reasonable doubt is just one of the conditions required for detention, and that in addition there must be valid and sufficient reasons of public interest to justify further deprivation of persons' liberty whose innocence is presumed. The European Court of Human Rights found four such grounds, namely:

- risk of absconding,
- interfering with the course of justice,
- risk of repetition of criminal act
- protection of public order

In its Recommendation on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse, adopted on 27 September 2006[1], the Committee of Ministers of the Council of Europe recommends Member States to follow the rules in this area intended to set strict limits on the use of remand in custody; encourage the use of alternative measures wherever possible; require judicial authority for the imposition and continued use of remand in custody and alternative measures; 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; require the provision of suitable facilities and appropriate management for the holding of persons remanded in custody; ensure the establishment of effective safeguards against possible breaches of the rules.

According to this recommendation, remand in custody shall generally be aplied only in respect of persons suspected of committing offences punishable by imprisonment. A person may only be remanded in custody where all of the following four conditions are satisfied: a) if there is reasonable suspicion that he or she committed an offence; and b) if there are substantial reasons for believing that, if released, he/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) if there is no possibility of using alternative measures to address the concerns referred to part b and; d) this is a step taken as part of the criminal justice procedure. In addition to that, and in line with the established case law of the Court, the recommendation provides clear guidelines to the judicial authorities to determine the conditions under which a person may be remanded in custody.

3.2 National legislation

Article 30 of the Constitution of Montenegro envisages the basic principles related to deprivation of liberty, such are request for court decision, duration of detention and right to appeal.. Basic grounds for deprivation of a person's liberty as mentioned in the European Convention are also contained in the Criminal Procedure Code (CPC). Among the measures that can be taken against the defendant to ensure his/her presence in the criminal proceeding and its undisturbed conduct, detention is the most severe measure foreseen by the CPC. According to the Article 147 of the old CPC and the Article 174 of the new CPC detention can be ordered only if the same purpose of the procedure cannot be achieved by any other measure and is necessary for the undisturbed course of the criminal procedure.

[1] Recommendation (2006)13

All authorities involved in the criminal procedure are obliged to proceed with exceptional urgency when the person is in detention. Also, in the course of the procedure, detention shall be terminated as soon as the reasons for which it has been ordered cease to exist.

As it was already stated, national legislation foreseen reasons based on which it is possible to order detention. Namely, while deciding on ordering detention, each reason foreseen by the law has to be explained and justified by sufficient facts. Also, it should be beard in mind that once given reasons for detention can be changed in dependence of the circumstances, which can be mitigating or aggravating. In that sense, it is necessary to review periodically the reasons for ordering detention, and terminate or prolong it, in accordance with the situation.

4. FREQUENCY OF ORDERING DETENTION

Just before the beginning of the research, the OSCE Mission gathered information about all cases before Basic and Higher Courts in 2011 and 2012. Also, courts provided information on the number of detention cases and the number of defendants in those cases. On the basis of information gained, monitoring team calculated the frequency of detention in basic and high courts in Montenegro in period covering 2011 and 2012. The results are shown in the following table.

Table: Frequency of ordering detention in Courts in Montenegro

Court	Total number of court cases in 2011 and in 2012 (until 01-07-2012)	Total number of detention cases in 2011 and in 2012 (until 01-07-2012)
Higher Courts	496	324 (65,32%)
Basic Courts	8649	412 (4,76%)

Through the analysis of court files it was noted that ordering of detention was significantly more frequent in the Higher than in the Basic Courts. As can be seen from the table above, in the Higher Courts in Bijelo Polje and Podgorica detention was ordered in 324 from the total number of 496 cases, or in 65,32% of the total number of cases. This leads to the conclusion that the detention seems to be the rule rather than the exception in practice of higher courts.

When it comes to basic courts, detention was ordered in significantly lower percentage - in 4,76% of cases, i.e. 412 out of the total number of 8649 cases.

5. LEGAL GROUNDS FOR ORDERING DETENTION

The CPC of Montenegro, in accordance with the international standards in this area, provides that a decision on ordering detention must cumulatively contain two important elements:

a. The first one is the existence of a reasonable suspicion that the person has committed a criminal offence, which certainly implies that there must be an explanation for its determination and must specify valid and compelling reasons of public interest justifying the detention of persons whose innocence is assumed.

b. The second element is the existence of at least one of the conditions specified in the CPC. In the Article 148 of the old CPC and the Article 175 of the new CPC conditions under which existence the Court can render a decision on ordering detention are specifically listed, of course, together with the existence of the first condition – the reasonable suspicion that the person has committed a criminal offence.

