PILOT PRE-TRIAL DETENTION PROJECT

FINAL REPORT AND RECOMMENDATIONS

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I. Introduction

A. THE ORIGINAL CONCEPT OF THE PILOT PROGRAM

This Fiscal Year 2005-06 Pilot Pretrial Detention Project ("Pilot Project") was authorized and endorsed by the Supreme Court of Ukraine. It was funded by the United States Department of State’s International Narcotics and Law Enforcement Affairs (INL) division and implemented by the American Bar Association/Central European and Eurasian Law Initiative (ABA/CEELI).

Ukraine is perceived by some international observers as having unduly high rates of pretrial detention as well as problems with torture of criminal suspects and substandard detention conditions. The goal of the Pilot Project was to take a specific Ukrainian region - the Nikolaev\(^1\) Oblast - and institute specific practices regarding pretrial release or detention of criminal suspects or accused persons. Then, the Pilot Project was to compare 2005 data regarding pretrial release and detention with 2006 data created after implementing the Pilot Project in the Oblast courts.

The Pilot Project was to focus on bail as a preventive measure. It was widely accepted that bail was rarely used in Ukraine despite being one of the statutorily authorized "preventive measures," i.e., pretrial alternatives ranging from detention to release on a signature bond, for criminal suspects and accused persons. The original plan would have required court hearings and judicial decision making before any preventive measure could be imposed.

To the extent that the Pilot Project was deemed a success (which presumably meant reducing the number of people detained pretrial), the modifications could be applied to other regions in Ukraine or ultimately on a country-wide basis.

B. NIKOLAEV

The Nikolaev Oblast is in the south of Ukraine, about 500 kilometers (310 miles) south of Kiev. It is known as "the breadbasket of Ukraine," due to its huge number of grain farmers. Its southern border is the northern coast of the Black Sea and the oblast’s southern territories include hundreds of kilometers of Black Sea beaches and estuaries. The city of Nikolaev is located where the South Bug and Ingul rivers merge.

In addition to grain, Nikolaev’s history is one of shipbuilding. During the Soviet era, Nikolaev was where Soviet Navy ships were built. Since now there is no Soviet Union the shipbuilding industry of Nikolaev is nearing extinction.

Politically, Nikolaev is a part of the southern and eastern sections of Ukraine in which the people speak Russian -not Ukrainian - and are skeptical of the wisdom of Ukraine’s increasing hostility towards Russia and efforts to become part of Europe and NATO. In regard to crime, Nikolaev has a fairly high crime rate which encompasses a typical array of crimes. It turned out to be an interesting selection for a pretrial detention and release program due to the government statistics (more fully discussed below) that showed Nikolaev to have the highest rate of pretrial release in the entire country. It is unclear whether the Court knew that prior to its selection.

\(^1\) "Nikolaev" is the Russian name of the city and Oblast, while "Mykolayiv" is the Ukrainian name. This report will use the Russian name as it is the one most commonly used by people living in the Oblast and that appears on the signs welcoming people to the city. No disrespect to Ukrainian speakers is intended.
II. The State of Ukrainian Law and Procedure on Pretrial Detention

A. PREVENTIVE MEASURES

Currently, the Ukraine Criminal Procedure Code ("CPC") provides for six possible preventive measures, i.e., restrictions on a suspect's or accused person's liberty. Those preventive measures, which are set out in CPC Article 149 (and then more fully discussed in subsequent Articles, noted below in parentheses), include: a signed promise not to leave a place of residence (CPC Article 151); a personal surety (CPC Article 152); a pledge of a nongovernmental organization or labor collective (CPC Article 154); bail (CPC Article 154-1); taking into custody (CPC Articles 155-56, 158, 161, and 165-3); and supervision by a military division command (CPC Article 163).

B. PREVENTIVE MEASURE DECISIONMAKERS

Under the existing Ukrainian criminal procedure code, “[t]aking into custody as a preventive measure may be applied only if based on a judge’s ruling with justification or on a court order.” See CPC Article 165. “Other preventive measures may be applied pursuant to the order of an inquiry authority, investigator, procurator, or judge or a court order.” Thus, consistent with its Soviet predecessor, the CPC only requires a judicial decision on preventive measures where custody is requested by an investigator or prosecutor. All other preventive measures may be imposed by “[a]n inquiry authority, investigator, [or] procurator.” See CPC Articles 165, 165-1, 165-2.

C. CUSTODY

Where a motion for custody of a suspect or accused is filed by an investigator or prosecutor the judge “shall examine the [case] materials, interrogate the suspect or accused and, if necessary, obtain explanations from the person conducting the case, [and] hear the opinion of the procurator and of defense counsel [if present] and issue an order” denying the motion or imposing custody as a preventive measure.” See CPC Article 165-2. Additionally, CPC Article 106 requires the court to hear an initially detained person’s complaint about being detained at the same time the Court hears a request for custody as a preventive measure.

When determining whether or not to impose custody as a preventive measure, the trial court must consider both the purpose of preventive measures and the circumstances presented in the case before it. As to the purpose of preventive measures, CPC Article 148 sets forth four: (1) future appearances; (2) compliance with the enforcement of procedural decisions; (3) attempts to obstruct establishment of the truth; and (4) engaging in criminal conduct.

As to case-specific circumstances, CPC Article 150 sets forth relevant considerations: the severity of the alleged crime; the suspect’s or accused person’s age, health, family and financial status; occupation; residence; and other relevant characteristics. The court may also consider a person’s activities, previous convictions, social ties, behavioral dispositions (e.g., drug or alcohol use), lifestyle, and behavior during this or previous criminal cases. See Supreme Court of Ukraine Plenum Decree No. 4 dated 25 April 2003, amended by Decree No. 10 dated 11 June 2004 (hereinafter “Decree”), entitled

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2 Former Soviet states’ criminal procedure codes, including Ukraine’s, frequently use terms that can confuse Americans. For example, the term “detain” generally corresponds with the US’s concept of arrest and the term “custody” generally corresponds with the US’s concept of pretrial detention. This report will use “custody,” used in the Ukrainian code, and “pretrial detention,” an American term, interchangeably throughout.

3 Consistent with the Soviet system, Ukraine has “procurators,” prosecutors who also have certain judicial authority. In this report, “procurator” and “prosecutor” should be read as being interchangeable.

4 CPC Article 165-2 authorizes “an inquiry authority or investigator” to seek custody “with the consent of the procurator.”

At the hearing on the matter of pretrial custody, if the Court concludes that custody is not required, “the court shall have the right to choose a preventive measure other than taking into custody for the suspect or accused.” See CPC Article 165-2. See also Decree, paragraph 13 (if a court refuses a request for custody, “the court has the right to choose another measure of restraint provided for in part 1 of Art. 149, CPC.”)

D. TIME LIMITS

The Ukraine Constitution and CPC place strict time limits on custody during the preventive measure phase of a case. Under Article 29 of the Constitution, “The detained person should be immediately released if, within 72 hours of his detention, he is not given a motivated decision of the court about his detention in custody.” Additionally, pursuant to CPC Article 106, “upon detention, the inquiry authority shall within 72 hours: (1) release the detainee if the detention period described by law expired.” Pursuant to CPC Article 165-2, a motion to impose custody as a preventive measure “must be considered within 72 hours from the detention of a suspect or accused.” If the suspect or accused over which custody is sought is not already detained, “the period of detention may not exceed 72 hours.”

Despite these clear constitutionally - and statutorily - mandated remedies for the violation of the 72-hour rules, the Supreme Court of Ukraine has eliminated these remedies. In its Decree, at paragraph 5, the Court stated: “[I]f a submission on taking to custody of the detained person is delivered to court after expiration of these terms, it is not a reason for refusal to consider the submission.” (Emphasis added).

Pursuant to CPC Article 148, “[i]n applying a preventive measure to a criminal suspect, charges against him shall be brought not later than 10 days of the time of application of the preventive measure.” CPC Article 148 does not provide an express remedy if this rule were to be violated, nor has the Supreme Court addressed the matter.

