

**OSCE Trial Monitoring Programme
for the Republic of Moldova**

Analytic Report

**Observance of Fair Trial Standards and Corresponding
Rights of Parties during Court Proceedings**



ANALYTIC REPORT OF THE TRIAL MONITORING PROGRAMME FOR THE REPUBLIC OF MOLDOVA

Observance of Fair Trial Standards and Corresponding Rights of Parties during Court Proceedings (April 2006 – May 2007)

Realised by
OSCE Mission in Moldova

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This is the second report in the framework of the Trial Monitoring Programme in Moldova. It uses mostly the same data as the first report, though collected and analyzed during a longer period and from additional perspectives. Many contributions have been identified by the OSCE Mission to Moldova by the same people and organizations who contributed to the first report, launched in April 2007.

We sincerely appreciate the time and effort that everyone has spent to prepare and review the material collocated in the present report. While it is never possible to adequately acknowledge all the contributions which we have received from colleagues both within and outside the OSCE, we would like to name at least those without whom there would be no report.

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In order to ensure successful implementation of the Trial Monitoring Programme, close partnership with the national authorities continues to be crucial. We highly appreciate the support from the Superior Council of Magistrates and personally from its President Nicolae Clima, as

well as from the General Prosecutors Office and from Prosecutor General Valeriu Gurbulea personally.

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We sincerely hope this interest in contributing to the development of the judiciary system in Moldova in order to adequately meet relevant international standards and OSCE commitments will continue.

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May 2008*

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EXECUTIVE SUMMARY

The Analytic Report “*Observance of Fair Trial Standards and Corresponding Rights of Parties during Court Proceedings*” (hereinafter referred to as *the Present Report*) summarizes the findings of the first full year of trial monitoring conducted in the framework of the Organisation for Security and Co-operation in Europe (OSCE) Trial Monitoring Programme for the Republic of Moldova. The Trial Monitoring Programme (Programme) was designed and is being implemented by the OSCE Mission to Moldova in partnership with the OSCE Office of Democratic Institutions and Human Rights (ODIHR). Utilizing a human rights-based approach, the purpose of the Programme is to analyse the actual compliance of the Moldovan judicial system with both national and international fair trial standards, to draw the attention of national authorities to areas that need improvement, and to encourage and assist national authorities to find solutions to enhance human rights protection and strengthen the rule of law.

The OSCE Mission to Moldova and the ODIHR launched the Programme on 21 March 2006. From April 2006 until 31 May 2007, a total of 2,395 hearings in 596 criminal cases were monitored in all five district courts in Chişinău Municipality, in the Chişinău Court of Appeal, and in the Supreme Court of Justice. The number of trial hearings does not match the number of criminal cases because the trial of each criminal case usually involves multiple hearings.

The first report of the Trial Monitoring Programme entitled “*6-Month Analytic Report: Preliminary Findings on the Experience of Going to Court in Moldova*” (hereinafter referred to as *the 6-Month Analytic Report*) was published in April 2007. It is factually based and structured on an analysis of participants reflecting “the experience” in a Moldovan courtroom based on observations after the first six months of the Programme. *The Present Report*, which is the second report, elaborated within the framework of the Programme presents a legal analysis of the observance and/or violation of pertinent fair trial standards and the corresponding rights of parties during court proceedings. The legal analysis is construed from the perspective of the European Convention on Human Rights (hereinafter referred to as the European Convention) given both the quality and breadth of the European Court of Human Rights (hereinafter referred to as the European Court) case law on the right to a fair trial and its direct relevance for the Republic of Moldova. Some fair trial rights and standards are not addressed in this Report due to the limitation of scope of the Trial Monitoring Programme in Moldova only to those fair trial rights and standards the observance of which can be monitored during trial proceedings. The principal findings are the following:

I. The Fair Trial and the Corresponding Rights of the Defendant

The right to a public hearing: the right to a public trial is usually duly observed in practice, but there are still a number of exceptions to this rule. Often a public trial is precluded by room size, especially when hearings are held in judges’ offices. The number of chairs can be insufficient for trial participants and the public to attend hearings, and information about the time and place may not be accessible. Although most often hearings are held in judges’ offices due to the unavailability of an appropriate courtroom, the monitors noted several instances in which hearings were held in judges’ offices for various unclear or invalid reasons, including merely the judge’s or court clerk’s reluctance to use the specially designed court rooms even when available. The reaction of many judges to the presence of outside observers at their trials might indicate that many of them still remain suspicious of outside monitoring and unenthusiastic about greater transparency in and public scrutiny of court practices. Some individual judges seemed reluctant

to accept the fact that publicity is an important and indispensable component of the right to a fair trial, and that furthermore the publicity of trials is not only a legal requirement but also a tool through which public trust in the judiciary could be built up and maintained. The monitors noted several occasions when judges announced that the court hearing would be closed either without giving reasons for the decision or using such inappropriate reasons as “protection of defendant’s reputation” or that it was a “preliminary hearing which is closed to public”.

The right to a fair hearing: The application of legal provisions safeguarding a “fair” hearing is not always up to standard in practice. Judges consistently uphold the defendant’s right to be present at the proceedings and postpone the hearing whenever the defendant is absent. However, there were cases when arrested defendants could not be present because the police failed to ensure their presence. Legislation declares that the prosecution and defence are equal during case examinations and that trial proceedings should be adversarial. However, efforts are needed to ensure that the defence is genuinely treated as equal and is given adequate opportunities to bring evidence. The adversarial nature of court proceedings may occasionally be affected by poor performance, i.e., not presenting evidence according to procedural rules, which may cause the judge to take an inappropriate role. The adversarial nature of proceedings may be affected by the small size of judges’ offices. Although judges are required to give reasons for every question fundamental to the outcome of the case, monitoring revealed instances in which judges either inadequately reasoned their decisions/resolutions during court proceedings or did not give reasons for them. Such practices negatively affect the defendant’s right to a fair trial, especially when the defendant wants to exercise the right to appeal.

The right to trial within a reasonable time: Delays and postponements seem to be a general practice rather than exceptions in the courts monitored. Of special concern are cases in which hearings are unreasonably postponed while the defendants remain in custody. Lack of punctuality and of basic respect for the court, especially by the defendant, prosecutor and defence lawyer, is a major cause of postponement and delay. Poor scheduling practices led to timing conflicts. Some judges are themselves often late or absent. Monitors noticed that victims and witnesses were the most punctual trial participants, especially during the first hearings. However, after a few postponements they would also appear less punctually and a high percentage of postponements were noted due to their absence. Judges seemed to be concerned with establishing a reasonable amount of time for examining cases and often tried speeding up examinations. Care must be taken that speeding up trial proceedings does not affect the rights of trial participants and the normal course of justice.

The right to be tried by an independent and impartial tribunal: Most guarantees for independence and impartiality relate to the institutional framework of the judiciary and thus fall outside the scope of the Trial Monitoring Programme. This analysis is limited to observations related to the appearance of independence and to the issue of whether judges present sufficient guarantees to exclude legitimate doubt with respect to their impartiality. Several instances were noted when judicial conduct could give rise to reasonable doubts about impartiality: judges behaving like close friends with the prosecutor/defence, engaging in *ex parte* communications with one party, and receiving the prosecutor/defence in his/her office before the start of trial proceedings without explaining to the other party and the defendant what the discussion was about. Although more open than in the beginning of the Programme, many judges still misinterpret the role and tasks of the trial monitors and seem to be anxious about their presence at court hearings. The impression of judges being biased is often indicated by the way the judges behave towards the trial participants, react to interventions, and ask questions that would be more appropriate coming from the prosecution. This may be the result of unclear legislation that declares the neutrality of the judge, but that also allows him/her to ask the defendant and the witness all

types of questions, not only clarify points. Efforts are still needed to improve the independence and impartiality of the judiciary.

The right to be presumed innocent: In general, judges conduct trials in a neutral and professional manner; however, there were a few instances when the judges made improper remarks not compatible with the presumption of innocence. On occasion judges rushed defendants while they were heard or otherwise showed a lack of interest in what defendants were saying. Some judges were manifestly biased, siding with one party, usually the prosecutor, while questioning trial participants or making other comments during the proceedings. The monitoring revealed instances of improper conduct by prosecutors and defence lawyers. Although a prosecutor's role is to make accusations, the prosecutor should refrain from using inappropriate language when addressing or speaking about the defendant. The monitors observed instances in which the prosecutor used the term "criminal" when referring to the defendant. On rare occasions even defence lawyers had accusatory attitudes towards their clients. The use of handcuffs and metal cages for keeping defendants during trials is also an aspect that judges could take a more balanced approach on and decide in each case whether they are indeed needed for securing public order or whether they are rather disproportionate precautionary measures.

The right to adequate time and facilities to prepare the defence: This right is generally respected at the trial stage of the proceedings when judges usually accept defence requests for additional time to prepare (e.g., presenting new evidence, preparing the defendant to make statements, getting acquainted with new evidence brought by prosecution). However, monitoring has also revealed many instances in which judges did not allow the defence adequate time to prepare. Especially worrying in this respect is the practice of appointing ex-officio defence lawyers 5–10 minutes before a hearing, a practice especially widespread at the Chişinău Court of Appeal. There were also instances when the defence was not granted full access to new evidence presented by prosecution with no explanation from the judges.

The right to legal assistance: The right to legal assistance is largely respected. Defendants were usually represented by a lawyer in court. Rarely did judges proceed with the hearing if the defendant did not have a lawyer or if the lawyer was absent or very late. It is commendable that judges take care to ensure that the defendant is represented; however, the practice of appointing an ex-officio defence lawyer on the spot without allowing proper time for preparation raises concerns about the effectiveness of the defence and should be avoided. Defence lawyers generally seemed prepared to defend their clients by asking actively pertinent questions, presenting additional evidence, and making good closing arguments. Monitoring indicated that about 20% of defence lawyers were unprepared, not interested in the case and/or passive. Especially worrying is the performance of ex-officio defence lawyers and the instances when an ex-officio defence lawyer asked clients for payment even though those services are paid by the state. Although the European Court calls on judges to take measures to ensure the right to an effective defence "...when the errors of the defence are manifest or sufficiently brought to their attention," monitors observed few instances when judges reprimanded a defence lawyer for poor performance.

The right to an interpreter: Lack of translation was noticed by monitors and acknowledged by several judges who complained about the lack of translators and about the fact that courts have translators for Russian only and no translators for other languages that are occasionally needed (Gagauz, Turkish, English etc.). The lack of translators is a serious systemic problem. The monitors noticed many instances when an interpreter either did not translate at all or the quality of translation was poor. The judges seemed to tolerate this, often explicitly mentioning that the translator was present "for the record." Only a few judges reacted to a translator's pro

forma presence or poor translation and genuinely tried to ensure an adequate translation for the defendant. The use of the state language and Russian interchangeably during court proceedings was the rule rather than an exception. Often judges themselves translated from one language to the other, even dictating to the court clerk what to write in the minutes of the court hearing. This practice hinders a judge from fully focusing on the merits of the case, increases the chances the court clerk will take incorrect or insufficient notes, and frustrates participants who do not know both languages.

II. The Fair Trial and the Corresponding Rights of Victims and Witnesses

Although Moldovan legislation provides guarantees for victims and witnesses that comply to a great extent with relevant international standards, in practice a court experience can be frustrating and discouraging for victims and witnesses. Frequent delays and postponements, coupled with inadequate facilities that can lead to traumatic confrontations, especially for victims of trafficking and domestic violence, often persuade victims to give up and withdraw their complaints because of the feeling that they are “losing time for nothing” or because they feel humiliated.

While most judges show understanding and concern for victims, monitors noted many instances in which judges asked inappropriate questions, made humiliating comments or did not react to such comments and questions from other participants at the trial. The right to physical security was also endangered when defendants, victims, and witnesses were all present in small judges’ offices or when victims were made to wait, sometimes for hours, in the same corridors with the defendants and their relatives or friends before the case is examined.

The standard means of protecting the privacy of victims seems to be declaring court sessions closed rather than by applying the range of other protective measures provided by the law. Both victims and witnesses face problems in communicating with the court due to the lack of translators or to the poor quality of such services when provided. Although criminally liable for the truthfulness of the testimony they give in court, victims and witnesses rarely read their statements that are written down in the minutes by the court clerk.

INTRODUCTION

As a participating state of the Organization for Security and Co-operation in Europe (OSCE) since 1992, the Republic of Moldova has accepted the presence of observers in proceedings before its national courts as a confidence building measure.¹ The Republic of Moldova recognizes that observing trials is a means of ensuring both an effective judiciary and effective protection of human rights. It is in this spirit that the current Trial Monitoring Programme is carried out.

The overall goal of the Trial Monitoring Programme, as set forth in the initial Programme Document of 17 July 2005, is to enhance compliance by the Republic of Moldova with its OSCE commitments and other international standards on the right to a fair trial, to strengthen the rule of law, and to promote respect for human rights. In particular, the purpose of the Programme is to monitor and disseminate information on compliance with fair trial standards, to build the capacity of civil society to monitor and accurately report on trials, and to raise awareness among national and international actors of the right to a fair trial and violations thereof. Emphasizing a human rights-based approach, special attention is also paid to the rights of victims and witnesses in trial proceedings. Underlying the Trial Monitoring Programme is the generally accepted view that organized and regular court monitoring standardizes the observation and information gathering process and provides a comprehensive means to examine the justice system, noting both the strengths and weaknesses in an impartial manner.

Building upon OSCE/ODIHR experience in other countries, it has been concluded that utilizing national trial observation networks increases the awareness of civil society of court procedures and the functioning of the judiciary and also serves as a means to enhance trust among citizens in the judicial system. As is often quoted, “Justice must not only be done, but must be seen to be done.” This principle of “open justice” lies at the heart of trial monitoring because justice implies fair outcomes achieved through fair procedures. The appropriate observer is a fair-minded observer who acts reasonably. Thus, in order for the justice system truly to function fairly and for the public to believe that it functions fairly, it is useful to identify, train, and support a national cadre of such fair-minded observers.

Trial monitoring is carried out by teams of two monitors selected and trained by the OSCE Mission to Moldova and ODIHR and the local implementing partners, the Institute for Penal Reform and the American Bar Association Rule of Law Initiative in Moldova.² The role of the monitors is to observe attentively and neutrally everything that occurs during and surrounding the trial proceedings they are assigned to in Chişinău Municipality. They prepare detailed reports on each trial hearing they attend using a comprehensive reporting form (questionnaire) developed for the purpose of collecting both statistical information and factual descriptions. Since one of the fundamental principles underlying trial monitoring is respect for the independence of judiciary, monitors have been instructed never to attempt to influence or to intervene in proceedings, and to be careful not to identify with either the prosecution or the defence. Monitors further cannot and do not assess evidence, evaluate the merits of the case, or determine a defendant’s guilt

¹ See in this respect the *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE* (1990), paragraph 12 that states that, “The participating states decide to accept as a confidence-building measure the presence of observers sent by participating states and representatives of non-governmental organizations and other interested persons at proceedings before courts as provided for in national legislation and international law.”

² The Institute for Penal Reform is a national non-governmental organization (NGO) and ABA Rule of Law Initiative in Moldova is an international NGO.

or innocence. Rather, they concentrate on the observance of procedural rules; on respecting the rights of the defendants, witnesses, and victims; and on the overall appearance of fairness of court proceedings in general. The information they collect and record on their questionnaires is entered into a database designed for the Programme that is capable of compiling statistical reports in real time.

The first report of the Trial Monitoring Programme “6-Month Analytic Report: Preliminary Findings on the Experience of Going to Court in Moldova” was launched for the public on 19 April 2007 in cooperation with the Superior Council of Magistrates and the General Prosecutor’s Office of the Republic of Moldova. It was based on information and data collected from monitoring almost 800 court hearings in all the courts of law in Chişinău Municipality (i.e., five district courts, the Chişinău Court of Appeal and the Supreme Court of Justice) during the first six months of the implementation of the Programme. *The 6-Month Analytic Report* described the experience of going to court including observations on the court premises and facilities, public access to trial proceedings, delays and postponements, and security and public order; as well as on the performance of the main participants at trials including judges, prosecutors, defence lawyers, court clerks, interpreters, victims and witnesses. Analysis of the preliminary findings was supplemented by charts and graphs based on statistical data collected and by vignettes based upon real events observed by trial monitors in specific cases.

The Present Report aims to present the main findings of the Trial Monitoring Programme in its first full year of operation, i.e., 19 April 2006 – 31 May 2007.³ It is based on observations of **2,395 hearings in 596 criminal cases** in the courts of Chişinău Municipality (Table 1 and Figure 1).

Table 1: Number of Hearings Monitored in the Courts of Chişinău Municipality

Courts in Chişinău Municipality	Number of Hearings Monitored
Supreme Court of Justice	88
Chişinău Court of Appeal	338
Centru District Court	646
Ciocana District Court	198
Rişcani District Court	444
Botanica District Court	305
Buiucani District Court	376
Total Number of Hearings Monitored	2.395

³ *The Present Report* includes hearings monitored over 14 months due to the fact that *de facto* monitoring of all courts in the municipality of Chişinău started in April 2006, and includes hearings monitored up to the end of May 2007.

Figure 1: Number of Trial Hearings Monitored per Month

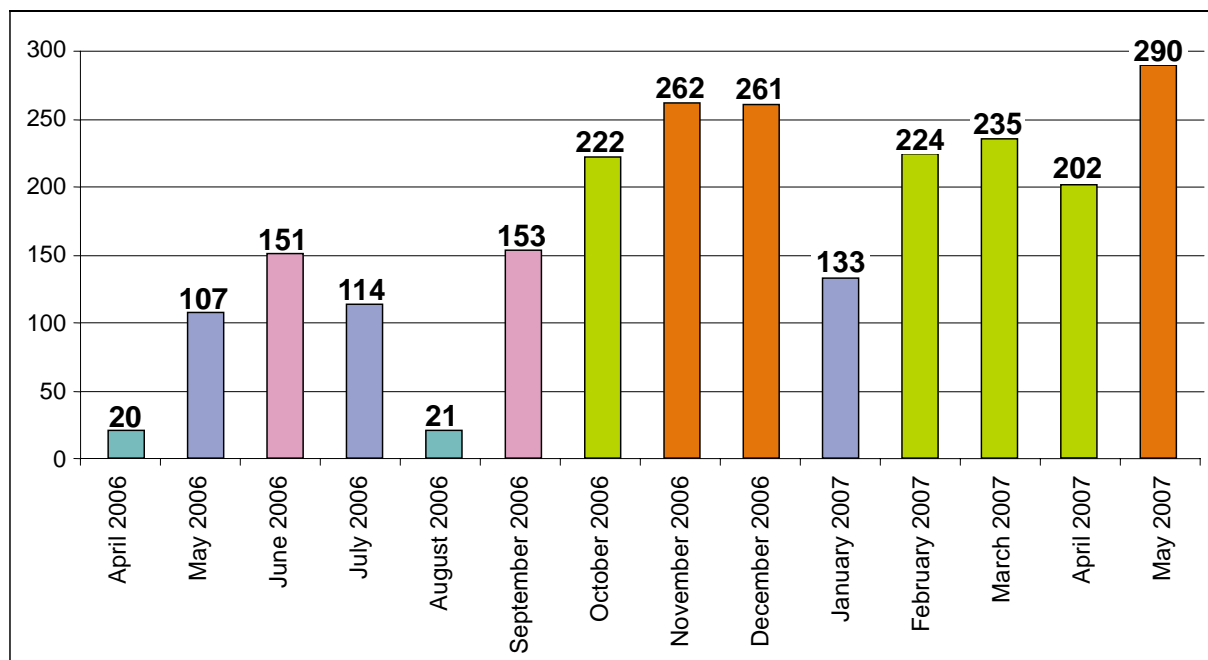


Figure 1 shows the graphical representation of the number of hearings monitored by the Trial Monitoring Programme each month from April 2006 – May 2007.