Article 148 of the “old” CPC (Ordering Detention)

(1) When reasonable suspicion exists that a certain person had committed a criminal offence, detention may be ordered against that person, if:
1) The person hide or his/her identity cannot be established, or if other circumstances exist indicating a risk of flight;
2) Circumstances exist that indicate that they would destroy, hide, modify or fabricate evidence or traces of a criminal offence or indicate that they would hinder the procedure by influencing witnesses, accomplices or accessories by virtue of concealment;
3) Circumstances exist that indicate that the criminal offence would be repeated or attempted criminal offence completed or that they would commit the criminal offence they threaten to commit;
4) In the case of the criminal offence punishable by imprisonment of ten years or a more severe punishment and especially grave due to the manner of commission and consequences and exceptional circumstances exist indicating that liberation would lead to a serious threat to the preservation of public order and peace;
5) Duly summoned defendants obviously evade appearing at the main hearing.

Article 175 of the ‘new’ CPC (Ordering Detention)

(1) When reasonable suspicion exists that a certain person had committed a criminal offence, detention may be ordered against that person, if:
1) the person hide or his/her identity cannot be established, or if other circumstances exist indicating a risk of flight;
2) circumstances exist that indicate that they would destroy, hide, modify or fabricate evidence or traces of a criminal offence or indicate that they would hinder the procedure by influencing witnesses, accomplices or accessories by virtue of concealment;
3) circumstances exist that indicate that the criminal offense would be repeated or attempted criminal offence completed or that they would commit the criminal offence they threaten to commit;
4) in the case of the criminal offence punishable by imprisonment of ten years or a more severe punishment and especially grave due to the manner of commission and consequences and exceptional circumstances exist indicating that liberation would lead to a serious threat to the preservation of public order and peace;
5) duly summoned defendants obviously evade appearing at the main hearing.
(2) In the case referred to in paragraph 1, item 1 of this Article, detention ordered only because it was not possible to establish the identity of the person shall last until this identity is established. In the case referred to in paragraph 1, item 2 of this Article, detention shall be terminated as soon as evidence because of which detention was ordered are secured. Detention ordered pursuant to paragraph 1, item 5 of this Article may last until the publication of the judgment.

6. JUSTIFICATION OF THE DECISION ON ORDERING DETENTION

As it was stated in previous part of the Report, the CPC envisages grounds on which decision on ordering detention could be based. **While making decision on ordering detention, all legal grounds have to be explained in details, with providing sufficient relevant facts and information in favour of imposing detention**. Also, it should be beard in mind that once given reasons for detention can be changed in dependence of the circumstances, which can be mitigating or aggravating. In that sense, it is necessary to review periodically the reasons for ordering detention, and terminate or prolong it, in accordance with the situation.

Table: Overall number of justified and decisions on ordering detention not justified in accordance with the practice of the ECHR per Court

Court	Number of justified decisions	Number of decisions which are not justified in accordance with the practice of the ECHR
Higher Court Bijelo Polje	18	29
Higher Court Podgorica	21	27
Basic Court Bar	29	1
Basic Court Berane	5	9
Basic Court Bijelo Polje	7	7
Basic Court Cetinje	6	5
Basic Court Danilovgrad	4	0
Basic Court Herceg Novi	13	0
Basic Court Kolašin	0	0
Basic Court Kotor	50	2
Basic Court Nikšić	7	1
Basic Court Plav	2	4
Basic Court Pljevlja	8	5
Basic Court Podgorica	30	0
Basic Court Rožaje	1	9
Basic Court Ulcinj	14	2
Basic Court Žabljak	0	0
TOTAL:	**215 (68.03%)**	**101 (31.97%)**

This table contains data on justification of detention orders in all courts in Montenegro. Overall number of justified decisions on ordering detention is 215, which represents 68,03% of the total number of appraised court files. On the other side, in less than a third of a total number of appraised court files (101 cases) decisions on ordering detention were not justified in accordance with the practice of the ECHR.

