Judgement-drafting and Training on Legal Writing in the Republic of Moldova
Judgement-drafting and Training on Legal Writing in the Republic of Moldova

Holger Hembach

This report has been produced with the assistance of the U.S. Government provided in the framework of the ‘Support to Justice Sector Reform in Moldova’ Project, implemented by the United Nations Development Programme. The views expressed in the document are those of the authors and do not in any way express, nor do they necessarily reflect the official position of the United Nations Development Programme or the U.S. Government.

Any omissions, inaccuracies and mistakes are solely the responsibility of the authors.
Content

Background and methodology ........................................................................................................................................... 3
Summary ............................................................................................................................................................................. 5
International standards .......................................................................................................................................................... 7
    Opinion no. 11 of the Consultative Council of European Judges ........................................................................... 7
    Article 14 ICCPR ............................................................................................................................................................. 8
    Requirements under the European Convention on Human Rights ................................................................. 8
        Article 6 ECHR ............................................................................................................................................................. 8
        Obligation to provide reasons which are relevant and sufficient ................................................................... 9
Current practices in the area of judgment writing and perceived short-comings ......................................................... 11
    Analysis of judgments .................................................................................................................................................. 11
        Language ................................................................................................................................................................... 11
        Assessment of evidence ............................................................................................................................................. 13
        Legal assessment ........................................................................................................................................................ 23
    Possible reasons for short-comings ............................................................................................................................... 32
        Workload ................................................................................................................................................................... 32
        Corruption .................................................................................................................................................................. 33
        Lack of training ......................................................................................................................................................... 33
Training on legal drafting ................................................................................................................................................... 34
    Training on legal writing at the National Institute for Justice ................................................................................. 34
    The case for separate courses on legal writing ....................................................................................................... 35
Examples from international practices ........................................................................................................................... 41
    Dealing with evidence ..................................................................................................................................................... 44
    Breaking down legal provisions and defining legal terms ......................................................................................... 44
Recommendations ............................................................................................................................................................... 49
Appendix: Training outline .................................................................................................................................................. 51
This report was drafted in the frame of a project financed by the U.S. Embassy and implemented by UNDP Moldova. The project aims to increase the overall quality of judgements and legal drafting in the Republic of Moldova; the report provides an assessment of current practices in the area of the judgement drafting and describes (perceived) shortcomings. It also depicts the way legal writing is taught at the National Institute of Justice (NIJ), the institution mandated to train future judges and prosecutors, and furnishes recommendations with a view to improving the training offered.

The report is based on the analysis of some 25 judgements rendered by courts across Moldova in various matters, which have been provided translated into English, as well as on a visit to Chisinau. During the visit, which lasted from 11 to 20 July, I conducted numerous interviews with judges, prosecutors, attorneys, candidates undergoing training at the NIJ and with staff of the NIJ and staff members of the Equality Council. I also participated in a three-day training on decisions in pre-trial detention cases taught at the NIJ by two US-Federal judges mostly (but not exclusively) attended by candidates undergoing training at the NIJ.

Finally, I have drawn on research which I conducted for purposes of other projects in the Republic of Moldova I had been engaged in. They included also 30 judgements given by the Supreme Court in corruption cases in the past years.

This report does not deal with the merits of cases adjudged. I.e., it is not concerned with the question whether a defendant convicted in a criminal case should, in fact, have been acquitted or whether the plaintiff’s claim in a civil matter should have been granted rather than rejected. The report deals with the way in which judgements are drafted, their structure, clarity, and coherence.

It may seem counter-intuitive to ask a person who has not undergone any legal training in the Republic of Moldova (in my case, a German attorney) for his opinion on the quality of judgements
Background and methodology

given by Moldovan courts. I would argue that I am well-positioned to assess to what extent the judgments I examined meet the criteria mentioned above, though.

International documents or research papers regarding the quality of judgements usually indicate that the language the judge employs should be clear, simple and concise and that the reasoning should be well structured, logical and coherent. These terms are not well defined; clarity is hard to measure. A workable (if not very academic) definition could be that a judgement is clear and coherent if an average reader is able to understand what the facts of the case were, how the court established them and how it applied the law to the facts. In his classic book on legal writing, Bryan Garner wrote:

- ‘Some of the most effective judicial writers have a person of average intelligence and average education in mind as their reader. Many judges acknowledge that people other than lawyers or law students might actually read their opinions. In his Supreme Court confirmation hearings, Justice Stephen Breyer said that as an appellate judge, he wanted his opinions to be understandable to a high-school student’.¹

This is the standard I applied when assessing the reasoning of the judgments I read when preparing this report.

Most readers will not be familiar with the judgments on which I based the report. This created a dilemma: I could either try to substantiate my findings by using examples, which would entail citing (often: lengthy) extracts from judgments and render the report hard to read. Or I could just present my conclusions, inviting the criticism that the report criticizing the reasoning of judgments was itself not substantiated very well. I opted for the first alternative, hoping that the increased validity would outweigh the inconvenience.

---

A number of judgements rendered by various courts in the Republic of Moldova have been analysed for purposes of this report. Their reasoning was frequently flawed. Judges tend to describe the evidence before them rather than to analyse it. They often rephrase witness testimony at length but fail to elaborate on the relationship between different pieces of evidence or testimonies (corroboration, inconsistencies etc.). When assessing evidence, judges often confine themselves to standard phrases (‘the court assesses the testimony of witness X critically’) instead of dealing with the specificities of a given piece of evidence and providing reasons for their assessment.

Judgment frequently refer to an abundance of legal provisions or statutes. It does not always become clear what impact these statutes have on the ruling in the case or in how far they are even relevant.

When applying legal provisions to the facts of the case, judges generally do not break down the provision in question into its requirements. They apply the section or article in its entirety to the facts of the case (‘On the basis of the above mentioned, the court qualifies the actions of the defendant on the basis of art.145 par. (2) lit.e) j) Criminal Code of the Republic of Moldova, following the signs: killing a person committed against a family member and with great cruelty.’) Thus, it does not become clear how specific facts the court has established correspond to specific legal requirements contained in a legal provision. The application of the law to the facts remains obscure.

The language employed is often convoluted and hard to understand.

Since the judgments analysed had been given by courts from various regions of Moldova in different areas of law, it may be assumed that the aforementioned shortcomings do not reflect only on a small number of judgments but are widespread and systemic. This seems to be attributable, at least in part to the training on legal drafting judges receive. During their university education, law students do not receive any formal training on legal writing. Judges have to acquire their
Summary

writing-skills practicing law or during their traineeship. Since 2007, the National Institute of Justice (NIJ) is entrusted with the initial and continuing education of judges. The NIJ has recently changed its methodology. The initial training is now mainly conducted on the basis of mock trials, in which candidates enrolled in the NIJ assume the roles of judges, prosecutors etc. under the guidance of experienced legal practitioners (mostly practicing judges and prosecutors).

While this methodology is promising in many ways, it remains doubtful whether it is suitable to provide candidate with the necessary drafting skills. The time dedicated to legal drafting is insufficient; candidates do not receive enough writing assignments and the feedback mentors provide on documents drafted in the course of the mock trials is too superficial.
Opinion no. 11 of the Consultative Council of European Judges

The Consultative Council of European Judges has dealt with the quality of judgments in its Opinion no. 11 of 8 November 2007.

The Opinion distinguishes between external factors which impact the quality of judicial decisions and factors inherent to the decisions themselves. External factors include the resources available to judges, the training they undergo and the legal framework within which judges operate.

With regard to factors inherent to a judicial decision, Opinion no. 11 highlights the clarity of decisions and their reasoning as characteristics of high-quality judgments. It underscores that judicial decisions should be ‘intelligible, drafted in clear and simple language – a prerequisite to their being understood by the parties and the general public. This requires them to be coherently organised with reasoning in a clear style accessible to everyone’.

As a core element determining the quality of judicial decisions the Opinion identifies their reasoning, which has to ‘be consistent, clear, unambiguous and not contradictory’ and ‘must allow the reader to follow the chain of reasoning which led the judge to the decision’. In this context, the opinion highlights that proper reasoning of judicial decisions is above all a ‘safeguard against arbitrariness’.

In line with the jurisprudence of the European Court of Human Rights, the Opinion sets out that judgments should address the parties’ main arguments, but do not have to answer to every single submission.

In addition to that, Opinion no. 11 stresses that judicial decisions should deal with the ‘factual and legal issues lying at the heart of the dispute’. In regard to factual issues, the opinion states that
International standards

‘the judge may have to address objections to the evidence, especially in terms of its admissibility. The judge will also consider the weight of the factual evidence likely to be relevant for the resolution of the dispute’.

As far as the legal issues are concerned, the opinion states that ‘examining the legal issues entails applying the rules of national, European and international law. The reasons should refer to the relevant provisions of the Constitution or relevant national, European and international law. Where appropriate, reference to national, European or international case-law, including reference to case-law from courts of other countries, as well as reference to legal literature, can be useful’

While these issues should be addressed, the Opinion underlines that judgment and other judicial decisions should not necessarily be long. Rather, they have to strike ‘a proper balance (…) between the conciseness and the proper understanding of the decision’

Article 14 ICCPR

Article 14 of the International Covenant on Civil and Political Rights (ICCPR) enshrines the right to a fair trial. While the right to reasoned judgement is not expressly mentioned in that provision, it is generally acknowledged that it forms part of the guarantees afforded by article 14.

However, case law on that issue appears to be scarce. The Human Rights Committee has mainly examined cases regarding the failure of appeal courts provide sufficient reasoning for their judgements. E.g., in Collins v. Jamaica, the author had been sentenced to death; upon appeal, the Court of Appeal upheld the judgement rendered by the court of first instance. However, it had failed to provide written reasons for its decision for several years. The author had argued that the lack of written motivation to judgement had prevented him from exercising his right to appeal to the Privy Council. The Human Rights Committee found a violation of the right to a fair trial pursuant to article 14.

Requirements under the European Convention on Human Rights

Article 6 ECHR

Article 6 ECHR enshrines the right to fair trial. It is long-standing jurisprudence of the European Court of Human Rights that this right also implies a right to reasoned judgement.

Courts are obliged to examine the arguments raised by the parties to the trial. Art. 6 ECHR places a ‘tribunal under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to its decision’.

The purpose of this is to satisfy the parties that they have been heard, ‘thereby contributing to a more willing acceptance of the decision on their part’

---

2 Perez v. France, Grand Chamber Judgment, application no. 47287/99, para 80
3 Taxquet v Belgium, Grand Chamber Judgement, application no. 926/05, para 91
This does not imply, however, that the court is obliged to give a detailed answer to every argument advanced by the parties. The scope of the obligation to provide reasons will vary according to the nature of the decision and must be determined in the light of the circumstances of the case. The assessment of the scope of reasoning warranted by the circumstances of the case may differ, though. In Vetrenko v. Moldova, the applicant had been convicted of murder following a confession. He maintained that he had confessed under duress. He contended that the way he had described the commitment of the crime in his confession did not match the actual events. He also asserted that he had had an alibi for the night in question. The court of first instance acquitted the applicant on these grounds. The prosecution appealed; the acquittal was ultimately quashed, and the case sent back for retrial. The applicant was convicted of murder. He appealed and pointed again to the discrepancies between his confession and the findings of the forensic experts. The Supreme Court did not examine these arguments. The European Court of Human Rights found a violation of the right to a reasoned judgment. It attached particular weight to the fact that during the retrial the courts had not dealt with the very arguments which had led the first court to acquit the applicant. However, three dissenting judges found that the Moldovan courts had discharged their duty to provide reasons in a satisfactory manner.

At any rate, arguments which may be decisive for the outcome of the case have to be addressed. For example, in Hiro Balani v. Spain, a Japanese company had filed a motion to delete a trademark which had been registered under the applicant’s name. The company claimed that it had registered the trademark in Japan in 1951 and was therefore entitled to hold the trademark globally. The applicant had submitted several submissions in her defence. Inter alia she had claimed that her husband had already registered the trademark in 1934. The case was ultimately decided by the Supreme Court, which ruled in favour of the Japanese company. The Supreme Court did not address the applicant’s argument that the trademark had already been registered in 1934. The European Court of Human Rights held that the applicants right to a reasoned judgement had been breached. It stated that, if the Spanish Supreme Court had found the applicants submission to be well founded, it would necessarily have had to find in the applicant’s favour. Consequently, the submission was relevant and the Spanish courts had been obliged to deal with it.

In addition to that, the European Court of Human Rights has held that national courts are obliged to examine arguments advanced by the parties to proceedings with particular care if the parties invoke rights and freedoms enshrined in the ECHR. This means that domestic courts will, as a rule, be required to answer to these arguments.

**Obligation to provide reasons which are relevant and sufficient**

Obligations to provide sufficient reasoning for judicial decisions do not only flow from article 6 ECHR. They are also entailed by other articles of the Convention and the additional protocols thereto. Several of the fundamental rights and freedoms guaranteed by the European Convention on Human Rights are not absolute but may be limited subject to certain conditions. Examples of
such rights are the right to private life (article 8), freedom of conscience (article 9), freedom of
expression (article 10), freedom of association (article 11) and the right to property (article 1 of
Protocol 1 to the ECHR).

Limitations on these rights are generally justified if they have a sufficient basis in domestic
law, serve a legitimate aim and are necessary in a democratic society. In the context of the
latter requirement, the European Court of Human Rights also pays considerable attention to the
question whether the domestic courts involved in the review of the measure in question have
supported their ruling with reasons that are ‘relevant and sufficient’. In Lindon, Otchakovskya-
Laurens and July v France8, the Court’s Grand Chamber held:

▪ ‘what the Court has to do is to look at the interference complained of in the light of the case as
a whole and determine whether it was ‘proportionate to the legitimate aim pursued’ and whether
the reasons adduced by the national authorities to justify it are ‘relevant and sufficient’... In doing
so, the Court has to satisfy itself that the national authorities applied standards which were
in conformity with the principles embodied in Article 10 and, moreover, that they relied on an
acceptable assessment of the relevant facts ...’

If the European Court of Human Rights considers that the domestic courts failed to address
important issues or neglected to deal with arguments germane to the outcome of the case,
it may find a violation of the ECHR due to those shortcomings. The case Standard Verlags
GmbH v Austria9 may serve as an example. The applicant company was the publisher of the
‘Newsmagazine’. It published an article on a scandal in the banking sector. In the article the
treasury manager of the bank was identified with his full name. It was mentioned that he had
authorised questionable actions and been told to leave his desk. The treasury manager brought
proceedings against the applicant for publishing his name; ultimately, the applicant company was
convicted. The European Court of Human Rights referred to a number of criteria it had developed
in its jurisprudence regarding the balance to be struck between the right to reputation and the
right to freedom of expression. It noted that the Austrian courts had not addressed many of
these criteria and concluded that the reasons adduced by the Austrian courts for limitation of
the right to freedom of expression had been relevant but not sufficient.