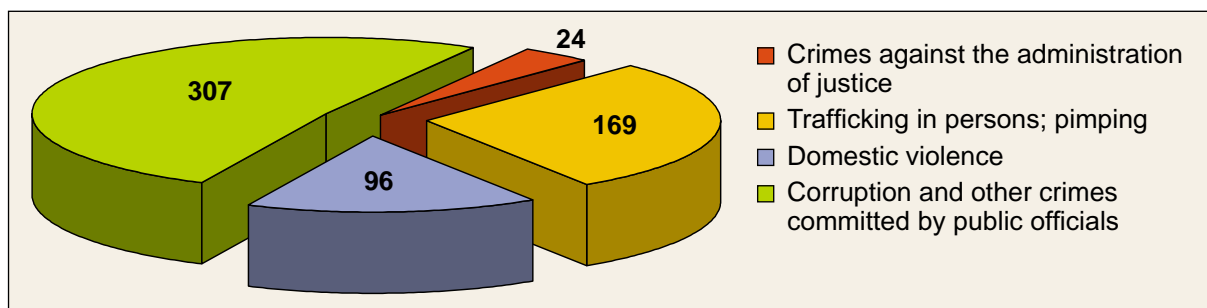
The number of trial hearings does not match the number of criminal cases because the trial of a criminal case usually involves multiple hearings. The types of cases monitored included 169 of trafficking in persons, trafficking in arms, and pimping; 96 of domestic violence; 24 of crimes against the administration of justice; and 307 of corruption and other crimes committed by public officials (Table 2 and Figure 2).

Table 2: Category of Crimes Monitored and Related Articles of the Criminal Code of the Republic of Moldova

Category of Crimes	Articles of the Criminal Code Monitored
Trafficking in Persons; Pimping	Art. 165. Trafficking in human beings Art. 206. Trafficking in children Art. 207. Illegal taking of children out of the country Art. 220. Pimping
Trafficking in Arms	Art. 248 (par. 3). Smuggling in weapons, explosives, ammunition
Domestic Violence	Art. 145. Deliberate murder Art. 150. Inducement to commit suicide Art. 151. Deliberate gross bodily or health harm Art. 152. Deliberate average bodily harm or health harm Art. 153. Light bodily harm or health harm Art. 154. Deliberate maltreatment or other acts of violence Art. 155. Threatening to murder or inflict gross bodily or health harm Art. 156. Deliberate gross or average bodily or health harm inflicted in a state of affect Art. 157. Gross or average bodily or health harm caused by imprudence

Category of Crimes	Articles of the Criminal Code Monitored
Crimes against the Administration of Justice	Art. 303. Interference in the enforcement of justice and in criminal prosecution Art. 306. Knowingly holding an innocent person criminally liable Art. 307. The passing of an illegal sentence, decree, conclusion or decision Art. 308. Illegal detention or arrest Art. 309. Coercion to make statements Art. 310. Falsification of evidence Art. 312. Making false statements, conclusions or incorrect translation Art. 313. The refusal or evasion of a witness or injured party from making statements Art. 314. Coercing to make false statements, conclusions or incorrect translations, or to evade such duties Art. 315. The disclosure of criminal investigation information Art. 316. The disclosure of information on security measures applied for the judge and for the participants in criminal proceedings Art. 318. Facilitating escape Art. 320. The deliberate failure to execute a court decision Art. 323. Favoring a crime
Corruption and other Crimes Committed by Public Officials	Art. 324. Passive corruption Art. 325. Active corruption Art. 326. Pedaling in influence Art. 327. Abuse of power or of an official position Art. 328. Exceeding one's authority or official powers Art. 329. Professional negligence Art. 330. Receiving of an illicit reward by a servant Art. 330/1. Violation of rules on the declaration of incomes and property by state dignitaries, judges, prosecutors, civil servants and some persons with management positions Art. 331. Refusal to carry out the requirements of the law Art. 332. Falsification of public documents Art. 243. Money laundering Art. 333. Bribe-taking Art. 334. Bribe-giving Art. 335. Abuse of service Art. 336. Exceeding one's job prerogatives

Figure 2: Number of Criminal Cases Monitored by Type of Criminal Offence



The 6-Month Analytic Report was fact-based and structured on an analysis of trial participants. *The Present Report* is an analysis of the legal aspects of the observance and/or violation of

pertinent fair trial standards and the corresponding rights of the parties during court proceedings. In other words, *the 6-Month Analytic Report* reflected “the experience” in a Moldovan court, and *the Present Report* builds on that experience supplementing it with vignettes to analyse fair trial standards and rights. The legal analysis is mainly construed from a European Convention perspective given both the quality and breadth of the European Court’s case law on the right to a fair trial and its direct relevance for the Republic of Moldova. *The Present Report* has two main chapters: the first deals with fair trial rights and standards as guaranteed by Article 6 of the European Convention focusing on the rights of the defendant; the second deals with the rights of victims and witnesses and relevant international standards regarding their treatment in court.

Some fair trial rights and standards are not addressed in *the Present Report* due to the limited scope of the Trial Monitoring Programme in the Republic of Moldova. The right to a fair trial does not relate only to trial proceedings *stricto sensu*; rather, it implies guarantees that apply both before the trial commences⁴ and after the trial, i.e. at the execution phase.⁵ The scope of the Trial Monitoring Programme, however, is limited strictly to the trial stage, and therefore the analysis contained in *the Present Report* are also restricted mainly to fair trial rights and standards that can be monitored at trial proceedings. The fact that some rights and standards are not commented upon is not due to oversight or to omission, but rather to the fact that the Programme declines to make assumptions on or to speculate about issues not directly observed through monitoring court proceedings.

The Trial Monitoring Programme is being implemented at a time when the Moldovan judiciary is still under going reform. Ongoing criticism asserts that notwithstanding many positive accomplishments, certain problems still remain.⁶ It is hoped that the information collected and presented in *the Present Report* will inform the national authorities and the international community as well as civil society and the general public on the *de facto* functioning of the judicial system. It is also hoped that in the longer term the gathered information will contribute to a better administration of justice and to a better observance of fair trial standards and human rights in the Republic of Moldova in general.

⁴ See *Imbrioscia v. Switzerland*, Judgment of European Court, 24 November 1993, paragraph 36.

⁵ See *Hornsby v. Greece*, Judgment of European Court, 19 March 1997, paragraph 40.

⁶ See in this respect the European Commission observations that judicial reform is an area in which Moldova is still lagging behind noting that, “Further reform of the judiciary, in particular to ensure its independence, is needed. [...] [Though some progress is noted,] Further reforms of the judiciary remain a priority” (European Commission’s ENP Progress Report on Moldova {COM (2006) 726 final}, pages 3 and 4 – http://ec.europa.eu/world/enp/pdf/sec06_1506-2_en.pdf). Strengthening the judiciary is still one of the highest policy objectives of Moldova for 2007-2013 (European Neighbourhood and Partnership Agenda, Republic of Moldova, Country Strategy Paper 2007–2013, pages 4 and 33, see at http://www.delmda.ec.europa.eu/eu_and_moldova/pdf/enpi_csp_moldova_en.pdf). See also Freedom House assessment that, “The reform of the judiciary has so far failed to address a series of practical problems ranging from judiciary overload to lack of sufficient office space and qualified personnel, to low salaries, insufficient financial resources allocated from the state budget, poor quality of judgments, poor implementation of judgments, poor independence of the judiciary (page 5), precarious state of the judiciary; low public trust; insufficient number of judges and auxiliary personnel (pages 19 and 20)” (Freedom House Report, *Nations in Transit 2007 – Moldova*), http://www.freedomhouse.hu/images/fdh_galleries/NIT2007/nt-moldova-proof-ii.pdf). Or see the concerns of the UN Committee against Torture and the UN Human Rights Committee about, “...allegations of a dysfunctional criminal justice system, caused in part by a lack of independence on the part of the judiciary and the prosecutors. The Committee Against Torture has called on Moldova to take effective measures to ensure a fully independent judiciary (and prosecution service), in conformity with the UN Basic Principles on the Independence of the Judiciary.” (EU Country Strategy Paper 2004-2006 / National Indicative Programme 2005-2006 / Moldova, page 15, http://ec.europa.eu/comm/external_relations/moldova/csp/csp04_06_nip05_06.pdf). See also the American Bar Association (ABA) Rule of Law Initiative for Moldova Judicial Reform Index that compares findings on 30 factors related to the judiciary from 2002 to 2006 noting that slightly more than half received neutral correlations, while 12 factors were rated negatively and only 2 positively (ABA Rule of Law Initiative, *Judicial Reform Index for Moldova, 2007, Volume II*, at http://www.abanet.org/rol/publications/moldova_judicial_reform_index_01_2007_en.pdf).

I. THE FAIR TRIAL AND THE CORRESPONDING RIGHTS OF THE DEFENDANT

A. Introductory Remarks

The focus of this chapter is on fair trial standards and the corresponding rights of the defendant which are inherent in the notion of a fair trial. The legal analysis is built upon factual events directly observed through trial monitoring. These are commented upon from the perspective of Article 6 of the European Convention⁷ and Moldovan criminal procedural law.⁸

From a human-rights perspective, the right to a fair trial can be viewed as the right of all people charged with the commission of a crime to have certain procedures respected in the process by which the state determines whether to hold them accountable. The right to a fair trial is instrumental in the protection of other human rights, in that it serves as a safeguard that guarantees judicial redress through the courts to anyone who has had his or her rights violated. From a broader, social perspective, the right to a fair trial is a means to ensure that criminals are duly brought to justice while ensuring that no innocent person is erroneously convicted of a crime. The concept of a fair trial as a core element in the rule of law is linked to the fundamental principle of separation of powers, as it requires the judiciary to exercise its powers independently, free from encroachment by other state powers.

The European Court in its case law has repeatedly underscored the importance of Article 6 holding that, "In a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6 paragraph 1 would not correspond to the aim and the purpose of that provision."⁹ It has been said that "the guarantee of a fair trial is 'only' a procedural guarantee designed to secure 'procedural justice' rather than 'result-oriented justice,' i.e. a decision or judgment based on the true facts and the correct application of the law."¹⁰ The right to a fair trial is, "...at the centre of both the rights of the defence, and the guarantee of the rule of law."¹¹

As a core element in the concept of the rule of law and the protection of human rights in general, the right to a fair trial is guaranteed to all by the European Convention under Article 6. This article that has been interpreted extensively by the European Court and throughout the years has been one of the most dynamically evolving provisions. Under United Nations¹² and Council of Europe¹³ standards, as well as political commitments created under the auspices of the OSCE¹⁴ and the Stability Pact for South Eastern Europe, everyone is entitled to a fair trial in both civil and criminal proceedings.

⁷ *European Convention on Human Rights*, Rome, 4 November 1950, ratified by the Republic of Moldova on 12 September 1997.

⁸ Relevant guarantees from the *Constitution of the Republic of Moldova*, adopted on 29 July 2004, the *Criminal Procedure Code*, adopted by Law Nr. 122-XV of 14 March 2003, entered into force on 12 June 2003, and other organic laws related to criminal proceedings.

⁹ See *Delcourt v. Belgium*, Judgment of the European Court, 17 January 1979, paragraph 25.

¹⁰ Trechsel, Stefan, *Human Rights in Criminal Proceedings*, Oxford University Press, 2005, p. 83.

¹¹ Trechsel, Stefan, Op. cit, p. 84, relying on the European Court analysis in *Golder v. United Kingdom*, Judgment of 21 February 1975.

¹² Article 14 of the *International Covenant on Civil and Political Rights* (ICCPR), G.A. Res. 2200A (XXI) of 16 December 1966, entered into force on 23 March 1976, to which Moldova is a party since 26 April 1993.

¹³ Article 6 of the European Convention

¹⁴ Paragraph 13.9 of the *Concluding Document of Vienna Meeting* (1989).

In Moldovan law, provisions guaranteeing a person's right to a fair trial can be found in the Constitution,¹⁵ the Criminal Procedure Code,¹⁶ and other laws. Where any contradiction exists between national criminal procedural law and international human rights treaties to which Moldova is a party, international law prevails.¹⁷ The European Convention, in particular, functions as an integral part of the national legal system and is to be applied directly. The jurisprudence of the European Court is binding on the courts of Moldova¹⁸ and maintains priority over incompatible national legal provisions.¹⁹

The right to a fair trial is often explained in two dimensions: the principle of equality of arms, one feature of the wider concept of a fair trial; and the fundamental right that criminal proceedings should be adversarial.²⁰ States have a positive obligation to establish and maintain an independent and impartial judiciary with full competence to review and issue final decisions in civil and criminal cases. Courts must conduct all proceedings in conformity with both the procedural standards set forth in key international human rights instruments and those prescribed within the domestic legal system. The European Court approach is to look at the "entirety of domestic proceedings" when deciding whether the proceedings meet the standards of fairness required by Article 6.²¹ Therefore, the rights attached to a fair trial apply throughout all stages of the procedure, not only to the actual hearings before the court, but also from pre-trial proceedings to the appeal and cassation levels of jurisdiction.

Before proceeding to an analysis of the various fair trial rights and standards, it must be emphasized that *the Present Report* does not offer a comprehensive and exhaustive analysis of all fair trial rights and procedural guarantees provided by Article 6 of the European Convention and relevant domestic legislation. That is beyond the scope of the Trial Monitoring Programme. Rather, *the Present Report* analyses the main rights stemming from Article 6 through observations over time of court hearings, without following the development of cases from beginning to end. It must also be emphasized that the court monitors did not have the task of assessing the substance of the application of the law. Their task was to observe and report on procedural compliance and the appearance of how "justice is done."

Thus, *the Present Report* focuses on the following selected fair trial rights of the defendant:

- the right to a public hearing;
- the right to a fair hearing;
- the right to a trial within a reasonable time;
- the right to a trial by an independent and impartial tribunal;

¹⁵ See, in particular, articles 20, 21, 26, 117, 118 and 119.

¹⁶ See, in particular, Title I, Chapter II and the Special Part of the Criminal Procedure Code.

¹⁷ See Article 4 paragraphs. 1 and 2 of the Constitution; see also Article 8 of the Constitution. (Observance of International Laws and Treaties); Decision of Constitutional Court on Interpretation of Certain Provisions of Article 4 of the Constitution of the Republic of Moldova # 55 (14 October 1999), paragraphs 6, 8, 11, n.6 (ruling that universally recognized norms and principles of international law are binding on Moldova to the extent it has agreed to be bound; and that international treaties represent an integral part of the national legal framework and supersede national law in any conflict between the two). See also articles 2 and 7 of the Criminal Procedure Code of Moldova.

¹⁸ Since 12 September 1997, Moldova has been a party to the European Convention.

¹⁹ See Decision of Supreme Court of Justice on the Application in Judiciary Practice by Judiciary Institutions of Certain Provisions of the Convention on the Protection of Fundamental Human Rights and Freedoms # 17 (19 June 2000), paragraphs 2 and 3 (holding that the ECHR is an integral part of the internal legal system, is directly applicable, and supersedes national law in cases of conflict).

²⁰ See *Belziuk v. Poland*, Judgment of the European Court, 25 March 1998, paragraph 37.

²¹ See *Granger v. United Kingdom*, Judgment of the European Court 28 March 1990, paragraph 44; *Imbrioscia v. Switzerland*, Judgment of 24 November 1993, paragraph 38.

- the right to presumption of innocence;,
- the right to adequate time and facilities to prepare the defence;
- the right to legal assistance;
- the right to an interpreter.

The state is under a positive obligation to take all steps necessary to ensure that all the rights enshrined in the text of the European Convention are guaranteed in both theory and practice. In the context of the right to a fair trial, this includes putting sufficient financial resources at the disposal of their systems for a fair and effective administration of justice.²²

²² Mole, N. and C. Harby, *The Right To A Fair Trial. A Guide To The Implementation of Article 6 of the European Convention On Human Rights*, 2nd edition, August 2006, p. 7.

B. The Right to a Public Hearing

The right to a public hearing is a unique component of the right to a fair trial. Whereas other component rights serve defendants exclusively, the right to a public trial also has a more general, social dimension. From the viewpoint of defendants in criminal cases or parties in civil cases, the public character of court proceedings "...protects litigants against the administration of justice in secret with no public scrutiny,"²³ and thereby protects the parties from the exercise of arbitrary state power. The right to a public trial is instrumental in securing public trust in the judiciary, and it serves as "...one of the means whereby confidence in the courts, superior and inferior, can be maintained."²⁴ Additional rationales for public trials are that they educate the public; they have therapeutic value for the community; the presence of outsiders may serve as a check on judicial power; and the publicity of a trial may enhance fact finding by bringing new evidence to light and by persuading those who testify to speak more truthfully than if permitted to testify in private.²⁵

Article 6, paragraph 1 of the European Convention states:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a ... public hearing ... Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

This suggests that the right to a public hearing is unique since, as an unqualified right not permitting any derogation, it can be justifiably restricted with reference to other values however. The explanation for this particular nature of the "publicity" component is that, as stated above, it serves not only the interests of the defendant but also the general interests of the society as a whole; where a contradiction between these interests arises, the interests of the individual take precedence.

As part of their obligation to ensure public nature of the trial, the competent authorities must make information on the date and place of the hearing available to the public. This is particularly important if a trial hearing is not held in a courtroom equipped as such. If the hearing is not held in such a courtroom, the competent authorities must take additional measures to facilitate the attendance of the public and the media.²⁶

Article 6 of the European Convention aside, the principle of public nature of court proceedings is similarly guaranteed by the Moldovan Constitution and other legislative acts.²⁷ The Criminal Procedure Code allows for some exceptions from the general rule of holding all trial hearings in public, similar to those spelled out in Article 6, when public access to a trial (including all trial hearings) may be restricted by a reasoned court order in respect of morality, public order, or national security; protection of the interests of minors or the private life of parties to the proceedings; or special circumstances indicating that publicity may damage the interests of justice.²⁸

Monitoring indicates that the right to a public hearing is generally well respected in the Chisinău Municipality. Trial monitors and members of the general public were granted access to most trial

²³ *Pretto and Others v. Italy*, Judgment of the European Court, 8 December 1983, Series A, No. 71, at 21-22. See also *Axen v. the Federal Republic of Germany*, Judgment of the European Court 8 December 1983, paragraph 25.

²⁴ *Axen v. the Federal Republic of Germany*, Ibid.

²⁵ Resnick, Judith, *Due Process: A Public Dimension*, 39 UNIV. FLORIDA L. REV. 405, 419 (1987).

²⁶ See *Riepan v. Austria*, Judgment of the European Court, 14.02.2001, paragraph 29.

²⁷ See, in particular, article 117 of the Constitution; article 18 paragraph 1 of the Criminal Procedure Code; article 10 of the Law on Judicial Organization, Law Nr. 514-XIII of 6 July 1995, entered into force on 19 October 1995.