Table: The Structure of decisions on ordering detention, which are not justified in accordance with the practice of the ECHR per legal reasons

Legal reasons	Number of decisions which are not justified in accordance with the practice of the ECHR
"Risk of absconding"	33
"Risk of influence on witnesses"	34
"Risk of re-offending "	10
Art. 175 par. 1 point 4 or the new CPC	24
TOTAL:	**101**

This table presents number of decisions on ordering detention, which are not justified in accordance with the practice of the ECHR - per legal reasons stated in the article 148 of the old CPC and the article 175 of the new CPC. So the majority of decisions on ordering detention are linked with the risk of absconding (in 33 unjustified decisions) and the risk of influence on witnesses (in 34 insufficiently justified decisions).

6.1. General overview of decisions on ordering detention which are not justified in accordance with the practice of the ECHR

One of the main stands of the European Court for Human Right is that when deciding on detention, Court should re-examine all relevant issues and occasions in concrete case and to decide on detention by referring to the objective criteria prescribed by the Law. Thereby, existence of a reasonable suspicion that arrested person committed a crime is condition sine qua non for ordering or prolonging detention, but with that fact the Court should find if there are enough relevant reasons to order detention in concrete case.[2] The ECHR stated that the justification of detention depends on the circumstances of each case which have to refer to the existence of general interest which significance outweighs the principle of respect of individual liberty despite the existence of the presumption of innocence.[3]

The Mission has found that out of the total number of 316 analysed court files, in 101 cases courts have not justified decisions on ordering detention in accordance with the practice of the ECHR. It could be generally concluded that in those cases, courts have failed to state all concrete and convincing facts which justify ordering of detention, but they just have stated standardized explanations consisted of copied provisions from the CPC. Also, it has been noted that facts in favour of justification of ordering detention were not qualitatively sufficient to justify ordering of detention in concrete cases.

In the following part of the Report, the Mission analyzed unjustified decisions on ordering detention, from the aspect of legal grounds for ordering detention

6.1.1. Risk of absconding

The new CPC in the Article 175, paragraph 1, point 1 states that detention may be ordered against the person, if that person is hiding or his/her identity cannot be established, or if other circumstances that exist indicate a risk of flight. This reason is most frequent in the practice of Montenegrin

[2] Trzaska v. Poland, Judgement 11-07-2000
[3] Ilijkov v. Bulgaria, Judgement 26-07-2001

Courts when reasoning the decisions on ordering detention. However, in order to justify ordering detention with this legal reason, Courts have to provide concrete and sufficient reasons in each case arguing the existence of risk of absconding.

Assessment of detention cases in the practice of Montenegrin Courts shows us that the Courts in 33 cases, from total number of unjustified decisions on ordering detention (101 cases) have not justified this legal ground in a proper manner. Here is one typical example from an unjustified decision:

> *"There is a fear that the suspect might flee before the final decision, considering that the gravity of the crime and gravity of expected punishment for the criminal offence, and the fact that the suspect is unemployed, single, with no family responsibilities and without motivation to remain in the place".*

As it can be seen from this example, the Courts most often justify this legal ground for ordering detention by stating some facts about personality of the suspect – that he/she is young, unemployed and single person, or the fact that that the defendant may face a hefty sentence if convicted. The Mission concluded that this explanation is not in accordance with the practise of the ECHR and that personal characteristics of the defendant and the level of the sentence can not be sufficient reason for justifying decision on ordering detention on the basis of this legal ground.

This conclusion is stated in practice of the Appellate Court of Montenegro, which in its decisions stated that personal characteristics of defendant (young, single, unemployed person) either by itself, either in conjunction with other circumstances can not be considered as concrete reasons indicating the risk of absconding.[4]

> **APPELLATE COURT'S DECISION ON TERMINATION OF DETENTION,**
> **made upon the appeal of defence lawyer on the decision on ordering detention**
>
> *"...Justification of the first instance decision, in relation with legal ground – risk of absconding, is that this legal ground exists when we bear in mind the gravity of criminal offence expressed through the weight of the penalty prescribed by the law, and the fact that suspect persons are young, single and unemployed, and these are special circumstances indicating the risk of absconding. The fact that someone is young, single and unemployed can not be considered as circumstances that indicate the risk of absconding, neither alone, nor in relation with severity of the criminal offence. Under other circumstances that can be considered as facts that indicate the risk of flight (behaviour of defendants after committing a criminal offence, like escaping from the crime scene, obtaining of travel documents, providing of financial resources to stay out of the place of residence, that defendant had previously often changed places of residence and did not inform the competent authority about it. The existence of these circumstances (some of them) in relation with the gravity of the criminal offence, and with the fact that defendants are young, single and unemployed persons without permanent residence would indicate to the risk of escape in the case that defendants are released..."*