8 Application no. 21279/02, para 45 in fine
9 Standard Verlags GmbH v. Austria (no. 3), application no. 34702/07, judgment of 10 January 2012
Current practices in the area of judgment writing and perceived short-comings

Analysis of judgments

Language

Famous German jurist Rudolf von Jhering once said that the legislator should think like a philosopher and speak like a peasant (a critic added that, ever since that day, the world was waiting for the philosophers to develop simpler ideas and for the peasants to speak less understandably).

The quote mirrors a widespread perception that legal language should be easy to understand. Judgments are pronounced in the name of people – so the proverbial man or woman on the street should be able to understand them. As different as the structure of judgments and the style of judges drafting them may be in different jurisdictions, it seems widely accepted that the language courts employ should be clear and simple.

Assessing the language of a judgment on the basis of a translated text is a difficult undertaking. A sentence which is lithe and elegant in the original text may sound stilted and flowery in translation. But regardless of problems caused by translation, it is possible to form an opinion on whether a sentence is written in simple, conceivable language.

In the judgments I analysed, that was frequently not the case. Moldovan courts tended to use overly long and convoluted sentences. Sometimes, that makes judgments just hard to read, sometimes it renders parts of them almost inconceivable. A Supreme Court decision in a corruption case started by summarizing the facts of the case as follows:

10 Case file no. 1-558/2016, judgment of 5 April 2016
11 All translated judgments are cited the way they were provided to me, without any changes to spelling or grammar.
Defendant Covalschi Ghenadi, as a public functionary in position of responsibility, acting as operational inspector of Ciocana District Police Station, in complicity with inspector of Criminal Police of Ciocana District Police Station Ciortan Ion, getting hold of operational information that in May 2010 citizen Bairamov Elicar was involved in actions related to circulation of narcotic substances, aiming to receive goods in the form of money not due to him, and taking advantage of his involvement, to discover the crime, in the working group on the case no.2010480429, initiated on 08.04.2010 on the basis of the indices of the crime provided in art.186 para.(2), let. b), d) of the Criminal Code, on the theft of money in the amount of 4300 lei from Liscu Valentin, committed on 29.03.2010 by unknown persons, by deceit, without any legal ground, obtained the issuance of a search order which was authorized by investigative judge Obada Iurie.

Subsequently, on 27.08.2010, the policeman Ciortan Ion in complicity with inspector of Criminal Police of Ciocana District Police Station, Covalschi Ghenadi, aiming to receive money not due to them, have stopped Bairamov Elicar who was going home, and showing him the order for carrying out the search of his domicile in the locality of Dobruja, municipality of Chisinau, searched his car, then they asked Bairamov Elicar to take them to his place of residence, in order to conduct the search of domicile.

Another Supreme Court decision began with the introductory sentences:

In order to express its view, the first instance court has found that Guzun Tudor, acting as a criminal investigation officer of the Criminal Investigation Unit of the Police Station of Riscani District of the General Police Station of the municipality of Chisinau, having the special rank of senior lieutenant of police, therefore under the provisions of art. 123 para. (2) of the Criminal Code, being an official, that is to say, a public functionary with special status, who pursuant to art. 13 para. (1) let. a), i) of Law on the Status of Criminal Investigation Officer no. 333 of 10.11.2006, has the obligation to perform his official duties in strict compliance with the legislation as well as have a dignified conduct in society and refrain from actions which would compromise the dignity and honor of a criminal investigation officer, accepted money which are not due to him from Smirnova Tatiana, not to carry out actions in the exercise of his office and stating that he had influence on the decision makers from Rascani Prosecutor’s Office, municipality of Chisinau, claimed and received money, in the following circumstances.

It also contained the sentence:

With regard to the discussions, carried out by the defendant with Smirnova after the criminal case against her daughter was sent to the prosecutor with the proposal to terminate it, which were held while the defendant was on his annual leave, and the fact that the case materials do not contain data administered by the criminal investigation body and presented by the prosecutor during court inquiry, according to which the defendant would have been involved in committing corruption acts, the argument that in the absence of instigation to commit the crime incriminated to the defendant, he would not have committed it, is refuted by the video recording which confirms several times the refusal of T. Guzun to receive money, but he refuses it only until Smirnova Tatiana takes out the money and no finding is made that Guzun T. was instigated by her, on the contrary, when Smirnova T. put the 2 banknotes of 50 Euros each on the table, these were taken and accepted by Guzun T.

\[12\] Case file no. 1ra- 1113/2015, judgment of 1 December 2015
and wrapped in 2 white paper napkins, promising her that in future he would attempt to influence the prosecutor, who was leading the criminal investigation on the case of Ecaterina Smirnova and would be able to determine him to terminate the criminal case against her.

Sentences of this length and structure render the judgment hard to comprehend; they also make it difficult for readers to identify the legal issues with which the court dealt and how it applied the law to the facts.

All of the judgments analyzed for purposes of this report contained verbose or overly long sentences to some extent.

**Assessment of evidence**

In a civil law jurisdiction, the court essentially has three tasks:

- to establish the facts of the case which are legally relevant and on which it bases its judgement (assessment of evidence);
- to apply the law to the facts it has established (legal assessment);
- to make the actual ruling as to be inferred from the application of the law.

The methods by which the facts are established may differ in criminal, civil and administrative matters. Also, different standards of proof and rules governing the presentation and admissibility of evidence may apply. Regardless of these differences, the court has to form an opinion as to what has happened and what is legally relevant- either because of the duty incumbent on the court in criminal matters to explore the truth or on account of the submissions of the parties in civil matters.

It will do so on the basis of the evidence before it. The quality of the ruling made in the case depends on how thoroughly the court establishes the facts of the case; if relevant facts are omitted or distorted, the ruling is likely to be wrong. I.e. the judgement does not correspond to the real events.

Therefore, the court has to display utmost thoroughness when analysing the evidence before. This thoroughness should be mirrored in the part of the judgement explaining what evidence the court took into consideration and how it assessed that evidence.

The section of the judgement dealing with evidence serves several functions:

- it is a means of self-control for the judge(s) adjudicating the case. It enables the court to test whether it has dealt with the evidence in a logical and coherent manner;
- it enables higher courts dealing with possible appeals against the judgement to check whether the first instance court has committed errors when establishing the facts;
- it explains to the readers why the court considered the relevant standard of proof met in a certain case, why the judge considered certain witnesses or other pieces of evidence reliable and why certain pieces of evidence were not admitted or considered.

Almost all judgements I analysed for purposes of this report contained a section dealing with evidence. Several observations seem of interest in regard to the way Moldovan judges put their analysis in writing:
Current practices in the area of judgment writing and perceived short-comings

Repeating of evidence instead of analysing it

A common feature of many of the judgements examined is that they provide an account of the evidence presented in court, but fail to analyse it. In particular, judgments

- frequently do not elaborate on the relationship between different pieces of evidence, for example whether they corroborate or contradict each other;
- provide little or no information on the weight the court attached to a given piece of evidence;
- tend not to explain why the judge considered witnesses trustworthy or expert witnesses reliable.

A case decided by a court in Chisinau\textsuperscript{13} may serve as an example. According to the prosecution, the defendant had been involved in an argument with a group of juveniles. He had then entered his car and run deliberately into one member of the group, injuring him severely. The defendant had denied these accusations. The court assessed the evidence in the following manner:

- **Although the defendant in the trial did not recognize the guilt, his guilt is fully proved by the following evidence:**

  Statements of the injured party XXXXXXXXX, who was heard at the hearing, said that knew the defendant XXXXXXXXX only in relation to what had happened, and did not know him until then. On May 22, 2012, around 21.00-22.00, together with Bogza Corneliu they went to a friend’s home, Sirbu Ghenadie, to spend the night there. After watching some movies, they decided to drink alcohol in the morning. After having drunk a little cognac, at about 4:00 in the morning they decided to go out for a walk. They could walk freely, not being under influence. They were walking down the Mircea Cel Batrin alley, and outside it had begun to light up. On May 23, they had to go to the classes and took a different road home. Near the the “Golden Pheasant” restaurant they went further down, reaching the “033” nigh club. After having turned to the right, they entered a school courtyard moving to Dacia and Gaudeamus high schools, which are also located on P. Zadnipru Street. In the area of a dwelling block a person yelled at them, “Hey you, quit walking around and breaking the mirrors on the cars and damaging the cars.” The person in question was about the age of their parents, had aggressive behavior, and when they saw him in that state, they began to explain to him that they had nothing to do with those things, not having the intention of getting into a fight with him. The person concerned was the defendant XXXXXXXXX. He had aggressive behavior and called them names with uncensored words. The defendant XXXXXXXXX approached his Peugeot model car while continuing to shout at them with ugly words. At one point, the defendant Dropca Ion opened the car’s door, pulled a Taser and started threatening them. They saw this and decided to go further with a little more hurried steps. They heard the defendant XXXXXXXXX slamming his car’s door and getting inside, after which they heard the car starting.

  The injured party XXXXXXXXX also said that turning his head he noticed that the defendant XXXXXXXXX drove towards them in his car, climbed the sidewalk and accelerated to them at a speed of about 50-60 km/h, but he doesn’t know exactly at what speed because he was running in that moment. He does not know if any other cars are driving on the alley between the two high schools because it was a pedestrian zone. The other two boys were running faster ahead of him.

\textsuperscript{13} Case no. 22-1-3966-04082014 (1-514/14), judgment of 11 November 2016
Current practices in the area of judgment writing and perceived short-comings

Being next to the stairs of a high school, he decided to go down them, thinking it was better rather than trying to hide behind a tree, but he didn’t succeed. Feeling a hit on his left leg, exactly in what part of the leg he does not know, the fell down on the grass beside the stairs and after a while he lost consciousness. He was hit by the defendant XXXXXXXX’s car, with the front of the car, after which the latter left the scene of the accident. Ghenadie and Corneliu were already near the stadium, at a distance of about five meters they turned back and went up to him.

Being afraid that the defendant XXXXXXXX can come back, he went downhill with the other boys' help. He could not walk alone because the leg was fractured and he was in a shock. One of the boys called the ambulance, and why they did not call the police he does not know. There weren't any other people around at that time. He had an open leg fracture, and there was blood on the ground. After about 50 minutes the ambulance arrived and transported him to the hospital. From the moment they left the house and until the hit he hadn’t fallen or hit himself. Considering that it is a light fracture and there is no need for surgery, at first, he told the doctors that he had fallen off a bulwark because he did not want for his parents to know about the fact, but the doctors did not believe him and said it was a “car bumper fracture”, after which he told the doctors what actually happened, as well to his parents. His mother announced the police. While being hospitalized, he was interviewed by a police inspector about where his leg was hit, in the absence of a legal representative. No one at that time remembered the car plates as due to the speed at which the car was moving, it raised dust, but he later recalled the place of the accident, its color and its make. On the first day of hospitalization he had the first surgery, being introduced a spike into his heel. The second surgery took place the next day, and the third when the “Ilizarov” apparatus was removed, consisting of eight spikes pierced in his leg. He wore the Ilizarov apparatus from May 23 to February 2013. Both for applying and removing the device total anesthesia was required. After removing it, he did not have any other surgery, but gypsum was applied for about two months.

Until the trauma, he was doing martial arts but he can no longer do it now, moreover, he cannot even take the physical education class at school. Also because of the trauma, he can not realize his dreams he has planned for himself. When the weather changes, he has foot pain, because the foot tilts on one side of the shoe, deforming at certain times. The submitted civil action supports it, being forced to go for medical dressing day by day, traveling by taxi. Because of the apparatus, he could not wear his usual clothes, having to order zippered clothes. To rehab quicker, it was necessary to consume calcium, being forced to use more dairy products.

Defendant XXXXXXX did not apologize, nor did he cover the material damage or any damage caused. Requests reject of the civil action.

The statement of the witness Budei Andriana, who was heard at the hearing, she said she knew the defendant XXXXXXXX, being from the same village and went to the same school, and the injured party XXXXXXXXX is her son. On May 23, 2012, in the morning she was called by her son’s colleague who told her son was in the hospital and a misfortune had happened. Going to the hospital, she found her son’s friends in the corridor, XXXXXXXXX and Bogza Corneliu, and her son was with the doctors in one of the hospital halls, on a table, bleeding and with the torn pants, while the doctors were conferring about the need for a surgery. She tried to ask her son’s friends what had happened, but they did not really want to tell her because they were stressed. After that she
talked with the doctor and her son, telling the doctor that she has now arrived and knows nothing. The doctor immediately told her that her son had drunk alcohol, but his son lied about alcohol. The doctor told her that her son had fallen and thought to apply gypsum, after which they would return home and everything would be fine. He told her that they would perform surgery on her son the next day because it required preparedness, and the operation was going to be complicated. Talking to her doctor, she learnt that her son fell down, but the doctor told her that he knew this type fracture, called the “bumper” fracture. After that, the boys told her that while they were walking through the courtyard of a block, an unknown person appeared, who told them not to walk through that area and damage the car mirrors. They told the stranger that they had no connection with those cars, and they were in that yard because they made a wrong turn. What he said afterwards they don’t know. The man climbed into his car. The boys heard something after which they noticed that a Taser snapped. Then they thought better to speed up their pace, starting in the direction of a high school, after which the gentleman started after them. She later called her husband telling him everything she found out.

Budei Andriana, the witness, mentions that she remembered very well what the boys told her and what the defendant XXXXXXXXX told her then. Defendant XXXXXXXXX said he had got into the car and started after them. The boys seeing the car coming after them started to run away, yet the car hit her son. At all their meetings before the trial, the defendant admitted the fact, but the lawyer told her that he did not remember. The defendant told her he had heard something, but he did not know whether it was a blow or something else. The action brought in the court hearing supports it. Her son was subjected to two serious surgical procedures, both of which were under full anesthesia, then wore the Ilizarov apparatus, with special covers for this device, after which he was hospitalized in the Traumatology section with other children, under special care. In the cold part of the year, her son did not go to school, always helping her at home because she had a small baby. Because he could not go to medical dressing alone, she had to ask leave from work to allow her to take care of her son. They travelled by taxi or by car because they could not travel by public transport because of the crunches and the Ilizarov apparatus. The left foot clothing was zipper sewn. The foot remained tilted, the shoe being damaged. At the graduation ball it was hard to find special pants for her son. It was much more expensive than what was stated in the claim, having to buy many special products for her son, having to go to x-rays, she believes will remain a mark in their life. After the accident, meeting with the defendant XXXXXXXXX, he suggested for them to strike a deal, in order to make things right, he recognized the guilt only in the fact that he followed the boys with a Taser. From the beginning, her husband told the boys to search for the car and go to the scene where they actually found the car. The phone number was indicated on a car’s window because the defendant XXXXXXXXX intended to sell the car.