²⁸ Article 18 paragraph 2, CPC.

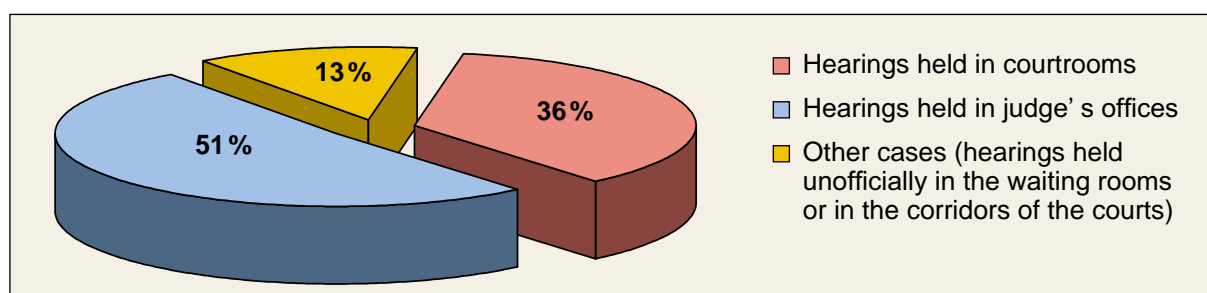
hearings, and largely tolerated. However, on numerous occasions monitors' access was refused, restricted, or otherwise conditioned thus indicating that some judges and prosecutors do not fully understand the principles of public hearings and the transparency of trial proceedings.

For instance, a judge from a district court once evicted monitors from a public trial saying, "*Please vacate my office, we are not holding this trial hearing in a courtroom,*" implying that only trials held in the courtroom were open to the public. In other isolated instances, public access was denied on improper grounds such as, "...in order to protect the defendant's reputation," or "... because this is a preliminary hearing and all preliminary hearings are closed to the public." Judges who declared that preliminary hearings were closed to the public violated the Article 345 of the Criminal Procedure Code which states that the preliminary hearing should be held according to the general rules for the trial provided for in the Chapter I, Title II, Special Part of the Criminal Procedure Code; i.e., preliminary hearings should also be public. Several proceedings were declared closed to the public at the moment when monitors came to observe the trial and without a reasoned decision from the judge as to why the proceeding was closed. This practice violates articles 18 paragraph (3) and 316 of the Criminal Procedure Code, which expressly requires the judge to provide reasoned arguments for any decision to hold closed hearings. There were a few instances in which the judge declared the hearing closed to "protect the victim's privacy." Although a legitimate reason, the monitors noted that judges did not usually ask the victims if they preferred a closed hearing, and that many victims in fact welcomed the monitors' presence.

In some cases, a trial could not be public because of circumstances not imputable to judges. This was due first and foremost to the state of court buildings and premises. As mentioned in *the 6-Month Analytic Report*, the premises of some Moldovan courts are inadequate because of chronic under-financing and poor infrastructure. Because the buildings occupied by some district courts were not originally designed as courthouses, they mostly consist of small rooms now used as judges' offices with few rooms large enough to serve as courtrooms that can accommodate both the parties to the case and the public.²⁹ There have been many situations in which monitors and representatives of the general public could not attend trials simply because the office of the judge where the hearing was held was barely large enough to accommodate even the parties to the case.

Out of 2,395 hearings monitored by the Programme, proceedings were held in a courtroom in 36% of the hearings (860 hearings) and in the judge's office in 51% of the hearings (1,227 hearings). The remaining 13% of the hearings (308 hearings) includes hearings which were unofficially postponed after having been held in other places such as waiting rooms or in the corridors of the court, sometimes even without the participation of the judge (Figure 3).

Figure 3: Rooms in which Court Hearings were Conducted
(Average percentage per all Courts from Chişinău Municipality)



²⁹ More detailed information on the premises and facilities of the courts in Chişinău Municipality including the ratio of judges to courtrooms and the approximate percentage of trial hearings held in judges' offices and in courtrooms is contained in the *6-Month Analytic Report*.

The effective exclusion of the public from trials in many cases, though arguably covered by Article 316 paragraph (4) of the Moldovan Criminal Procedure Code, may be seen as conflicting with the general obligation to hold trials in public (absent circumstances warranting a closed trial) under Article 6 of the European Convention. Individual judges are obviously not responsible for the lack of sufficient courtrooms adequate for public trials. Rather, of direct relevance is the state's positive obligation to take all steps necessary to ensure the right to a fair trial, including making sure that sufficient financial resources are put at the disposal of the judicial systems for the fair administration of justice.

Monitors found that sometimes judges preferred to hold proceedings in their offices even when courtrooms were available that could better accommodate the hearing and all its participants. For instance, in one of the cases monitored in a district court it was initially agreed that the trial would be conducted in a courtroom that was free and available; however, in the end all trial participants had to stay in the judge's office because the clerk did not wish to go to the courtroom, which was cold and draughty. Subsequent hearings on that case were similarly conducted in the judge's office, which could barely accommodate trial participants. Monitoring indicates that particular judges are reluctant to use available courtrooms and prefer to hold hearings in their small offices even though the public cannot be physically accommodated.

Such practices are in violation of the standards set by the European Court which stated that, "A trial complies with the requirement of publicity only if the public is able to obtain information about its date and place and if this place is easily accessible to the public. In many cases these conditions will be fulfilled by the simple fact that a hearing is held in a regular courtroom large enough to accommodate spectators.... [In cases when the trial is held outside the regular courtroom] the State is under an obligation to take compensatory measures in order to ensure that the public and the media are duly informed about the place of the hearing and are granted effective access."³⁰ The absence of publicity at the court of first instance cannot be remedied by a public hearing at the appellate level unless the appeal court is equipped to review fully the facts and legal matters related to the case.³¹

Holding a trial in a judge's small office may also affect the general order and solemnity of the trial. Proceedings in such cases are often interrupted by telephone calls and by persons who open the door and ask for something, and trial participants themselves tend to behave less professionally, for instance by addressing the court without standing up and without using the legally prescribed formula, or simply by devoting their attention to something other than the trial taking place. Seating arrangements in a small judge's office may affect the adversarial nature of the proceedings, may render it difficult for the defence lawyer to consult his or her client confidentially, and may place victims and witnesses in uncomfortable proximity to defendants.³² When a trial involves defendants who present symptoms of tuberculosis, holding the trial in a cramped judge's office may endanger the health of all participants. In one such case the judge always looked for a courtroom and when none was available placed the defendant in a corner of his office and warned all participants to keep a safe distance.

One more element that must be noted is the need to provide sufficient information on the date, time, and venue of scheduled trials so that the parties to the case as well as any interested third party can be informed about and attend hearings. This is normally ensured by posting calendars with information on upcoming trials in a public place in the courthouse, usually on a specially designed board/panel. Though the requirement to post trial schedules publicly is

³⁰ See *Riepan v. Austria*, Judgment of the European Court, 14.02.2001, paragraph 29.

³¹ *Ibid.* paragraph 40.

³² For more details and examples of problems associated with using judge's offices as trial venues please consult the *6-Month Analytic Report*.

expressly prescribed by the Moldovan penal procedural law,³³ not all judges comply with this requirement, thus hampering the ability of the general public to know about and to attend trials (Table 3). In the early stages of the implementation of the Trial Monitoring Programme, one court in Chişinău did not even have a board for posting trial schedules, though this situation was remedied in the summer of 2007.

Table 3: List of Cases Scheduled for Trial Posted Publicly at the Courts
(Average percentage per Court from Chişinău Municipality)

Courts in Chişinău Municipality	List of Cases Posted Publicly at the Courts		Number of Hearings Monitored
	Yes	No	
Supreme Court of Justice	100%	–	88
Chişinău Court of Appeal	98%	2%	338
Centru District Court	38%	62%	646
Ciocana District Court	78%	22%	198
Riscani District Court	3%	97%	444
Botanica District Court	43%	57%	305
Buiucani District Court	83%	17%	376
Total Number of Hearings Monitored			2.395

Even when the boards are used, the information posted on them is often incomplete and insufficient. The case number may be missing or the citation might simply say “criminal case” without indicating the exact nature of the crime or listing the courtroom or judge’s office where the case will be examined. Judges and their auxiliary personnel are not always available or polite enough to provide even basic information on upcoming trials, although such information is supposed to be available to the public (Vignette 1).

Vignette 1

On one occasion, when a person inquired about the date and time of a hearing, adding that the information was not posted on the schedule board as required, the judge replied, “So what if it’s not posted on the board? Maybe there’s not enough space on it.” The board was in fact almost empty.

In another incident, when monitors wanted to check with a clerk the information posted on the board, the clerk replied, “Who told you that the hearing was scheduled for today? ... Oh, the board? Listen, don’t look at the board. We just write cases there just so we have something on it. What case? ... No, that case was finished in January. We simply keep posting it on the board, just like that...”

With regard to pronouncing the sentence in public, judges usually respected this requirement, monitors found. On only a few occasions when the office was too small was access to the pronouncement objectively hindered, and often when the court clerk or the judge announced that the hearing would be closed, they invited the monitors to be present at the sentencing. This does not compensate for excluding the public during the trial nor does it provide public access to information related to the trial, since court judgments are not published or made available to the public through other means.

³³ Article 353 of the Criminal Procedure Code.

C. The Right to a Fair Hearing

Article 6 paragraph 1 of the European Convention guarantees everyone the right to a “fair” hearing. The European Court in its case law has developed the meaning of this term extensively. Today it is understood to incorporate a series of underlying due process standards that are not expressly enshrined in the text of the European Convention. These components of the “fair hearing” principle, often examined by the European Court together with other aspects of Article 6 paragraph 3, include the following main points:

- right of access to court;
- right to be present at one’s proceedings;
- freedom from self-incrimination;
- equality of arms;
- right to adversarial proceedings;
- right to a reasoned judgment.

The right of access to court means that everyone must have the right to have any claim relating to his/her civil rights and obligations brought before a court; furthermore, it includes the right to a final determination of the dispute.³⁴

The right to be present at one’s proceedings implies that the defendant must be present at all trial hearings³⁵ which in turn means that a defendant’s absence should normally call for a postponement except in cases where the authorities have acted diligently but were not able to notify the accused of the hearing;³⁶ or in the interests of the administration of justice in some cases of illness.³⁷ Consequently, trials *in absentia* are not completely incompatible with the European Convention, but are highly undesirable and require strict observance of several conditions, such as the above, that the European Court would examine in every case. Domestic legislation should provide detailed rules for trials *in absentia* and criminal investigations and court authorities should show a particular diligence in looking for the defendant but failing to find him/her. The defendant can also be removed from the court room if s/he is disturbing the proceedings, however these instances should be of a rather exceptional nature.

Hearings can also be held *in camera*³⁸ without the defendant present if this is necessary to protect the victim.³⁹

The freedom from self-incrimination is, “The right of anyone charged with a criminal offence [...] to remain silent and not to contribute to incriminating himself,”⁴⁰ and is aimed at protecting the defendant from, “...improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6...”⁴¹

The equality of arms principle demands that each party to the proceedings have a reasonable opportunity to present his/her case to the court under conditions that do not place them at a

³⁴ See *Burdov v. Russia*, Judgment of the European Court, 7 May 2002, paragraph 34. See also *Jasiuniene v. Lithuania*, Judgment of the European Court, 6 March 2003, paragraph 27.

³⁵ See *Ekbatani v. Sweden*, Judgment of the European Court, 26 May 1988, paragraph 25.

³⁶ See *Colozza v. Italy*, Judgment of the European Court, 22 January 1985, paragraph 28.

³⁷ See *Ensslin and others v. the Federal Republic of Germany*, 14 DR 64.

³⁸ “*In camera*” hearings refer to hearings where one party is not present and is used in this report particularly regarding instances when the defendant can be removed from the court room in order to protect the interests of the victim or witness as well as referring to closed hearings when the access of the public is restricted in circumstances allowed by the law.

³⁹ See Article 15 of the *Recommendation R (85) 11*, Committee of Ministers, Council of Europe, 28 June 1985.

⁴⁰ See *Funke v. France*, Judgment of the European Court, 25 February 1993, paragraph 44.

⁴¹ See *Saunders v. the United Kingdom*, Judgment of the European Court, 17 December 1996, paragraphs 68-69.

substantial disadvantage compared to the opponent, so that a fair balance is struck between the parties.⁴² The equality of arms principle means equal treatment of both parties throughout the entire proceedings and is applicable both in civil and criminal cases. This principle refers only to the way the parties should be treated by the court and does not refer to the relations between the parties and the court. This allows the court to assess whether balance was maintained during the proceedings, especially regarding the communication between the parties of all the elements of the case.⁴³ Therefore, when both parties are prohibited from adducing any evidence, even if it might have been useful, the European Court would not find a violation of the equality of arms principle.⁴⁴

This principle is closely connected to the right to adversarial proceedings which requires that both parties to a criminal or civil trial have the opportunity to have knowledge of and to comment on all evidence adduced or observations filed.⁴⁵ It implies the availability to both parties of all pieces of evidence presented to the judge that could influence his/her decision, even those presented by an independent magistrate. The European Court has decided that national law can ensure this requirement in different ways. What is required is that the “opposite party” be informed about evidence put forward and be given a chance to comment on it.⁴⁶ An inherent part of a “fair hearing” is the defendant’s opportunity to comment on evidence obtained with regard to facts in dispute even if the facts relate to a point of procedure rather than the alleged offence as such.⁴⁷

The European Court distinguishes the equality of arms and adversarial nature of proceedings depending on how the case materials are communicated. Thus, if one party lacks knowledge of certain material while the other party knew about it, the European Court examines the situation from the equality of arms perspectives. If both parties have been equally deprived of the possibility to acquaint themselves with useful information submitted to the judge, without having the chance to discuss and comment on this information, such a situation would be examined from the perspective of the adversarial nature of proceedings.⁴⁸

Finally, the right to a reasoned judgment means that courts must give reasons for their judgments, although this cannot be understood as requiring a detailed answer to every argument.⁴⁹ The extent to which this duty applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case.⁵⁰ All submissions that are fundamental to the outcome of the case must be specifically addressed in the judgment.

These fair trial standards are provided to a varying degree in Moldovan legislation. Thus, free access to justice/court is guaranteed by the Constitution⁵¹ and the Criminal Procedure Code.⁵² The Code provides for a defendant’s right to be present at the examination of his/her case in

⁴² See *De Haes and Gijssels v. Belgium*, Judgment of the European Court, 24 February 1997, paragraph 53.

⁴³ C. Bîrsan, *European Convention on Human Rights. Commentary by article* (in Romanian: *Convenția Europeană a Drepturilor Omului, Comentarii pe articole*), București, Editura ALL PECK, 2005, p. 507.

⁴⁴ See *Jasper v. United Kingdom*, Judgment of the European Court, 16 February 2000, paragraph 57, whereas the Court stated that equality of arms principle was respected since „both the prosecution and the defence were prohibited from adducing any evidence which might tend to suggest that calls had been intercepted by the state authorities”.

⁴⁵ See *Ruiz-Mateos v. Spain*, Judgment of the European Court, 23 June 1993, paragraph 63.

⁴⁶ C. Bîrsan, *European Convention on Human Rights. Commentary by article* (in Romanian: *Convenția Europeană a Drepturilor Omului, Comentarii pe articole*), București, Editura ALL PECK, 2005, p. 512-513

⁴⁷ See *Kamasinski v. Austria*, Judgment of the European Court, 19 December 1989, paragraph 102.

⁴⁸ C. Bîrsan, *European Convention on Human Rights. Commentary by Article* (in Romanian: *Convenția Europeană a Drepturilor Omului, Comentarii pe articole*), București, Editura ALL PECK, 2005, p. 513

⁴⁹ See *Van de Hurk v. the Netherlands*, Judgment of the European Court, 19 April 1994, paragraph 19.

⁵⁰ *Hiro Balani v. Spain*, Judgment of the European Court, 9 December 1994, paragraph 27. See also *Ruiz Torija v. Spain*, Judgment of the European Court, 9 December 1994, paragraph 29.

⁵¹ Article 20 of the Constitution.

⁵² Article 19 of the Criminal Procedure Code.

court⁵³ and states that trials *in absentia* can be held only in certain exhaustively enumerated, exceptional circumstances.⁵⁴ The Code contains an express prohibition against forced self-incrimination and states that no one can be forced to confess guilt or to testify against himself/herself or his/her close relatives, spouse, or fiancé.⁵⁵ The Code further guarantees the equal rights of the parties during case examination and the principle of adversarial proceedings⁵⁶ and requires that court judgments be legal, well grounded, and reasoned.⁵⁷

The Trial Monitoring Programme, given its limited scope, could not cover the observance of all aspects of the right to a fair trial in practice. For instance, the **right of access to court** falls clearly outside the scope of the Programme as it deals *stricto sensu* only with cases that have already reached and are being examined by the courts. As such, no assessment can be made as to the observance of this due process requirement in practice.

As concerns the **right to be present at one's proceedings**, no significant violations of this requirement were registered during monitoring. Judges have consistently upheld a defendant's right to be present at his or her proceedings and have postponed the hearing whenever the defendant was absent. It is noteworthy that in some cases a defendant's repeated absence led to undue procrastination that in turn rendered the entire trial very long; however, this cannot be considered as violating the reasonable time guarantee as all the delays were attributable to the conduct of the defendant. However, there were also cases when arrested defendants could not be present at their trials because, as the judges explained to those present, the police did not have enough gas/petrol to drive them from their penitentiaries to the court on that day. Such occurrences, particularly if systematic, could justly be regarded as violating the defendant's right to be present at his trial; if leading to repeated postponements, they could also breach the reasonable time guarantee.

The monitors did not record significant violations of the principle of **freedom from self-incrimination**. It would be difficult for the Trial Monitoring Programme to detect violations, however, since they would usually occur at the pre-trial stage and the Programme observes court proceedings only. In the few cases when defendants alleged in court that they had been forced to confess guilt and to incriminate themselves, most judges took appropriate measures to investigate whether coercion had indeed been used against them. Sometimes, however, judges treated allegations of ill-treatment without tact and in a dismissive manner saying, in one instance, "*Ok, the prosecutor will be looking for that chair of yours, so we can see if you were truly beaten...*" According to Article 218 of the Criminal Procedure Code, when the court finds that a violation of legality and human rights was committed during the proceedings, the court should issue a decision along with the judgment through which these violations are brought to the attention of appropriate authorities, responsible persons, and the prosecutor. This example was one such case. According to the European Court jurisprudence regarding Article 3 of the European Convention, the burden of proof regarding allegations of torture lies with the state authorities.

⁵³ Article 66 paragraph (2) p. 23) of the Criminal Procedure Code.

⁵⁴ Article 321 of the Criminal Procedure Code.

⁵⁵ Article 21 paragraph (1) of the Criminal Procedure Code.