This Mission's conclusion is also contained in one to the decisions of the ECHR according to which, the risk from absconding can not be justified just with the gravity of the expected punishment, but only in connection with other elements which can confirm the existence of the risk of absconding or to make that it looks irrelevant so that it can not justify detention while waiting trail.[5] Also, risk of flight cannot be established on the fact that a suspect does not have a fixed residence

[4] Muller v. France, Judgement 17-03-1997
[5] Tomasi v. France, Judgement 27-08-1992

within the state, nor stating as a relevant reason being possible or easy for someone to cross the border.[6]

Compared with unjustified decisions when it comes to this legal ground, the Mission held that decisions for ordering detention based on this legal ground are justified if they are based on the facts that defendant is foreign national, without a permanent or temporary residency in Montenegro or other interest to stay in the country. This conclusion is also in accordance with the practice of the Appellate Court, presented in a following decision:

Appellate Court's Decision on rejecting defence attorney's appeal to decision on ordering detention

"...By the finding of this Court, the fact that the defendant is reasonably suspected of having committed a criminal offense punishable by the imprisonment for a term of 2 (two) to 12 (twelve) years, along with the fact that he is a foreign citizen, citizen of the Republic BIH, are circumstances which, in the opinion of this court, indicating a risk of flight, if the defendant is released, and which reasons, for the purpose of uninterrupted criminal proceedings justify the extension of custody under the legal ground from the Art. 175 para. 1 Item 1 of the CPC, as the trial court correctly decided."

6.1.2. Risk of influence on witnesses

In the Article 175 Paragraph 1 point 2 of the new CPC it is stated that detention may be ordered to person if circumstances indicate that he/she would destroy, hide, modify or fabricate evidence or traces of a criminal offence or indicate that he/she would hinder the procedure by influencing witnesses, accomplices or accessories. This is one of the most frequent grounds for ordering detention in the practice of Montenegrin Courts. In 34 cases, from the total number of 101 decisions on ordering detention, which are not justified in accordance with the practice of the ECHR, the Courts failed to properly justify this legal ground by not providing concrete and convincing reasons in favour of existence of this ground in a concrete case. The Courts have only stated that it necessary to testify some witnesses and that this is the reason why the risk of influence on witnesses exists in the current case. Here is the example of one unjustified decision:

"Considering that there are special circumstances indicating that if the defendant remain at liberty he/she will disrupt proceedings by influencing witnesses, accessories and accomplices."

This is not an example of justified decision, because the Courts have to provide concrete and convincing justification of existence of collusion threat (risk that the defendant by remaining at liberty would disrupt proceedings by influencing witnesses, who should be interviewed). The ECHR held that prosecutors and judges may indeed be concerned that there is a real risk that the

defendant, if left at liberty, will obstruct the normal course of investigations by attempting to influence witnesses. Nevertheless, the Courts cannot just rely on such concerns in abstracto to base a detention on this ground, but should show that there are concrete factual circumstances pointing to the risk of destroying the evidence or suborning witnesses.[7]

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[6] Sulaoja v. Estonia, Judgement 15-02-2005
Stögmüller v. Austria, Judgement 10-11-1969
[7] Trzaska v. Poland, Judgement 11-07-2000

The results of this research have shown that Courts in a number of cases based decision on ordering detention on this ground, even after investigation was closed, despite the fact that ECHR held that detention based on this ground should be terminated as soon as the phase of investigation is closed, because there is no risk of collusion between the suspects and witnesses[8] after the finalisation of investigation.

6.1.3. Risk of re-offending

In the Article 175 paragraph 1 point 3 of the new CPC it is stated that detention may be ordered to a person if there are circumstances indicating that the criminal offense would be repeated or attempted criminal offence would be completed or that he/she would commit the criminal offence he/she threaten to commit. From the total number of unjustified decisions, in 10 cases, the Courts have not justified their decisions in a proper manner considering this legal ground for ordering detention.