E. PRESUMPTION OF RELEASE FOR MINOR CRIMES

Under CPC Article 155, pretrial detention “shall be imposed as a preventive measure for crimes in which law provides for a punishment of over three years.” “As an exception,” however, custody “may be imposed” where the maximum punishment is three years or less” (emphasis added).

The Supreme Court, in its Decree at paragraph 3, lists a series of circumstances that may present the trial court with such “exception[s],” where the detained person: (1) has no permanent residence; (2) abuses drugs or alcohol; (3) is likely to continue to commit crimes; (4) maintains negative social relations; (5) or has violated the conditions of a preventive measure, or evaded the investigation, court, or the execution of court decisions.

F. BAIL

Bail is governed by both CPC Article 154-1 and an entire Supreme Court Decree devoted to the subject. See Supreme Court of Ukraine Plenum Decree No. 6 dated 26 March 1999, amended in Decree No. 5 dated 6 June 2003 (hereinafter “Bail Decree”), entitled “On Practice of Courts Applying Bail as a Measure of Restraint.”

5 While this language can be construed as requiring custody in a case where the maximum punishment is more than three years, this is belied by the remaining statutory provisions on preventive measures and the Supreme Court of Ukraine Decree.
The bail statute authorizes an inquiry authority, investigator, procurator, or judge to set bail\(^6\) (“the amount of bail shall be determined by the authority imposing [it]”) and permits “a pretrial investigative authority or a court” to receive bail (either cash or property) from a suspect or accused person. See CPC Article 154-1. It provides that a person who violates his pretrial obligations forfeits the posted money to the state. It further provides that if the case results in a conviction, bail posted by a detainee can have it converted and applied towards any monetary portion of a sentence. If the bail was posted by someone other than the detainee, the conversion can only occur with the owner’s consent. See Bail Decree, paragraph 13.

The statute also imposes minimum amounts of bail that a trial court may set, dependent on the seriousness of the charged crime or whether the detainee has a prior record. Those minimums are not less than: (1) 1,000 times the untaxed minimum income (currently 17 UAH) where the alleged acts are punishable by up to 10 years of imprisonment (especially grave or grave offenses); 500 times the untaxed minimum income where the suspect or accused was previously convicted; and 50 times the untaxed minimum income for all other alleged criminal acts.\(^7\)

Due in large part to the infrequency of bail being used as a preventive measure, the Supreme Court issued its Bail Decree in 1999. In its Decree, the Court stated that bail “should become an effective measure of restraint,” and that trial courts “should, if appropriate grounds are available, apply bail” even “upon their own initiative.” See Bail Decree, paragraph 1.

The Bail Decree provided some logistical guidance as to the mechanics of bail, though in some cases did not go far enough. For example, the Court stated that after bail was determined appropriate, the deciding court “should fix the bail amount and state who and at which account is supposed to make such bail,” order that bail “should be deposited within specified time limits,” and that the detainee should be released from custody “on the ground that the bail as previously fixed has been deposited.” See Bail Decree, paragraphs 2 and 3. The Court did not, however, explain what bank account should be used for bail deposits, a problem since local trial courts are not authorized to set up bank accounts. Moreover, the Court confused the matter further by referencing bail that “has been deposited to the pretrial investigation agency or court” (emphasis added).

The Bail Decree also attempted to deal with property as bail, requiring the local court to clarify, inter alia, title to the property, the cost of the property, and ensuring the safety of the posted property. The Court stated that the detainee, at his own expense, could hire an expert to appraise the value of the property, however, the Court failed to spell out what the local court was to do with property posted as bail, including where to store it, which person or agency would be responsible for it, etc.

G. THE DETENTION HEARING

Where a motion for custody as a preventive measure is filed, a hearing should be held. The court should announce the nature of the hearing, establish on the record the identity of the participants, and advise the suspect or accused of his rights. See Decree, paragraph 9. At this hearing, defense counsel’s presence at the hearing is authorized - but not required - by CPC Article 165-2. See also Decree, paragraph 7 (requiring that defense counsel be notified of the hearing, and that defense counsel be appointed as “provided for in parts 4 and 5 of Art. 47, CPC.” CPC Article 47 provides for the appointment of counsel for minors, persons with mental defects, and indigent persons).

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\(^6\) If pretrial bail is set by a person other than the judge, it must have “the consent of the procurator who sanctioned the arrest.” See CPC Article 154-1.

\(^7\) In U.S. dollar terms, the minimum bail amount for especially grave or grave offenses is 17,000 UAH, or about $3,400 USD; where the defendant has a prior conviction 8,500 UAH, or about $1,700 USD; and for all other crimes 850 UAH, or about $170 USD.
There appears to be some burden on the prosecution to show reasons that a release upon a signed obligation is insufficient. CPC Article 148 (“If no reasonable ground exists for the application of a preventive measure, a signature shall be obtained from the suspect, accused, or defendant concerning his or her obligation to appear in response to a summons, and to provide notification of a change in his or her residence.”) See also CPC Article 165-2, which requires the government to provide the court a “sufficient reason for selecting [the requested measure].”

In order to impose custody as a preventive measure, the Court must make findings regarding the detained person’s risk of nonappearance, obstruction of justice, or committing criminal conduct while on release. See Decree, paragraph 9 (referencing CPC Article 84’s “mandatory drawing up of a record in sittings of a court of first instance) and paragraph 15 (“[C]ourts shall comply with the requirements provided for in part 2 of Art. 165 CPC regarding the content of a decision on choosing a measure of restraint”)

Arguably, the trial court must impose the least restrictive conditions it believes are necessary to deal with the aforementioned risk(s). See Decree, paragraph 3 (“custody is the most severe measure of restraint, therefore it should be selected only if there are grounds to believe other (less severe) measures of restraint” are not sufficient) and paragraph 13 (“[t]o elucidate to courts that a mandatory condition of taking to custody (regarding its legal nature) should be a reasoned confidence of the judge that more lenient measures of restraint may not ensure proper behavior of a suspect or accused.”)

There is no statutory provision for discovery; no Article mandates the prosecution or court to provide the detainee or defense counsel with reports or even the motion that has been filed with the court.

H. THE COURT’S DECISION

The Court must announce its decision to the suspect or accused, explain the conditions imposed, and have the person sign his or her acknowledgement of the conditions. See Decree, paragraph 16. The court must also explain the appeal rights that are available to each party.

I. APPEALS

Following the entry of the pretrial release or detention order, either party has the right to an immediate appeal, which must be filed in a court of appeal within 3 days of the entry of the order. See CPC Articles 165 and 349. Pursuant to CPC Article 382, the court of appeal should receive the lower court materials without delay. See also Decree, paragraph 17.

J. THE PLACE OF DETENTION

Ukrainian law, in CPC Article 155, requires that pretrial detainees be held in “investigation holding facilities,” or “in some cases places for holding detained persons.”
III. The Pilot Program’s Start-up Investigation

A. INFREQUENT BAIL AND FLAWED PRETRIAL HEARINGS

1. The Dismal State of “Custody Hearings”

After arriving in Ukraine, the Pilot Project’s legal advisors traveled extensively throughout Ukraine and spoke to academicians, judges, prosecutors, investigators, and defense lawyers about their respective preventive measure experiences. It became clear that “custody hearings” - or lack thereof - varied widely from oblast to oblast and from judge to judge. At one end of the spectrum, hearings occurred (often in chambers) at which the defendant was present and given an opportunity to be heard. At the other end of the spectrum, an investigator would take the investigative file and proposed custody order to a judge’s chambers, and the judge would usually sign the order outside the presence of the defendant and any defense counsel where there was one. Much fell between the two ends of the spectrum.

A universal complaint by advocates was the refusal of the prosecutor or court to provide them access to the materials on which the prosecutor or investigator relied to support the request for custody. This lack of discovery often included the written motion or request for custody. This effectively forced the defense to guess the specific reasons given to justify custody as a preventive measure, i.e., fight with both hands tied behinds its back.