⁵⁶ Articles 24, 314 and 315 of the Criminal Procedure Code. According to the current legislation, however, the equality of arms is somewhat limited at the pre-trial stage since the defence can administer evidence only through the opposite party. Thus, for example, Article 100 paragraph (2) of the Criminal Procedure Code provides for the right of the defence to talk to physical persons if the latter agrees to be heard according to the procedure established by law. This wording means that the person also has the right to refuse to talk to the defence and consequently testify. In contrast, if the criminal investigation body considers it necessary to hear a person, the latter cannot refuse to testify and also bears criminal responsibility for refusing to do so. The detailed analysis of the legislation is not the purpose of this report; this is the reason for a brief note on this issue. For a detailed analysis of the issue, see Igor Dolea, *The principle of equality of arms and the right of the defence to administer evidence in the criminal proceedings in Moldova* (in Romanian), *Analele Științifice ale USM*, 2004, p. 371.

⁵⁷ Article 384 paragraph (3) of the Criminal Procedure Code.

Under Moldovan law, the right not to incriminate oneself includes inter alia the right not to testify against one's close relatives.⁵⁸ In one isolated instance in a domestic violence case a witness who was the defendant's daughter was not informed about her right to refuse to make statements against her father and instead was ordered by the court to testify against him. According to Article 105 paragraph (6) of the Criminal Procedure Code, the person who is carrying out the procedural action is obliged to explain to each witness his/her rights, and according to paragraph (7), each witness shall be asked if s/he is a close relative of the defendant. If so, the witness shall be informed of the right not to testify. Moreover, according to Article 371 paragraph (3), if a witness relieved by law from the obligation to testify refuses to testify in court, his/her statements given at pre-trial stage cannot be read in court.

Regarding the **equality of arms** principle, legislation equips both the prosecution and the defence with generally equal prerogatives (or "arms" metaphorically speaking) with the limitations mentioned above. In practice the defence is sometimes encumbered in exercising some of its legally prescribed rights. Defence lawyers complain that their petitions and requests are not treated with the same respect as prosecutors' are, particularly with regard to adducing evidence in court. Defence lawyers alleged, for instance, that often their requests for ordering an expert analysis were not treated in the same way that prosecutors' requests were or that when defence lawyers asked the court to order records of telephone conversations from Moldtelecom, the court often said that they were not necessary as they would only prolong the proceedings unnecessarily and not produce any additional evidence.

Monitoring confirmed that judges did not always treat defence lawyers' objections with due respect, even when these seemed *prima facie* justified. For example, during a trial of a corruption case compact disks containing recordings of telephone conversations were presented to the court. The defence objected because the disk cases were not sealed, so tampering could have occurred. The judge dismissed the objection by saying that the disks, "...were unsealed in the registrar's office, to make sure there was no cat in the bag." Another time, in a different case, a tape that was not sealed in an envelope was presented as evidence. The defence objected that the evidence should be inadmissible. The judge overruled the defence lawyer without giving a reason. In another monitored case the defence lawyer objected to the prosecutor's request to present pictures to the witness, arguing that any identification had to follow the procedure required by law. The lawyer asked the judge to note this request in the minutes of the court hearing. The judge refused, stating, "*Here I decide what is to be noted and what is not to be noted in the minutes. This will not be noted.*"

In general, most judges treated both the prosecution and the defence with equal respect, though in some cases it appeared that particular judges favoured one side or the other, usually the prosecution. Particularly when the trial was presided over by a panel, during defence arguments some judges arranged files, turned on TVs and changed channels, or even left the courtroom for a while, but they seldom did that when a prosecutor was speaking. It was also evident that some judges paid more attention to the prosecutors and attached more weight to their arguments. Monitors noticed in many cases that the judges interrupted defence lawyers when they were asking questions or making their pleas, a practice less frequently observed with prosecutors.

The attitude of judges towards defence lawyers and prosecutors could also be inferred from their reactions when lawyers and/or prosecutors were late or absent for a scheduled court hearing. When prosecutors were absent without prior notice, the judges would usually postpone the hearing. If, on the other hand, defence lawyers failed to appear, the judges would often try to

⁵⁸ Articles 21 paragraph (1) and 90 paragraph (2) of the Criminal Procedure Code.

replace them by appointing another one on the spot, usually an ex-officio defence lawyer. This suggests that judges either did not put a high premium on uninterrupted representation by the same lawyer or had a disregard for a particular lawyer. The monitors observed that judges more often fined defence lawyers for being late or for failing to appear at a hearing, while for similar tardiness or absences by prosecutors, the judges usually sent a note to the General Prosecutor's Office. According to Article 201 paragraph (4) sub-point 3) of the Criminal Procedure Code, both the defence and the prosecution can be fined if they do not appear in court without a good reason and without informing the court beforehand.

The principle of **adversarial proceedings** is closely linked to that of equality of arms, so a breach of one would often entail a violation of the other as well. As previously stated, proceedings are considered adversarial when both sides have knowledge of and can comment on all the evidence adduced or observations filed.⁵⁹ Therefore the incidents described above call into question not only the equality of arms principle but also the adversarial nature of the proceedings, since without full access to and knowledge of incriminating evidence the defence is clearly handicapped in its efforts to oppose or comment on it.

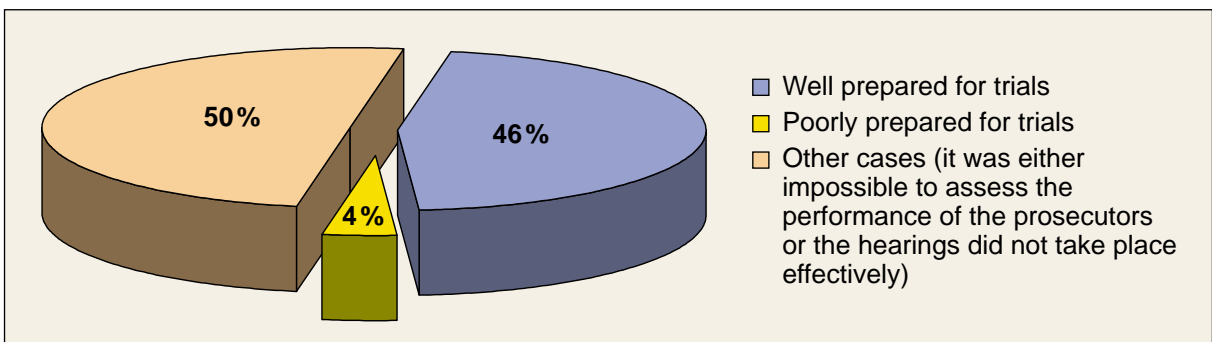
It was noted that the adversarial nature of court proceedings was occasionally affected by poor preparations for trials. In some of the cases monitored, prosecutors and/or defence lawyers were clearly unprepared and could not present evidence in a coherent manner; judges themselves had to intervene. After reprimanding the prosecutor or lawyer for lack of preparation, they actively engaged in questioning the parties to obtain the necessary information and clarifications. Even court clerks have seemed to be taking on the role of prosecutor on occasion (Vignette 2).

Vignette 2

In one case of abuse of power two witnesses testified consecutively, but the prosecutor remained very passive. The court clerk then took over and started asking various pertinent questions. This continued for long enough that the defence lawyer at one point remarked rhetorically, "What, have the roles changed?"

In some cases, judges questioned the defendant actively and sometimes even aggressively even though the prosecutor himself seemed to be well prepared. The performance of the prosecutors can be seen in Figure 4 and Table 4 below. The defence lawyers' performance is shown in Figure 6 and Table 8 of the *Present Report*.

Figure 4: Performance of Prosecutors during Trial Proceedings
(Average percentage per all Courts from Chişinău Municipality)



In Figure 4 the percentage has been calculated from the total number of monitored hearings – 2,395.

⁵⁹ See *Ruiz-Mateos v. Spain*, Judgment of the European Court, 23 June 1993, paragraph 63.

Table 4: Performance of Prosecutors during Trial Proceedings
(Average percentage per Court from Chişinău Municipality)

Performance of prosecutors	Courts from Chişinău Municipality						
	Supreme Court of Justice	Chişinău Court of Appeal	Centru District Court	Ciocana District Court	Rîşcani District Court	Botanica District Court	Buiucani District Court
Well prepared prosecutors	82%	97%	91%	96%	93%	85%	88%
Poorly prepared prosecutors	18%	3%	9%	4%	7%	15%	12%
Number of hearings monitored	57	172	309	118	214	154	173

In Table 4 the percentage has been calculated from the number of the hearings which took place effectively and during which it was possible to assess the performance of the prosecutors.

In the context of equality of arms and the adversarial nature of court proceedings, the European Court attaches particular importance, "...to appearances and to the increased sensitivity of the public to the fair administration of justice."⁶⁰ Certain widespread practices in Moldovan courts may give rise to reasonable doubts about how genuinely adversarial particular court proceedings are. For example, monitors observed on many occasions that hearings in practice can be postponed not only by the judge, as required by law, but also by the defence lawyer or the prosecutor. One of the sides would come to court, enter the judge's office, spend some time there alone with the judge, and then come out and announce to all parties that the hearing was postponed until another day. Such *ex parte* consultations between the judge and one party give rise to doubts not only about equality of arms and adversarial proceedings, but also with regard to the impartiality of the judge.

Monitoring indicated that the adversarial nature of court proceedings may occasionally be affected by the physical constraints of judges' offices. In a courtroom, opposing parties should normally stand opposite each other. In a cramped and crowded judge's office with inadequate seating, however, it may happen that the prosecutor, defence lawyer, and interpreter stand on one side of the office while the other persons stand on the other with no clear separation between the opposing parties. Professional participants may feel inclined to disregard procedural niceties in the more intimate atmosphere of a judge's office, further affecting the adversarial nature of court proceedings. Occasionally, during court hearings, it has been noted that the relationship between prosecutors, judges and defence lawyers exceeded a mere professional character (Vignette 3).

Vignette 3

In a case of pimping in a district court, the prosecutor and the defence lawyer spoke at length both before and after the trial hearing. During the trial, the prosecutor filed a request for termination on grounds that the defendant's actions fell under the scope of the Law on Amnesty and that the defendant had no criminal history. The defence lawyer stated that he agreed with the prosecutor and added that his client admitted to being guilty. The judge then briefly deliberated and ordered the termination of the trial. After this sentence, both the defence lawyer and the prosecutor approached the judge and shook hands with him (as if having concluded a deal) and then left together.

⁶⁰ See *Borgers v. Belgium*, Judgment of the European Court, 30 October 1991, paragraph 24; see also, *mutatis mutandis*, *Piersack v. Belgium*, Judgment of the European Court, 1 October 1982, paragraph. 30.

There is obviously nothing wrong with professional trial participants having good relations with one another. What must be borne in mind, however, is the impression which such unreserved displays of friendship may have on the public. As the European Court has indicated in its case law, appearances bear a particular importance when it comes to the fair administration of justice, and therefore the solemnity of the proceedings and order should at all times be respected by all persons, particularly by professional participants if public confidence in the judiciary is to be maintained (Vignette 4).

Vignette 4

Monitors overheard the following conversation between the defence lawyer and the prosecutor in a court corridor before the start of the hearing.

Defence lawyer: “Mr. Prosecutor, he’s a good guy (referring to the defendant)... maybe we can arrange the sentence? ... I have one version prepared here ...”

The prosecutor reacted positively and took the defence lawyer aside, seeming inclined to come to an agreement. When the hearing commenced and monitors were asked by the judge to introduce themselves, the defence lawyer and the prosecutor became rather nervous.

On several occasions prosecutors’ requests to have a witness’s written testimony read out in court were granted by judges over defence objections that no evidence had been presented on the impossibility of summoning the witness and hearing their testimony live in court. Such practices may violate: 1) the principle of equality of arms and adversarial proceedings, which are inherent in the concept of fair hearing under Article 6 paragraph 1 of the European Convention, and 2) the right to witness attendance and examination under Article 6 paragraph 3 (d) of the European Convention. The European Court has ruled that, in principle, all prosecution evidence should be produced in the presence of the accused at a public hearing with a view to adversarial argument.⁶¹

Finally, in some cases the adversarial nature of court proceedings was affected by such seemingly unrelated matters as the lack of adequate technical equipment. In one case, the prosecution presented a video tape with crucial evidence, but since there was no video cassette recorder it could not be properly screened in court. Instead, the judge watched the tape on the small screen of the video camera with no sound. Though the defence did not raise an objection, presenting evidence in this fashion may affect the equality of arms, the adversarial nature of proceedings, and the capacity of the defence to effectively combat or at least comment on the evidence.

Violations of the **right to a reasoned judgment** would have to be found in court documents to which observers working in the framework of the Trial Monitoring Programme do not have access. Monitoring did observe poor reasoning by some judges during court proceedings. This is especially damaging when the defendant wants to exercise a right to appeal. For example, in one corruption case involving a political figure, the defence filed a request to change the panel of judges on grounds that they were not impartial. That request was rejected after a brief deliberation, and in rejecting it the court simply read out the provisions of Article 35 of the Criminal Procedure Code⁶² without providing further arguments to connect those provisions of the law to the facts of the specific case. In another example, at a hearing at the Chişinău Court of Appeal, the defence lawyer filed a request asking the court to hear one witness who had been ignored by the court of first instance. The Court of Appeal rejected the request without providing justification, and the hearing was postponed to prepare the pronouncement of the sentence.

⁶¹ See *Barbera, Messegue and Jabardo v. Spain*, Judgment of the European Court, 6 December 1988, paragraph 78.

⁶² Article 35 of the Criminal Procedure Code provides for the procedure of settlement of recusal application and abstention declaration.

D. The Right to Trial within a Reasonable Time

The European Court case law on the right to be tried within a reasonable time is particularly rich. According to some estimates, the guarantee of reasonable time accounts for more European Court judgments than any other issue.⁶³ In terms of numbers, it has been the subject of almost one-third of the judgments delivered by the European Court since 1968.⁶⁴

There are several reasons why the right to trial within a reasonable time is held to be of such importance. The common rationale lies in the truism that justice delayed is justice denied. From a defendant's perspective, it is unfair to have a trial that lasts an unjustifiably long time because of the psychological insecurity that inevitably accompanies criminal proceedings. From a more general perspective of legal certainty, the guarantee of reasonable time is based on the fundamental due process principle that states that a trial that lasts an unreasonably long time becomes tainted with injustice and in general undermines the course of justice. The European Court has explained that the aim of the reasonable time guarantee is to protect, "...all parties to court proceedings [...] against excessive procedural delays,"⁶⁵ and to guarantee the, "...rendering [of] justice without delays which might jeopardize its effectiveness and credibility."⁶⁶

Through its wealth of case law, the European Court has progressively developed the meaning of the guarantee of reasonable time and has established that an assessment of whether the length of court proceedings is reasonable or not must be based on the following criteria: the complexity of the factual or legal issues raised by the case; the conduct of the applicant; the conduct of the State's judicial and administrative authorities; and what is at stake for the applicant.⁶⁷

Moldovan law expressly enshrines the principle of holding criminal proceedings (criminal investigations and trials) within a reasonable time.⁶⁸ The criteria used to assess the reasonableness of the length of proceedings are similar to and mirror the ones developed by the European Court. Under Moldovan law, the duty to ensure the observance of the guarantee of reasonable time is that of the prosecutor at the criminal investigation stage and that of the court during trial proceedings.⁶⁹

Monitoring indicated that delays and postponements of trial hearings seem to be the rule rather than the exception in the courts in Chişinău Municipality and that ensuring that a trial does not last an unreasonably long time is not always a priority for the professional trial participants.

Almost 12% of all monitored hearings started with a delay of 30 minutes or more. Such delays can lead to the postponement of subsequent hearings since judges, prosecutors and defence lawyers have busy work agendas and cannot always accommodate unanticipated re-scheduling of court hearings.

The results of the first year of trial monitoring, as concerns the issue of postponements, are presented in Figure 5 below.

⁶³ N. Mole, C. Harby, Op. cit, p. 24.

⁶⁴ Frederic Edel, *The length of civil and criminal proceedings in the case-law of the European Court of Human Rights* (Human Rights Files No. 16), 10 July 2007.

⁶⁵ See *Stogmuller v. Austria*, Judgment of the European Court, 10 November 1969, paragraph 5.

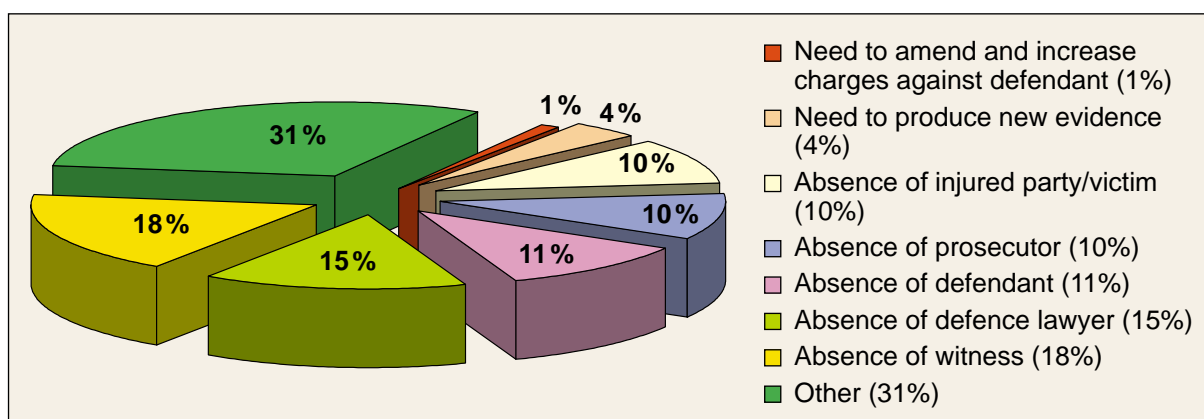
⁶⁶ See *H v. France*, Judgment of the European Court, 24 October 1989, paragraph 58.

⁶⁷ See *Zimmermann and Steiner v. Switzerland*, Judgment of the European Court, 13 July 1983, paragraph 24; see also *Buchholz v. Germany*, Judgment of the European Court, 6 May 1981, paragraph 49.

⁶⁸ See article 20 of the Criminal Procedure Code.

⁶⁹ See article 20 paragraph (4) of the Criminal Procedure Code.

Figure 5: Reasons for Postponements
(Average percentage per all Courts from Chişinău Municipality)



In Figure 5 the category “Other” includes cases when no reason for postponement was given or some other trial participants (the judge, court clerk, translator etc.) were absent and also hearings which took place effectively, but were postponed in order to continue the examination of the case.

The reasons for postponements vary considerably. In many cases they relate to the absence of a key trial participant (defendant, prosecutor, defence lawyer, victim or key witness). Monitoring indicates that court hearings were delayed or even postponed for reasons such as the absence of the judge or the unavailability or unannounced absence of the court clerk. The presiding judge had to search the corridors and ask other clerks to replace their absent colleague. Some hearings were postponed because no translator was available and the judge, after asking monitors if they could translate, had no other option but to postpone the trial.

The failure of prosecutors and lawyers to appear in court was often noted. Trials were postponed in 10% of hearings due to absence of the prosecutor and in 15% due to absence of the defence lawyer. Monitors noted failures to appear of prosecutors and defence lawyers up to several times during the examination of one case. For example, in one case the trial was postponed when prosecutors failed to appear for the sixth time. Defence lawyers failing to appear three or four times in the same case were also noted. Witnesses and victims who showed up punctually at the first hearings adopted a similar attitude after postponements due to the absence of the prosecutor or defence lawyer. The monitors noted on several occasions that prosecutors failed to ensure the presence of prosecution witnesses and/or the victims, another frequent reason for postponement.