He phoned the police telling them he found the car. The police arrived at the hospital after her son underwent surgery, inquiring how to question his son after total anesthesia. Then she phoned the defendant XXXXXXXXX telling him he wanted to buy the car. By calling the number the boys gave him, she was convinced that the defendant XXXXXXXXX had committed the act, according to the registration number, make and color of the car. After he left the yard with his family, she asked him if the Taser was for sale as well. She claims that her son was hit by a white car with grey stripes, she doesn’t remember the make and that she personally saw that car. In the evening the defendant
XXXXXXX called her asking her to meet and discuss. When she phoned him in order to agree on the purchase of the car, the defendant’s XXXXXXXXXX phone was disconnected, and she met him only at the Police. After the criminal case was filed, the defendant XXXXXXXXXX called her on several occasions and they had several phone conversations, being called more often by him. Because the boys drank alcohol and walked around where they were not supposed to, they were punished. Defendant XXXXXXXXXX told her different stories about what happened. Talking to the citizen Ardeleanu and the others, he told her that the defendant XXXXXXXXXX was at the shop and was under influence, but the ladies would not make statements. Going to the shop-assistants they told her that they knew XXXXXXXXXX, that he was living nearby. The complaint was filed much later after the accident occurred, and was drawn up by the police inspector, as she dictated. She does not remember, if there were any of her explanations recorded either handwritten or typed. She confirms that the signature from the file page 39 is her own. Why it is written so on the file page 30 she does not know, saying that at on the 28th of the month, when she wrote the complaint, she knew that her son was hit by a car and only looked for the guilty person. The injury was already inflicted, and the reason why the complaint contained the phrase “what are the circumstances that made him inflict bodily injuries?”, she doesn’t know. She also did not know then who injured her son. Before the surgery, it was already known that her son was hit by a car. The purpose of the complaint was that the police officers found out the guilty persons who had injured her son.

The statement of witness XXXXXXXXXX Ghenadie, who was heard at the hearing, said the injured party XXXXXXXXXX is his friend and they are in a good relationship with him. He knows the defendant XXXXXXXXXX only in relation to the event. In the spring of 2012, he agreed with his friends: Bogza Corneliu and Budei Igor, to meet him at his place later in the day. Their parents allowed them to spend the night at each other with no restrictions whatsoever, but they did not allow them to drink alcohol. Nor did they allow them to go out in the city at night, their night promenades being clandestine in that sense. They met, watched several movies and drank a little cognac in the morning, which amount he did not recall, but claimed it was a little. They decided to go out for a walk because they were under the influence of alcohol, and that in the morning they had to go to school. When they left the house XXXXXXXXXX was able to go walk because they did not drink much alcohol. They walked along the Mircea cel Batrin avenue alley. At “Golden Pheasant” restaurant, they went down the road, the name of the street on which they were moving he did not know, then from the “O33” nightclub they detoured to the right. That’s where the defendant came out and started shouting at them, telling them to stop ruining cars’ mirrors and windows, to which they told him they had nothing to do with those events, and that they had been there for the first time. The defendant XXXXXXXXXX approached them calling them with bad words, approached a white Peugeot, opened the door, picking up a Taser, the sound of which was heard, and they went on their way, not wanting to enter the conflict, which they didn’t. When they heard the car starting, they hurried. Running up to a tennis court, alongside with Corneliu, he did not see Igor. Turning back, they saw how XXXXXXXXXX was hit by the car, it was in the morning, and outside it was already light. At that time they were at a distance of about 5-10 meters away. After the car hit without stopping, the car went ahead and didn’t turn back. The car had speed at the moment of travel and even in the courtyard it started with acceleration. They did not see who was driving, but that was the car beside beside which stood the defendant XXXXXXXXXX with the Taser. The road was free, and there were no obstacles. The car passed by them and they went down a steep hill, after which,
he did not remember who from them called the ambulance, nor how many people came with the ambulance, after which they went to the hospital. Perhaps he had discussed something with the medical staff when they arrived with the ambulance, but he doesn’t remember, nor whether he explained to them what actually happened

(…)

Witness Bogza Corneliu Vitalie statement, who was heard at the hearing, said that XXXXXXXX is his friend and they are in good friendship. He knows the defendant XXXXXXXX in relation to the incident. In May 2012, at about 22:00, together with his friend Budei Igor, they went to a friend of theirs XXXXXXXX to watch some movies until morning, then they all drank a little alcohol, less than a half of glass, and walked to the alley for a walk in the morning. When they reached the “Golden Pheasant” restaurant, they walked down the road, which street he doesn’t know, until they arrived to the “033” nightclub, and then bypassed to the right, entering some of the courtyards. On their way there, they met the defendant XXXXXXXX, who began to talk ugly with them, saying that they damaged mirrors and cars, to which they told him they had nothing to do with the given happenings. Defendant XXXXXXXX approached the white Peugeot, picked up a Taser and turned it on. Seeing this, they stepped up down the road near Dacia and Gaudiums high schools. Then he heard the car start from the spot. Turning his head back and seeing that the car started following them, they started running. He and XXXXXXXX were running ahead, and when he turned around to see where XXXXXXXX was, he saw how he was hit by that car, at that moment they were about 8-10 meters away. Seeing XXXXXXXX being hit, they fled to one side and the car passed quickly past them, failing to see the car’s registration numbers, but noting that it was white with grey stripes. He noticed that the defendant XXXXXXXX was behind the wheel. Turning back and approaching the XXXXXXXX, he noticed he was in a shock, white on his face and not aware of what was going on, with his left foot visibly fractured, then they took Budei Igor down the stairs and called the ambulance. He together with Genadiy took him by his arms and walked him down the stairs to be safe, from that place they could not be seen, and being afraid of the circumstances that could follow. Bogza Corneliu also said that, from the moment they left the house and until the incident, XXXXXXXX had not fallen or been hit at all. They were in light state of alcohol influence. Igor Budei could move on his own. He was hit with the front of the car while he was in the middle of the road. As a result of the hit XXXXX hit fell down and broke his leg. The place of the incident is a wide and paved road on which the car fits well, on the right side of it is grass, trees and a hill, and on the other side is a little steep, about 1-2 meters, and a little lower is the high school, but he does not know its destination

(…)

The testimony of Romesco witness, Iurie Nicolae, who was heard at the hearing, declared that he knew XXXXXXXX from about three years ago while he was doctor on duty and received him at about 5-6 of clock in the morning. As he remembers XXXXXXXX was brought with the ambulance, with him were 2-3 friends and he was brought on a stretcher. He said he had pain in the left leg. After examination, he determined that XXXXXXXX had an open fracture in the foot, he was then hospitalized and prepared for surgery. When brought in, XXXXXXXX was in a serious-medium condition. He established his condition because he had an open fracture, i.e. the bones
were open, they were in contact with the air. Type 1 A Fracture. The next day XXXXXXXXXX was operated. It was an indication to be operated immediately, but considering that he was going to wear the Ilizarav apparatus which had to be bought, he waited and the next day he was operated. Then XXXXXXXXXX received treatment and stayed in the hospital for about two weeks. With the Ilizarov apparatus he received out-of-clinic treatment and was periodically present at the clinic. Over 9 months ago, he came to him, and was hospitalized again, where he found that the fracture was strengthened, and the apparatus was removed, then the patient received a rehab course, and is currently healthy. He personally operated on XXXXXXXXXX. Witness, Romesco Iurie Nicolae, said that talking with XXXXXXXXXX, he told him he fell down to whom he told him he’d been working for 25 years and he knows that every trauma has its own special feature. If it is a trauma relating to falling from a height they are looking for fractures in the spine and calcaneus bone. If it is a road accident and the child was hit by the car, it is a specific fracture called the “bumper” fracture, consisting of three fragments. XXXXXXXXXX was hit by a car’s bumper and after the blow a bone fragment was removed. XXXXXXXXXX had this very type of fracture.

(...) The statement of the witness Cernogorov Alexandru, who was heard at the hearing, declared that he didn’t know the XXXXXXXXXX defendant. He also does not know the injured party XXXXXXXXXX. They received a phone call around 5:00 - 5:20 in the morning, approximately in the spring of 2012-2013, in connection with a foot injury. They went looking for the person because the high school did not have the number on it. They went to a high school which name they do not know, he also does not know the name of the street, but they moved down Petru Zadnipru Street. They were told to come to Petru Zadnipru Street 15/4, where there is a high school, but they could not get there because the road was blocked by the cars that were stationed between a block of flats on Petru Zadnipru 16/3 and the high school. So they reached the second high school and went around to the right and then saw some people waving. That place is between two high schools. They went up near the house on Ginta Latina Street 19 and reached the place where the young men were. When they got there, there were about 10 people there, three girls and the rest of the boys, all of them cheerful. He personally did not talk to the girls or with the boys from that group. He usually does not get out of the car because he is a driver. The doctors came out of the ambulance, and the boy was seated on the grass, down hill, after a steep. He stepped out of the car to pull the stretcher. He did not hear the conversation between the person sitting on the grass and doctors, so he did not know what had happened. That boy probably had his leg broken. He saw that the boys were a bit under alcohol influence because there were some beer bottles beside them, they were cheerful and their visual behavior created such impressions, but they were not intoxicated and did not fall down. One or two of the boys accompanied the boy with the broken leg to the hospital. When he left the spot, he turned to Ginta Latina Street. The place where was the person with the broken leg was not accessible by car. They stopped as near as possible to the location of the person with the broken foot. The distance between the injured person and the road was about 8 meters. At the place where he stopped the car he did not see any marks of brake. There were no police crews on the scene, he took the boy and left. He can help the doctors just fix the stretcher in the vehicle, in rest he is just behind the steering wheel. The injured boy was conscious, he wasn’t in a shock. He saw how he was given the first aid by the doctors, fixing his foot with a splint. To take that boy
to the ambulance, he was probably helped by two people who were on the scene. The witness, Cernogorov Alexandru also said that on the spot he and Dr. Burla Serghei and the paramedic, he didn’t remember his name

(...) Statement of witness, Burla Serghei Vitalie, who was heard at the hearing, said that he did not know the defendant XXXXXXXX. He also doesn’t know the injured party, XXXXXXXX. He remembers the case, but he certainly doesn’t remember the patient. In the summer of 2012, while at work, at 05:00 in the morning they received a call to Zadnipru Street 15/4, next to a high school, about a a person with a foot injury. At that time, they were traveling with Cernogov Alexandru, the driver and the paramedic, Oleg. They did not have a stable crew, every shift could change. As they reached the place of the call, they found no one at the indicated address. He contacted the dispatcher of his service and got a new address that was on another side of Petru Zadnipru Street, in another high school. As they got there, they saw some boys standing in the street, pointing with their hands that they had to reach an alley. On the given street there was access from Petru Zadnipru Street, but they could not pass because that morning cars were parked there and surrounded the high school, so they entered from Ginta Latina Street, block no.19. In that place there are two high schools, and next to them there is a road, on Petru Zadnipru street. They drove beside those high-schools with the flashing light and siren on. Going past the first high school, they saw the boys as they were waving to them. They stopped beside a tennis court, in the alley beside the stairs where there was a bulwark. The arrived on the spot in about 20 minutes. The place where they stopped the car was paved, and the road width was 2-3 meters. From the place where they stopped and to the injured person was a distance of about 3-4 meters. It was a pedestrian road, and the ambulance had the right to enter that road. There were some boys around who showed them where the patient is, maybe they were girls among them, but he does not remember. Going to the spot, he saw a boy lying down beside the bulwark, whom he did not remember how he was

(...) Apart from witness statements, the defendant’s XXXXXXXX guilt is also proven by the following documents:

- The forensic expertise report no.1561 / D of July 11, 2012, from which it is stated that, on the body of Budei Igor Valeriu was established the open fracture of the left-sided bone in the median third with the movement of the fragments, which qualifies as serious bodily injury (f.d. 108- 109);

- The report of forensic expertise in commission no. 171 of January 17, 2014, which stated that within the framework of the provision of medical care citizen XXXXXXXX had the open fracture of the left calf bone: fracture of the tibia at the middle 1/3 level and the fibula fracture in the proximal 1/3. The character of fractures inflicted to citizen XXXXXXXX allows to say that they were produced by a hit mechanism, in this case by the prominent parts of a moving car (file page number 194-199);

- Minutes of the reconstruction of the events of 18.04.2013, with the participation of the defendant XXXXXXXX and his defender Prutean Lilian, where they went on the spot specifically in the yard of the block of flats located on 14/4 Petru Zadnipru Street, Chisinau mun. to show and describe all the circumstances of the offense. The defendant XXXXXXXX specified where the private car was parked when he noticed the injured party and two young people, seeing that they were aggressive he switched on the Taser, the young people headed for Dacia High School, but XXXXXXXX got into the car and moved to the direction of Milescu Spataru Street, Chisinau (file page number 179);
Reconstruction of the event of XXXXXXX with participation of the injured party XXXXXXX and his legal representative Budei Andriana, thus reconstructing the events on the spot where was the model car “Peugeot 307” with licence plate CPK 054, and the place where the latter one was together with his friends Ghenadie and Cornel on Petru Zadnipru 14/6 Street, Chisinau. He said that while he was in front of a food shop, a gentleman made an observation after which he showed them a Taser after which the latter had moved to the “Dacia High School” with a hurried step, where they heard the engine of the car start, so the injured party showed where he was hit by the car’s bumper, then specified where he fell after the hit (file page number 180);

The on-site minutes of the statement verification of June 11, 2013 with the witness XXXXXXXXX indicating where the crime was committed on Petru Zadnipru Street, Chisinau, thus indicating where the injured party, Budei Igor was was hit by a white “Peugeot 307” vehicle (file page number 183);

The on-site minutes of the statement verification of June 11, 2013 with the witness Braga Cornel, which indicated the place of the crime on Petru Zadnipru Street, Chisinau, thus indicated where the injured party XXXXXXXXX was hit by a white “Peugeot” vehicle (file page number 184-185);

The confrontation minutes between the defendant XXXXXXXX and the injured party XXXX where the latter maintained their position, the injured party maintaining his statement of being hit by the defendant in his car (file page number 118-119);

The confrontation report between the accused XXXXXXXXX and the witness XXXXXXXXX through which each of them maintained their position, the witness indicating that the accused Dropca hit the injured party with his car (file page number 120-123);

The confrontation report between the accused XXXXXXXXX and the witness Bogza Cornel through which each maintained his position so the witness said the accused Dropca him the injured party with his car (file page number 124-127);

Recognition Ordinance as evidence of a CD-Disc with audio recordings, attached to criminal case (file page number 181);

Recognition Ordinance as evidence of car model “Peugeot 307” with license plate CPK 054, white with grey stripes, stored in the compound of Police Inspectorate, Ciocana Sector, Chisinau. (file page number 252).

According to art. 101 (1) and (2) of the Criminal Procedure Code of the Republic of Moldova - each body of evidence is to be assessed from the point of view of its relevance, conclusiveness, utility and authenticity, and all the evidence as a whole – in terms of their corroboration. The judge assesses the evidence according to his own conviction, formed by their examination in their entirety, in all respects and objectively, guided by the law.

The court, assessing the evidence from the point of view of their relevance, conclusiveness, utility and authenticity, from the point of view of their corroboration, establishes the deliberate commission by the defendant XXXXXXXXXX of injurious actions within the limits of art. 151 (1) of the Criminal Code.