What usually occurred where there was a courtroom hearing - and the Project’s legal advisors observed hearings in several different courts - was understandable yet troubling. Generally, there was the judge, a prosecutor, an investigator, and the defendant in “the cage.” Without an advocate to speak on his or her behalf, the defendant spoke for himself or herself. This resulted in the judge succumbing to the temptation of questioning the defendant about the crime (without warning the defendant of the consequences of admissions that may be made). The defendant, wanting to be cooperative with the judge who held his liberty, invariably made incriminating statements. The investigator provided his or her version of the offense, and the prosecutor spoke in support of the requested custody. The judge again questioned the defendant on any disputed matters and retired to chambers to make a decision. The judge returned to the bench and rendered a decision. Either side could appeal within three days.

2. Bail

In February 2006, the Pilot Project requested the 2005 pretrial release statistics from the Ministry of Internal Affairs. The Ministry provided those statistics in March 2006, and they are discussed more fully below. In the year 2005, throughout the entire country, bail was used as a preventive measure 274 times. Out of a total of 52,866 persons who were detained, that constituted a bail rate of .005%. Out of the total of 15,948 who were released, the rate released on bail was .02%. Bail had largely been ignored throughout Ukraine.

The Pilot Project’s legal advisors quickly determined that there were two predominant reasons for this. First, the Ukraine Criminal Procedure Code contains monetary bail minimums that are simply beyond the reach of most criminal defendants. As mentioned above, the amount of bail, pursuant to CPC Article 154-1, must not be less than 1,000 times the untaxed minimum income (currently 17 UAH) where the alleged acts are punishable by up to 10 years of imprisonment (especially grave or

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8 The Project’s legal advisors met twice with Professors Zeleneskiy and Borisov and once with Professor Shilo, of the Kharkiv Law Academy. Between them, they have authored several academic studies on pretrial detention in Ukraine.

9 In Ukraine, like in many countries, there is no jury box but rather a large metal cage in which the defendant is placed.

10 It is true that under Ukrainian law, a judge different than the one who heard the custody matter will hear the trial of the case. Nonetheless, there is nothing in the law that bars admission at trial of the defendant’s statements made at the custody hearing.
grave offenses); 500 times the untaxed minimum income where the suspect or accused was previously convicted; or 50 times the untaxed minimum income for all other alleged criminal acts.

Second, the courts did not have a workable mechanism to dispose of posted bail. In other words, judges had not been advised on the method for handling money that was posted for bail. While the statute also allows for bail to be posted in the form of property, judges were also confused over the disposition of such property.

B. THE STUDY TRIP

In late April 2006, the Pilot Project took a delegation of Ukrainian judges on a study trip to Washington, D.C. The delegation included two members of the Supreme Court of Ukraine, two members of the Nikolaev Court of Appeal (including the Chairman), and six trial judges from throughout the Nikolaev Oblast. The group observed detention hearings in both Superior and United States District Courts, and saw hard fought detention hearings with live witnesses, active defense counsel, and arguments over the type of preventive measure that should be imposed. The delegation spent an entire day at the Federal Judicial Center, where they were immersed in pretrial detention matters, including presentations on the Federal Bail Reform Act, the Pretrial Services Division of the United States Probation Department, alternatives to incarceration (including electronic monitors, halfway houses, and substance abuse and mental health treatment), and the role of the prosecutor and defense attorney in a detention hearing.

Without exception, the members of the delegation were impressed with the process and its relative efficiency. At a meeting led by the Pilot Project legal advisors near the end of the week, a full discussion was had on the things the delegation had seen and heard, which of those things could be done in Ukraine (or at least the Nikolaev Oblast) relatively quickly, and the fact that limited resources in Ukraine would limit the incorporation of some features of the United States practice on pretrial detention matters.

Though money bail is not widely used in either the federal system or in Washington, D.C.‘s Superior Court, the American judges nevertheless explained to the delegation that bail is pervasive throughout the United States, and that states as geographically close as Maryland and Virginia still use bail as their principal condition of release. The Ukrainian judges were able to ask questions and gained a better understanding of bail and its usage.

IV. THE REVISED DESIGN AND ULTIMATE IMPLEMENTATION OF THE PILOT PROJECT

A. THE PILOT PROJECT’S PROTOCOL AND FORM PRETRIAL ORDER

After reviewing the challenges in designing a workable project, the Pilot Project’s legal advisors decided that an instrument or instruments needed to be designed that would accomplish two things. First, a “script” had to be prepared to assure that detained persons were not placed in custody without the scrupulous recognition and protection of their rights. Second, data had to be captured after the Pilot Project was implemented in the Nikolaev region, so that the collected data could be compared to the 2005 data.

The result was two documents, a “Protocol” (“Pilot Protocol”) and a form “Pretrial Order Regarding Release or Detention” (“Form Pretrial Order”). The Pilot Protocol was a brief summary of the Pilot Project and a step-by-step explanation of the Court’s responsibilities when presiding over a motion for custody to be imposed as a preventive measure. The Form Pretrial Order was to be completed by the Court in every case in which custody was sought or may have been the result of another action. It was to guide the local Courts through the required process in such cases and capture all the necessary data for a comparison with the 2005 data.
The Form Pretrial Order was designed to be user-friendly for local judges who would hear pretrial custody requests from an investigator or prosecutor. Broken into three major parts, the order had a part to be completed if the judge was inclined to order pretrial custody, a different part to be completed if the judge was inclined to order pretrial release, and a part to be completed in all cases on matters of appeal rights and the pretrial detention site where the detainee was incarcerated.

1. Courtroom Hearings

The Pilot Protocol required that judges make all pretrial detention or release decisions that may result in custody. The Pilot Protocol required a courtroom hearing any time the preventive measure of custody was requested, and where, for example, an investigator set bail at an amount that the suspect or accused could not afford, the result of which was that the person remained in custody. This last scenario is not expressly addressed in the CPC.

The Pilot Protocol mandated that at detention hearings, there was a presumption of release upon a signed obligation. See CPC Article 148 (“If no reasonable ground exists for the application of a preventive measure, a signature shall be obtained from the suspect, accused, or defendant concerning his or her obligation to appear in response to a summons, and to provide notification of a change in his or her residence.”) At these hearings, the court was required to announce the nature of the hearing, establish on the record the identity of the participants, and advise the suspect or accused of his rights. See Decree, paragraph 9.

The Pilot Protocol required that the court hold a detention hearing within 72 hours\(^\text{11}\) of the person being detained. See CPC Article 165-2.\(^{12}\) See also CPC Article 106 (which also places a 72-hour limit on the determination of a pretrial preventive measure); Decree, paragraph 5. If the suspect or accused resided outside the court’s district, the hearing was to occur within 48 hours of the person being brought into the district.\(^\text{13}\)

At this hearing, the Pilot Protocol required the presence of the detained person as well as his or her lawyer unless that right had been knowingly and voluntarily waived by the detained person. Defense counsel’s presence at the hearing was authorized by CPC Article 165-2.\(^\text{14}\) See also Decree, paragraph 7 (requiring that defense counsel be notified of the hearing, and that defense counsel be appointed as “provided for in parts 4 and 5 of Art. 47, CPC.” CPC Article 47 provides for the appointment of counsel for minors, persons with mental defects, and indigent persons).

Pursuant to the Pilot Protocol, at the beginning of the hearing, the Court was to establish the maximum punishment for the most serious crime the person was suspected or accused of committing. If a person was suspected or accused of committing a crime punishable by no more than three years of imprisonment, there was a presumption of release unless exceptional circumstances existed, e.g., homelessness, drug addiction, or a history of ignoring court orders. See CPC Article 155; Decree, paragraph 3.

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\(^{11}\) Pursuant to CPC Article 165-2, the court may extend the detention for up to 10 days if it believes additional information or corroboration is required to make an informed decision. In light of the detained person’s presumption of innocence, any such extension should be the exception, not the rule, and the defense should be able to argue against any such extension. See also Decree, paragraph 12.

\(^{12}\) CPC Article 165-2 requires that an investigator’s motion for the detained person’s custody (filed with the consent of the procurator) be heard within 72 hours. Under the Pilot Protocol, however, CPC Articles 165-1’s and 165-2’s grant of authority to judges to make all pretrial detention or release decisions would have effectively broadened the 72-hour rule to all such matters, regardless of who made the motion or the relief requested by the motion. Investigators and procurators could still have made preventive measure motions in any case.