Some trials appeared to last an unduly long time not because of their complexity, but because of poor organization by the presiding judge(s) In one case involving a high-level political figure, the examination of the case was postponed for almost half a year because first the prosecutor and then each judge of the panel planned to go on leave, with their vacations scheduled in a consecutive manner almost without overlaps, giving the appearance of an attempt to make the postponement as lengthy as possible. In another case, the trial was completed but pronouncement of the sentence was postponed for more than two months because the judge was either sick, absent, or unavailable despite protests from the defence lawyer. Similar postponements occur even when the defendant is in custody. In a trafficking case, four defendants were held under pre-trial arrest while court hearings were postponed twice, each time for one month. The first postponement was because the judge was sick and the second was because the lawyer “...will be at a sanatorium and will not be in the city.” The defendants spent 90 days under arrest. According to Article 20 paragraph (3) of the Criminal Procedure Code, investigations

and examinations of cases in which the defendant has been arrested and those in which the defendant is a minor should be done as a matter of urgency and given priority.

In one case, the court took several months to call all the witnesses and hear their testimonies. This could have been done in a matter of days, as the witnesses were all eager to testify. Such procrastination may not only make the trial last an unreasonably long time, but may also directly affect the quality of witnesses' testimonies, as their recollection of factual events naturally tends to fade (Vignette 5).

Vignette 5

This example illustrates how a case examined at a court of first instance was delayed for months due to the conduct of the judge, prosecutor and defence lawyer.

21.09.2006 (the first monitored hearing): The hearing did not take place. The monitors found out from the court clerk that the case had been transferred to another judge.

03.10.2006: The court clerk said that the new judge was on vacation and that it would be possible to find out the date of the next hearing only after October 10. It was not clear why the case was transmitted to a judge who was on vacation.

18.10.2006: The hearing took place.

02.11.2006: The hearing took place although the judge's office did not have adequate facilities to accommodate all participants.

23.11.2006: The hearing did not take place. The court clerk postponed the hearing because the judge was attending another hearing.

08.12.2006: The hearing was postponed due to absence of a defence witness. The defence promised that the witnesses would be present at the next hearing.

11.12.2006: The hearing did not take place. The participants waited for the judge for 40 minutes, but he did not come. The court clerk announced that the judge was ill and postponed the hearing.

12.12.2006: The court clerk postponed the hearing because the judge was on sick leave.

20.12.2006: The hearing did not start on time, because the judge was 45 minutes late. It was postponed in order to prepare for judicial debates.

22.12.2006: The hearing was postponed because the prosecutor was on leave.

08.02.2007: The hearing did not take place. The judge was 40 minutes late and the defence lawyer left for another hearing. The prosecutor was not present.

02.03.2007: The hearing was postponed because the prosecutor was on leave.

30.03.2007: The hearing did not take place. The defence lawyer had filed a request asking the court to postpone the hearing.

02.04.2007: The hearing took place (judicial debates, last word and the pronouncement of the sentence).

An instance was previously mentioned in which the trial was postponed because the escort police did not have fuel to drive the defendant from the penitentiary to the court. Another time, a defendant could not be delivered to court because no police car was available. In a few incidents, defendants were not brought to court because of poor coordination among escorting police officers. The judges were visibly upset in such situations, but aside from reprimanding the officers they could only postpone the trial to another date. After a few such incidents, one judge sighed, *"Maybe at least these monitors will write some sort of a notice to the European Court or something..."*

The length of postponements varied considerably from case to case and could last from one day to several months, but the majority were postponed for up to one month (Table 5).

Table 5: Length of Postponements of Hearings
(Average percentage per all Courts from Chişinău Municipality)

Length of Time Hearings were Postponed				
one day	up to one week	up to one month	up to two months	more than three months
8%	14%	65%	9%	4%

After several postponements some judges tended to speed up the proceedings to finish examining a case before it clearly lasted an unreasonably long time or before they went on summer leave or Christmas vacation. Monitors occasionally noticed hastiness and superficiality in examining some case files (Vignette 6). In some trials the case file was not even read; instead the judge simply turned over one page after another as if quickly skimming through the text. Another case was examined in just nine minutes including closing arguments, deliberation, and sentencing.

Vignette 6

In one corruption case, four volumes were examined in four minutes. As the prosecutor was turning one page after another, the judge told him, “Not like that, faster!” The examination of case turned into a page turning exercise.

Monitors noted that prosecutors had special difficulty coping with end-of year workloads, when hearings were crowded onto the calendar to ensure that no cases dragged on into the next year. According to discussions between some of the prosecutors, this would be an “unfavourable” indicator of their performance.

Guaranteeing that cases are heard in a reasonable amount of time should not be done to the detriment of properly conducted trial proceedings.

E. The Right to be Tried by an Independent and Impartial Tribunal

Article 6 paragraph 1 of the European Convention states, “Everyone is entitled to a fair and public hearing within a reasonable time **by an independent and impartial tribunal** established by law.” Other international documents, e.g., Article 14 of the International Covenant on Civil and Political Rights and paragraph 5.16 of the OSCE Copenhagen Document, also require that a tribunal be competent in addition to being independent and impartial.

The right to be tried by an independent and impartial tribunal established by law is considered, “...by far the most important guarantee enshrined in Article 6” as it lays the foundation for the rule of law.⁷⁰ The requirements of independence and impartiality are also held to be of outstanding importance amongst other Article 6 guarantees. Violation of these requirements in the court of first instance cannot be remedied on appeal (in contrast, for instance, violation of the publicity component in the court of first instance can be redressed on appeal, thus avoiding a violation of Article 6). If the European Court finds that the tribunal did not conform to the independence and impartiality requirements of Article 6, it will usually not examine other procedural circumstances finding instead an immediate violation of the fairness of the proceedings.

In assessing the **independence** of a tribunal, the European Court looks into the following:

- manner of appointment of its members;
- duration of their term of office (security of tenure);
- existence of guarantees against outside pressure;
- existence of the appearance of independence.⁷¹

The tribunal must be independent from both the executive body and the parties.⁷²

The concept of **impartiality** is understood by the European Court to denote “...absence of prejudice or bias. [...] A distinction can be drawn in this context between a subjective approach, that is endeavouring to ascertain the personal conviction of a given judge in a given case, and an objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect.”⁷³

The requirements of independence and impartiality are interrelated and sometimes difficult to dissociate;⁷⁴ the European Court often considers them together.

In Chapter IX on judicial authority of the Moldovan Constitution, Article 116 paragraph (1) states that judges sitting in courts of law are independent, impartial, and not removable under the law. The Criminal Procedure Code further provides in articles 25 and 26 the right to access to an independent and impartial tribunal established by law. Laws that regulate the functioning of the judiciary, namely the law on status of judges⁷⁵ and the law on the organization of the judicial system,⁷⁶ also proclaim and detail the requirement of judicial independence and impartiality.

Most guarantees of independence and impartiality relate to the institutional framework of the judiciary⁷⁷ and thus fall outside the scope of the Trial Monitoring Programme, which deals

⁷⁰ Trechsel, Stefan, Op, cit, p. 47.

⁷¹ See *Campbell and Fell v. UK*, Judgment of the European Court, 28 June 1984, paragraph 78.

⁷² See *Ringeisen v. Austria*, Judgment of the European Court, 16 July 1971, paragraph 95.

⁷³ See *Piersack v. Belgium*, Judgment of the European Court, 1 October 1982, paragraph 30.

⁷⁴ See *Langborger v. Sweden*, Judgment of the European Court, 22 June 1989, paragraph 32.

⁷⁵ Law on the status of judges, nr. 544-XIII adopted on 20.07.95, entered into force on 16.10.1995.

⁷⁶ Law on the organization of the judicial system, nr. 514-XIII, adopted on 06.07.1995, entered into force on 19.10.1995.

⁷⁷ The institutional framework of the judiciary refers to the legal establishment of the courts, the composition of courts and the manner of appointment of judges, the duration of their office, the existence of guarantees against external

only with procedural issues. The Programme has, however, made findings related to the appearance of independence and to the issue of whether judges present sufficient guarantees to exclude any legitimate doubt in respect of their impartiality. Examples of the latter included judges behaving as close friends with the prosecutor/defence, engaging in *ex parte* communications with only one side, and receiving the prosecutor/defence in his/her office before the start of trial proceedings without explaining to the other party what the discussion was about (Vignette 7).

Vignette 7

Before the hearing started the judge invited the prosecutor into his room. After several minutes, the prosecutor came back and the defence lawyer asked him, "Will we file a request to recuse the judge, as the latter held a discussion in private with the prosecutor?" The prosecutor mentioned that the secretary had also been present in the room. The judge stated, "It does not matter. So, shall the sentence be pronounced? Do we finish today or not?" Everyone present in the courtroom smiled.

The appearance of bias stems from the way many judges behave towards the participants (Table 6). The way they ask questions and react to interventions is another factor in the appearance of impartiality or bias. In several cases judges limited the right of the defence to make statements, asking the lawyer, "...to speak faster and to the point," or by saying that the, "...last word is usually short," or even by limiting the right of the lawyer to present arguments for the client.

Table 6: Appearance by Judges of Impartiality and Freedom from Personal Bias or Prejudice during Trials (Average percentage per Court from Chişinău Municipality)

Judges appeared impartial and free of personal bias or prejudice	Courts from Chişinău Municipality						
	Supreme Court of Justice	Chişinău Court of Appeal	Centru District Court	Ciocana District Court	Rîşcani District Court	Botanica District Court	Buiucani District Court
Yes	100%	90%	98%	97%	94%	92%	96%
No	0%	10%	2%	3%	6%	8%	4%
Number of hearings monitored	82	326	479	164	289	241	277

In Table 6 the percentage has been calculated from the number of the hearings during which it was possible to assess the appearance of impartiality of judges.

As mentioned previously, on a few occasions that the judges actively, even aggressively, interrogated the defendant. In one case the prosecutor even mentioned that the judge was too actively interrogating the witness. Such behaviour affects the judge's appearance of impartiality, especially when the judge adopts an accusatory attitude (Vignette 8 and Table 7). The distinction is indeed ambiguous in national legislation between judges' neutral roles and their rights to ask defendants and witnesses questions, not only questions of a clarification nature, according to Article 367 paragraph (2) and Article 370 paragraph (3) of the Criminal Procedure Code.

pressure, namely the executive and legislative branches of state power and the parties in the case, and the rules regarding the participation of a particular judge in the same case in different roles and the withdrawal of judges when there are legitimate reasons to fear lack of impartiality.

Vignette 8

The judge played the role of the prosecutor as the prosecutor was very passive. The judge's behaviour towards the witnesses was unfavourable; he made jokes while hearing their testimonies. The defence lawyer objected to leading questions asked by the judge, but the judge did not consider the objections "serious" and ignored them. The defence lawyer stated: "It is not a hearing, it is an interrogation."

Table 7: Judges Actively Engaged in the Interrogation of the Parties during Trials
(Average percentage per Court from Chişinău Municipality)

Judges actively engaged in the interrogation of the defendant, victim, injured party or witness	Instanţele de judecată din mun. Chişinău						
	Supreme Court of Justice	Chişinău Court of Appeal	Centru District Court	Ciocana District Court	Rîşcani District Court	Botanica District Court	Buiucani District Court
Yes	44%	38%	15%	14%	16%	25%	8%
No	56%	62%	85%	86%	84%	75%	92%
Number of hearings monitored	50	157	228	96	163	127	130

In Table 7 the percentage has been calculated from the number of hearings which took place effectively and only in cases when the parties were heard.

Sometimes judges made remarks that could reasonably cast doubt as to their independence and impartiality (Vignette 9).

Vignette 9

This dialogue occurred among a panel of judges presiding at the Chişinău Court of Appeal.

Judge 1 (referring to a paper on the desk): "What's with this sentence?"

Judge 2: "That's the one you were so interested in!"

Judge 1: "Why are you shouting so loudly?"

Judge 2 (even louder): "Hey, this is that sentence which..."

Judge 3: "Dear colleagues, why don't we go to another room for deliberations."

Such practices may leave a strong negative impression on the general public. "In this respect even appearances may be of certain importance. What is at stake is the confidence that the courts in a democratic society must inspire in the public."⁷⁸

Monitors generally found that judges behaved professionally and gave an impression of independence and neutrality. However, there were many instances noted in which actions took place indicating lack of independence from outside pressure – e.g., when the judge spoke on the telephone several times during a hearing or when unknown people entered the room during the proceedings. In one case the judge even admitted that there was a degree of outside pressure (Vignette 10).

Vignette 10

One judge said openly so that monitors could also hear, "To be honest, I'm so tired of this case. I keep getting phone calls from the Ministry of Interior Affairs. Everyone is pressuring me..."

⁷⁸ See *Fey v. Austria*, Judgment of 24 February 1993, paragraph 30.

F. The Right to be Presumed Innocent

Article 6 paragraph 2 of the European Convention states, “Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.” As the European Court put it, the presumption of innocence embodied in Article 6 paragraph 2 and the various rights, a non-exhaustive list of which appears in paragraph 3, are constituent elements, amongst others, of the notion of a fair trial in criminal proceedings.⁷⁹ This right requires that “[w]hen carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused.”⁸⁰ Consequently, the judge and other public authorities⁸¹ should have an impartial attitude towards the defendant and refrain from doing or saying anything that might imply that the defendant is guilty. When examining the evidence brought by the prosecutor, the judge should give the defendant the benefit of any doubt. The Programme cannot assess certain aspects of the European Court’s interpretation of the right to be presumed innocent -- evaluating evidence, allowing presumptions of law and fact, and deciding on acquittal or on orders to pay costs, among others. This section will refer only to observations regarding the attitude of the judge and other participants towards the defendant during the trial.

The presumption of the innocence of every accused person is guaranteed in Article 21 of the Moldovan Constitution. Article 8 of the Criminal Procedure Code further details the right stating that:

- (1) Any person accused of a crime will be presumed to be innocent until his/her guilt is proved in the way provided by the present Code through a legal public trial, during which all the guarantees necessary to the defence were assured, and found by a definitive court decision.
- (2) No one has to prove his or her innocence.
- (3) Conclusions on the guilt of the individual for the commission of a crime cannot be based on suppositions. In proving somebody’s guilt, all doubts that cannot be eliminated under the conditions of the present Code will be interpreted in favour of the suspect, accused and defendant.

Monitoring indicated that with regard to judges’ attitude towards the defendants, the right is generally upheld. Monitors noted several cases in which judges made improper remarks prejudging the defendant (Vignette 11).

Vignette 11

In one case the judge looked at the case file and addressed the defendant, “Have you seen your biography in this file? Your life is all messed up, boy.”

The judges’ decisions and their explanations sometimes surprised the monitors (Vignettes 12 and 13).

⁷⁹ See *Deweere v. Belgium*, Judgment of 27 February 1980, paragraph. 56

⁸⁰ See *Barbera, Messegue and Joabardo v. Spain*, 6 December 1988, paragraph 77.

⁸¹ See for example *Allenet de Ribemont v. France*, Judgment of 10 February 1995, paragraph 36 and 37, when the Court found the remarks of two senior police officers made at a press conference held during the judicial investigation and supported by the Ministry of Interior violated the right to be presumed innocent as they were, “...clearly a declaration of the applicant’s guilt which, firstly, encouraged the public to believe him guilty and, secondly, prejudged the assessment of the facts by the competent judicial authority.”

Vignette 12

After sentencing, the judge said, "It was a 50/50 case here. It was between acquittal and pimping. I did not acquit because there was a pre-trial arrest and now if we had acquitted him he would have to be exonerated...Hmm...but we will see...probably the defence lawyer or even the prosecutor will appeal the sentence."

This comment raises a number of concerns: although the judge acknowledged that the defendant's guilt was not proved beyond a reasonable doubt (a "50/50 case"), he nevertheless convicted the defendant apparently because of his pre-trial detention and the fear that the defendant might seek compensation for wrongful deprivation of liberty.

Vignette 13

The court heard the defendant's last word in a case involving the defendant's declaration that she found cartridges on the lakeside. The judge convicted. When the defendant asked the judge to fine her, the judge mentioned sarcastically "But will you pay the fine? ... or only if you find something more on the lakeside..." (.)

The monitors noticed a few instances in which the judge was manifestly uninterested in the case and appeared to have reached a decision in advance. In one case the judge interrupted the defendant during his final statement and told him, "*Everything is clear, but in fact the final statement has to be brief.*"

Although judges should ask questions for clarification only and should not indicate their attitudes about the guilt of the person until proven beyond a reasonable doubt, monitors noticed on several occasions that judges asked the defendants questions early on in the case indicating that they had already reached a conclusion. One judge said to a defendant, "*You took the money and now claim that you don't know how it got into your pocket.*"

Judges' comments often showed bias towards one party or another. At one hearing the defence lawyer filed a request asking the court to replace the existing preventive measure of house arrest with an "interdiction to leave the locality," arguing that the defendant needed medical treatment. The judge limited the defence lawyer's statements by telling him, "*We already know that if you do not have a medical certificate that confirms those conditions...do not file formal requests and let us not play theatre any more.*" In another hearing the judge declared, "*As never before, I now agree with the prosecutor... We will see.*" In a few cases the monitors noted a quick, superficial review of case files by a judge who was trying to speed up the examination. Such a rush may be in the interest of respecting the reasonable time requirement, but it calls into question the degree to which the judge formed his/her opinion based on a thorough examination of the evidence adduced in court.

Monitors observed the behaviour of other trial participants with regard to the right to be presumed innocent and noted a few cases in which the prosecutors called the defendant "the criminal" or addressed the defendant rudely. Even defence lawyers sometimes encouraged their client to confess, "*...as anyhow it is clear that you did it.*"

The degree to which the presumption of innocence is respected can also be inferred from the way the defendants are brought to court and kept during trials. International fair trial standards require that "[n]o attributes of guilt [be] borne by the accused during the trial which might impact on the presumption of their innocence. Such attributes could include holding the accused in

a cell within the courtroom, requiring the accused to wear handcuffs, shackles or a prison uniform in the courtroom, or taking the accused to trial with a shaven head in countries where convicted prisoners have their heads shaved.”⁸² In this regard, the Moldovan practice of holding defendants handcuffed or in metal cages throughout the trial is notable. These practices, however, must be balanced against the need to ensure public order and security in the courts, especially considering the insufficient number of court police and the fact that there have been cases (not during monitoring) when armed persons entered courtrooms and threatened judges. It should further be considered that such practices, in addition to raising concerns about the presumption of innocence, in some circumstances may also amount to a degrading treatment of the defendant.⁸³

⁸² See the Amnesty International Manual on Fair Trials, chapter on presumption of innocence, available at http://www.amnestyusa.org/Fair_Trials_Manual/151_The_presumption_of_innocence/page.do?id=1104715&n1=3&n2=35&n3=843, last accessed on December 20, 2007.

⁸³ See *Sarban v. Moldova*, Judgment of 4 October 2005, paragraph 90.

G. The Right to Adequate Time and Facilities to Prepare the Defence

Article 6 paragraph 3 (b) of the European Convention states, “[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to have adequate time and facilities for the preparation of his defence.” It follows from the text that the right has two dimensions, adequate time and adequate facilities. The case law of the European Court on this right falls more or less into these two categories. It has to be emphasised, though, that the case law does not make a clear-cut difference between the guarantee provided by paragraph 3 (b) and other guarantees. Often complaints regarding the adequacy of time and/or facilities for preparing the defence are examined under or in conjunction with paragraph 3 (c), guaranteeing the right to real and effective defence, or paragraph 3 (a), guaranteeing the right to be promptly informed of the charge. Sometimes, complaints about facilities for the defence are also examined under Article 8 under the heading of the right to confidential communication with a lawyer. It should therefore not be surprising that many of the monitors’ observations regarding adequate time and facilities are similar to observations reported under the section on the right to legal assistance.