The non-recognition of guilt by the defendant XXXXXXXXXX the court considers as a defense method and his right not to be self-inflicted, the person who during the criminal trial has the procedural capacity of the defendant cannot be prosecuted for submitting false intentional statements, except in the cases expressly provided by the criminal procedural law.

It is noteworthy that this is a shortened version of the assessment of evidence. The judgment the extract is taken from runs to 17 pages, 13 of which contain a summary of witness statements or other evidence. It seems fair to assume that the judgment paints a largely complete picture of
Current practices in the area of judgment writing and perceived shortcomings

The evidence presented during the trial. Yet it does not enable the reader to understand what led the court to conclude that the defendant was guilty as charged and that his version of the facts was not true. On the contrary, the wealth of information renders it rather difficult to see how the court evaluated the evidence.

This is, firstly, because the court does not confine itself to stating the most relevant parts of the testimonies given but presents them more or less in full. Facts which are legally not relevant (such as the fact that the ambulance had difficulties to find the injured person and which streets it took when approaching) are presented in the same amount of detail as crucial statements (e.g. the statement that a witness saw how the defendant ran into the injured person with his car).

Secondly, it is due to the fact that the court does not elaborate on how different pieces of evidence relate to each other. The judgment does not state, say, whether what witness A said is consistent with the testimony of witness B and if their statements square with document C. Thus, the intellectual process the judge carried out when assessing the evidence remains opaque.

Finally, the court does not provide a qualitative assessment of the evidence. It does not state why it considered certain pieces of evidence as reliable or valuable in view of establishing the facts. Criteria frequently used to assess testimonies such as consistency, detailedness, an own interest in the outcome of the trial are not employed at all.

Relaying the evidence in full rather than summarizing it was – to different extents - a characteristic to be found in most of the judgements scrutinized in the context of this report.

Using of standard phrases instead of an assessment in the concrete case

Another observation in regard to the judgments I examined is that they often use certain standard phrases when dealing with evidence. Judges tend to employ these phrases to justify a certain result instead of analyzing the individual piece evidence before them. If, for example, the court considers the testimony of a witness unreliable, the judgement frequently states ‘the court assesses the testimony of witness X critically’ and does not explain what exactly the shortcomings of the testimony were.

In a case decided by the Straseni District Court, the defendant had been charged with providing false testimony in a trial. He maintained that his testimony had been truthful. The court’s assessment of the evidence reads as follows:

- The Court gives a critical assessment to the statements of defendant Cioban Iurie Victor, which are contradictory, opposing the statements of witnesses Dodon Simion and Zubic Serghei who confirmed within the court hearing that the defendant provided explanations voluntarily, with all details, not being influenced by anyone, he signed the minutes of the examination, a fact which was also not denied by the defendant within the court hearing.

  The Court also critically assesses the statements of the defendant that being driven by Vrincean Ion to the hill, they all had a fight with each other, but Vrincean Ion did not beat anyone, as a version

---

14 Case file no. 1-272/2016, judgment of 10 October 2017
of defence, in order to avoid liability for the actions committed by him and in order to exonerate defendant Vrîncean Ion from criminal liability; this argument of the defendant is rebutted by the evidence examined within the court hearing. His guilt is confirmed through the cumulation of pieces of evidence presented within the court hearing, which are corroborated and interconnected with each other, pertinent and conclusive evidence, gathered and managed within criminal investigation and directly presented within the court hearing.

Having assessed the evidence presented within the court hearing, the Court considers that the guilt of defendant Cioban Iurie Victor is entirely proven, and his actions are to be qualified on the basis of art. 312 para.(1) of the Criminal Code – knowingly making of the false statement by the injured party, action which was committed within criminal proceedings.

The court states that it considered the testimony that the Vrincean Ion had not beaten anybody rebutted by the cumulation of pieces of evidence which are ‘corroborated and interconnected’. How the pieces of evidence are interconnected and in what way they corroborate each other remains unclear.

This kind of reasoning was to be found in some 70% of the judgments examined for purposes of this report.

**Legal assessment**

Having established the facts of the case, the court has to apply the law to them. This does not mean, that the court simply states the result of its legal assessment or the conclusion it derived from the law. The reasoning should reflect the thought-process the judge carried out when applying the law; it should become clear which facts correspond to the requirements of a given provision or how specifically the provision applies to specific facts of the case. The reasoning has to highlight the legal issues of the case and to explain the court's position on them. Most of the judgements I analysed for purposes of this report failed to achieve this goal. There are several reasons for that:

**Judgments do not reflect how the facts correspond to the requirements of legal provisions**

Most legal provisions consist of several requirements. If all requirements are fulfilled, the law ties a specific legal consequence (e.g. a liability to compensation) to that. It is good practice to go through all requirements contained in a legal provision individually and to apply them to the facts. This renders the process of legal assessment more comprehensible to the reader. It also helps the judge to control the way he formed his opinion.

Judgments analysed in the frame of this report frequently failed to reflect how the facts matched individual requirements or components of legal provisions. Rather, they simply quoted a provision and stated that applying it had led the court to a specific result. A judgment rendered by the court of Anenii Noi in a homicide case\(^\text{15}\) may serve as an example.

---

\(^{15}\) Case no. 08-1-4504-03112017 (1-47/2017)
At the outset, the judgment sets out the court’s finding:

- On the basis of the materials in the casefile and the evidence administered at the hearing, the court found:

  In the time period from 16 to 17 xx2016, located in apartment no. 3 on xxx str., Bender, with the direct intention of killing the person, applied to Elena Semionova, with whom he was in concubinage, multiple punches and kicks, as well as with other unidentified objects in different regions of the body, causing more bodily injuries, namely: head trauma, chest and abdomen associated trauma, occipital bone fracture, multiple bilateral fractures of ribs, rupture of the liver, left kidney contusion. As a result of body injuries received, the victim died.

Under the headline ‘circumstances established in the judicial examination’ the court goes on to summarize witness statements and other evidence over more than 13 pages. It concludes that the defendant’s guilt is proven. The full assessment of the legal qualification of the defendant’s actions reads:

- On the basis of the above mentioned, the court qualifies the actions of the defendant on the basis of art.145 par. (2) lit.e1) j) Criminal Code of the Republic of Moldova, following the signs: killing a person committed against a family member and with great cruelty.

In what way precisely the defendant fulfilled the requirements of this provision remains unclear. It is possible that the legal qualification of the deed did not give rise to any difficult legal issues under Moldovan law. Anyway, the judgments should demonstrate how the court applied the law to the case and at least shortly elaborate on points which might merit an explanation. For example, the provision requires that a ‘family member’ be killed. The judgment states that the defendant lived ‘in concubinage’ with the victim. It seems worth explaining in how far a person with whom one lives in ‘concubinage’ is considered a family member under the law. The judgment should also explain the definition of the term ‘concubinage’ and its implications (is sharing a flat required? Are sexual contacts a necessary component? Are they sufficient to establish ‘concubinage’?)

The judgment also fails to define what ‘great cruelty’ means and how the defendant’s actions match the requirements of this legal notion. As a consequence, it is impossible for the reader to understand the reasoning of the court and to form an opinion whether the requirements of the provision the court applied were satisfied.

However, there was also a small number of judgements in which the courts broke down provisions into their requirements and dealt with them separately. An example is a judgment by the Straseni court in a case16 regarding false testimony. The court stated:

- Thus, the object of the crime are the social relations related to the truth-finding activity in the process of justice delivery, relations endangered by the false statement.

  The objective side of the crime set out in art.312 of the Criminal Code consists in the prejudicial act expressed in action, and namely making of the false statement by a witness or the injured party, thereby distorting the truth, and thus creating conditions for commission of judicial errors and incorrect assessment of the circumstances of the case. Within the court hearing, the Court

---

16 Case no. 1-272/2016 16-1-1489-23082016
Current practices in the area of judgment writing and perceived short-comings

established with certainty that Cioban Iurie Victor, while being examined at the criminal investigation body on 28.03.2014 as injured party, told in detail about all actions and circumstances of Vrâncean Ion, which were also confirmed by the statements of witnesses Dodon S. and Zubic S.

The subject of the mentioned crime is a responsible individual, who at the moment of the commission of the crime has reached the age of 16 and has one of the procedural statuses, either of witness or of the injured party, either of specialist or expert.

Defendant Cioban Iurie Victor had at the date of commission of the crime the corresponding age, thus being responsible for his action.

The subjective side of the analysed crime is characterized by direct intent, meaning that the perpetrator knowingly makes a false statement, in order to accuse someone of committing a crime. The Court holds that the defendant acted with direct intent, realised the consequences of their actions and wanted this action.

This crime is considered consummated from the moment of signature of the respective procedural acts by a witness or the injured party.

However, this is a relatively rare example. About 20% of the judgments I examined tied the facts of the case to individual requirements of legal provisions.

None of the judgments stated and discussed legal problems, though. It is pivotal that a judgment identifies the legal issues arising from a case. In most cases, it cannot seriously be argued that certain legal requirements are met – but it can be quite difficult to ascertain whether others are fulfilled. For example, the most basic definition of manslaughter is that one person acts negligently and thus causes the death of another person. If person A is exceeding the speed limit in traffic and runs over person B, killing him on the spot, it will not be subject to much debate that A is responsible for B’s death. If however, B is only injured and transferred to a hospital, where he dies of a virus infection, it seems less clear whether B’s death should really be attributed to A’s conduct. Here, a judge would be expected to elaborate on his assessment.

The ability to discern one category from the other is an important skill every judge (and every lawyer at that) should possess. However, in none of the judgements I read for purposes of this report were any legal issues identified and analysed.

Judgements refer to legal acts or provisions which are not pertinent

Many judgments cite a number of legal provisions or acts which are connected to the general legal problem a case gives rise to but have no bearing on the decision of the case. This tends to obfuscate the way the court applied the law to the facts of the case. For the reader, it is hard to establish which legal provisions determined the ruling and how the judge arrived at the conclusion that the ruling he made was the one dictated by the law.

A case adjudged by the Court of Criuleni17 may serve as an example. It concerned a claim for compensation by a prosecutor who had been charged with a crime, suspended and reinstated in

17 Casefile No. 2-1070/16; 24-2-454-09022017, judgment of 16 November 2017.
his position following his acquittal by the Supreme Court (upholding the judgments by the two previous instances).

The court granted his claim. Its reasoning commenced:

- Hearing the participants present in the trial, studying and analysing the materials of the case, the court concludes the partial admission of the lawsuit for the following reasons.

The provisions of art.130 paragraph (1) of the CPC state that the court judges shall assess the evidences according to its intimate conviction, based on many aspectual, complete, unbiased and direct research of all the evidences in the casefile in their entirety and their interconnection, being guided by the law.

According to Article 1 (1) of the CPC, which defines the purpose of the criminal process, identifying it as the activity of the criminal investigation bodies and the courts with the participation of the parties in the proceedings and other persons, carried out in accordance with the provisions of the Criminal Procedure Code. The criminal proceedings are considered to have started from the moment when the competent body was notified or self-notified about the preparation or commission of a crime.

The provisions of paragraph (2) of the same article expressly indicate that the criminal proceedings are aiming at protecting the person, society and state from offenses, as well as at protecting the person and society from the illegal actions of the persons with a responsible position in their activity related to the investigation of the alleged crimes; so that any person who has committed an offense is punished according to its guilt and no innocent person shall be held criminally liable and convicted.

The provisions of paragraph (3) state that the criminal investigation bodies and the courts in the proceedings are obliged to act in such a way that no person is unreasonably suspected, accused or convicted and that no person is arbitrarily subjected or unnecessary procedural constraint measures.

According to art. 1423 of the Civil Code, the amount of compensation for non-pecuniary damage is determined by the court depending on the nature and gravity of the psychological or physical suffering caused to the injured person, the degree of guilt of the author of the damage, if the guilt is a condition of the liability, and the measure which compensation can bring satisfaction to the injured person.

The nature and severity of mental or physical suffering are assessed by the court, taking into account the circumstances in which the damage was caused and the social status of the injured person.

According to art. 2 of the Law on the reparation of the damages caused by the illicit actions of the criminal prosecution bodies, prosecutor’s office and the courts no.1545-XIII of 25 February 1998, the illicit actions are meant actions or inactions of the body authorized to examine cases of administrative offenses, of the criminal prosecution bodies or courts, which exclude their guilt, the illegality of which is manifested in violation of the general principle that no innocent person can be held liable and cannot be judged, (errors) or deeds of the persons with responsible positions from the criminal investigation bodies or courts, manifested through intentional violation of procedural and material norms during criminal or administrative proceedings (offenses).

According to art. Article 3 (1) a) of the same law, it shall be repairable the material and moral damage caused to the natural or legal person following the illegal detention, the illegal application
of preventive measures in form of arrest, the declaration of not leaving the city or the country, the illegal extradition to criminal liability.

According to art. 11 par. (1)-(3) of the Law on the reparation of the damage caused by illegal actions of the criminal investigation authorities, the prosecutor’s office and the courts, the amount of compensation for the reparation of the moral damages shall be determined by the court in the manner prescribed by the law. The actual amount of the compensation shall be determined taking into account: a) the seriousness of the offense with which the person has been charged; b) the nature and gravity of the procedural violations committed in the criminal investigation and in the examination of the criminal case in the court; c) the resonance in society of the information about the accusation of the person; d) the length of the criminal investigation, as well as the length of the examination of the criminal case in the court; e) the nature of the injured person’s right and its place in the value system of the person; f) physical suffering, the nature and degree of mental suffering; g) the extent to which monetary compensation can alleviate the physical and mental suffering caused; h) the duration of the person’s illegitimate detention.

The court shall determine the amount of compensation and on the basis of the criteria specified in Article 219 (4) of the Criminal Procedure Code.

In all cases, the court will rely on the principles of reasonable and fair compensation of moral damages.

According to art. 5 par. (1) of the Law no. 1545-XIII of February 25, 1998 on the way of reparation of the damage caused by the illicit actions of the criminal investigation authorities, of the prosecutor’s office and of the courts, the body representing the state in the court on this category of cases is the Ministry of Justice.

The court then chronicles (again) the events starting with the investigation into the plaintiff’s actions to his final acquittal:

- At the court hearing, it was found that by the Order of the criminal investigation body of November 18, 2010, on criminal case no. 2010978161, Zamşa Viorel was acknowledged as suspect in committing the offense provided by art. 327 par. (1) Criminal Code (f.d.25), and he was heard on the criminal casefile according to the assigned quality (f.d.27)

(…)

In turn, the Criminal Panel of the Supreme Court of Justice on December 17, 2013 pronounced the decision by which it dismissed as inadmissible, as plainly as ungrounded, the ordinary appeal declared by the prosecutor of the Prosecutor’s Office at the level of the Chisinau Court of Appeal, Radu Sili, against the decision of the Criminal Panel of the Chisinau Court of Appeal of April 25, 2013 regarding Zamşa Viorel Mihail, with upholding the contested judgment (fd19-21).