\(^{13}\) There is no explicit remedy provided for a violation of these time limits, so the Court was to consider the petition for custody even where the hearing is untimely. See Decree, paragraph 5. The Project’s legal advisors strongly disagreed with this, but were bound by the Supreme Court decree.

\(^{14}\) While CPC Article 165-2 does not appear to require defense counsel’s presence, the Pilot Protocol’s requirement of a hearing in any case where custody may result envisioned that a reasonably effective defense counsel would be present at his or her client’s hearing unless that presence was waived. Such waivers should have been rare indeed.
In all cases, in determining whether a more restrictive measure than a signed obligation was appropriate, the court was required to consider the factors set out in CPC Article 148, i.e., the risk that the suspect or accused would fail to appear at the inquiry, investigation, or in court; obstruct the investigation’s search for the truth; continue criminal activity; or refuse to comply in the implementation of procedural decisions.

If the government sought custody as a restrictive preventive measure, the government bore the burden of proof to show that it was more likely than not that custody was the only available option under the circumstances. See CPC Article 165-2, which requires the government to provide the court a “sufficient reason for selecting [the requested measure].”

While the government was not required to call witnesses, the Pilot Protocol required it to at least offer proof regarding documents it possessed and witnesses it could call (and a summary of the witness’s expected testimony) to support custody as a preventive measure. The defense (or detained person) could have also - but was not required to - offer proof and argue for the release of the detained persons, with or without conditions of release.

In order to impose custody as a preventive measure, the Court must have made findings regarding the detained person’s risk of nonappearance, obstruction of justice, or committing criminal conduct while on release. See also Decree, paragraph 9 (referencing CPC Article 84’s “mandatory drawing up of a record in sittings of a court of first instance) and paragraph 15 (“[C]ourts shall comply with the requirements provided for in part 2 of Art. 165 CPC regarding the content of a decision on choosing a measure of restraint”)

In determining the appropriate restrictive measure - whether it was custody or some less restrictive alternative - the court must have considered the factors set forth in CPC, Article 150: the severity of the alleged crime, the suspect’s or accused person’s age, health, family and financial status, activities, residence, and other characteristics. The court could have also considered previous convictions, social ties, behavioral dispositions (e.g., drug or alcohol use), lifestyle, and behavior during the instant case or previous criminal cases. See Decree, paragraph 10. The person’s financial resources were also relevant with respect to release on the posting of bail.

The Court was required to impose the least restrictive conditions it believed were necessary to deal with the aforementioned risk(s). See Decree, paragraph 3 (“Custody is the most severe measure of restraint, therefore it should be selected only if there are grounds to believe other (less severe) measures of restraint” are not sufficient) and paragraph 13 (“[t]o elucidate to courts that a mandatory condition of taking to custody (regarding its legal nature) should be a reasoned confidence of the judge that more lenient measures of restraint may not ensure proper behavior of a suspect or accused.”)

2. Bail

The Pilot Protocol also addressed bail. As discussed above, it is widely accepted that in Ukraine bail is an underutilized condition of release (as clearly shown by the above numbers for the last six months of 2005). The most commonly accepted reasons are (1) the courts do not have or do not believe they have a workable mechanism either for placing a value on a person’s property or to deposit cash or property titles; and (2) the statutory bail minimums are simply too high for bail to be an option for most suspects or accused persons.

In an effort to stimulate local courts’ willingness to consider bail as an alternative to custody, the Pilot Protocol did three things:
1. Before ordering custody as a preventive measure, the Court must have inquired into the financial holdings of the suspect or accused, including cash or bank deposits, real property (other than his or her private residences), or personal property (e.g., automobiles, jewelry, appliances, audio/video components, et al)

2. The court must have made a record of whether the person had sufficient resources to post the statutory minimum bail amount.

3. If the court, after finding that the person was able to post the statutory minimum bail amount, still believed that bail was not a sufficient preventive measure, it must have placed its reasons on the record.

3. The Court’s Decision

The Court must have announced its decision to the suspect or accused, explained the conditions imposed, and had the person sign his or her acknowledgement of the conditions. See Decree, paragraph 16. The court must also have explained the appeal rights that are available to each party.

4. Appeals

The Court was also required to explain that, following the entry of the pretrial release or detention order, either party had the right to an immediate appeal, which must have been filed in a court of appeal within 3 days of the entry of the order. See CPC Articles 165 and 349. Pursuant to CPC Article 382, the court of appeal should receive the lower court materials without delay. See also Decree, paragraph 17.

5. The Place of Detention

Finally, the Pilot Protocol required the court to inquire into the place where the detained person was being held in custody. Ukrainian law, in CPC Article 155, requires that pretrial detainees be held in “investigation holding facilities,” or “in some cases places for holding detained persons.” There is a widely-held belief that in Ukraine, pretrial detainees are often held, along with convicted persons, in prisons with substandard conditions. This may be due to facility overcrowding or as a way to facilitate a “successful” interrogation. By requiring the Court to inquire into this issue, and order the immediate transfer of a detainee to a different facility where appropriate, the Pilot Protocol sought to address this concern head-on.

B. SUBMISSION OF THE PLAN TO THE SUPREME COURT OF UKRAINE

In March 2006, the Pilot Project’s legal advisors met with key members of the Supreme Court of Ukraine to submit the Pilot Protocol and Form Pretrial Order to be used in every applicable case. The legal advisors requested that the Supreme Court enter an administrative order adopting the documents and requiring all judges in the Nikolaev Oblast to follow and use the documents.

Also at the March meeting, a preliminary issue arose that needed to be resolved by the Court. The original Pilot Project proposal envisioned court hearings in every criminal case in which a preventive measure was requested. The concept was intended to shift all such decision-making away from investigators and prosecutors and to an independent judiciary. When the concept was announced, 15

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15 With respect to international standards of detained persons, the major international conventions require that a suspect or accused who has been detained be promptly brought before a judge or judicial officer to determine both the legality of the detention and to assess whether detention before trial is necessary. The international standards essentially combine into one hearing a detainee’s rights to both a determination of the legality of the arrest and a decision on whether to detain or release.
however, there was some opposition expressed. The general view from Ukrainian judges was that there would need to be legislative amendments for such a change because the existing Criminal Procedure Code clearly authorized investigators and prosecutors to impose all restrictive measures short of custody. As a result, the Pilot Project was scaled back to apply to only those cases in which custody was sought, or could result from an action, by an investigator or prosecutor.

In April 2006, the Supreme Court responded to the submission of the Pilot Protocol and Form Pretrial Order with four written comments regarding what it believed were deviations from the statutory language contained in the Criminal Procedure Code or provisions in the Supreme Court Decree. The Pilot Project addressed each of the Court’s concerns by revising portions of the documents, and then re-submitted the documents for final approval.

In June 2006, the Court advised that it was uncomfortable with the concept of a Form Pretrial Order. It instead suggested a similar order and a separate data collection document drafted by the Nikolaev Court of Appeal. These documents captured almost identical data sought by the Pilot Project’s documents, but still required local judges to issue written decisions on pretrial custody matters. While certainly an improvement from the previous process, the new form did not have the benefit of the category by category “script” afforded by the Pilot Project’s Form Pretrial Order to ensure complete compliance with the detainees’ legal protections.

With respect to bail, even though the Form Pretrial Order was not ultimately adopted, a letter from Nikolaev Appeal Court Chief Judge Koval to all local judges essentially required the same things. Where a hearing was held on a petition for custody as a preventive measure, local judges were to inquire into the financial status of the detainee and, if appropriate, impose bail - and not custody - as a preventive measure. Most importantly, the Court of Appeal set forth in subsequent bail orders the bank account numbers of the Court of Appeal and the Ukraine Court Administrator’s office, into which bail money could be deposited by a defendant or his or her family or friends depending on whether it was a local court of the Court of Appeal that set bail. Thus, there was for the first time an easy mechanism to dispose of the cash that might be posted. The posting of property as bail, allowed by the Criminal Procedure Code, remains problematic, but the Nikolaev Court of Appeal appears to be determined to make it work if and when it is confronted with that matter.

With Chief Judge Koval’s letter and accompanying documents disseminated to all Nikolaev judges throughout the oblast, the Pilot Project was finally implemented in July 2006.