A fundamental element of a fair trial is that the defence lawyer must have sufficient time to allow proper preparation to take place.⁸⁴ Adequacy of time does not have a clear definition in European Court case law. This is understandable, given the subjectivity of the term “adequate” and the nature of the defence function. Adequacy of time depends on the complexity of the case and the stage the proceedings have reached.⁸⁵ The European Court will usually look into each case to decide whether the defence has been allowed sufficient time to prepare and put forward its arguments.⁸⁶

Adequacy of facilities usually refers to timely and full access to the case file and the fairness of proceedings. The prosecution is required to disclose to the defence all evidence for or against the accused⁸⁷ except when it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. Measures restricting the rights of the defence are permissible only if they are strictly necessary and the judge⁸⁸ has access to all evidence and can rule on the question of disclosure.⁸⁹ Adequacy of facilities includes access to legal materials, to a copy of the text of the reasoned judgment, to access to a medical examination as needed,⁹⁰ and timely and unrestricted access to a lawyer when examined with complaints related to paragraph 3 (c).⁹¹

Moldovan law guarantees the right to adequate time and facilities in Article 17 of the Criminal Procedure Code. The obligation to provide adequate time and facilities is on the criminal investigative body and the court. The Code provides details in Article 293 on the procedure for the defence lawyer and the defendant to acquaint themselves with the complete case before it

⁸⁴ Mole, N. and C. Harby, Op. cit., p. 60.

⁸⁵ See *Albert and Le Compte v. Belgium*, 10 February 1983, paragraph 41; see also *X v. Belgium*, 9 DR 169.

⁸⁶ For example, in *Ocalan v. Turkey*, Judgment of the European Court, 12 May 2005, paragraphs 145 -148, two weeks to read a 17,000 page file, access to which was obtained only at a very late stage in the proceedings was found to have, “...so restricted the rights of the defence that the principle of a fair trial, as set out in Article 6, was contravened.”

⁸⁷ See *Edwards v. United Kingdom*, Judgment of the European Court, 16 December 1992, paragraph 36.

⁸⁸ Or another neutral authority, see for a discussion on this matter in Stefan Trechsel, Op. cit. p. 227.

⁸⁹ See *Rowe and Davis v. United Kingdom*, Judgment of the European Court, 16 February 2000, paragraphs 61 – 67.

⁹⁰ See for details and examples of case law Stefan Trechsel, Op. cit., p. 236 – 241.

⁹¹ See *Ocalan v. Turkey*, Judgment of the European Court, 12 May 2005, paragraphs 131 – 137 where the Court considered that the restriction on the number and length of the applicant’s meetings with his lawyers was one of the factors that made the preparation of his defence difficult.

goes to court. The time for acquaintance with the case file is not limited, but the prosecutor can set a time limit if the defendant or the defence lawyer abuses this right. Although not expressly provided, it follows logically that if the defendant or the defence lawyer feels that the prosecutor has restricted their time, they can file a complaint with the court. The investigative judge, at the prosecutor's request, can limit access to some materials or personal data of persons mentioned in the case file to protect a state, commercial, or other legally protected secret or the life, corporal integrity, and liberty of a witness or other persons.

Although the judge is the key authority for ensuring the right to adequate time and facilities, criminal investigators, prosecutors, and prison authorities also have an important role to play, especially at the pre-trial stage. The defence lawyer and defendant also have a responsibility, as the guarantee is not absolute in nature and a violation is present only if some degree of prejudice is shown. The judge's challenge is to achieve a proper balance between the requirement to provide adequate time and facilities and the obligation that trials be concluded within a reasonable time.

Monitoring indicated that the right to adequate time and facilities in court is generally respected, to the extent that it could be observed through the Programme. Monitors observed instances in which judges accepted the defence lawyer's request to postpone the hearing to bring additional evidence, to prepare the plea, or to consult with the defendant. However, monitoring observed violations of this right that could have led to a violation of the fairness of the entire proceeding if not remedied at a later stage.

Of particular concern was the practice, especially widespread at the Court of Appeal, of appointing defence lawyers 5–10 minutes before the hearing. From an observer's perspective, even an ordinary case requires more than five minutes' preparation and one could reasonably assume that the resulting defence would be of poor quality.

Where it is clear that the lawyer representing the accused did not have the time and facilities to prepare the case properly, the presiding judge has a duty to take positive measures to ensure that defence lawyer's obligations to the defendant are properly fulfilled; in such circumstances an adjournment is usually necessary.⁹²

The monitors noted cases in which defendants were denied requests for additional time to prepare their statements (Vignette 14).

Vignette 14

It was previously agreed that witnesses would be heard first and then the defendant would make his/her statement. The presiding judge instead decided to proceed with interviewing the defendant.

Defendant: "I wasn't informed that I would be heard by the court now."

Judge: "Then state in writing that you refuse to make any statements."

D: "I don't refuse to make statements, I'm just not prepared today."

J: (angrily): "Just write there."

D: "How can you do something like this?"

J: "Now that's our business. We are the ones rendering justice here. Don't you forget that you are the defendant."

⁹² See *Goddi v. Italy*, 9 April 1984, paragraph 31.

Speeding up trial proceedings cannot be done at the expense of the defence, therefore the practice of replacing an absent contracted defence lawyer with an available but unprepared ex-officio lawyer or by not allowing the defendant to prepare his/her statements can represent violations of fair trial rights.

Monitoring indicated instances in which access to case materials was not fully ensured for the defence. Such violations generally occurred at pre-trial proceedings and thus fell outside the scope of the Programme (Vignette 15).

Vignette 15

In the trial of a corruption case, the prosecutor brought a new document to the hearing and asked that it be attached to the case file. When the defence lawyer asked for a copy, the judge told him that he could only examine it, but did not have the right to make a copy. The judge then added that after the hearing, the defence lawyer could transcribe the document by hand if he so wished. The lawyer protested saying that all parties have the right to examine documents and to make copies,* but the judge simply ignored the protest.

**a reference to Article 68 paragraph (1), 10), 13) of the Criminal Procedure Code*

Such practices do not only call into question the effectiveness of the defence, but also the impartiality of the judge. In another case the lawyer asked that her complaint be noted in the minutes of the hearing, but her request was refused (Vignette 16).

Vignette 16

The judge argued with the defence lawyer about an objection that should be registered in the minutes. The judge said, "Here, I decide whether it must be in the minutes." The defence lawyer's question was not recorded. The defendant asked the judge also to record that the court had not given him permission to speak. The judge threatened him, saying, "If you do not stop, I will remember how you came late to each hearing." The defence lawyer asked the court for a break of 10 seconds to speak with the client, but the judge replied, "I do not have time to wait." The lawyer answered, "I have waited for two years with this file," and the judge remarked, "No problem if you waited!"

By refusing to note a complaint or a request of the defence in the minutes, the judge breaches the rule that minutes must be accurate and may also deprive the defendant of the opportunity to raise this argument on appeal.

H. The Right to Legal Assistance

Article 6 paragraph 3 (c) of the European Convention states, “[in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled], to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.”

It follows from the Convention’s language that a defendant is entitled to (1) defend him/herself in person, if s/he so chooses, (2) benefit from the legal assistance of his/her own choosing, or (3) be given legal assistance for free when s/he does not have sufficient means to pay for it and the interests of justice so require.

The right to defend him/herself in person is not absolute. The state has the option to appoint a lawyer against the wishes of the defendant if such an appointment is well justified in the interests of justice.⁹³ The right to benefit from legal assistance of his/her own choosing is not an absolute right either, as the state can place some restrictions on who can act as defence lawyers, e.g. specialized lawyers for supreme courts⁹⁴ or professional lawyers instead of lay persons.⁹⁵

If the defendant is poor and the interests of justice so require, s/he is entitled to free legal assistance. The defendant has the burden to prove his/her lack of sufficient means to retain a lawyer; however this does not have to be “beyond all doubt.”⁹⁶ In deciding whether the interests of justice require appointing a legal aid lawyer, the authority making the decision should consider one of the following: the seriousness of the offence and the severity of the potential sentence, or “what is at stake for the accused”; the complexity of the case and the personal situation of the defendant.⁹⁷ The European Court has further stated, “Where deprivation of liberty is at stake, the interests of justice in principle call for legal representation.”⁹⁸

Legal assistance must be effective since the European Convention is intended to guarantee rights that are practical and effective, not theoretical or illusory.⁹⁹ The requirement of “practical and effective” laid the foundation for a further examination by the European Court of the quality of legal assistance provided to defendants. European Court case law on this issue is underdeveloped and debated at the national level. These requirements would not be met by the mere presence or nomination of a lawyer. “[M]ere nomination does not ensure effective assistance since the lawyer appointed for legal aid purposes may [...] shirk his duties. If they are notified of the situation, the authorities must either replace him or cause him to fulfil his obligations.”¹⁰⁰ The authorities must take “positive action” to ensure that the defendant enjoys an effective defence and should provide adequate time and facilities for such a defence.¹⁰¹ Competent national authorities are required under Article 6 paragraph 3 (c) to intervene only if failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way.¹⁰²

The Moldovan Constitution guarantees the right to defence in Article 26, stating in paragraph 3 that throughout a trial the parties have the right to be assisted by a lawyer, either chosen or

⁹³ See *Crossant v. Germany*, Judgment 25 September 1992, paragraph 34.

⁹⁴ See *Meftah and Others v. France*, Judgment 26 July 2002, paragraph 47.

⁹⁵ See *Mayzit v. Russia*, Judgment 20 January 2006, paragraph 68.

⁹⁶ See *Pakelli v. Germany*, Judgment of the European Court, 25 April 1983, paragraph 34.

⁹⁷ See *Quaranta v. Switzerland*, Judgment of the European Court, 24 May 1991, paragraphs 33 – 35.

⁹⁸ See also *Behnam v. UK*, Judgment of the European Court, 10 June 1996, paragraph 61.

⁹⁹ See *Artico v. Italy*, Judgment of the European Court, 30 April 1980, paragraph 33.

¹⁰⁰ See *Artico v. Italy*, Judgment of the European Court, 30 April 1980, paragraph 33.

¹⁰¹ See a separate section on this issue.

¹⁰² See *Kamasinski v. Austria*, Judgment of the European Court, 19 December 1989, paragraph 65.

appointed ex-officio. The Criminal Procedure Code restates the general guarantees of the right to defence in article 17 and in article 69 provides a detailed and exhaustive list of circumstances that require the mandatory participation of a lawyer.¹⁰³ The investigative authority and the court are responsible for ensuring the participation of a lawyer when required by law. Although the mandatory participation of a lawyer does not necessarily mean free legal assistance, the practice in the country to date has been that when circumstances require the mandatory presence of a lawyer, and the suspect/accused/defendant has not retained one, a lawyer is appointed ex-officio by the investigative authority or court to represent the person free of charge using state-guaranteed funds. This is known as “ex-officio representation,” a term used in this report to refer to legal representation provided at state expense for defendants who do not retain private lawyers.

Ex-officio representation¹⁰⁴ is provided by lawyers who are members of the Bar Association and are registered on the ex-officio lawyer lists kept by the coordinators of the District Bar for each district of the country. The procedure for appointing an ex-officio lawyer is detailed in Article 6 of the Law on the Bar¹⁰⁵ and in the Ministry of Justice regulation on tariffs and remuneration procedures for ex-officio legal representation at the request of investigative authorities or courts.¹⁰⁶

The right to legal assistance starts before the case goes to trial and is meaningful to the defendant if provided early in the case and in an unrestricted manner throughout the proceedings. The scope of the Trial Monitoring Programme permitted observations only during the trial, not on how legal assistance is provided in the country throughout the proceedings.

Monitoring indicates that generally the right to legal assistance is well respected with regard to the presence of a defence lawyer in court. Judges usually check if the defendant has a lawyer and if not, they appoint one on the spot. Only in rare cases did judges go ahead with a hearing if the defendant did not have a lawyer or the lawyer was absent. In one case sentence was pronounced in the absence of the defence lawyers. The defendants did not understand it and asked the judge directly “what was decided?” Monitors noticed in many cases that in the absence

¹⁰³ (1) The participation of a defender in criminal proceedings shall be compulsory, if:

- 1) it is requested by the suspect, accused, defendant;
- 2) the suspect, accused, defendant has difficulties defending himself, being dumb, deaf, blind or has other essential difficulties of speech, hearing, seeing and physical or mental disabilities;
- 3) the suspect, accused, defendant does not speak the language well enough or does not speak the language in which the criminal proceedings are conducted;
- 4) the suspect, accused, defendant is under age;
- 5) the suspect, accused, defendant is a military man in service;
- 6) the suspect, accused, defendant is accused or suspected of a serious, extremely serious or exceptionally serious crime;
- 7) the suspect, accused, defendant is under arrest as a preventive measure or is sent for a judicial expert examination in a medical institution;
- 8) the interests of the suspects, accused, defendants in a case are contradictory and at least one of them is assisted by a defender;
- 9) the defender of the injured party or of the civil party participates in the case;
- 10) the interests of justice require the participation of a defendant in first instance, in appeal, in appeal in cassation, and in the examination of the case under extraordinary proceedings;
- 11) the criminal proceedings are conducted in respect of an irresponsible person accused of having committed dangerous actions or in respect of a person who became mentally ill after such crimes were committed;
- 12) the criminal proceedings are conducted for the rehabilitation of a person deceased when the case is examined.

¹⁰⁴ The term “ex-officio” representation was the term used in the legislation in force when this report was written; however, it should be mentioned that on July 1, 2008 the law on state-guaranteed legal aid adopted on July 26, 2007 will enter into force and introduce new terminology and procedures for providing legal aid.

¹⁰⁵ Law on the Bar Nr.1260-XV adopted on 19.07.2002, entered into force on 19.09.2002.

¹⁰⁶ Regulation of 31.03.2003, with amendments of 30.01.2007. [note: the procedure and tariffs are going to be changed in 2008 due to the entry into force of the new Law on State-Guaranteed Legal Aid adopted on 26.07.2007]

of a lawyer the judge allowed only 5–10 minutes for an ex-officio lawyer to get acquainted with the case file and prepare for the trial, calling into question the effectiveness of that defence. The procedure for appointing ex-officio lawyers at the Chişinău Court of Appeal is particularly worrisome. In many cases judges appointed a lawyer just a few minutes before the hearing started (Vignette 17). The European Convention does not require merely nominating a lawyer: legal assistance must be practical and effective, implying time for good preparation.

Vignette 17

These incidents happened at the Chişinău Court of Appeal:

A judge assigns another case to the ex-officio lawyer, saying;

Judge: “Well, Mr. Defender, come and take this one too.”

Lawyer: “Ohhh, I already have four cases!”

Judge: “Take this one too. You’ll make another nickel before the New Year!”

Or, at the same Court:

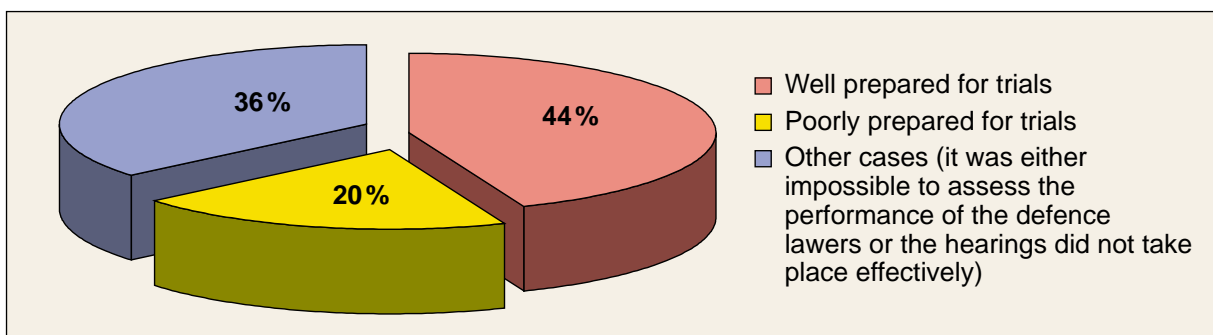
A judge, addressing the ex-officio lawyers: “Mr. Lawyers, will you take another one?”

Lawyer: “Well, let’s give alms...”

Monitors noted instances when the defendant’s lawyer did not show up in court. Often in such cases, especially if the previous lawyer was ex-officio, the court would appoint another ex-officio lawyer rather than postpone the session, arguing that this was necessary for speeding up the review of the case. Such appointments do not allow sufficient time for the defence to prepare or for contact between the lawyer and the client, speeding up the trial at the expense of the defence.

Monitors noted that they generally seemed well prepared to defend their clients (Figure 6 and Table 8). They asked pertinent questions, presented additional evidence and made good closing arguments. There were, however, instances when defence lawyers were unprepared, not interested in the case and very passive. At the examination of one such case at the first instance court, the judge mentioned that the defence lawyer had not even familiarized himself with the file’s materials, although he had been retained by the defendant. In another case, the prosecutor failed for the fourth time to produce prosecution witnesses, but the defence lawyer said only, “It makes no difference to me.” Of special concern was the practice at the Supreme Court of Justice of nominating the same unprepared lawyer(s) to appear in ex-officio cases.

Figure 6: Performance of Defence Lawyers during Trial Proceedings
(Average percentage per all Courts from Chişinău Municipality)



In Figure 6 the percentage has been calculated on the basis of the total number of defence lawyers (3,390) who attended the court hearings in the monitored cases. The total number of defence lawyers does not match the total number of hearings (2,395) because in many of the monitored hearings several defendants were present and each of them had one or more defence lawyers.

Table 8: Performance of Defence Lawyers during Trial Proceedings
(Average percentage per Court from Chişinău Municipality)

Performance of defence lawyers	Courts from Chisinău Municipality						
	Supreme Court of Justice	Chisinău Court of Appeal	Centru District Court	Ciocana District Court	Rişcani District Court	Botanica District Court	Buiucani District Court
Well prepared defence lawyers	60%	58%	74%	80%	66%	73%	64%
Poorly prepared defence lawyers	40%	42%	26%	20%	34%	27%	36%
Number of defence lawyers	97	306	585	207	365	289	325

In Table 8 the percentage has been calculated on the basis of the number of the defence lawyers who attended the court hearings which took place effectively.

There were instances in which the defence lawyer did not behave appropriately and the defendant had to intervene. In one such case the defence lawyer was slightly inebriated and the defendant had to ask him several times to lower his voice and behave more seriously.

Monitors observed that the manner of appointing defence lawyers made a difference in their performance. Lawyers retained by defendants would normally make use of their training and experience, while if they were appointed ex-officio, they barely made an effort to defend their clients. When appointed ex-officio, the lawyers often appeared passive and uninterested in the case, often talking on their mobile phones during court proceedings and occasionally asking the court to allow them to go to another trial where they had clients who had retained them.¹⁰⁷ When representing ex-officio, the defence lawyer's attitude was often manifestly exhibited in his/her remarks to the defendant such as, "Keep it short," "Who needs all this?" "Don't talk so much!" (Vignette 18).