The court then states why it considers that the plaintiff is entitled to compensation:

- Article 3 of the Universal Declaration of Human Rights, adopted by the UN General Assembly, enshrines the rule that “Every human being has the right to life, to his or her liberty and security”. This fundamental right of the person is also enshrined in the Habeas Corpus Act, in the US Declaration of Independence, in the European Convention for the Protection of Human Rights (Article 5), in the
Constitution of the Republic of Moldova (Article 25), in the Criminal Procedure Code (art.1), etc., which configures its content, providing the libertatis status of the person. This right is restricted only in case of violations against the social values, protected by the criminal law.

Under these circumstances, the court concludes that the applicant, Zamșa Viorel Mihail, has the right to claim compensation of moral damages under the Law on compensation for the damage caused by the illicit actions of the criminal investigation authorities, the prosecutor’s office and the courts.

The court lists a number of legal acts, from numerous articles of the Civil Code to several international provisions. It cannot be inferred from the reasoning, though, which exact laws or provisions the court applied to reach the result it did. In regard to some of the laws invoked, it may well be doubted whether they are pertinent to the facts of the case at all. It is hard to see what role article 3 of the Universal Declaration of Human Rights would play in deciding the case (apart from the fact that it is not binding law). Article 5 ECHR does not seem relevant since the plaintiff had not been deprived of his liberty and the US Declaration of Independence does not appear to contain pertinent provisions either.

In addition to that, the judgment hardly identifies any legal issues arising from the case. It seems that the court bases its decision to grant compensation on legal provisions to the effect that the state is liable to compensation if the prosecution service has committed illicit acts. One of the important questions to be answered when adjudicating in the case, in my opinion, would be whether investigating and indicting a suspect has to be considered an illicit act just because the suspect is acquitted later on. The judgment does not deal with that problem at all.

A case decided by a court in Chisinau regarding defamation is an additional example:

- A Moldovan TV-station had published a report on a trial in a criminal case. It concerned members of a group called ANTIFA; they were accused of preparing armed attacks and storing weapons and money of Russian origin in their homes. In the report, the voice of the speaker said ‘at least two members of the ANTIFA group are targeted in criminal proceedings’. At the same time, pictures of two persons were displayed. One of them was the plaintiff. He initiated proceedings for defamation on the grounds that viewers must have had the impression that he was a member of the ANTIFA group, which he was not.

The court rejected the claim. The reasoning of the judgement starts by paraphrasing the content of the articles 117, 180, and 113 of the Civil Procedure Code. These articles set out that the court is obliged to obtain lawful evidence, that each party has to prove circumstances in his favour and that the court is free in its assessment of the evidence. Which concrete conclusions are to be drawn from these provisions for the case at hand, or why the court is quoting these provisions remains unclear.

The court then refers to article 10 ECHR (freedom of expression), article 32 of the Constitution of Moldova (freedom of expression), article 7 of the Law on Freedom of Expression, article 16 of the Civil Code (governing the right reputation). The concrete relevance of these provisions for the case is not explained at that stage.

The judgement then gives an account of the facts, starting with information on the broadcasting licence of the defendant. This account runs to eight lines of the judgement.
Following this summary, the judgement states again that pursuant to article 16 of the Civil Code a person has the right to demand the revocation of information which damages his personal or professional reputation. The judgement then again paraphrases article 3 of the Law on Freedom of Expression. It goes on to explain the distinction between value judgements and allegations of facts. The court does not elaborate on the bearing of that distinction for the case at hand.

The judgement then states that pursuant to article 24 of the Law on Freedom of Expression the plaintiff must prove the dissemination of information, that the defamation contained therein is defamatory the information is the account of facts and essentially false, or value judgement is not based on a sufficient factual substrate and the existence and the amount of damage caused. The court then states that the information spread about the plaintiff was simply a value judgement based on factual substrate. However, there is no explanation whatsoever on the criteria the court applied or the way in which that result impacts the ruling.

In addition to that, the judgement states that the information spread by the defendant company was not defamatory since 'the defendant did not give names to any person, presenting about the case that was accompanied by video, without mentioning that these would have anything to do with the people in the video'. The court does not elaborate further on this. Consequently, the issue is not discussed whether the information was defamatory since viewers were likely to get the impression that the persons depicted were members of the ANTIFA – although this seems to be one of the main issues of the case.

The judgement then points out that the plaintiff did not substantiate whether the information constituted an account of facts which was basically false and that he did not submit evidence proving that the value judgement was not based on sufficient factual substrate. Subsequently, the judgement explains yet another time the difference between value judgements and allegations of facts. It refers to jurisprudence by the European Court on Human Rights both with regard to value judgements and statements of fact. Again, the judgement does not link these legal concepts to the case. At this point, the court neither explains whether it considered the information a value judgement or an allegation of facts nor does it state what legal conclusions it draws from that.

The court proceeds to refer practice direction issued by the Supreme Court regarding the Law on Freedom of Expression and cites definitions of honour, dignity and professional reputation. Again, the court does not explain what the bearing of these definitions on the case at hand is.

The court then points out that according to the practice direction of the Supreme Court the revocation of statements can only be demanded if the information was found to be false. It also underlines that it is incumbent on the plaintiff to prove that the information is false.

The judgement then explains that there was no defamation ‘but there was news that was accompanied by some visual images, including that of the plaintiff, including through video recording attached to the case material’. Again, the court does not deal with the issue whether depicting the plaintiff in the report by referring to the Antifa group portrays the plaintiff by implication as a member of this group.
Finally, the judgement states that the plaintiff did not prove to have suffered any damage.

Thus, the judgment fails to identify the crucial legal points on which the decision turned. It remains unclear which legal provision was decisive, what role freedom of expression played (if any) and in how far the distinction between facts and value judgments impacted the decision.

While this judgment is an extreme example, chosen to highlight a point, the tendency to cite numerous legal norms without clarifying their importance for the case is widespread. It was found in about 50% of the judgments scrutinized for purposes of this report.

**Not addressing legal arguments advanced by the parties**

Another observation regarding the judgements examined is that they often deal with legal arguments advanced by the parties in cavalier and superficial way or fails to address them altogether.

An example for the former is a decision given by the Supreme Court. The defendant had been convicted for bribing a public official. He argued that he had been entrapped (leaning on judgments by the ECtHR, the term ‘provocation’ is used in Moldova). The Supreme Court stated:

- In another line of thought, the Criminal Chamber assesses critically the arguments of the appellant that the defendant has been provoked by Smirnova T. to commit the crime, that provocation as a means of establishing the crime is not accepted, and that the minutes of receipt of the complaint of citizen Smirnova T. of 03.08.2012 were to be declared void, due to the reason that they were drawn up in a language not known to the denouncer, in the absence of a translator, which implies their nullity, because the appellate court expressed its argued view on them in its decision, considering the arguments as unfounded.

In essence, the Supreme Court argued that it rejected the appeal against the judgement by the Court of Appeal because the Court of Appeal had already decided on the matter.

In other cases, courts failed to address legal arguments or important legal issues altogether. It is, obviously, hard to substantiate this finding on the basis of judgements only (since the point is that certain considerations are **not** in the judgement). The case in point can be made, however, referring to judgements by the European Court of Human Rights. As pointed out above, the European Court of Human Rights interprets the right to a fair trial pursuant to article 6 ECHR as encompassing the right to a reasoned judgement. The court found Moldova in violation of this right in several cases.

For example, in Nichifor v Moldova, the applicant had created a company in form of a limited liability company together with partner. Years after they had founded the company, the partner initiated an action with the aim that the applicant be removed from the list of shareholders since he had not paid his contribution to the capital of the company. In first instance, the action was rejected as time-barred. The plaintiff appealed. At the appeal stage, he produced an agreement allegedly signed by the applicant several years before, in which the applicant agreed to pay his

18 Case file no. 1ra-1113/2015, judgement of 1 December 2015
19 Application no. 5205/10
Current practices in the area of judgment writing and perceived short-comings

outstanding contribution within one month or, should he fail to pay, be removed from the list of shareholders. The applicant asserted that the document had been forged and requested that an expert be commissioned to examine if the signature under the document was authentic. He submitted documentation proving that he had been in Israel when the document had allegedly been signed. The court did not respond to his request and did not include in the minutes that the request had been submitted. It ruled, that the applicant be erased from the list of shareholders. The applicant noted that his motion to authenticate his signature had not even been included in the minutes of the trial and asked for an amendment of the minutes. The court turned down the request. The applicant appealed against the judgement. The Supreme Court rejected the appeal, relying solely on the minutes of the trial. In the reasoning of its decision, the Supreme Court did not address the applicant’s argument that his signature had been forged.

The European Court of Human Rights found a violation of article 6 ECHR. It pointed out, that the applicant’s argument that his signature had been forged had been sufficiently substantiated and that it had been potentially decisive for the outcome of the litigation. Consequently, the domestic court had been under an obligation to deal with this argument.

In Vetrenko v Moldova\(^\text{20}\), the applicant had been convicted of murder. He maintained that he had made his confession under duress. He contended that the way he had described the commitment of the crime in his confession did not match the findings of the forensic expert. The defendant was initially acquitted on account of the inconsistency of his confession and the findings of the forensic expert. Following a retrial, he was convicted of murder. He appealed the judgement, pointing to the difference between his confession and the way the crime had been committed according to the forensic experts. The Supreme Court did not examine these arguments. The European Court of Human Rights found a violation of the right to reasoned judgement. It attached particular weight to the fact that during the retrial the courts have not dealt with the very arguments which had prompted the first court adjudicating the case to acquit the applicant.

Cases in which the European Court of Human Rights held that Moldova had breached its obligations under the Convention are not limited to article 6.

In Tiramavia Srl and others v Moldova\(^\text{21}\), the Moldovan Civil Aviation State Authority had certain irregularities in the way three companies specialising in air transportation conducted their businesses. It set a deadline to remedy these irregularities; however, before the deadline had expired it withdrew the companies’ licenses. The companies appealed that decision. They argued that according to the applicable law, the license could only be withdrawn after irregularities had not been addressed within the deadline set by the Civil Aviation State Authority. The competent court confirmed the decision to withdraw the license without addressing this argument. The Supreme Court upheld this decision without addressing the applicant’s argument. The European Court of Human Rights held that the applicants right to property had been violated since the domestic courts had not provided sufficient reasoning for their judgements.

\(^{20}\) Application no. 36552/02
\(^{21}\) Application no. 54115/09
Possible reasons for shortcomings

Workload

There was a widespread consensus among interlocutors – judges, attorneys, law professors, prosecutors and representatives of NGOs – that judgments rendered by Moldovan courts are generally not well-written (most persons interviewed underlined that there are capable legal professionals in Moldova and that there are also numerous examples of excellent judgments).

Interviewees attributed this to various factors. The reason most frequently cited was the overwhelming workload which did not enable judges to dedicate sufficient time to analyzing the case and to draft their judgments thoroughly. One interlocutor suggested that a study be produced to establish whether it was humanly possible to cope with the number of cases a Moldovan judge was burdened with.

Number support the claim of overburdening to a limited extent. Study no. 26 published by the European Commission for the Efficiency of Justice (a body under the Council of Europe) compared, inter alia, statistics regarding the justice system in 45 member states of the Council of Europe plus Israel and Morocco (the latter ones had been granted observer status and were therefore included in the exercise). The report states that there are 11.8 judges per 100,000 inhabitants in Moldova. This is significantly lower than the median of all countries included in the report, which is 17.8 and far below the average of 21.5\textsuperscript{22} (the average is increased substantially due to states such as Monaco with an average of 98.5 judges, Montenegro with 51 judges and Serbia with 38.5 judges). It is noteworthy, though, that there are also several countries in which the average number of judges per 100,000 inhabitants is lower than in Moldova or approximately the same. Examples are Norway (10.6), Denmark (6.5), UK – England and Wales (3.0)\textsuperscript{23}, Spain (11.5) or the Netherlands (13.6)\textsuperscript{24}.

These numbers draw an incomplete picture. The number of judges has to be seen in relation to the volume of cases. A statistic published by the Supreme Council of Magistrates of Moldova indicates that the average number of monthly cases per judge is 62.7, which is substantial. Another factor to be considered is the proclivity of litigants to exhaust all legal remedies (several interlocutors stated that individuals involved in litigation as well as defendants in criminal trials and prosecutors tend to make use of every appeal available to them). Still, it seems that the number of judges in Moldova is at the lower end of the scale in comparison but not exorbitantly small. In addition to that, many judges benefit from the help of legal assistants who conduct research for them or draft judgments. There are countries in which this is not the case. For example, in Germany only judges of the highest courts have law clerks or assistants.

However, numbers of judges also have to be taken with a grain of salt because cases are not distributed evenly among the judges in the country. Many interlocutors stated that judges working in rural areas are assigned a substantially lower number of cases than judges in Chisinau,

\textsuperscript{22} P. 105 of the report
\textsuperscript{23} According to the report, the low number is explained by the fact that many cases are adjudicated by non-professional judges Magistrate Courts; the report also states that the number of non-professional judges is 16.296 (p.109 of the report)
\textsuperscript{24} P. 105 of the report
the commercial center of the country. The statistic shows that the courts with the smallest workload have between 1010 and 1511 cases per year, while there are courts dealing with numbers as high as 5,321 (Anenii Noi) or 5,529 (Hincesti). It is difficult to draw conclusions from this disparity, though, since the statistic does not show how many judges are working in the respective courts.

Finally, it should be noted that it is not entirely clear how reliable these statistics are. The report by the European Commission for the Efficiency of Justice, which is based on number submitted by the participating states in 2016, states that the total number of judges in Moldova is 418. According to the statistic for the year 2017 by the Superior Council of Magistrates it is 397. This might mean that the number of judges has been reduced, for example through retirements, or it might reflect a lack of accuracy in one of the statistics.

It is hard to derive clear conclusions from the above numbers. Without doubt, the workload of many judges in Moldova is substantial. Resources in terms of personnel and technical equipment are limited.

I would argue, though, that approaching cases with the right methodology and structuring judgements in a clear way is often less time-consuming than drafting them in the way many of the judgements were written. For example, focusing on relevant parts of witness testimony and its analysis will in many cases reduce the length of judgments significantly, which saves time and resources.

**Corruption**

A small number of interlocutors argued that corruption of judges impacted the quality of drafting of judgments. Different arguments were advanced as to the form this impact takes. However, as none of these points can be proven nor can the actual amount of corruption in the judiciary be assessed, I did not analyze its impact on the quality of judicial decisions.

**Lack of training**

Many interviewees underlined that judges did not undergo any formalized training on legal writing. They had to develop their own approach to writing judgments and the results differed depending on influences they were exposed to (their peers, judgments rendered by other judges which they read, their own studies etc.). Consequently, results differed considerably.

---

25 P. 103 of the report
Training on legal drafting

Training on legal writing at the National Institute for Justice

During university education, law students do not undergo any specialized training on legal writing. Drafting or legal reasoning is not a subject taught at university. Teaching is mostly based on lectures which usually focus on legal theory; exams are conducted orally or in the form of questions students have to answer briefly or in form of multiple-choice tests.