C. THE EFFORT AT IMPROVING CUSTODY HEARINGS

Following the study trip, Pilot Project also began to think about steps that would ensure that whenever custody was sought as a preventive measure, the court would hold a public and transparent hearing in the courtroom. At such a hearing, the defendant and his or her counsel (if there is one) would be present, with the burden of proof squarely on the prosecution to convince the judge that no other preventive measure short of custody could sufficiently assure the defendant’s future appearances and appropriate behavior. Ordinarily, in order to meet its burden the prosecution would have to present testimony of a witness who would be subject to cross-examination.

Such hearings would serve several purposes: First, the hearings would put the prosecution to its proofs on the issue of custody as a preventive measure. Second, it would focus on the ultimate decision being made by an independent judge based on the evidence presented (or lack thereof). Finally, it would instill public confidence in the judiciary, as friends or family of the accused would be able to see the full proceeding and better understand its nature and the basis of the court’s ultimate decision.

the detainee pending trial. The Supreme Court of Ukraine has made clear that, at least where custody is sought as a preventive measure, the Court must inquire into the legality of the arrest at the hearing on the preventive measure. See Decree, paragraph 10. Where custody is not sought, it is unclear when a suspect or accused will ever appear before a Court prior to the trial.
Ultimately, such hearings did not develop in any systematic way. There is simply too much history and too many forces against such seismic change. Judges, even if inclined to seek such hearings, cannot force the prosecutor to produce evidence, especially live witnesses, at a custody hearing.\footnote{While judges could refuse to detain persons unless the prosecution puts on evidence at the hearing, judges still feel threatened by the General Prosecutor’s office, its ability to appeal every such case, and its ability to seek disciplinary proceedings against a judge.} Under existing law, if the defendant has a lawyer that lawyer is not required to appear at a custody hearing, and appointed counsel rarely will appear due to the distressingly low rates of pay and even more frustrating inability to ever actually receive payment.

**D. TRAINING**

Following the study trip, the Pilot Project put on trainings for Nikolaev Oblast judges and defense counsel. The trainings consisted of a thorough review of the law of pretrial detention and release, including a discussion of all preventive measures. The trainings also included a careful review of the Pilot Project’s Pilot Protocol and Form Pretrial Order.

Of the approximately 125 Nikolaev judges who at least occasionally hear pretrial custody hearings, more than 100 of them attended one of the three training sessions held in Nikolaev during the first week of May 2006. The following week, a similar training was held for criminal defense lawyers, with more emphasis put on effective advocacy at a custody hearing.

**E. A BROCHURE FOR THE ACCUSED AND OTHERS**

The Pilot Project developed a brochure on preventive measures generally, and more specifically bail, for use by accused persons and other interested persons such as advocates and accused persons’ family. The brochure describes the array of statutory preventive measures and then focuses on bail as a preventive measure.

The brochure is intended to educate defendants and their friends and family on the general legal principles which govern pretrial preventive measure decisions and the general process which leads to a preventive measure decision.

The Nikolaev Oblast Appellate Court did final editing of the brochure and hundreds of copies of the brochure were delivered to the Nikolaev Appellate Court in late 2006. That Court distributed copies of the brochure to oblast judges, courts, and pretrial detention centers. As a follow-up to the brochure ABA/CEELI will prepare preventive measures guidelines aimed at and drafted by judges, prosecutors, and defense counsel. A “benchbook” will be developed for judges that will also be accessible to prosecutors and defense counsel. These documents will ensure that each of the actors in the criminal justice system will have a thorough familiarity with the law and practice of preventive measures, especially the underutilized bail.

**F. AN EXPERIMENTAL “PRETRIAL SERVICES OFFICER”**

As mentioned above, the Ukrainian delegation that participated in the April 2006 study trip to Washington, D.C., was particularly impressed with the concept of a pretrial services agency that independently investigates an accused person’s circumstances regarding the pretrial release decision. In the U.S. federal and District of Columbia court systems, such an agency operates independently from the prosecution, and reports directly to the judge. The investigation is limited to those matters relevant to the pretrial release decision and does not elicit information from the accused person about the charged offense nor share with the prosecution any information about the offense conduct that the accused might inadvertently blurt out.
The Nikolaev Oblast court system did not have available resources to add such an independent agency. Therefore, the Pilot Project agreed to provide a single court with a person who would be charged with carrying out an independent pretrial investigation of an accused wherever custody was sought as a preventive measure.

The central Nikolaev District Court was selected. It is the court of general jurisdiction for the City of Nikolaev. The Court and the Pilot Project agreed that the selected person could not have a law enforcement background; would prepare a written report for the assigning judge regarding the accused person’s circumstances; and the report would be disclosed to both the prosecutor and defense prior to the custody hearing. The Court’s Chairman, Alexander Golubkin, after giving the Pilot Project’s legal advisors an opportunity to meet and approve the proposed candidate, assigned an existing court employee to fulfill the role of independent investigator for pretrial release purposes.

This independent investigator began her duties on June 1, 2006. Chairman Golubkin reported wide-spread satisfaction by all of the judges on the court. Without exception, the judges believed the pretrial reports were more complete, less biased and more reliable. Unfortunately, there was not a funding source from which to continue the position following the end of the fiscal year on September 30, 2006.

V. The Statistics

A. THE PRETRIAL RELEASE STATISTICS FROM 2005

The 2005 pretrial release statistics obtained from the Ministry of Internal Affairs showed that Ukraine as a whole accused 204,011 persons of committing crimes. Of these accused persons, 95,463 were alleged to have committed grave or especially grave crimes, i.e., crimes punishable by at least 10 years of imprisonment. A total of 52,866 people out of the 204,011 (25.9 %) were initially detained (arrested) and of these, 15,948 people (30.2 %) were released pretrial. Of these 15,948 people who were released, 8,577 (53.8 %) were released due to a prosecutor's refusal to consent to an investigator’s motion for custody.

The most likely preventive measure to be imposed other than custody was a signature bond under which the detainee promised to appear for future investigative and court appearances and not change residence without notice to the authorities. Out of the 204,011 persons accused of committing crimes, 165,183 (81 %) were released on their signature.

With respect to bail, as discussed above, the numbers were distressingly low. Throughout the entire country, bail was used as a preventive measure 274 times. Out of the total of 52,866 who were detained, that constitutes a bail rate of .005 %. Out of the total of 15,948 who were released, the rate released on bail was .02 %. While bail and its limitations are discussed more fully above, it is fair to say that bail was virtually nonexistent throughout Ukraine.

In a breakdown of localities, the Nikolaev numbers stood out. The Nikolaev Oblast accused a total of 7,032 persons of committing crimes. Of these accused persons, 1,848 (26.3 %) were alleged to have committed grave or especially grave crimes punishable by at least 10 years of imprisonment. A total of 2,959 (42.1 %) were initially detained (arrested), a rate significantly higher than the 25.9 % national average. Nikolaev, however, released 1,724 of those 2,959 detained persons (58.3 %), nearly double the national average of 30.2 %, and indeed the highest percentage of pretrial release in the entire country. No other region or city in the country exceeded 50 % in its rate of releasing detainees.\footnote{The second highest rate of release of detainees was the Odessa Oblast at 49.2 %. The lowest rate was in the Lviv Oblast, which released detainees at a rate of 14.6 %, less than a quarter of the Nikolaev rate.}

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A further breakdown of who released these detainees is instructive. Nikolaev investigators released 1,266 (73.4 %) without filing a petition seeking custody; this was well more than double the national average of 31.4 %, and again led the country in this regard.\textsuperscript{18} Of these released persons, 543 (42.9 %) were originally detained for allegedly committing grave or especially grave crimes punishable by at least 10 years of imprisonment. Of the 1,724 people who were released in the Nikolaev Oblast, 362 (21 %) were released due to a prosecutor’s refusal to consent to an investigator’s motion for custody to be imposed. That rate was the third lowest in the country.