Vignette 18

One time, when a defendant was released from under arrest and had tears of happiness in his eyes, the defence lawyer said: "At least you know now what prison is like..."

Although ex-officio defence lawyers cannot accept payment from their clients according to the legislation in force,¹⁰⁸ they don't always respect this principle (Vignette 19).

Vignette 19

In a domestic violence case in a district court, an ex-officio defence lawyer was appointed for the defendant. Before the start of the hearing, the lawyer said to the defendant, "Look, the prosecutor is going to ask for 6–12 years. Maybe you want to hire me? The defendant said, "But what can a lawyer do?" The lawyer replied, "There are many things I can do, but if not – then not."

Analysis of postponements of hearings during the period of April 2006 – May 2007 raises concerns about defence lawyers' performance. In all, 15% of postponements were for due to

¹⁰⁷ More detailed information on the conduct of ex-officio lawyers is contained in the *6-month Analytic Report*.

¹⁰⁸ See article 53 of the Law on the Bar which expressly provides that the state covers the lawyer's expenses for legal assistance provided ex-officio.

the absence or late arrival of defence lawyers. Some defence lawyers complained that this was the result of the established practice of judges and prosecutors of setting the time for court hearings without consulting the defence. A high incidence of postponements because of absence is harmful to clients, especially those who are incarcerated.

Following European Court jurisprudence, when the errors of the defence are manifest or sufficiently brought to the attention of the authorities in charge, they must take measures to ensure the right to effective defence, especially in cases of legal aid.¹⁰⁹ Article 70 paragraph (4) p. 3 of the Criminal Procedure Code states that a criminal investigative body or a court can request the relevant District Bar to change the ex-officio lawyer if the lawyer is not able to provide effective legal assistance to the defendant. Monitors observed few instances when judges reprimanded defence lawyers for poor performance. Though in one case the judge told the defence lawyer that the latter had not filed the appeal on time and warned the lawyer that the Bar Council would be so informed, in many more instances when defence lawyers, especially ex-officio lawyers, were very passive and obviously did not actively defend their clients, judges did nothing to replace them or make them fulfil their obligations. Judges were frequently aware that defence lawyers were not prepared, yet tolerated their efforts without taking measures to ensure the right to an effective defence (Vignette 20).

Vignette 20

In a case that involved two defendants represented by ex-officio lawyers, at one hearing a different lawyer came instead of the one that had represented the defendants at previous hearings. After the hearing started, the judge asked the defendants to leave the court room for a few minutes and asked the lawyer, "Have you at least read the case materials?" The lawyer admitted that he had not because one of his friends had just asked him to substitute for him at this hearing. The judge then gave him the case file to read and after a short while said, "Go sign a plea bargain agreement with your clients, because I will not sentence them to a prison term."

The lawyer left the court room with the prosecutor to make a plea bargain with his clients. When they re-entered the court room, the judge asked the defendants whether they admitted their guilt, and the defendants answered no because they had not given false statements as charged. The judge then said, "Admit your guilt because you are guilty, and you cannot trick me." The ex-officio defence lawyer also told them to admit their guilt, "...for you have already signed the papers." It was clear that the defendants did not understand what was happening to them. In the end they admitted their guilt ("well, if we have to..."). The judge asked the defendants what they would prefer as a sentence: a fine or imprisonment. The defendants said that they did not have money to pay a fine. The judge then sentenced them to two years in prison with one year suspended.

Such instances raise concerns regarding the observance of the defendant's right to be presumed innocent, to have an effective defence, and to be tried by an impartial judge.

Defence lawyers have occasionally complained that their requests are not as respected as those of the prosecutors. Monitoring indicates instances when the judge ignored defence lawyers or limited their ability effectively to defend their clients. In several monitored hearings the monitors noted that judges interrupted the defence, laughed or talked among themselves while the defence made statements, and did not permit them to ask questions.

¹⁰⁹ See *Czekalla v. Portugal*, Judgment of 10 October 2002, paragraphs 60-71.

I. The Right to an Interpreter

Article 6 paragraph 3 (e) of the European Convention states, “[in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled] to have the free assistance of an interpreter if he cannot understand or speak the language used in court.” The European Court has detailed this right in its case law stating that, “Article 6 read as a whole, guarantees the right of an accused to participate effectively in a criminal trial. In general this includes, *inter alia*, not only his right to be present, but also to hear and follow the proceedings.”¹¹⁰ This means the defendant should not be impeded by any hearing or language-related problems from participating in the trial.

The article guarantees the right to free interpretation defined as: “...for anyone who cannot speak or understand the language used in court, the right to receive the free assistance of an interpreter, without subsequently having claimed back from him payment of the costs thereby incurred.”¹¹¹ In addition, “[a]n accused who cannot understand or speak the language used in court has the right to the free assistance of an interpreter for the translation or interpretation of all those documents or statements in the proceedings instituted against him which is necessary for him to understand in order to have the benefit of a fair trial.”¹¹² Thus, the European Court has established that, “[t]he right to free assistance of an interpreter applies not only to oral statements made at the trial hearing but also to documentary material and the pre-trial proceedings...” However, Article 6 paragraph 3 (e) does not go so far as to require a written translation of all items of written evidence or official documents in the procedure. “The interpretation assistance provided should be such as to enable the defendant to have knowledge of the case against him and to defend himself, notably by being able to put before the court his version of the events.”¹¹³

The defendant should complain if s/he cannot follow the proceedings or if s/he feels the interpretation is not adequate, although it is the judge, as “the ultimate guardian of the fairness of the proceedings”¹¹⁴ who bears the burden of verifying if the defendant needs an interpreter and assuring that interpretation is adequate. “The obligation of the competent authorities is not limited to the appointment of an interpreter but, if they are put on notice in the particular circumstances, may also extend to a degree of subsequent control over the adequacy of the interpretation provided.”¹¹⁵ As to the “language used in court,” Article 6 paragraph 3 (e) does not grant the defendant the right to use a specific language or his/her native language, therefore it would meet the standard if proceedings were held in a language that the defendant was conversant with/could understand and speak, or interpretation were provided in such a language.¹¹⁶

Article 118 of the Moldovan Constitution and Article 16 of the Criminal Procedure Code guarantee the right to become acquainted with all documents and materials of the case, and to speak before the criminal investigative bodies and the court through an interpreter if the defendant does not know or speak the state language. The Constitution and the Code also provide for the right to hold court proceedings or to conduct criminal proceedings in another language acceptable for the majority of the persons participating in the proceeding, provided that all procedural decisions

¹¹⁰ See *Standford v. United Kingdom*, Judgment of the European Court, 23 February 1994, paragraph 26.

¹¹¹ See *Luedicke, Belkacem and Koç v. Germany*, Judgment of the European Court, 28 November 1978, paragraphs 40 and 46.

¹¹² *Ibid.* paragraph 48.

¹¹³ See *Kamasinski v. Austria*, Judgment of the European Court, 19 December 1989, paragraph 74.

¹¹⁴ See *Cuscani v. United Kingdom*, Judgment of the European Court, 24 December 2002, paragraphs 38-39.

¹¹⁵ See *Kamasinski v. Austria*, *Op. cit.* paragraph 74.

¹¹⁶ Trechsel, *Op. cit.* p. 330.

are issued in the state language also. Thus, Moldovan law is in line with Article 6 of European Convention and with guarantees related to the right to free interpretation.

Given the scope of the Trial Monitoring Programme, monitors only observed whether interpreters were present during court hearings. They saw many instances in which this right was violated either in that no interpreter was provided or in that one was present but either did not interpret or did so poorly. Their conclusions are drawn from observations of 334 court hearings, at which translators were present, observed in the framework of the Programme between April 2006 and May 2007.

The lack of interpreters was acknowledged by several judges, who complained about it directly to the monitors and about the fact that courts have interpreters for Russian only and not for other languages that are occasionally needed (e.g., Gagauz, Turkish, English). In a few cases monitors noted the presence of an interpreter in the court room though none of the parties needed one. Conversely, in one case the court provided an interpreter and the defendant also brought one, but neither of them translated the proceedings although the defendant needed it; there was no reaction from the judge. In the final hearing on that case, sentence was pronounced in the state language, which the defendants did not speak. When they left the court room they had to ask the monitors about their sentence and punishment. The issue of interpreters was not even discussed at that hearing.

Monitors got the impression that in such cases the judge had invited the interpreter only so his/her presence could be noted in the minutes to comply with the letter of the law, without taking steps to ensure that the defendant received adequate interpretation (Vignette 21).

Vignette 21

One case: Judge: "This is the interpreter. He has been at our trial before." Judge turning towards the interpreter: "Sit down here, just so, for the minutes of the hearing."

In another case, one witness testified in Russian and the judge and the prosecutor addressed him in Russian. The clerk, however, was translating and recording the testimony in the minutes in the state language. To observe due process, the name of a student-practitioner who was present at trial was noted in the minutes as if he were the interpreter, while in reality he remained silent.

In one case at the Chişinău Court of Appeal, only at the end when the defendant was making his closing argument was it clear that he did not know the language in which the trial was held. One judge from the panel reprimanded the lawyer for that, but the hearing continued. The panel explained to the defendant in a couple of sentences what had happened up until then. Monitors noted a series of cases of this type, that often the right to an interpreter is violated either by the lack of one or by having a silent one only for the record.

In a few instances judges reacted to the passiveness of the interpreters by making them translate. This is the proper behaviour for a judge as the "ultimate guardian of the fairness of the proceedings." In one case, a judge reacted angrily to a passive interpreter, saying, "*Translate! I want to hear your translation, is this clear?*" In the same case the judge reprimanded the interpreter for not translating for the defendant during the court hearing. The interpreter replied, "*I see it like this. If there's something he doesn't understand, he should ask me.*" After that the interpreter translated only at the defendant's direct request. That is not the correct approach. It is not for the interpreter to decide what and how to translate. The defendant should not ask for phrases or parts of the proceedings to be translated but should instead get a translation of the entire hearing. Lastly, the judge should firmly request and ensure an adequate interpretation.

Lack of translators is not a problem that can be imputed to individual judges. It seems to be a systemic problem that requires solution. Monitors noticed instances in which judges were looking for interpreters in the corridors of the courthouse or postponed the hearings in order to find an interpreter (Vignette 22).

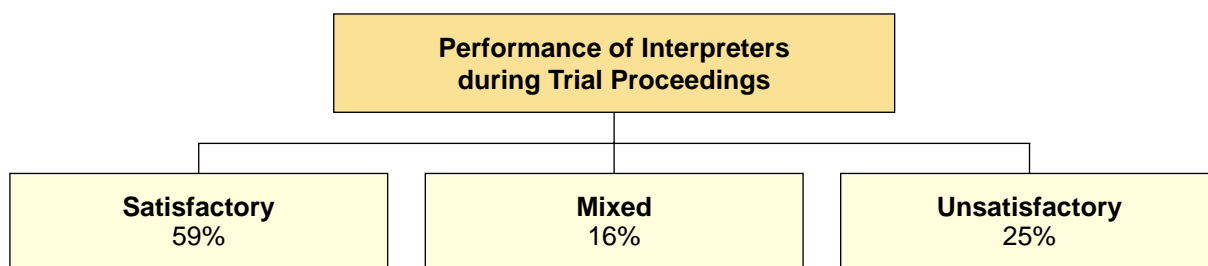
Vignette 22

On one occasion as a monitor was waiting in the corridor for a hearing to resume, she was approached by a judge who asked, “Do you know Russian?” The monitor answered affirmatively. The judge then said, “Then come to our hearing to translate.” The monitor explained she had other duties as a monitor and was waiting for a hearing to resume. The judge went further down the corridor looking for someone who could translate.

Until a solution is found, the judicial system could take small steps to improve the situation by clarifying in advance whether parties need interpreters and scheduling hearings accordingly.

The quality of translation was in general adequate, though of mixed or unsatisfactory quality in a significant number of cases. Of 334 hearings at which interpreters were present, monitors observed that their performance was satisfactory in 59% of the cases, of mixed quality (neither bad nor good, or sometimes bad and sometimes good) in 16% and of an unsatisfactory quality in 25% (Figure 7).

Figure 7: Performance of Interpreters during Trial Proceedings
(Average percentage per all Courts from Chişinău Municipality)



Examples of mixed or unsatisfactory performance include an interpreter with inadequate knowledge of legal terminology in Russian, who could not translate words such as “defendant;” a witness had to admonish the interpreter to translate correctly. In another court hearing that lasted 2 hours and 30 minutes, the translator confused many words and left the room for 10 minutes. In another case, in which the defendant was a Russian speaker, the interpreter translated selectively.

Monitoring indicated that often hearings are conducted in two languages – the state language and Russian -- interchangeably with no interpreter provided. Usually in such instances the judge asks the clerk to “switch” to the other language so participant’s statements are heard in Russian but go into the minutes in the state language. The judge him/herself may even translate the proceedings into the state language for the minutes.

Monitors noticed that judges frequently do not follow the requirement of the law to warn translators about their criminal liability for the accuracy of their translation. This was striking in one case where the judge, after the monitors introduced themselves, warned the translator about criminal liability for the accuracy of the translation; the latter was very surprised about this warning.

II. THE FAIR TRIAL AND THE CORRESPONDING RIGHTS OF VICTIMS AND WITNESSES

A. Introductory Remarks

Although Article 6 of the European Convention does not directly refer to victims and witnesses, “Principles of fair trials also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify.”¹¹⁷ The principle of proportionality between the need to fight crime (including the protection of victims’ rights) and the interests of the accused persists throughout European Court jurisprudence. Although the specific rights of the defence included in paragraphs 2 and 3 of Article 6 do not apply to victims and witnesses, in addition to protections provided by Article 6 paragraph 1, victims enjoy a series of guarantees provided by European Convention in view of the general obligation of the state to ensure that fundamental rights are secured within its territory as set out in Article 1. Other international documents provide important guarantees for victims and witnesses, requiring states to ensure victims’ access to justice and fair treatment by authorities, fair restitution by offenders or third parties held responsible, fair compensation by states where restitution is not available, and access to and provision of necessary material, medical, psychological, and social assistance through governmental, voluntary, community-based, and indigenous means.¹¹⁸

The Council of Europe has recognized that meeting the needs and safeguarding the interests of the victim is the fundamental function of the criminal justice system and has recommended a series of measures to member states.¹¹⁹ The European Union requires its member states to, “...ensure that victims have a real and appropriate role in its criminal legal system,”¹²⁰ providing for a range of rights and guarantees to victims in criminal proceedings.

The Trial Monitoring Programme has focused on the application of human rights protections for victims and witnesses, particularly in cases of trafficking in human beings and domestic violence. Many of the guarantees provided by international standards and national law to victims and witnesses refer to the pre-trial stage of proceedings and thus fall outside of the scope of the Programme. Nonetheless, several cases monitored in the framework of the Programme allowed observations about the protection of the rights of victims and witnesses during trials, particularly with regard to the following rights:

- the access to court;
- the right to physical security;
- the right to be treated with respect;
- the right to privacy;

¹¹⁷ See *Doorson v. The Netherlands*, Application No. 20524/92, 26 March 1996, paragraph 70, where the European Court stated that, “It is true that Article 6 does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, the life, liberty or security of a person may be at stake, as may interests coming generally within the ambit of Article 8 of the Convention. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of a fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify.”

¹¹⁸ Article A (4), Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, United national General Assembly Resolution 40/34, 29 November 1985.

¹¹⁹ See Recommendation No. R (85) 11 of the Committee of Ministers to member states on the position of the victim in the framework of criminal law and procedure, 28 June 1985.

¹²⁰ See European Council Framework Decision on the Standing of Victims in Criminal Proceedings, 15 March 2001.

- the right to adequate interpretation facilities;
- the right to legal assistance;
- the right to timely examination of the case;
- the right to compensation for costs.

Moldovan law defines victims as, "...any physical or legal person who suffered moral, physical, or material damage resulting from a crime."¹²¹ The victim has the right to have her/his complaint registered by the criminal investigative body and from that moment to be informed about the results of the investigation. An injured party is, "...the physical person who suffered moral, physical or material damage resulting from a crime and has been recognized in this capacity, according to the law, with the consent of the victim."¹²² A civil party is, "...the physical or legal person regarding whom there are sufficient reasons to consider that s/he has suffered moral or material damage resulting from a crime, and who has filed a civil claim with the criminal investigation body or the court against the defendant or the persons materially liable for the defendant. The civil claim is examined by the court within the criminal trial if the volume of the damage is undisputed."¹²³ A witness is, "...the person summoned in this capacity by the criminal investigative body or the court, as well as the person who testifies as a witness in a way set by the present code. Persons who have information regarding a certain circumstance, which needs to be determined in the case, may be summoned as witnesses."¹²⁴ The status of victim, injured party, civil party or witness is important to define in each case as the law grants them different substantive and procedural rights. For the sake of brevity, the term victim in this report is used to refer to all three—victim, injured party and civil party—unless it is relevant to emphasize the quality of the injured or civil party in the given context.

B. The Access to Court

The victim has the right to have his/her complaint registered by criminal investigative bodies, to be informed about the outcome of the examination of this complaint, and to take part in court hearings.¹²⁵ Witnesses are obliged to testify unless it would be contrary to their interests, or if the defendant is a close relative, or if for other legitimate reasons they cannot be heard as witnesses.¹²⁶ It falls outside the scope of the Trial Monitoring Programme to assess to what extent the victims have free and easy access to register their complaint and have it further examined by the court. The Programme's observation of court hearings allows observations regarding the frequency and manner of victims' and witnesses' testimonies, the conduct of trial participants – especially judges and prosecutors – towards victims and witnesses, and the readiness and willingness of the latter to testify in court.

¹²¹ Article 58 paragraph (1) of the Criminal Procedure Code. Of note, in contrast to international law, the criteria of definition under Moldovan law is somewhat restrictive in that it does not expressly recognize persons directly related to the actual victim as victims as well (See Section A (2), Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, GA Res. 40/4, 29 November 1985, which declares that victims may also include "where appropriate, the immediate family or dependents of the direct victims, and persons who have suffered hard in intervening to assist victims in distress or to prevent victimization"). The draft Law on witness protection is being prepared while the Present Report is written, and it should improve the national legal framework in the field.

¹²² Article 59 paragraph (1) of the Criminal Procedure Code.

¹²³ Article 61 paragraph (1) of the Criminal Procedure Code.

¹²⁴ See Article 90 paragraph (1) of the Criminal Procedure Code. Witnesses are obliged to give statements, except a list of persons provided in article 90 paragraph (3) who are excluded from the obligation to give statements as witnesses. Close relatives, as well as the husband, wife, or fiancée of the defendant, are not obliged to testify. The criminal investigative body or the court is obliged to bring this circumstance to the attention of these people under signature.

¹²⁵ See articles 58 – 62 of the Criminal Procedure Code for a detailed list of rights of the victim, injured party and civil party.

¹²⁶ See Article 90 of the Criminal Procedure Code for details.

Monitoring indicates that generally victims participated in court hearings. However, frequent delays and postponements, combined with inadequate facilities, often led to repeated traumatization and frustration of victims of trafficking and domestic violence. After repeated postponements, for example, victims sometimes declared they wished to withdraw their complaints because they were tired of “walking the road to court” and “losing time for nothing” or “being humiliated again.”