Namely, the Courts have stated as a fact in favour of justification of this legal ground that defendant was already convicted, but not for the same type of criminal offence for which he/she is suspected in current proceedings. The Mission concluded that this type of justification was not adequate, and is not in accordance with pose stated in one decision of the Appellate Court of Montenegro:

Appellate Court's Decision on rejecting defence attorney's appeal to decision on ordering detention

"…The fact that defendant is already convicted for the similar criminal offence (by verdict of the basic Court in Podgorica K..01/9306 from 15.04.2004 for the crime offence theft – Art. 239 of CC, by verdict of the Basic Court in Podgorica K 01/5297 from 12.12.2003, for the criminal offence severe theft – Art. 145 para 1 item.1of CC in relation to the Art. 19 CC of FRY and by verdict of Basic Court in Podgorica K.05/1300 from 03.11.2008, for criminal offence of severe theft in prolonged duration - Art 240 para.1 item.1 of CC in relation to Art. 49 of CC) and in conjunction with the fact that against defendant another criminal procedure for the same type of criminal offence (from article 242 para 4 in relation with para 1 of CC (case No. K 83/2012) is ongoing, concrete circumstances indicating that criminal offence would be repeated in the case if the defendant is released exists, so the extension of detention in this case is justified…"

According to the practice of the ECHR, risk of re-offending cannot be established simply by reference to unspecified antecedents or prior convictions for offences, which are not comparable in their nature or degree of seriousness.[9] Also, the ECHR held that the risk of re-offending have to be proved, the measure appropriate, in the light of circumstances of the case and in particular the previous history and personality of the person concerned.[10]

6.1.4. Legal ground from the Art. 175 par. 1 point 4 or the new CPC

In the Article 175 paragraph 1 point 4 of the new CPC it is stated that detention may be ordered to person in the case of the criminal offence punishable by imprisonment of ten years or a more severe punishment and especially grave due to the manner of commission and consequences

[8] Kemmache v. France, Judgment 27-11-1991
Muller v. France, Judgement 17-03-1997
[9] Muller v. France, Judgement 17-03-1997
[10] Clooth v. Belgium , Judgement 12-12-1991.

and if exceptional circumstances exist indicating that liberation would lead to a serious threat to the preservation of the public order and peace. Detention can be ordered with a decision based on this legal ground if three conditions are fulfilled cumulatively:

- If it is a criminal offense which is sentenced with 10 years of imprisonment or more;
- If it is a criminal offence that is particularly difficult due to the manner of execution or it's consequence and;
- If there are exceptional circumstances which indicate that the release will lead to a serious threat to the preservation of the public order.

Assessment of the analyzed court files indicates that the Courts failed to properly justify decisions on ordering detention based on this legal ground in 24 cases. In those cases, the Courts failed to evaluate and justify all three conditions – they have justified only first two conditions, while justification of the third condition *(exceptional circumstances which indicate that the release will lead to a serious threat to the preservation of the public order*) is missed. Therefore, it could be concluded that Courts are not taking into consideration evaluation of the facts why someone's release could lead towards a serious threat to the preservation of the public order. This is a constitutive element of this legal ground which has to be considered in every single case in which detention is ordered stating sufficient facts arguing the existence of this legal ground in concrete case.

The Mission has notified that this is a frequently used legal ground for detention in practice of Higher Courts in Podgorica and Bijelo Polje – for criminal offences prescribed in Article 300 of the Criminal Code - unauthorised production, keeping and trafficking of narcotic drugs. It is concluded that Courts have to be focused on the nature and the gravity of the criminal offence in every case in which they are going to order detention to the defendant under this legal ground, because the defendant's release can lead to a serious threat to the preservation of public order just in case of certain crimes. Such explanation can be also founded in the opinion of the ECHR, which held that certain criminal offences that might give rise to a social disturbance are capable for justifying pre-trial detention, at least for a time. This ground could be regarded as relevant and sufficient only if it was based on facts capable of showing that the release of an accused person would actually disturb public order.[11]

Also, in this regard, as an example of a good practice, in text bellow we presented a judgment of the Constitutional Court of Montenegro, which, acting upon the constitutional complaint on the decision on ordering detention, has adopted the complaint, cancelled decision on detention and thus expressed the following attitude:

> *"Courts have to establish that there are some objective circumstances or specific and documented actions and procedures that undoubtedly indicate that there will be a disruption of public order in case that the applicants of constitutional complaint are released. The fact is that in this concrete case, it is about the criminal offense of abuse of office, but such fact by itself is not, as stated above, sufficient to meet the standards of Article 5, paragraph 1, point c) of the European Convention, but the reasons for extension of custody must be viewed in light of the particular circumstances. Therefore, the Constitutional Court finds that competent courts have failed to explain and to justify more precisely and specifically on which grounds the decision for the extension of the detention was based stating that the release of the applicant would led to a serious threat to public order and peace, particularly considering that except of the statement that the applicant was a public figure, no other circumstances are given to support and to justify the existence of the assessment of the detention grounds.*

11 Letellier v. France, Judgment 26-06-1991

In the same manner, results of the research shows that this legal ground for ordering detention is not justified in a certain number of cases because of the fact that Courts have failed to indicate concrete and relevant facts in favour of the existence of this legal ground *in concreto*. In those cases, the Courts stated some assumptions that are not sufficient. Below is an example of one decision that was not justified in accordance with the ECHR practice:

> *"It is a criminal offense under Article 300 of the Criminal Code, which is quite common on the territory under the jurisdiction of the Higher Court in Bijelo Polje. Therefore, the frequency of this criminal offence leads toward the disturbance of the population and is a circumstance which indicates that the release of the defendant will lead to serious threats of a preservation of the public peace and order."*

7. ORDERING A BAIL

Article 170 of the CPC stipulates that the defendant who shall be detained or has already been detained only for a risk of flight or on the grounds referred to in Article 175, Paragraph 1, item 5 of the present Code, may be allowed to remain at large or may be released if he/she personally or someone else on his/her behalf submit a surety that he/she will not flee before the conclusion of the criminal proceedings, and the defendant him/herself pledges that he/she will not conceal him/herself and will not leave his/her residence without permission.

Article 171 of the CPC stipulates the contents of the bail. According to this article, the bail shall always be expressed as an amount of money that is set on the basis of the seriousness of the criminal offence, the personal and family circumstances of the defendant, and the property situation of the person posting bail. Also, the bail shall consist of depositions of cash, securities, valuables or other movable of more considerable value that can be easily cashed and kept, or of placing a mortgage for the amount of bail on real estate of the person posting bail. Finally, if the defendant flees, a decision shall be issued ordering that the amount posted as bail shall be credited to the judicial budget.

Article 172 of the CPC predicts that notwithstanding the bail posted, detention shall be ordered if a duly summoned defendant fails to appear and fails to justify his/her absence, or if following a decision that he/she remains at large, some other legal ground for detention occurs against him/her. Also, the defendant who gives bail on the grounds for detention referred to in Article 175, Para. 1, Item 5 of the CPC shall be detained if, although duly summoned he/she fails to appear at the trial and to justify his/her absence. In the case referred to in Para. 1 and 2 of this Article, bail shall be terminated Cash, valuables, securities or other movables shall be returned and the mortgage shall be removed. The same proceedings shall be followed after the criminal proceedings have been terminated by a ruling discontinuing the proceedings or by a verdict. If the verdict pronounces a sentence of imprisonment, the bail shall be terminated when the convicted person begins to serve his/her sentence.

Out of the total number of assessed court files, the Courts have ordered a release on bail only in eight cases as highlighted in the below table:

Court	Total number of cases in which detention was dismissed and replaced by ordering a bail
Basic Court Bar	2
Basic Court Nikšić	1
Basic Court Kotor	5