The institution mandated to equip future judges and prosecutors with the requisite drafting skills is the National Institute of Justice (NIJ). It was created in 2006 and provides training to candidates aspiring to be judges or prosecutors. In addition to that, the NIJ offers continuing legal education to sitting judges and active prosecutors as well as to members of certain other professions such as law clerks or bailiffs.

The NIJ is designed to be the main entry point into careers as judges or prosecutors. The initial training is comprised of two components. Candidates undergo training at the Institute for 41 weeks followed by a period of six months during which they work in prosecution offices and/or courts under the mentorship of an experienced prosecutor or judge.

The format of the training period at the NIJ has recently been changed. It was initially mostly comprised of teacher-centered teaching on various subjects which also included a course on legal writing.

Now the legal education provided by the Institute is mostly based on trial simulations. Students assume the roles of judges, prosecutors, attorneys, clerks, witnesses and experts and enact trials. They are supervised by mentors who are carefully selected among experienced judges and prosecutors and who provide guidance and feedback.

Most of the mentors exercise this function in addition to their ordinary professions; a small number of mentors is seconded to the NIJ full-time.
Training on legal drafting

The basis for simulations is real case files, which are chosen by the mentors (mostly from their own practice or designed by them specifically for trainings at the NIJ). Students playing their parts have to undertake all activities required by their role in the trial. Training on legal writing is integrated into these exercises. The candidate playing the judge has to write the judgement; the candidate playing the prosecutor will draft motions to be submitted on behalf of the prosecution etc. Feedback on these writing assignments is furnished as part of the general feedback on their performance candidates receive at the end of each simulation.

The mock trials are videotaped. Mentors as well as candidates have remote access to the recordings which enables them to check the performances at any time and from almost any place. Mentors also have access to the full files of any student including grades, documents written by candidates as part of their training etc.

The first semester at the NIJ lasts 19 weeks during which candidates receive 714 hours of training. It is, according to the program of the Institute, dedicated to pre-trial skills. Subjects taught are ‘conducting and exercising criminal prosecution’, ‘civil proceedings in first instances: Incidents not relating to the examination of the merits of the case’ and ‘judicial control of pre-trial proceedings’. All of these subjects are broken down into several sub-categories.

In terms of methodology, the subjects are taught via simulations. This will include writing assignments, which subsume only a small portion of the lessons dedicated to the subject (see below). During the first semester, students receive 20 lessons on legal writing and stylistics (which is 10 lessons less than the 30 lessons dedicated to ‘judicial psychology’).

The second semester is comprised of 21 training weeks, equaling 764 of training, plus one week for final exams. Teaching is conducted via simulations. Among the topics covered are 'examination of civil and criminal cases in first instance' and 'representation of indictments in court'. There are no specific courses on legal writing in this semester.

The third semester is comprised of a 30 weeks traineeship. While legal writing is surely addressed in the frame of this internship, it is not expressly taught as a subject.

The case for separate courses on legal writing

The new approach to training candidates has clear advantages. It is widely accepted that learning actively and applying knowledge (‘learning by doing’) is more effective than ex-cathedra-teaching. In addition to that, the simulations allow students to acquire practical skills which are hard to convey by teaching theory. Delivering a closing argument cannot be learned by listening to a lecture. The simulations bear the prospect that students will be able to carry out such practical activities confidently from day one once they start working in their professions. It also seems likely that students would be more motivated when engaging in practical exercises then when listening to presentations.

However, the methodology employed by the NIJ has downsides, too. In particular, I have doubts whether it is capable of equipping future judges and prosecutors with the drafting skills they need to exercise their professions.
Legal writing is an essential skill for all attorneys, prosecutors and judges. For judges, it is arguably the single most important skill. Accordingly, future judges and prosecutors (training for attorneys is not within the scope of this report) should dedicate significant amounts of time and effort to honing it. This is particularly true in an environment where candidates have not undergone any previous training on the subject in the course of their education.

The number of writing assignments candidates undergoing training in the NIJ receive is very limited. In every mock trial, only the candidate assuming the role of the judge is tasked to draft the judgement. Candidates playing witnesses, defendants, experts or interpreters (obviously) do not draft anything at all; since the number of students in a group frequently exceeds the number of roles to be played in the frame of the simulation, some candidates just watch the performance of their colleagues and do not write anything either. It was hard to obtain a concrete statement on the overall number of judgements each candidate has to write in the course of the training at the NIJ. Most interlocutors stated that it was somewhere between five and nine. At any rate, the amount of drafting assignments does not seem sufficient for the students to develop the necessary writing skills. Also, while acknowledging the benefits of the methodology developed by the NIJ, it is doubtful whether the training time is used efficiently when students spent such long periods playing witnesses or observing trials enacted by others.

In addition to that, improving one’s writing skills requires extensive feedback. Texts have to be drafted and critiqued in detail and precise guidance must be provided; possibly texts have to be rewritten. The feedback furnished during the feedback sessions did not (and could not) achieve this.

The feedback sessions deal with the mock trials in their entirety. Mentors address all aspects of the candidate’s performance in their respective roles. This means assessing the display of skills such as witness examination, delivering closing arguments for presiding over the trial regarding at least three persons (judge, prosecutor, defence counsel), discussing legal questions arisen in the course of the trial and practical issues (for example, when to file a certain motion, when to decide on it). Considering the number of topics to address, there is not enough time to discuss the quality of written submissions or the judgement in a sufficiently detailed fashion to facilitate a learning process.

The feedback session I attended during my visit to Chisinau lasted approximately one hour. The mentor addressed a number of issues in regard to the mock trial the candidates had enacted in a rather superficial manner, inter alia advising the ‘judge’ to assert more authority. Some issues which in my opinion would have merited intense discussion were not mentioned or elaborated on. The defendant’s phone had been intercepted. The mentor stated that the legality of this interception was questionable since it had been carried out by body not authorized to do so. In my opinion, this could have triggered a broad debate on the admissibility of this piece of evidence, on how to raise the issue from the defence lawyer’s perspective, possibilities for the prosecutor to react and, finally, on how to decide as a judge. None of that was discussed. During the mock trial, a defense lawyer had moved (orally) to suppress a certain piece of evidence. The mentor had interrupted and stated that arguments of this kind should be brought up in the closing arguments; the student had objected. The mentor had announced that this should be discussed further during the feedback session. However, the issue was not brought up.
There was no feedback whatsoever regarding the quality of motions which had been submitted or the drafting style of the judgement.

It also seems that much attention is paid to formal aspects of a judgment such as the structure, information on the parties to be provided, the right place to include the file number and so on. This focus on formalities might at times come at the cost of the time dedicated to the coherence and persuasiveness of judgments.

In addition to that, experience suggests that complex skills are learnt better when broken down into several components. A person who wants to learn how to play tennis will not start by playing full matches but spend some time practicing forehand, backhand and service separately; an aspiring guitar player will not begin by playing ‘Smoke on the water’ and stage diving into the arms of an enthusiastic crowd. Participating in a trial is a very complex activity. To be learned, it should be broken down in several components, too.

There is also a risk that the current approach to teaching judgement-writing tends to exacerbate widespread shortcomings in the way legal documents are drafted. The issues addressed in the section dealing with the analysis of judgments do not seem attributable to individual errors or lack of time. The judgments examined were passed by courts from different regions in various areas of law. This indicates that they reflect what is considered 'state of the art' rather than occasional outliers. Although many of the mentors at the NIJ are experienced and highly respected legal professionals, it is likely that the concepts they teach will not differ substantially from the current practice in Moldova.

A mock trial I observed during my visit, may illustrate the point. In the trial, the court had to decide on the extension of a detention order (under Moldovan law, detention on remand is ordered for an initial period of 30 days. After this period, the court must review the measure and to determine whether continued detention is justified). The prosecutor asked for an extension of the measure without providing any reasoning; the defense attorney did not raise any objections. The court ordered that the detention on remand be continued for another 30 days. No reasoning was provided.

In the feedback session, the matter of detention on remand was not discussed. There would have been good reasons for debate. Article 5 ECHR requires court to provide relevant and sufficient reasons justifying detention on remand. According to long-standing jurisprudence by the European Court of Human Rights, the threshold to continue detention on remand increases over the course of time. Courts have to display 'special diligence' when ruling on the necessity of detention on remand. In Buzadji v Moldova, the Court held:

- According to the Court’s established case-law under Article 5 § 3, the persistence of a reasonable suspicion is a condition sine qua non for the validity of the continued detention, but, after a certain lapse of time, it no longer suffices: the Court must then establish (1) whether other grounds cited by the judicial authorities continue to justify the deprivation of liberty and (2), where such grounds were “relevant” and “sufficient”, whether the national authorities displayed “special diligence” in the conduct of the proceedings (see, among many other authorities, Letellier, cited above, § 35, and Idalov v. Russia [GC], no. 5826/03, § 140, 22 May 2012). The Court has also held that justification for any period of detention, no matter how short, must be convincingly demonstrated by the
When deciding whether a person should be released or detained, the authorities are obliged to consider alternative means of ensuring his or her appearance at trial.

There is a host of judgments by the European Court of Human Rights finding Moldova in violation of article 5 ECHR on account of insufficiently reasoned pre-trial detention orders. Against this backdrop, it should be expected that candidates at the NIJ are taught how to draft decisions on detention on remand – and that mentors react if they fail to comply.

In addition to that, some of the (few) judgments drafted by candidates in the frame of their training at the NIJ displayed similar characteristics as ‘real judgments’ examined for purposes of the report. For example, a mock trial in a criminal case regarded charges against a defendant accused of violating traffic rules, leading to the death of a person (art. 264 Criminal Code). According to the indictment, the defendant had ignored a red-traffic light and run into a pedestrian when trying to avoid a collision with another car.

The judgment commences the assessment of evidence:

- The guilt of the defendant, Dan Ruslan Somov, has been confirmed in the court hearing, being proved by the following evidence, namely

  The statements of the injured party’s successor, Vasile Dontu, who said in the court hearing that he is the son of the deceased Galina Dontu. For the last time, he saw his mother on 01.08.2017 at home. Later, probably, she went to a shopping center. The next day his sister, Elena Dontu, told him that on 1 August 2017 his mother was hit by a car and is in serious condition at the hospital. On 07.08.2017, Galina Dontu died in the Hospital. He claims that his mother has not had any health problems and that he has never heard of any acts of suicide. He also reported that the defendant ignored the deceased’s family and did not at least apologize.

  The statements of witness Daniel Cristin Botan, who stated that on August 1, 2017, about 18:00, driving the Dacia Logan car, registration no. BRD 456, was moving on blvd. Moscow from Alecu Russo str. towards Matei Basarab str., Chisinau municipality, With the speed allowed, on the extreme-left lane, closer to the horizontal road marking, the continuous double line. In the car salon he was alone. The car is owned by taxi company “Taxi 14222”, “Tenevga LLC”. While driving on blvd. Moscow, in order to make the return maneuver to move to Kiev str., Chisinau municipality, drove up to the intersection of Miron Costin str. And Moscow blvd. He noticed that at the traffic light, which is installed on the left side after the intersection, the green signal of the traffic light was connected to its direction. He lowered the speed to the minimum, connected the signal and stopped, being already in the intersection close to the middle. In front of him there was no car. From the opposite direction, at the level of lane no. 3, stood another car, the model and registration number of which he does not remember. He wanted to make the turn-around maneuver on Miron Costin Street to move to Dimo Street. He waited for some time, about 2-3 minutes. After that, he noticed that the car moved on, at the above-mentioned traffic lights, flashed a few times the intermittent yellow signal and seeing that there was no vehicle coming from the opposite direction, he began the return maneuver. When he arrived in the middle of the lane number two, he noticed a black BMW 5, moving from the opposite direction. The registration number he did not memorize. Until that moment, in his opinion, that car moved on the extreme left band, i.e no. 3 and for this reason the driver did not see him. Later, not reaching for him, at a short distance, the BMW car
driver suddenly took the steering wheel to the right and entered the sidewalk. He communicates that he continued the return maneuver and stopped to the right at a certain distance after the road marking “pedestrian crossing”, then wanted to go back through the circle at the intersection of Alecu Russo str. – blvd. Moscow – Kiev str. – Bogdan The Voivode str., but before reaching there, he was stopped by a police crew that asked him to go back to the scene. There was no contact between his car and the BMW car. Returning to the scene, he noticed that the BMW was standing in the middle of the road, at a certain angle, and near the right-back side, lying on the road, was a lady’s body.

(…)

Statements of the witness Andrei Vasile Alexei, who at the hearing declared that on 01.08.2017, about 18.08 min., He was driving home alone with the car “Subaru Forester”, registration no. BR RY 235, on the Moscow blvd. from the direction of Alecu Russo str. towards students str. Chisinau municipality. Driving up to the intersection of the streets Moscow blvd. – Miron Costin str., Chisinau municipality, he moved to the third lane, where he observed a dark-colored “Dacia Logan” that connected the left turn signal. Taking into account the traffic conditions, he moved to the third traffic lane, to the traffic lights at the intersection mentioned above the red light was connected for the Moscow blvd., respectively, he started to brake and at the same time he heard the passers who shouted. Looking to the left he noticed a BMW, and on the right side was a pedestrian on the ground. So, he realized that the given car hit the pedestrian. He has not seen the moment of the accident because he had to be attentive to the route. After that he remembered that he has a dashboard camera. Going home he watched the video and realized that it contains the accident. Subsequently, going out with his family, he stopped at the scene of the road accident and told police officers that he had a video that contains images with the accident and left them a contact number (f.d.);

(…)

The court found the defendant guilty providing the following reasoning:

- Thus, hearing the successor of the injured party, the witnesses, investigating the materials of the case and assessing in general the circumstances established in the judicial investigation and according to the own conviction, from the point of view of their pertinence, usefulness and veracity, and from the point of view of their corroboration, the court concludes that the defendant Dan Somov is guilty of committing the offense provided in in Article 264 (3) (b) CC because he, driving the vehicle, has violated the traffic safety rules and exploitation rules of vehicles i.e committed offence provided in point 45 par (l) l. (a), (b), (c) and (d) of the Road Traffic Regulations, which led to the death of the injured party – Galina Dontu.

The court refers to the evidence mentioned above, which clearly shows that the vehicle BMW 520, registration no. KND 123, driven by the defendant Dan Somov, was involved in the road accident on 01.08 .2017, after which the injured party Galina Dontu suffered from serious bodily injures, which led to her death. This fact is not denied by anybody.

At the same time, the court considers that the attorney’s argument that on the day of the road accident an expert was not present, his presence being necessary for the accurate execution of
the photograph (Article 87 of the CPC) and the forensic doctor for the examination of the body on the spot, since the injured party did not die at the scene, being transported to the hospital, cannot be taken into consideration and are to be criticized. The injured party’s death occurred only on August 6, 2017, within the medical institution. As regards the assessment that the evidence handed over by the prosecution is insufficient to show the features of the offense incriminated, the court considers them declarative. The court considers that the arguments of the defense cannot serve as a basis for delivering an acquittal decision, since the evidence examined at the hearing reveals that the defendant is guilty of the road accident, from statements made by the witnesses in the court hearing it results that the defendant hit the pedestrian Galina Dontu, who walked regularly on the sidewalk.