Witnesses are usually called to court to testify. In rare cases judges instead read out their testimonies instead of letting the witness testify in person.

Testifying in court is often emotional and even frightening for victims or witnesses. Although witnesses are obliged to testify a traumatizing experience can endanger the quality and accuracy of their testimony and reduce their willingness to collaborate with state authorities. Monitors noticed instances in which the judge insisted on questioning victims or witnesses although they could not respond comprehensively or coherently and it was obviously difficult for them to continue (Vignette 23).

Vignette 23

During the trial the victim filed a request asking the court to close the criminal case, because certain documents were not in the file and she did not want the defendant to be subject to criminal liability. The judge asked the victim:

“Are you Mother Teresa? What have we done for the last half a year during half a year?” The victim mentioned that she was not influenced by anyone in writing her request. The court finally attached that request to the file.

In some trafficking cases victims gave testimonies on trial that contradicted statements they made during the criminal investigation stage. For example, at the trial it became clear that the victim had wanted to travel abroad, that she herself had approached the alleged trafficker and had sought his assistance for travelling abroad—all elements previously unknown. On several occasions the victims explained that they had been ordered by the police to write specific statements in their depositions to make a stronger case against the alleged trafficker. Sometimes they said police would themselves write the statements and tell victims to sign them. Other victims complained about police abuses and ill-treatment during arrest, unwarranted searches, and objects that had been seized and then went missing.

Victims and witnesses are criminally liable if they deliberately testify falsely. Judges usually warned victims and witnesses about this; however, the way testimonies are recorded and signed may raise concerns. The court clerk usually writes out by hand what is said in court, including the testimonies of the victim and witnesses. Everyone therefore has to speak slowly in court. This takes up a lot of time and is often annoying for trial participants. On many occasions the judge paraphrases what the trial participants said and dictates to the court clerk. Once the minutes are ready, the victim/witness is invited by the court clerk to sign it. Only in extremely rare cases do victims/witnesses try to read the minutes before they sign. Usually, due to time pressure, they simply sign, despite their criminal liability for false statements.

C. The Right to Physical Security

“While respecting the rights of the defence, the protection of witnesses, their relatives and other persons close to them should be organised, where necessary, including the protection of their lives and personal security before, during and after trial.”¹²⁷

¹²⁷ See Recommendation No. R (97) 13 concerning intimidation of witnesses and the rights of the defence, Committee of Ministers of the Council of Europe, adopted on 10 September 1997.

The Criminal Procedure Code provides, “Where there are sufficient grounds to consider that the injured party, the witness or other persons taking part in proceedings as well as the members of their families or their close relatives may be threatened with death, with the use of violence, with the deterioration or destruction of assets or with other illegal acts, the criminal investigative body and the court shall be bound to take the measures prescribed by the legislation for the protection of the life, health, honour, dignity and assets of these persons, as well as for identifying and holding responsible persons liable.”¹²⁸

More specifically, national law allows keeping the confidentiality of the data about the protected person, including, *inter alia*, by changing data of the person in the case file, by conducting an anonymous identification of and confrontation with the alleged perpetrator, by interrogating the injured party or the witness in conditions that would ensure their security and anonymity, and by allowing written statements or testimony via video or audio recordings without appearing in court.¹²⁹

Monitoring indicates several violations of the victims’ and witnesses’ right to physical security in cases when judges or prosecutors did not react to threats made by defendants and in cases where inadequate court facilities placed victims, witnesses, and defendants in close proximity waiting for the hearing to begin.

In a case of domestic violence, monitors saw the defendant approach the victim, instructing her to say that she forgave him. In the same case, witnesses from the community where the defendant and the victim lived testified that the defendant had threatened them and said that if they testified against him, he would make sure that they suffered just like his wife. The prosecutor did not react to these threats and did not ask for protective measures for the victim or an arrest warrant against the defendant. Nor did the victim request protective measures. In a trafficking case, the judge fell asleep during the hearing and the defendant took that opportunity to threaten the victim orally and by simulating cutting her throat with hand gestures; the prosecutor and the judge did not react. In another case, the defendant was sentenced to three years and six months of imprisonment and to pay moral damages to the injured party, but the defendant fled from the courtroom while the judge was deliberating. The victim could not feel secure leaving such a hearing knowing that the defendant could appear at any moment.

During one hearing, a witness mentioned that the defendant had called him up and tried to influence what he was to say in court. There was no reaction from the judge. Throughout the monitoring, many instances of similar situations were noted without proper reaction from judges or, particularly, prosecutors, who according to law must ensure the physical safety of the victims of violent crimes or of witnesses facing threats. Sometimes monitors did note concern by judges for the safety of the victims or witnesses, though often this seemed for form’s sake or couched in an inappropriate manner (Vignette 24).

Vignette 24

The victim asked the court to close the criminal case, because the defendant was not guilty, he just helped her with money. The judge said he could not do this, because the court has to ascertain whether the victim was not threatened by someone to take back the complaint. The judge asked the victim “Did you meet someone with ‘fingers up’* and then decide to take your request back?” The manner in which the judge asked the victim discouraged the victim from admitting openly whether s/he was withdrawing his/her complaint willingly and under no external pressure.

* “Fingers up” is a local expression which is used when talking about criminals. The expression refers to finger-gestures used by criminals.

¹²⁸ See article 215 paragraph (1) of the Criminal Procedure Code.

¹²⁹ See for details Article 12 of the Law on State Protection of Injured Parties, Witnesses and other Persons Providing Assistance in Criminal Proceedings, Nr.1458-XIII, 28 January 1998.

Monitors noted instances in which the hearing was delayed while victims and witnesses waited in the corridors along with the defendants and their relatives. In cases of domestic violence and human trafficking, this is problematic and can traumatize victims and witnesses. The practice of scheduling all court hearings at 10:00 in the Court of Appeal is particularly problematic from this perspective, as participants are often required to wait for several hours, even an entire day, in the presence of the defendants.

Rooms where hearings are held can be inadequate, particularly the small judges' offices. For example, one case involved 15 trial participants, half of whom did not have seats and had to observe the hearing standing by the entrance, leading to questions as to whether the victim would feel secure in such an environment.

Monitors did not note cases in which a victim's or witness' identities withheld to protect their safety. Nor was there any hearing in which the defendant was asked to leave the courtroom during the victim's or witness's testimony for the sake of protecting their security.

D. The Right to be Treated with Respect

The judge and criminal investigative authority are obliged to ensure the respect of the "dignity and honour" of the persons involved in criminal proceedings and to take necessary measures when these are infringed upon.¹³⁰ During a trial this right implies the judge's obligation to refrain from any action that would compromise the dignity or honour of victims or witnesses and to react appropriately to any such actions by other participants.

Treating domestic violence and trafficking victims insensitively not only violates the principle of "dignity and honour," but is also potentially counterproductive for collecting evidence, including testimony, as they are often the sole sources of information. Monitors noted, however, many instances in which judges made inappropriate comments regarding the victims or witnesses, thereby intimidating them (Vignette 25).

Vignette 25

One judge said to an alleged victim of trafficking, "So what, were you the favourite wife? What a beauty! So it's not clear which body parts you've been working with [in Turkey]."

In another case, a judge at the Chişinău Court of Appeal remarked with an ironic smile about alleged trafficking victims who didn't show up in court, "The victims aren't here. I guess they must be working now..."

These are only a few of the comments monitors noted during one year of monitoring. Such remarks are a clear violation of the rights of victims. It is not surprising that many victims, subjected to such treatment, give up and change their statements or fail to appear at subsequent hearings. Monitors noticed inappropriate comments that judges made about witnesses that could have affected their willingness and sincerity while testifying (Vignette 26).

¹³⁰ See Article 15 of the law on the status of the judge, nr. 544-XIII, 20 July 95.

Vignette 26

The hearing did not start on time, because the prosecutor came late. While interviewing the witness, the defence lawyer solved puzzles.

The witness mentioned that during the criminal investigation, a collaborator from the Centre for Combating Economic Crimes and Corruption took him at 13:00 (which was lunchtime) and kept him for nearly three hours signing statements. Because he had a stomach ache, he signed the statements without reading them. The judge asked, "Did you faint from hunger? We stay here from morning till 19:00 and wait till you speak." The witness explained that he has a specific stomach condition and that lunch is obligatory for him.

The judge appeared indifferent to the violation of signing the statements without reading them.

In other cases, the judge made jokes about a witness. Monitors noted cases in which other participants at trials made intimidating comments regarding the victim or the witness without any reaction from the judge (Vignette 27).

Vignette 27

The lawyer asked a witness irrelevant questions: "Did you see her naked? Did you take a bath together?" The judge did not intervene.

Although many judges do treat victims and witnesses with respect and try to help them cope with their emotions when they have difficulties testifying, the overall impression is that too many judges do not.

E. The Right to Privacy

Referring to the interests of victims and witnesses in the course of criminal proceedings, the European Court stated, "The life, liberty or security of a person may be at stake, as may interests coming generally within the ambit of Article 8 of the Convention. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled."¹³¹

In cases of trafficking and domestic violence, protection of privacy is of particular importance to victims as well as to witnesses. Both international standards¹³² and domestic law¹³³ require states to protect the victim's private life and identity by means including closed hearings and/or non-disclosure of identity and/or change of name in addition to other measures of state protection (Vignette 28).

Vignette 28

In a few monitored cases the judges manifested no respect for the victim's right to privacy, asking questions that were not only irrelevant to the case, but degrading as well. One judge asked a trafficking victim: "Tell me, did you actually do this out of necessity or sheer pleasure?" Or in another trafficking case, the judge asked the victim about the number of clients with whom she had worked per day.

¹³¹ *Doorson v. The Netherlands*, Application No. 20524/92, 26 March 1996, paragraph. 70.

¹³² See, for example, Article 11 of the Council of Europe Convention on Action against Trafficking in Human Beings, 16.V.2005

¹³³ See Article 12 of Law r.1458-XIII, 28 January 1998 Op. cit.

In several cases the judges decided to hold closed hearings to protect the interests of the victim. The overall impression of the monitoring is that judges do take measures to protect the privacy of victims in terms of limiting the access of the public to court hearings; however, this often happens without asking the victims themselves, who, on the contrary in some particular circumstances might feel more protected if the hearing were open to public.

F. The Right to Adequate Interpretation Facilities

The victims and witnesses have the right to testify in their native language or another spoken language, and to get acquainted with their written or registered statements.¹³⁴ Ensuring appropriate interpretation for victims and witnesses is crucial for ensuring that communication between them and the judge is effective.

Monitoring indicates that ensuring victims and witnesses adequate translation is a challenge for Moldovan judges. Some judges have complained of lack of translators in courts. Monitors noticed many cases in which the judges did not even send anyone to look for an interpreter, perhaps assuming that there were not enough available interpreters. Monitors noted many cases in which proceedings were held simultaneously in the state language and in Russian. This seemed to be the rule rather than an exception in cases where there were participants who spoke only one of these languages. When participants speak different languages, but the minutes are in only one, concerns arise regarding the accuracy of the minutes. Making the court clerk into a simultaneous translator reduces his/her speed and accuracy in recording. In many instances, judges translated themselves, leading to questions as to whether the judge can fully concentrate on assessing what the witness or victim is saying. Monitors observed instances in which the victim or witness was not provided with a translator, although they required one.

Monitors noticed cases in which the translator was present during the hearing, while no participant in fact needed translation, or when the translator was simply attending while the judge was doing the translation.

Monitoring indicates that victims and witnesses often faced difficulties in communicating with the court due to lack of translators or to the poor quality of the translation. At times the judge, the defence lawyer or prosecutors had to intervene to make corrections or even to take the lead in translation.

G. The Right to Legal Assistance

Victims can choose lawyers to represent them or may have a lawyer appointed by the state in very grave or exceptionally grave cases if they do not have the financial means to retain one.¹³⁵ Witnesses can choose lawyers to represent them during criminal proceedings.¹³⁶ Monitoring indicates that some victims, especially those recognized as civil parties, and some witnesses did make use of this right if they had the financial means. No particular violations were noted in this respect. Monitors observed instances in which victims were represented by lawyers from specialized non-government organisations, who provided services of high quality.

With regard to the right of victims in very grave and exceptionally grave cases to have a lawyer appointed by the state, the impression is that this right is more declarative in nature. Monitors did not record any such appointments in the cases they monitored.

¹³⁴ See Articles 16, 90 paragraph (12) p. 8) of the Criminal Procedure Code.

¹³⁵ See Article 58 paragraph (4) p. 2) of the Criminal Procedure Code.

¹³⁶ See Article 90 paragraph (12) p. 10) of the Criminal Procedure Code.

H. The Right to a Timely Examination of the Case

Although a large percentage of postponements was attributable to the absence of victims and/or witnesses, in many cases victims and witnesses were the most punctual persons. At least at the beginning of the trial, they appeared in court at the time scheduled and were ready for the hearing, while the prosecutor, defence lawyer and sometimes the judge were not always readily available. After delays and postponements, however, victims and witnesses became less disciplined. Towards the end of the case, ensuring the participation of the victim or witness may become quite a challenge (Vignette 29).

Vignette 29

The hearing was postponed because of the absence of defendant. The defence lawyer said that his client had been hospitalized. The witnesses were angry because they had come for the second time from the suburbs of Chişinău and had spent time and money in vain. Witnesses said that they had seen the defendant that morning in court.

In a different case at the Chişinău Court of Appeal, a judge said, "You'll come at 10, you'll wait a bit for us to find a courtroom, and at 14.00 we'll start."

In several postponements, the judge was not able to establish the date of the next hearing immediately and left it for later. Rescheduling hearings without immediately informing the witnesses or victims of the new date reduces the likelihood of their appearing at the next hearing. Monitors noticed that judges usually consulted the prosecutor and the defence lawyer about a convenient time for the next hearing, but they did not consult victims or witnesses. It is obviously impossible to consult every trial participant about a convenient time for the hearing; however, especially in cases when victims and witnesses come from a long distance outside Chişinău, consulting them too might improve attendance at subsequent hearings.

Monitors noted instances in which all the necessary witnesses were present but either the prosecutor or defence lawyer was not, though they are usually in a better position to be on time due to proximity of their offices. In a few cases monitors noted that the judge was not present, either allegedly attending a qualification exam or commission, or was on other assignment or on leave. Such occurrences anger witnesses and victims and reduce their willingness to appear the next time. As a result, a circle of postponements starts. These could be reduced if courts could announce postponements in advance whenever possible.

I. The Right to Compensation for Costs

The right to compensation for costs for victims and witnesses falls outside the scope of this Programme, since it is realized through proceedings subsequent to the main criminal proceedings. However, a few instances were noted that suggest that victims and witnesses might face difficulties in getting costs reimbursed. This is especially so for compensation for taking part in criminal proceedings, a possible additional cause for victims' and witnesses' reluctance to participate in criminal proceedings (Vignette 30). In several cases monitored in the framework of the Trial Monitoring Programme, victims and witnesses complained that they were wasting not only their time but also money because of many postponements of trial hearings.

Vignette 30

When the hearing was postponed because the injured party did not show up, one witness said that she would not come to the next hearing because she had to work her piece of land. The prosecutor then told her that if she didn't come, he would send the police to bring her by force in a police vehicle. After a moment of thought the witness said, "Well, in that case at least I won't have to pay 20 lei for transportation. Let them come after me with the police car."

CONCLUSIONS

The Analytic Report “*Observance of Fair Trial Standards and Corresponding Rights of Parties during Court Proceedings*” is an intermediary report. The Trial Monitoring Programme is still on-going. The current conclusions are a summary of the main observations to date. They will be consolidated and presented in the final report of the Programme.

Based upon the findings of the first full year of implementation of the Trial Monitoring Programme, it appears that while Moldova has made significant progress in implementing fair trial guarantees *de jure* by adopting the Code of Criminal Procedure and several other laws in the spirit of the rights guaranteed by the European Convention and other international instruments to which it is a signatory, *de facto* more efforts are needed for the full implementation of these rights in practice.

Fairness is at the heart of criminal proceedings and is a necessary element for a democratic society based on the rule of law. Ensuring fair trials for both defendants and victims/witnesses is important not only to comply with international standards, but also to achieve a democratic society. Criminal justice authorities should treat the participants in criminal proceedings with respect to ensure their trust and confidence in the system. In turn, this is a necessary condition for a well-functioning justice system.

In general the fair trial rights of defendants are well respected at the trial stage by the majority of the professionals. However, some aspects need further attention. In particular, monitoring indicated that public hearings are still not the rule for examining all cases. Many hearings are held in judges’ offices which, due to their small size, in practice preclude the participation of the public. In the majority of cases, holding hearings in judges’ offices was justified by the lack of a court room; however, often it was a matter of the preference of an individual judge. Some judges are still suspicious of court observers. Public hearings are of key importance for ensuring trust in and transparency of court proceedings; it is up to judges to appreciate their importance and make them work.

Judges seem to have a good understanding of their roles and generally respect the principle of equality of arms and adversarial proceedings. However, there are still instances in which judges take an accusatory role. The general impression is that judges still do not treat defence lawyers and prosecutors on an equal footing.

Significant violations were observed regarding the right to legal assistance, particularly due to last-minute appointments of defence lawyers and to their passivity, or to poor preparation. Particularly worrying is the performance of ex-officio defence lawyers. It is hoped that the mechanism for appointing them and the possibility of quality control the new law on state-guaranteed legal aid provides will improve this situation.

Significant problems have been noted in connection with assuring the right to interpreters for defendants, victims, and witnesses. There is an acknowledged lack of translators, and this may significantly affect the course of justice. Adequate interpretation is needed not only for ensuring trial participants’ rights but also for the administration of justice, which is impossible if the judge cannot communicate with the trial participants. Monitoring indicated both a significant lack of translators in court and the poor quality of the few who were available. Ensuring adequate interpretation is a challenge that needs to be tackled comprehensively.

The Republic of Moldova has signed many important international documents and has transposed many of these provisions into national laws concerning the protection of victims and witnesses. Many judges act professionally and manifest a human and understanding attitude towards victims and witnesses, helping them to cope with their emotions while testifying. However, a large number of judges, prosecutors and defence lawyers still do not treat victims and witnesses with due respect, increasing their feelings of insecurity and frustration with the justice system. A major problem is the numerous delays and postponements of court hearings, particularly frustrating and sometimes even humiliating for victims and witnesses. Court facilities are inadequate, both in terms of the long waiting time in the corridors and the small, poorly equipped court rooms or judges' offices where hearings are held.

Overall, it seems that fair trial guarantees are functional in Moldova only to some extent. The experience of going to court is still often fraught with frustration, complication and insecurity. There are some material reasons for this. Improving the implementation of fair trial standards requires significant financial and other resources. These include resources for court buildings and translation services, sufficient petrol for escorts to bring defendants to court, adequate honoraria to motivate legal aid lawyers, and adequate salaries and equipment for all professionals involved in the administration of justice. There are, however, also many subjective reasons why fair trial standards have not been fully realized. Remedying these will depend on the good will and professionalism of individual justice authorities, in particular judges as the ultimate guardians of the fairness of proceedings.

The OSCE Mission to Moldova will continue to urge everyone involved in delivering justice in the Republic of Moldova to play their roles in a manner that ensures justice is done and seen to be done in a truly fair manner. The Trial Monitoring Programme continues and conclusions and recommendations will be presented to the national authorities in a final report at the end of its implementation.