Thus, when compared to the national average and those from other oblasts and cities, Nikolaev authorities initially detained (arrested) a relatively high number (42.1 %) of those persons accused, but then released them at a rate (58.3 %) nearly twice that of the national average.\textsuperscript{19} Nikolaev investigators were nearly two-and-a-half times more likely than the national average to release detained persons without filing a petition for custody. Of those who investigators sought to keep in custody, Nikolaev prosecutors refused to consent to the request about one out of five times, a low number no doubt explained by the unusually high rate of release by investigators.\textsuperscript{20}

**B. THE STATISTICS DURING THE PILOT PROJECT**

At the end of the fiscal year project funding in September 2006, with the new bail requirements in place only since July 2006, four defendants in the Nikolaev Oblast had been released on bail. That was a 300 % increase over the preceding two years, during which a single defendant had been released on bail throughout the entire oblast.

Unfortunately, over time the bail option ceased being used by oblast judges because, according to the Nikolaev Oblast Appellate Court, virtually no defendant could pay the statutory minimum bail amounts.\textsuperscript{21} In time, after defendants who were offered the bail option rejected it, oblast judges stopped offering the option at all.

The Pilot Project legal advisors believe that the oblast judges stopped offering bail for practical reasons, as well: First, the lack of a Pilot Project Nikolaev presence after August 1, 2006 inevitably led to less personal contact between the Pilot Project and the Nikolaev oblast courts, resulting in an “out of sight, out of mind” decrease in the judges’ interest in the Project; and second, by not adopting the Pilot Project’s more user-friendly Pretrial Order Form, granting bail requires judges to prepare a written opinion explaining the reasons behind the preventive measure, which is an extra burden for the judges.

**VI. Recommendations**

**A. LENGTHENING AND EXPANDING THE PILOT PROJECT**

In light of the potential for success with bail usage in the Nikolaev Oblast, it would be a mistake to let this Pilot Project “die on the vine.” The main goal of the Pilot Project, from its inception, was to get

\textsuperscript{18} The second highest rate of investigators releasing detainees without filing a petition seeking custody was the Khmelnitska Oblast at 71.0 %. The lowest rate was an astounding 0.4 % in the City of Sevastopol. Five other areas had an investigator release rate of less than 10 %.

\textsuperscript{19} It is fascinating that Nikolaev investigators were responsible both for abnormally frequent initial detentions and abnormally frequent releases without seeking custody. There is no obvious explanation for this paradox though two possibilities are, first, that the Nikolaev Investigator’s office, while quick to arrest, is committed to releasing all but the most risky defendants; or second, that the matter of release from custody is open to bribery. This Pilot Project did not further explore this paradox as it fell outside the scope of the Project.

\textsuperscript{20} The only lower rates of prosecutors refusing to consent to custody were in the Lviv Oblast at 17.7 % and the Lviv city at 7.8 %.

\textsuperscript{21} The problem with this explanation is that apparently four defendants could meet the statutory minimum shortly after the bail program was begun.
courts (more specifically Nikolaev Oblast courts) to more frequently use bail as a preventive measure. While the delay in the Pilot Project’s implementation resulted in a dearth of numbers with which to compare to 2005 statistics, the preliminary success calls for an expansion of the Pilot Project both in duration and geography.

With respect to duration, the Pilot Project should continue in Nikolaev. It is clear that when the Pilot Project ceased to maintain a physical presence in Nikolaev, the Pilot Project effectively ceased to exist. This was no doubt exacerbated by Nikolaev Appellate Court Chief Judge Koval’s mandatory retirement in January 2007.\(^\text{22}\) Too much groundwork, training, and effort went into the Nikolaev effort to let the program there end.

With respect to geographic expansion, the next logical step is to seek the Supreme Court of Ukraine’s permission to select another oblast in which to implement the Pilot Project’s bail initiatives. Given the indispensable support of Chief Judge Koval in Nikolaev, the next oblast should be one with an equally reform-minded Chief Judge of its Appellate Court. If the bail usage numbers can be increased in another oblast, there is no reason that the bail initiative cannot be implemented on a country-wide basis.

In considering the appropriate oblast to which to expand the pretrial release program, two criteria should be considered: First, an oblast closer to Kiev would allow for more direct supervision by the ABA/CEELI Kiev office. Second, it would be useful to select an oblast with more wealth than Nikolaev, to increase the number of potential accused or suspects with the resources to post the statutory minimum bail amounts.

Continuation and expansion requires the blessing and support of the Supreme Court of Ukraine. After the modest success in Nikolaev, the Court should be willing to authorize an extension in Nikolaev and a modest expansion to an additional oblast. The major obstacles during the Nikolaev Pilot Project took many months to hurdle but they were ultimately overcome and resolved. There is no reason for those obstacles to re-appear.

While budget issues are no doubt a concern, extending the Nikolaev piece should require only a periodic presence of an implementer at minimal cost. Geographic expansion would likely require a temporary sustained presence in the new oblast, but that relatively small amount of resources would be money well spent if the expansion leads to a country-wide increase in bail usage.

**B. AMENDMENTS TO THE UKRAINE CRIMINAL PROCEDURE CODE**

Before, during, and after the Pilot Project’s implementation, the Projects’ legal advisors kept track of a number of problems in the Ukrainian pretrial detention phase that require legislative “fixes,” i.e., repeal or amendment of portions of the existing Criminal Procedure Code. Most of these “fixes” would not appear to require extensive resource expenditures; some undoubtedly will. The proposed changes have been categorized accordingly.

1. **Amendments That Require No Increased Resources\(^\text{23}\)**

   a. **Judicial Hearings and Decision Making for all Preventive Measures**

As discussed above, under extant Ukrainian law, a judicial decision on preventive measures is required only where custody is requested by an investigator or prosecutor. All other preventive

\(^{22}\) New Chief Judge Rzhepetsky, however, was actively involved in the Pilot Project and seems equally committed to its goals.

\(^{23}\) The Pilot Project legal advisors recognize that any criminal justice “fixes” may require some resource expenditure. For example, requiring a hearing in all preventive measure matters will presumably require additional prisoner transports to and from the court. This section includes legislation that should not require a significant increase in or new line item in the country’s criminal justice budget.
measures may be imposed by “[a]n inquiry authority, investigator, [or] procurator.” See CPC Articles 165, 165-1, 165-2. In order for Ukraine to move away from its Soviet past into the category of nations with an independent judiciary, no preventive measure should be imposed by anyone other than a judicial officer. Any preventive measure places some restriction on a suspect’s or accused person’s personal liberty. An independent judge - not an investigator or prosecutor who has a direct stake in the outcome of the decision and the case - must be the person to decide the issue.

Moreover, international law requires at a minimum that a suspect or accused who has been detained be promptly brought before a judge or judicial officer to determine both the legality of the detention and to assess whether detention before trial is necessary. As to the determination of the legality of the arrest, see the International Covenant on Civil and Political Rights (ICCPR), Article 9(3) (“Every arrested or detained person in criminal case must be immediately brought before a judge or other authority which by law has judicial authority. Such a person has a right to a judicial hearing within a reasonable time or be released pending trial.”); ICCPR, Article 9(4) (“Each person who was taken into custody as a result of arrest or detention has a right to a court hearing and the court can immediately decide the legality of the detention and release this person if the detention was illegal.”); the European Convention on Human Rights (ECHR), Article 5.3 (“Every detained or arrested person is to be immediately brought before a judge or other authority which according to the law has judicial power, and has a right to a judicial hearing within a reasonable period of time or be released pending trial.”); Principle 38 of The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by consensus by the UN General Assembly in 1988 (“The person detained based on a criminal charge has a right to a court hearing within a reasonable time or be released pending trial.”)

Under the current Ukraine procedure, where a person has had a preventive measure other than custody imposed, the first time that person will see a judge is at trial, which may be many months or even years down the road. The current CPC Articles 106 and 165, 165-1, and 165-2 should be amended to require that a detained person be promptly brought before the court for a hearing on both the legality of the arrest and charge and any appropriate preventive measure to be imposed.

b. Discovery of Materials by the Defense

The loudest complaint voiced by advocates throughout Ukraine is the refusal of prosecutors and courts to ensure that the defense receives all documents relevant to the request for custody as a preventive measure. Surely there can be no “equality of arms” in the custody hearing if the defense does not even know the basis for the request, let alone evidence that may support it.

c. Prosecutor’s Burden to Prove No Less Restrictive Alternative

While the current CPC appears to implicitly place the burden of proof on the prosecutor where custody is sought as a preventive measure, the CPC should explicitly make this point.