As many of the judgments examined for purposes of this report, the judgment sets out the entire evidence considered rather than to weigh and analyze it; witness testimony is rephrased instead of capturing the key points provided by the most important witnesses. The fact that the deceased person died in hospital and did not have suicidal tendencies can hardly have been the subject of much debate, yet the judgment summarizes the testimony of the victim’s son in this regard.

In addition to that, the court does not provide a real explanation why it considered the defendant’s guilt proven. It does not become fully clear what exactly the defense argued; at any rate, the court just states that these arguments ‘cannot be taken into consideration and are to be criticized’, thus limiting itself to a phrase without addressing the arguments presented by the defense.

In summary, the judgment featured many of the shortcomings to be found in a large number of the judgements analysed for purposes of this report.

This finding reflects a risk of the teaching methodology currently applied: the approach to drafting judgments taught at the NIJ will be similar to the ones of the individuals delivering the lessons. Students are likely to adopt the same style of writing and reasoning. Since the legal reasoning in Moldovan judgments is at times poor, this might mean that widespread shortcomings will be exacerbated. To put it bluntly: a judge drafting poor judgments will not teach candidate to write good judgements.

Finding ways to address this is not easy. In my view, it would be helpful to incorporate international elements into courses (to be established) on legal writing. Candidates should gain insight into the way judgments are drafted in other countries or by international courts. A careful analysis of judgments by the European Court of Human Rights or other international courts or tribunals in regard to the drafting style could be helpful.

It might also prove useful to involve teachers from other countries or professionals who have at least been exposed extensively to judgment drafting in other countries into the training.

Finally, it might be helpful to obtain a kind of endorsement for a certain style of legal reasoning and dealing with evidence from the Supreme Court. Currently, there is a risk that persons who are capable of drafting judgments which are in line with international customs face social pressure from their peers, court presidents etc. to stick to the old ways. These issues could be addressed by involving the Supreme Court.
There is no internationally unified approach to drafting judicial decisions. Style and structure of judgments will differ depending on the legal system within which they are produced, legal cultures and traditions. For all the differences between various jurisdiction, studying examples of practices from other countries may be useful to receive a new perspective on one’s own approach to legal writing and to inspire discussion about the drafting style commonplace in the Republic of Moldova.

Therefore, a few examples of how judges in other countries handle some of the issues addressed in this report shall be provided.

**Dealing with evidence**

As pointed out above, Moldovan judges tend to repeat in their judgments at length what witnesses have stated. A good example of another approach to dealing with evidence may be found in judgments by the International Criminal Tribunal for the Former Yugoslavia (ICTY). This tribunal dealt with the atrocities committed in the wars and conflicts accompanying the resolution of the Federal Republic of Yugoslavia. The tribunal had to cope with large numbers of witnesses and expert witnesses and an immense volume of documentary evidence; trials often lasted for years. For judges, this posed the challenge of motivating their judgments in a way that addressed the evidence but was still manageable for the reader. Judgments by the tribunal exemplify how a judge can focus on analyzing crucial pieces of evidence rather than repeating what was in evidence.

In the Tadic\(^{26}\) case, the defendant (inter alia) was accused of mistreating and torturing prisoners in a prison camp situated in the town of Omarska. In the extract below, the judgment deals with the charge that he beat a person called Hase Ićić. The defense argued that Tadic had never been in the

\(^{26}\) https://www.icty.org/en/case/tadic
Omarska camp. For the event in question, the defence sought to provide an alibi, stating that Tadić had been on duty at a checkpoint in Orlovci. The judgments assessed the evidence as follows:

- In its closing arguments, the Defence seemingly accepted that the events charged in paragraph 10 took place on 8 July 1992. Hase Icić testified that the events happened on either 7 or 8 July 1992. The assignment records for the Orlovci checkpoint show that the accused was off duty on 7 July 1992 as of 7 a.m. and was not assigned again until 8 July. Hase Icić testified that the events happened during the evening and, on cross-examination, confirming an earlier account of the events, he estimated the time to be around 10 p.m. On 8 July, according to the assignment records, the accused completed his duty at the Orlovci checkpoint at 7 p.m.

The Defence challenged the credibility of Hase Icić. As will be discussed later in reference to paragraph 7, the Defence contended that a prior account of the events recorded by Hase Icić on 12 February 1993 differed from his testimony at trial. The Defence argued that, although the discrepancy does not relate directly to paragraph 10, it does affect the overall credibility of this witness.

The Trial Chamber finds that the assignment records for the Orlovci checkpoint do not provide the accused with an alibi for paragraph 10. Hase Icić is very clear in his testimony that the beatings took place on the evening of his arrival at the Omarska camp, at around 10 p.m. The Defence does not dispute that these events occurred on either 7 or 8 July 1992. The assignment records reflect that on those nights the accused was off duty. On 7 July 1992 the accused was off duty after 7 a.m. and offered no testimony regarding his whereabouts. On 8 July 1992 the records reflect that he completed his assignment at 7 p.m. and he likewise offered no testimony regarding his whereabouts at the time these events occurred. Prijedor is about 20 kilometres from the Omarska camp. The travel time is 30-35 minutes by car.

258. Hase Icić testified that he was standing face to face with the accused in the "beating room" at the end of the corridor of the notorious white house, just before a noose was put around his neck and the first blows hit him on the back. Hase Icić knew the accused since childhood and had regularly seen him in Kozarac until just before the war and thus could not have been mistaken about his identity. The witness’s description of the white house, its different rooms and their location correspond to that given by other witnesses whose testimony the Trial Chamber credits and is supported by the exhibits received into evidence.

259. Balancing the accused’s denial of ever having been at Omarska with the overwhelming testimony of witnesses that has been offered to the contrary, the Trial Chamber cannot accept this denial. The Trial Chamber furthermore has observed the demeanour of Hase Icić while he was testifying and concludes that he was credible and trustworthy. Although the Defence contended that there were important discrepancies between Hase Icić’s testimony in court and an earlier account of the events made by the witness on 12 February 1993, his recollection of the events specifically forming the basis of paragraph 10 was not challenged. The Trial Chamber finds that the alleged discrepancies which relate to Hase Icić’s testimony concerning paragraph 7 of the Indictment are not significant and do not affect his overall credibility.

260. The Defence’s general allegation of bias on the part of all victims is not a basis for the rejection of Hase Icić’s testimony. This issue is generally addressed elsewhere in the Opinion and Judgment. Although he was the only witness who testified in support of these charges, the quality of that testimony is sufficient to credit the allegations.
261. Having considered all the relevant probative evidence, the Trial Chamber finds beyond reasonable doubt that the accused was part of the group of Serbs who beat and kicked Hase Icić until he was unconscious in the white house on or about 8 July 1992 and that these acts were committed in the context of the armed conflict. All that remains for consideration in relation to the beating of Hase Icić is whether the elements of each of the crimes as charged in Counts 21, 22 and 23 of the Indictment are satisfied and, as stated previously, this will be considered in the Legal Findings section of the Opinion and Judgment.

As can be seen, the judgment does not rephrase the entire testimony given by the witness Hase Icić. Nor does it repeat the entire statement by the accused. It confines itself to providing the information relevant to the point in question, i.e. whether the defendant provided a credible alibi or whether it is proven that he was in fact in Omarska. When assessing the evidence, the tribunal provides clear reasons why it considers the alibi proven wrong. It demonstrates the relationship between different pieces of evidence rather than listing accounts of what was in evidence and deals with the arguments brought forward by the defence.

In Germany, it is a legal requirement that judgments state (only) necessary facts. A judgment not meeting this requirement and elaborating extensively on circumstances not relevant to the legal assessment may be quashed just for this reason. The German Supreme Court dealt with this requirement in its judgment of 30 May 2018 (inter alia pointing out that it was ‘the indispensable intellectual effort required from a judge to distinguish what is relevant from what is irrelevant’):

- In regard to the reasoning of judgments, the Federal Court of Justice has already ruled repeatedly that pursuant to section 267 of the Criminal Procedure Code the reasons of the judgments have to contain those facts proven beyond reasonable doubt which fulfil the elements of a criminal offence; the account of the facts should be short, clear and concise, leaving out everything which is irrelevant. The same applies to the assessment of evidence, in which the result of the evidentiary procedure should be discussed in so far as relevant for the decision, but which is not supposed to document the entire evidentiary procedure. By the same token, it is not required to support by specific references to the evidence presented every finding of facts in the reasoning regardless how immaterial it may be with respect to the charges in question (...) these are not merely non-binding style guidelines by legal requirements which have to be adhered to. The reasoning of the judgment does not meet these requirements and demonstrate a grave lack of skill and a fundamental lack of understanding. (…) The volume of the findings of fact, which run to 400 pages and of the ‘assessment of evidence’, which is 720 pages long lead to the conclusion that the drafter of the judgment did not make the indispensable intellectual effort required from a judge to distinguish what is relevant from what is irrelevant.

In the same vein, Bryan Garner states in his ‘Manual on legal style’ that it is problematic if judgments reflect:

- ‘a structurally diffident approach in which every point is considered ad nauseam, including all the facts in detail, because the writer is not confident about what really matters and what doesn’t’ (He attributes this phenomenon to law clerks drafting judgments).
Breaking down legal provisions and defining legal terms

As pointed out above, Moldovan judgments tend to establish certain facts and then to apply a legal provision in their entirety to the entire set of facts. Judges write that applying a certain legal provision leads to a certain legal consequence. They do not demonstrate which of the facts specifically meet the individual requirements of a provision. This makes it hard for the reader to understand how the judge applied the law to the facts and arrived at the legal conclusion.

Internationally, it is a widespread practice to break legal provisions down into their requirements and to apply them to the facts individually.

Many legal norms tie a specific legal consequence to certain requirements. It is the task of the judge to ascertain whether these requirements have been met in order to establish whether the legal consequences set out in the provision will set in. The logical operation underlying the application of the law to the facts is the syllogism. Syllogisms form part of the classical logic developed by Aristotle. Aristotle examined which conclusions can logically be drawn from a set of premises and categorized the deductions which are valid, i.e. which led to a true result if they were based on true premises. One of those syllogisms describes a conclusion which can be drawn from two positive premises. It is often explained using the example:

- All humans are mortal.
- Socrates is human.
- Socrates is mortal.

This form of conclusion is at the core of legal reasoning. The law states, for example, that a person who commits theft will be sentenced to imprisonment. If a defendant is convicted of theft, the judgment follows the pattern:

- A person who has committed theft will be imprisoned.
- The defendant has committed theft.
- The defendant will be imprisoned.

To establish whether the actions carried out by the defendant as established in the trial constitute theft, the provision has to be broken down into its requirements. The definition of theft may vary from jurisdiction to jurisdiction. To elucidate the point, I will employ the German example. German law defines theft:

- ‘Whosoever takes movable items belonging to another person away from another person with the intention of unlawfully appropriating them for himself or a third person shall be liable to imprisonment not exceeding five years or a fine’.

The provision comprises several requirements:

The perpetrator has to
- take away
- an object
- which is movable
Examples from international practices

- belonging to another person
- having the intention of unlawfully appropriating it
- for himself or another person
- acting with the required mens rea

When applying the law to the individual requirements, he again employs a syllogism (even though that is not necessarily spelt out in the judgment). A part of the mental process conducted might be, for example:

- Theft requires that the object in question belongs to another person.
- The car the defendant took belongs to witness A, who is another person.
- The defendant took an object which belongs to another person.

It is important to note that this process itself is not a purely logical one. Determining whether a certain set of facts meets the legal requirements of a given provision will in many cases require interpretation. Stephen Horowitz, who teaches legal writing at St. John's University School of Law, points to an example he uses in his leading writing classes, the 'banana peel case'\(^{27}\). It involves a jogger who throws a banana peel on the beach after passing a sign that indicates a fine for “littering”. A police officer sees this and has to decide whether to issue a ticket, remembering that her supervisor did give a ticket to someone who threw a candy bar wrapper on the ground but did not give a ticket to someone who poured coffee on the ground. The vast majority of Horowitz’ students, he writes, apply the following reasoning:

- There is a $100 fine for littering.
- A banana peel is litter.
- Therefore, the jogger should pay a fine of $100.

Doing so, the fail to address the crucial legal point if a banana peel is litter (which is to be answered by analogy to the ‘precedents’ of the candy bar wrapper and the spilled coffee). Students were supposed to expand on the meaning of the term ‘litter’ in the context of the provision.

As can be seen from the example above, applying the law to the facts frequently requires an act of interpretation. Thus, an additional step is introduced in the process. A legal term contained in the premise has to be defined or explained to see whether the facts correspond to it. Whether defining a term employed in the law is required depends on the circumstances of the case. A notion which is plain in a given case may require detailed examination in another one. For a judge, it is an important skill to be able to assess when a legal requirement is clearly fulfilled in a certain case and does not necessitate further elaboration in the reasoning of a judgment or should be dealt with in more detail.

For example, the term ‘movable object’ contained in the German provision on theft mentioned above will not be problematic in the vast majority of cases. It is straightforward that a car, a wallet or a painting are movable objects. However, in the 1899, the German ‘Reichsgericht’ (the predecessor of the Federal Court of Justice) had to decide a case in which the defendant had connected a cable to an electric transmission line in order to obtain electricity for his home.

\(^{27}\) https://stjohnslegalenglish.com/2017/10/01/legal-writing-connecting-irac-syllogisms-and-analogies-for-ilm-students/
without paying. The court had to examine the question whether electricity is an object within the meaning of section 242 of the Criminal Code. It stated (based on the understanding of electricity at the time):

- According to the natural understanding of the term, which is in line with results of and the use of language in science, only matter filling space has the characteristics of a physical object. A mere mode of being, a mere movement or a mere effect of physical substance is not considered an object by science nor by the ordinary use of language. Rather, these phenomena are juxtaposed to the physical objects in the world.

The requirement of physicality of an object is to be inferred for the notion of theft in criminal law from the requirement of this provision, according to which a movable object has to be taken away from another person. Accordingly, the law requires that an object have such characteristics that it can be taken away from the possession of another person. Taking away is a physical activity; possession means exercising the physical ability to control a specific object, thus first and foremost a spatial relationship between man and object. Taking away means ending possession by another person and creating possession by the thief. The latter does not have to be engendered by physically touching the object (for example, water could be taken away by opening a tap). But possession always requires that the object itself is subjected to factual control by an individual spatially and physically. Thus, one has to stick to the characteristics of being able to be physically controlled and the autonomous existence in regard to the notion of ‘object’.

The reasoning reflects the language of 1899 rather than modern language; yet the case shows that even legal notions which seem plain may give rise to problems of interpretation in certain circumstances.