8. CONCLUSIONS AND RECOMMENDATIONS

Conclusions

- When it comes to Higher Courts in Podgorica and Bijelo Polje, detention has been ordered in a large percentage (64,03%), out of which it could be concluded that ordering of detention is the rule and not the exception in the Higher Courts. Detention was generally ordered in a limited extent at the Basic Courts' level: out of all appraised files cases in basic courts detention was ordered in 4,76% of total number of received cases in researched period.
- This practice of ordering detention has multiple negative consequences, not only to the detainees, but also to the overcrowding of institution for detainees;
- Out of the total number of 316 analyzed cases, in 101 cases it was noticed the existence of unjustified decisions on ordering detention, which represents nearly a third of the appraised court files;
- The most common reason of ordering detention in unjustified decisions of ordering detention was in relation to the to legal basis concerning the defendant's risk of absconding (total of 33 unexplained decisions), risk of influence on witnesses (total of 34 unexplained cases).
- The general conclusion is that in majority of analysed cases, the courts stated stereotyped and standardized formulations, and they did not have in mind the specific circumstances of each case. Likewise, courts have stated only some of the reasons which were not specific enough and valid to justify ordering detention in a particular case;
- Regarding the detention ground - risk of absconding, the Mission concludes that personal characteristics of the accused and the gravity of the expected punishment can not be sufficient grounds for justification detention orders;
- For unjustified decisions on ordering detention based on the ground stated in Art. 175 Para. 1 point 2 of the CPC (risk of influence on witnesses), the courts have failed to properly explain the basis of detention, in a way that they did not give specific and convincing reasons in favour of the existence of this legal ground, but only stated that it is necessary to testify some witnesses and that this is the reason why the risk of influence on witnesses exists in the current case;
- Regarding the unjustified decisions on ordering detention based on a risk of re-offending - the courts have stated as a fact in favour of justification of this legal ground that defendant is already convicted but not for the criminal offence for which he/she is suspected in current proceedings, which according to the Mission's opinion is not justified;
- When it comes to detention cases based on Article 175, paragraph 1, item 4 of the CPC, in majority of cases the courts have failed to justify also the third reason necessary for the existence of this legal ground – that there are exceptional circumstances indicating that releasing of defendant would lead to the serious threat to the preservation of the public order. So, the first two conditions – foreseen sanctions, as one of the conditions for this ground, and the seriousness of the criminal offence, because of the manner of its conducting or the consequences, as second condition, are not sufficient to justify the ordering of detention according to this legal ground
- The use of other measures to ensure the presence of the defendant that are predicted by the CPC (such as guarantee, bail…) has been observed only in eight of the total number of analyzed cases. This leads to the conclusion that alternative measuressuch as apprehension, bail, ban on leaving the apartment or place of residence, passport confiscation, are not imposed sufficiently, nor they use the possibility to change the already ordered detention with some of these measures.

Recommendations:

- Considering the frequency of ordering detention in our courts practice, the courts should implement the rule that detention is only exceptional measure and that it should be determined only when necessary;
- A better use of the alternative measures for ensuring the presence of the defendant would contribute to decrease of the number of unnecessary orders on detention and thereby to the reduction of the costs related to the procedure and of overcrowding in the detention facilities;
- The courts should provide relevant and sufficient reasons in all decisions on ordering detention, and the specific circumstances that indicate the justification of detention as well;
- Under other circumstances which indicate to the possibility of risk of absconding, it could be found: the defendants behaviour after the committing a criminal offence, like escaping from the crime scene, procuring passport, providing material resources to stay out of the residence, defendants had frequently changed their residence and did not report it to the competent authorities. The existence of these circumstances (some of them) have been linked to the severity of the crimes for which there is a reasonable suspicion that have been committed, and with the fact that the defendants are young, single and unemployed persons without permanent residence would indicate to the possibility of escape in case the accused are released.
- The Courts have to provide concrete and convincing justification of existence of risk of influence on witnesses by stating concrete, precise and undoubted circumstances (risk that defendant's release would interfere with the process by influencing the persons who need to be heard as witnesses);
- Regarding the risk of re-offending, the concrete circumstances that the defendant has previously been convicted for criminal offenses of the same kind can be considered relevant in favour of justification of detention;
- Detention can be ordered on a basis of legal ground stated in the Article 175 Para 1 point 4 if three following conditions are fulfilled cumulatively: if it is a criminal offense sentenced with 10 years of imprisonment or more; if it is a criminal offence that is particularly difficult due to the manner of execution or it's consequences, and if there are exceptional circumstances which indicate that the release will lead to a serious threat to the preservation of the public order;
- The pure existence of the assumptions that the defendant's release would lead to the violation of public order is not enough, because the Courts can not assume such a possibility, but has to establish some objective circumstances or concrete actions and procedures which undoubtedly indicate that there will be a violation of the public order in particular case;
- The Courts should resort to other legal measures provided by the CPC to ensure the presence of the defendant during the trial, and to order detention only when alternative measures are not sufficient.