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24 The international standards essentially combine into one hearing a detainee’s rights to both a determination of the legality of the arrest and a decision on whether to detain or release the detainee pending trial. The Supreme Court of Ukraine has made clear that, at least where custody is sought as a preventive measure, the Court must inquire into the legality of the arrest at the hearing on the preventive measure. See Decree, paragraph 10. Where custody is not sought, it is unclear when a suspect or accused will ever appear before a Court short of the trial.

25 The UN Human Rights Committee has squarely held that a detainee is entitled to a prompt hearing before a judge or judicial officer; no other government agency (i.e., an investigator or prosecutor) is a sufficient substitute, as only a judge brings the necessary objectivity to the matter. See Chakhal v. UK, 70-1995-576-662 (November 15, 1996); Torres v. Finland, 219-1988 (April 2, 1990); Vuolann v. Finland, 265-1987 (April 7, 1989).

26 While it is true that the imposition of preventive measures other than custody may be appealed to a court, see CPC, Article 106, that option is generally not known by the detainee and rarely occurs.

27 International law requires an “equality of arms” between the prosecution and defense in a criminal case. See ICCPR Article 14(3), which guarantees defendants certain minimum standards of a fair trial “in full equality.”
CPC Article 165-2 requires the prosecutor to provide a “sufficient reason for selecting [the requested measure].” This appears to place the burden of proof on the prosecutor to justify custody as a preventive measure. The Supreme Court agrees, stating in its Plenum Decree No. 4 dated 25 April 2003, amended by Plenum Decree No. 10 dated 11 June 2004 (hereinafter “Decree”), at paragraph 13: “[A] mandatory condition of taking into custody should be a reasoned confidence of a judge that more lenient measures of restraint may not ensure proper behavior of a suspect or accused.”

As written, however, the Article fails to spell out the burden of proof. In the United States, for example, where the government seeks pretrial detention, the federal statute places two different burdens of proof on the government: (1) Where the basis for the detention request is risk of flight, the government must prove the need for detention by a “preponderance of the evidence.” (2) Where the basis for the request is that the detainee poses a danger to the community, the government must prove the need for detention by “clear and convincing evidence.” See 18 U.S.C. Section 3142(f).

A similar spelling out of the prosecutor’s burden of proof should be added to CPC Article 165-2.

d. Eliminating Bail Minimums

The purpose of bail is to provide a financial incentive for the accused person to engage in “proper conduct, compl[y] with an obligation not to leave the place of permanent or temporary residence without [ ] permission, and appear[ ], upon being summoned, before an investigative authority or in court.” See CPC Article 154-1. Thus, the appropriate amount of bail should be an amount low enough that the accused person can pay, but high enough for bail forfeiture to cause real financial damage to the person. An amount of bail that is too high and that the accused person cannot afford is nothing more than an illusion, since the result will be that the person is placed in custody.

By placing statutory minimums on bail, the legislature has simply “priced out” bail as an option for some people due solely to their indigence. The amount of bail to be set must be left to the discretion of the local judge who, after inquiring into the detainee’s financial circumstances, is in the best position to determine the appropriate bail. There should be no mandated minimum or maximum amount, as all persons’ circumstances are unique.

e. The 72-hour /10-day Rules Violation Remedies

The Ukraine Constitution and CPC place strict time limits during the preventive measure phase of a case. Under Article 29 of the Constitution, “The detained person should be immediately released if, within 72 hours of his detention, he is not given a motivated decision of the court about his detention in custody.” A plainer mandate is difficult to imagine.

Additionally, pursuant to CPC Article 106, “upon detention, the inquiry authority shall within 72 hours: (1) release the detainee if the detention period described by law expired.” Pursuant to CPC Article 165-2, a motion to impose custody as a preventive measure “must be considered within 72 hours from the detention of a suspect or accused.” If the suspect or accused over which custody is sought is not already detained, “the period of detention may not exceed 72 hours.”

Despite these clear constitutionally- and statutorily-mandated remedies for the violation of the 72-hour rules, the Supreme Court of Ukraine has inexplicably eliminated these remedies. In its Decree, at paragraph 5, the Court stated: “[I]f a submission on taking to custody of the detained person is delivered to court after expiration of these terms, it is not a reason for refusal to consider the submission.” (Emphasis added). In light of this strained interpretation, CPC Articles 106 and 165-2 should clearly provide that where any detained person is neither provided a hearing nor released within 72 hours of the time of detention, the detainee’s custodian must immediately release him.
Pursuant to CPC Article 148, “[i]n applying a preventive measure to a criminal suspect, charges against him shall be brought not later than 10 days of the time of application of the preventive measure.” CPC Article 148 does not provide a remedy if this rule is violated, nor has the Supreme Court addressed the matter. Article 148 should provide that where a suspect or accused person has been subjected to a preventive measure and has not been charged within 10 days of the time the measure was imposed, the preventive measure must immediately be rescinded.

f. A “Good Cause” Requirement for a 10-day Delay in the Decision

Currently, CPC Article 165-2 permits the court to, *sua sponte*, extend the detention for up to 10 days if it believes additional information or corroboration is required to make an informed decision. This 10-day rule is frequently invoked, resulting in presumptively innocent people being jailed for up to 10 more days even though the government has failed to convince the court of the need for custody at the scheduled hearing.

Article 165-2 should be amended to add a “good cause” requirement for the 10-day delay. The government must show or the judge must find “good cause” for the delay. In the absence of good cause, the detainee should be released on whatever conditions the court imposes.

g. Shortening the Duration of Pretrial Detention

Under extant law, the length of time a person - a presumptively innocent person - may spend in pretrial detention is unduly long. Pursuant to CPC Article 156, “[a] person may not be held in custody for longer than two months in the pre-trial investigation.” This general rule is reasonable and appropriate. Unfortunately, the Article then provides for extensions to this time period “to complete [the] investigation,” and these extensions can be for as many as 18 months, resulting in a total period of custody of 20 months. Additionally, the Article defines pretrial custody as beginning at the time of custody or detention (whichever is first) and ending “on the day the case is received for trial.” Thus, unless the Court releases the defendant on some less restrictive preventive measure, the detainee remains in custody during the trial, extending even further the total time a presumptively innocent person may be held in custody prior to being convicted of any crime.

Article 156 should be amended to shorten the length of possible extensions to the usual two-month rule. No legally innocent person should be held in custody for more than a year-and-a-half before the trial at which the government will attempt to prove his guilt. A 180-day rule should stipulate that a detained person must be brought to trial within 180 days or be released on some less restrictive preventive measure unless the government can affirmatively prove by clear and convincing evidence that the person poses an imminent threat to the safety of others.

2. Amendments That Will Require Expenditures

a. Timely Appointment of and Payment to Counsel

CPC Article 47 provides for the appointment of counsel for minors, mentally defective persons, and indigent persons. It is widely known in Ukraine that there is a severe shortage of available appointed counsel for the simple reason that they are vastly underpaid for their services and experience lengthy delays in actually getting paid the small fees they earn. The current rate of pay is 17 UAH per day, but the procedural requirements for getting paid are so Byzantine and burdensome that actually getting paid is the exception and not the rule. Criminal defense lawyers, like other professionals, have

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28 Article 165-2 permits a 15-day extension of detention if the defense so moves, to, for example, seek to raise money to post bail. Under those circumstances the motion should be granted as a matter of course; there, the presumptively innocent defendant is not having his detention extended over his objection.
office overhead to pay and the need to earn adequate income to support a family. Until the rates of payment for appointed counsel are raised, and the process by which payment is made is simplified, there will continue to be a crippling shortage of appointed counsel, resulting in reduced reliability of the decision made by a Court, and the public’s lack of confidence in the fairness of the criminal justice system.

b. Requirement of Defense Counsel Participation

In a related matter, current Ukraine law does not require defense counsel’s presence - let alone participation - at a pretrial custody hearing. See CPC Article 165-2. The Supreme Court has not provided any protection to an unrepresented suspect or accused person, concluding that the “[f]ailure to appear of a defense counsel or legitimate representative of a suspect or accused does not impede the consideration of a submission provided they were informed about its time and place.” See Decree at paragraph 8.

Yet the hearing to determine whether or not the detainee remains free or is jailed for the entire pretrial phase is surely a critical stage of the case that requires defense counsel assistance.29 Not only is a presumptively innocent person’s liberty at stake, so is his/her abilities to assist in the defense and to meet family and financial obligations during the pretrial phase.

To require defense counsel’s participation at pretrial custody hearings will cost a relatively minor amount of money to pay court-appointed counsel for their preparation and court time while making a huge impact improving the judicial process for accused persons and instilling public confidence in preventive measure judicial decision making.

c. Establishing Independent Judicial Pretrial Services Officers

The Ukrainian judges who traveled to Washington in April were particularly impressed with the pretrial services officers who investigated a detainee’s circumstances and reported back directly to the judge. This is critically important because currently, the case investigator is the person who does any investigation of a detainee’s circumstances; the case investigator is usually the person asking the Court to place the detainee in custody, and thus has a direct conflict of interest.

Pretrial services officers should report directly to the Court. Such officers should investigate a detainee’s circumstances with an eye toward whether the person can reasonably be expected to abide by conditions of release. The officer should interview the detainee about employment, residence, prior criminal history, and any other fact that may be relevant to the judge’s pretrial release decision. Then, the officer should follow-up on the information to verify its accuracy, etc.

The officer should not ask questions about the alleged criminal conduct, and if the detainee makes any statements about the alleged offense such statements should not be reported to the judge or put in the written report. Without this safeguard, detainees will not cooperate in an interview. Additionally, a written report should be prepared for the judge, a copy of which should be provided to both the prosecutor and defense lawyer prior to the custody hearing.

Establishing this independent office will accomplish several things. First, it places the pretrial release investigation in the hands of a person who has no stake in the outcome of the preventive measure decision. That means the judge can have more confidence in the accuracy of the information, and the detainee can have more confidence in the unbiased nature of the investigation and report.

29 Under CPC Article 156, while there is a two-month ceiling on pretrial custody, that period can be extended by four months merely upon motion by the investigator in coordination with the procurator; by nine months upon motion by the procurator; or by 18 months upon motion by the procurator in coordination with the Prosecutor General. See section (g) above.
Second, it will produce better and more complete information to the judge; the case investigator has no incentive to follow-up on information that my result in the detainee’s release, and may well believe his or her time is better spent investigating the offense or other unrelated offenses. Third, it is a step towards a more adversarial pretrial process, where both the prosecution and defense have access to the same information regarding a detainee’s circumstances, and each can argue his or her position based on those facts.

The costs of such a program may well be recouped if the result is fewer people being detained and thus reduced costs of incarceration. In any event, a presumptively innocent detainee should be entitled to an unbiased, complete investigation of his or her circumstances before being released or detained during the entire pretrial and trial phase.

d. Electronic Monitors, Half-Way Houses, and Substance Abuse and Mental Health Treatment Centers

Alternatives to costly pretrial incarceration have gained widespread use throughout the world. There are several reasons for this. First, less restrictive alternatives cost less than locking people up; second, such alternatives more fully respect the presumptively innocent nature of pretrial detainees; and third, such alternatives permit accused persons to meet with their attorneys for trial preparation, remain with their families, and continue to work and earn income.

Three alternatives to incarceration are electronic monitors, half-way houses, and substance abuse and mental health treatment centers. Each of these alternatives achieve the interests stated above; the treatment centers also allow the accused person to begin dealing with the conditions that may have played a significant role in the allegedly criminal conduct for which he/she is charged.

e. Improving Conditions of Pretrial Detention Facilities

Ukraine judges, prosecutors, investigators, defense lawyers, and correctional officials all agree that the state of pretrial detention facilities in Ukraine is at best dismal and at worst severe punishment of presumptively innocent pretrial detainees. There are consistent themes in the litany of problems that people list: There is an urgent need for more space; currently detainees break down days into shifts to determine who will have a bed in which to lie. Pretrial detention facilities are filthy and have rampant outbreaks of tuberculosis and AIDS. Investigators take advantage of such conditions by interrogating pretrial detainees and offering the enticement of getting out of the facility in exchange for “cooperation,” i.e., a confession.

Holding cells in courthouses are also troubling. In one district courthouse in Nikolaev, for example, the Pilot Project’s legal advisors were permitted to look in on three pretrial detainees who were brought to the courthouse for court proceedings in their case. In a cell that was about 1.5 meters x 1.5 meters (about 5 feet wide and 5 feet deep), there was a small bench barely large enough for two people. Two of the men were sitting while the third stood. There was virtually no room to move around and the heat and stuffiness in the small room were stifling. Such conditions are ripe for fights to break out or a weak prisoner to be preyed upon.30

Only expending more resources on these existing facilities and building new facilities will alleviate the problems. While incarcerating less people pretrial will also help, of course, it does not appear realistic that this alone - even if such a reduction occurs - will be sufficient to fix this badly broken system.

30 That courthouse had begun construction on larger holding cells, though it was unclear when the new cells would be completed.
Like all countries, Ukraine must make a difficult choice. Appropriating additional resources on pretrial detention facilities and prisons is never politically popular, but a society that values the presumption of innocence, human decency, and the health and safety of those in the custody of the State, must nevertheless expend the necessary resources.

VII. Conclusions

There are three major conclusions to be reached following the first year of the Pilot Project.

First, Ukraine’s government - here, more specifically, its Supreme Court - continues to struggle with the commitments to reform made following the 2004 “Orange Revolution.” The Pilot Project’s legal advisors submitted to the Supreme Court their design of the project, complete with the Pilot Protocol and Form Pretrial Order, in March 2006. Without clear explanation, the Court’s approval was delayed. While there are members of the Supreme Court who are clearly reform minded and particularly keen on the reform of pretrial detention matters, such fundamental reform takes time and cannot be accomplished without growing pains and some delay.

Additionally, the delay may have been exacerbated by confusion and poor communication between members of the Court. On several occasions, members of the Court who had not previously attended Pilot Program meetings had either not been briefed on what had already occurred or took positions contrary to those taken by their colleagues. The Court also seemed more comfortable communicating directly through the U.S. Embassy, which would result in delays in receiving communications and at times inaccurate or incomplete content of the message received.

Second, it is ultimately up to the Ukraine Parliament to fix much of what is broken in Ukraine’s criminal justice system. A revised Criminal Procedure Code is essential if Ukraine is serious about judicial reform. Ukraine still has deep roots in its civil - not common law - justice system. The Supreme Court of Ukraine is unable to issue decisions that deviate from the written statutes. Thus, the written statutes must be changed. While this Report sets forth suggested legislative changes, those are only the changes that relate to pretrial detention or release. There are many more legislative changes that could positively affect the rest of the country’s criminal procedure.

Third, this Pilot Project is another reminder that finding key government officials who are committed to reform is absolutely essential for success. Here, that key government official was Chief Judge Koval of the Nikolaev Appellate Court. Over and over again he stated (publicly and privately) his commitment to the program and worked closely with the Pilot Project’s legal advisors to try to make the program a success. Despite the delays and legislative hurdles, Chief Judge Koval persisted in his efforts to increase bail usage in his oblast.31 His efforts began to bear fruit until the Pilot Project’s physical presence in Nikolaev ceased.

Unfortunately, the Pilot Pretrial Detention Project got a late start, encountered legislative, bureaucratic and political obstacles, and took place in an oblast that already had the highest rate of pretrial release in the entire country of Ukraine. Despite those difficult circumstances, the Program was implemented, there was a significant increase in the number of people released on bail (though still a very small number), and more than 120 Nikolaev judges were trained on scrupulously honoring the rights of pretrial detainees. By any reasonable measure, the Pilot Project was a success.

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31 The Pilot Project’s legal advisors want to reiterate their confidence in Chief Judge Koval’s successor, Chief Judge Rzhepetsky., who was actively involved in and supportive of the Pilot Project. He was visibly working to improve the criminal justice system in the Nikolaev oblast.