In the text above, I have criticised a judgment which considered that the defendants’ actions fulfilled the legal requirement of cruelty without elaborating on what ‘cruel’ means and why the court regarded the defendant’s behaviour as cruel. It is useful to look, by way of contrast, at the way other courts have handled the same issue:

In the Tadic case, the defendant was inter alia charged with cruel treatment of prisoners. The ICTY elaborated on the concept of cruel treatment as follows:

- 723. Common Article 3(1) of the Geneva Conventions provides the basis for the inclusion of cruel treatment under Article 3 of the Statute. It reads:

  (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

  (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
According to this Article the prohibition against cruel treatment is a means to an end, the end being that of ensuring that persons taking no active part in the hostilities shall in all circumstances be treated humanely. In Article 7 of the International Covenant on Civil and Political Rights cruel treatment is very closely related to inhuman treatment. An almost identical provision appears in Article 5 of the American Convention on Human Rights where cruel treatment is dealt with under the heading “Right to humane treatment”.

724. No international instrument defines cruel treatment because, according to two prominent commentators, “it has been found impossible to find any satisfactory definition of this general concept, whose application to a specific case must be assessed on the basis of all the particularities of the concrete situation”.

725. However, guidance is given by the form taken by Article 4 of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) which provides that what is prohibited is “violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment”. These instances of cruel treatment, and the inclusion of “any form of corporal punishment”, demonstrate that no narrow or special meaning is there being given to the phrase “cruel treatment”.

726. Treating cruel treatment then, as J. H. Burger and H. Danelius describe it, as a “general concept”, the relevant findings of fact as stated earlier in this Opinion and Judgment are that the accused took part in beatings of great severity and other grievous acts of violence inflicted on Enver Alić, Emir Karabašić, Jasko Hrnić, Senad Muslimović, Fikret Harambašić and Emir Beganić, none of whom were taking any active part in the hostilities. The Trial Chamber finds beyond reasonable doubt that those beatings and other acts which each of those Muslim victims suffered were committed in the context of an armed conflict and in close connection to that conflict, that they constitute violence to their persons and that the perpetrators intended to inflict such suffering. The Trial Chamber further finds that the accused in some instances was himself the perpetrator and in others intentionally assisted directly and substantially in the common purpose of inflicting physical suffering upon them and thereby aided and abetted in the commission of the crimes and is therefore individually responsible for each of them as provided by Article 7, paragraph 1, of the Statute. The Trial Chamber accordingly finds beyond reasonable doubt that the accused is guilty as charged in Count 10 of the Indictment in respect of each of those six victims.

727. Count 11 of the Indictment charges that the accused by his participation in the acts alleged committed a crime against humanity recognized by Article 5(i) (inhumane acts) and Article 7, paragraph 1, of the Statute.

The German Federal Court of Justice dealt with the notion of ‘cruelty’ in its judgment of 21 June 2007 as follows:

- **Facts:**

  According to the facts established by the District Court, the two defendants lived in the same residence as N. who later on was killed. On the day of the deed, the two men were inebriated and started an argument. For this reason, defendant O. hit defendant M. on the head with a pistol
Examples from international practices

several times, so that he suffered a contusion and a fracture of (...) (translation of bone not to be found in dictionary). After that, the two men talked about N. Defendant M. stated falsely that it had been N. who had called the police several hours ago. Defendant O. mentioned that N. had not taken any steps to pay back the money he owed to defendant M. In this way, both defendants became angry with N. First one of them – the District Court could not clarify who – beat N., who suffered a contusion. After that, both defendants beat N., each of them agreeing with the other one’s actions. When N. fell to the ground because of the beating, the defendant O. kicked him with his boots against his heads and ribs ten times. N. died because of the injuries he suffered from that.

- Law:

The conviction of defendant O. for homicide committed in a cruel manner is legally erroneous.

An individual kills another individual in cruel manner, if he causes to the victim physical or psychological pain or suffering which goes in regard to intensity or duration beyond what is necessary for the mere killing, acting out of lack of empathy or in a relentless fashion. The specific suffering has to occur while the deed is committed. When qualifying the deed as cruel, the District Court also considered circumstances which did not have a relationship with the act of killing yet or anymore. When the defendant caused the contusion on N.’s head, he did not yet have the mens rea to kill him. The actions the defendant meted out on N. after kicking him were appalling but did not cause any further injuries. The District Court has not established that the defendant had the mens rea to kill N. anymore at this point. The actual actions leading to N.’ death lasted only until a witness interfered and were thus only of short duration.

In contrast to the judgment rendered by the Moldovan court, both judgments first define the legal notion of ‘cruelty’ and then apply the facts of the case to them in detailed, thorough way.
Recommendations

Separate courses on legal writing
A separate course on legal writing should be included in the syllabus of the NIJ. The course should focus on coherence and drafting style rather than the formalities of judgments or other legal decision (such as where to indicate the file number, what details regarding the parties to include). In particular, it should contain extensive lessons on legal methodology, legal interpretation and legal argumentation.

The course should put a strong emphasis on practical exercises; students should receive writing assignments which are assessed in detail. Assignments should start with simple exercises (the 'banana peel case' quoted above is a good example), not with real judgments. It might be useful to develop a training manual containing exercises for specific learning goals, expectations the students should meet, typical errors, examples of good writing.

The course should also tap on examples from international practices and make use of literature on legal writing from various countries.

More detailed suggestions on this are contained in a separate report.

Feedback on writing assignments at NIJ
The feedback students receive on their writing in the frame of mock trials should be improved. Mentors should highlight strengths and weaknesses of judgments etc. drafted by candidates, discuss alternatives and give concrete suggestions.

Writing assignments during mock trials
The mock trials conducted at the NIJ should be designed to contain more writing assignments. Candidates should be encouraged to submit motions on important points in writing. The mock trials should focus on typical and crucial situations (such as motions regarding the admissibility or
Recommendations

submission of evidence or pre-trial detention) and try to develop transferable skills rather than trying to prepare candidates for far-fetched scenarios (such as witnesses fainting in court).

Course on legal drafting as part of continuing legal education

Courses or seminar on legal writing should be included in syllabus for continuing legal education of judges. The could, for example, comprise of discussing a judgment rendered by a court in detail, legal methodology or present practices from other jurisdictions.

Similar courses should be offered for prosecutors and legal assistants (the latter being, according to some interlocutors, the persons drafting the bulk of judgments).

The course should be different from the ones offered to candidates. It should be borne in mind that many of the participants will have several years, in some cases decades of experience drafting judgments and legal documents. This is positive in that these participants already have significant knowledge of problems occurring in practice. It may also pose a difficulty since these participants will in most cases have a tendency to stick to what they always used to do.

A possible approach might be to deal with judgments which have been found to constitute a violation of the European Convention on Human Rights by the Strasbourg court later on (constituting proof that the judgment was not good), to discuss the short-comings and then to turn to writing assignments aiming to improve these judgments.

Working groups on quality of judgments

Working groups should be established to discuss the current practice of judgment drafting in Moldova and ways to improve it. The working group should develop a set of recommendations on how to draft judgments best in the frame of the Moldovan legal framework, which should ultimately be endorsed by the Supreme Court of Justice by way of an advisory opinion. The working group should be supported by the international community by furnishing translated examples of judgments from various jurisdictions and by translating literature on legal reasoning and related topics.

These working groups could also discuss the possibility of introducing ‘standard formats’ or ‘templates’ for judgments. Such standard formats are unlikely to improve the reasoning of judgments as such. They may, however, provide guidance on how to structure a judgment which may be helpful to present the facts and main legal issues in a logically organized way. I have provided a sample of the format used in Germany in a different paper which may serve as food for thought in the discussion.
Introduction

Legal drafting is an essential skill for any legal professional and for judges in particular. Despite the importance of legal drafting, candidates undergoing training at the NIJ have previously not undergone any formal training in that area. The NIJ should therefore dedicate significant efforts, amounts of time and resources to conveying the drafting skills that candidates are going to need to discharge their duties as judges or prosecutors.

To start training future judges and prosecutors on legal writing thus late—after they have already been selected for the NIJ—is a challenge. However, recently two federal judges from the United States delivered a training on drafting decisions regarding pre-trial detention. Participants proved very open to new concepts and made progress remarkably fast. This should be taken with a grain of salt; it seems likely that there was already awareness of the problems since there is a high number of judgements by the European Court of Human Rights against the Republic of Moldova regarding detention matters. In addition to that, decisions on pre-trial detention regularly boil down to very limited number of issues.

Anyhow, participants were perceptive and motivated, which instils optimism that good results can be achieved with training that is carefully designed and delivered by motivated and well-chosen professionals.

Overview

Approach

Drafting judgements is a practical skill; the same way swimming cannot be learnt from books, legal writing has to be practised. The training should therefore be focused on practical exercises.
The success of the training will hinge on the quality of the exercises offered and the quality of the feedback the candidates obtain. Expecting every trainer involved in teaching legal writing to develop his own exercises is neither realistic nor is it likely to yield consistent results. Therefore, it will be one of the most important tasks related to the training to be offered by the NIJ to produce training material that can be used by all trainers for several years. In my opinion, there should be one manual/exercise book to be used by candidates and one book containing solutions, suggestions for rewrites et cetera for the trainers.

Trainers to be engaged in the training on legal writing should be carefully selected. There is a risk that the training will extend or exacerbate shortcomings which currently characterise legal writing in Moldova. For this reason, it seems advisable not to pay too much attention to the experience of potential trainers in the selection process. It should be considered a significant asset in trainer has undergone part of his legal training abroad or had significant exposure to legal writing other countries in a different form.

Selected trainer should undergo a training of trainers during which they could familiarise with the teaching material, discuss exercises and the way to go about the training.

**Content**

In a civil law system, a judge essentially has to carry out three tasks when it comes to drafting the judgment:

- he has to relay the facts of the case;
- he must explain how he arrived at his findings of the facts;
- he has to apply the law to the facts of the case and state the legal result of this process, i.e. the actual ruling.

These areas are interconnected to a certain extent: A clear account of facts makes it easier for the judge to apply the law; it is also more likely to enable the reader to comprehend how the law corresponds to the facts. Only if the account of facts is clear, it is conceivable for the reader (and for higher courts dealing with possible appeals) what matters of law were decided. Only a clear statement of facts will enable the judge to identify the legal issue, to analyse it and to provide reasons for his decision.

In addition to that, proceedings will only be viewed as transparent and fair if the judgement makes clear why the court considered the facts established on which it based the judgement. Therefore, a good judgement requires a persuasive analysis of the evidence.

A meaningful training should target all three of the aforementioned areas.

**Account of the facts of the case**

**Language**

The analysis of judgements conducted in the frame of the project within which this outline was produced has revealed that judges tend to use lengthy sentences; the language is frequently
convoluted and the account of facts lack structure. In addition to that, the same piece of information is often repeated several times. At times, this hampers the reader’s ability to understand the facts of the case.

At the outset of their training on pre-trial detention orders, the American judges presented extracts from opinions and examples. Members of the audience discussed, whether these examples were clearly written and if and how they could be improved. The judges then presented different rewritten versions and the participants debated, if and how far they were improvements on the first version.

Training on drafting a clear account of the facts of the case could incorporate this method. Extracts from judgements should be chosen and the participants should discuss whether they are clear and how they could be improved. Participants should be asked to rewrite the extracts, present their results in class, where they could be critiqued by other participants.

Positive examples should be developed as part of the teaching material. That means that some of the extracts from judgements should be rewritten as examples of good practice. This could serve as a yardstick against which the rewrites produced by the participants could be measured; it could also be handed out to students as good examples (in the training offered by the American judges, participants asked the presenters how they would write certain pieces).

It might be advisable to involve an international expert or a Moldovan lawyer who has undergone training abroad into the development of positive examples. Otherwise there is a risk that practices currently prevailing in Moldova are exacerbated rather than improved.

Example of an exercise:

A judgment by a Moldovan court starts as follows1:

- Defendant Covalschi Ghenadi, as a public functionary in position of responsibility, acting as operational inspector of Ciocana District Police Station, in complicity with inspector of Criminal Police of Ciocana District Police Station Ciortan Ion, getting hold of operational information that in May 2010 citizen Bairamov Elidar was involved in actions related to circulation of narcotic substances, aiming at receiving goods in the form of money not due to him, and taking advantage of his involvement, to discover the crime, in the working group on the case no.2010480429, initiated on 08.04.2010 on the basis of the indices of the crime provided in art.186 para.(2), let. b), d) of the Criminal Code, on the theft of money in the amount of 4300 lei from Liscu Valentin, committed on 29.03.2010 by unknown persons, by deceit, without any legal ground, obtained the issuance of a search order which was authorized by investigative judge Obada Iurie.

Subsequently, on 27.08.2010, the policeman Ciortan Ion in complicity with inspector of Criminal Police of Ciocana District Police Station, Covalschi Ghenadi, aiming at receiving money not due to them, stopped Bairamov Elidar who was going home, and showing him the order for carrying out the search of his domicile in the locality of Dobruja, municipality of Chisinau, searched his car, then they asked Bairamov Elidar to take them to his place of residence, in order to conduct the search of domicile.

1 I have copied extracts from judgements as they had been translated to me without any adjustment to grammar, orthography etc.
Appendix: Training outline

Questions:

- Is this summary clearly written?
- Rewrite the section of the judgment so as to improve it (the manual used by the trainers should contain a revised version as a point of reference. This version should be discussed or possibly produced during the training of trainers).

Structure of judgements

As pointed out in the report, there also seems to be a wider problem regarding the structure of judgements and the way in which information is arranged. It does not always become clear which facts were in dispute and which were not; legal arguments and factual submissions are at times not clearly distinguished. Also, certain pieces of information are frequently repeated several times in a given judgement.

These issues might be tackled by training candidates to use a standardised structure for their judgements. Such formats or templates have advantages and disadvantages. They limit the creativity of judges when choosing the best way to present the necessary information – an area which some judges perceive to be at the core of their task as judges.

On the other hand, they spare the drafters of judgements the effort to decide each time on a useful structure and make it easier to focus on the legal issues. Also, standard formats which are widely agreed in a given jurisdiction ensure that ‘professional readers’ know where to expect certain information and enable them to get a quick overview of the judgement.

There is no unified international practice in this regard. In many mature and developed jurisdictions such as the United Kingdom or the US, judges are to a large extent free in the way they structure and organise their opinions. In others, specific formats are used.

Whether or not it is advisable to introduce standard formats for the judgement remains a judgement call. At any rate, this call should, in my opinion, not be made by the NIJ alone. If a certain format for judgements is taught to all candidates undergoing training at the NIJ, this format is likely to become the prevailing if not the only format used in the Republic of Moldova in the course of the upcoming years. The decision for or against format may have a far-reaching impact on the justice system. A change of this kind will require support from sitting judges, in particular the Supreme Court of Justice.

Assessment of evidence

Another important task a judge has to master when drafting the judgment is to provide an analysis of the evidence. He has to explain the mental process that led him to consider certain facts as established on the basis of the evidence before him (and others not).

Training on assessing evidence should start by lectures/presentations. Participants should familiarize with criteria used when assessing evidence (such as consistency, level of detail provided, own interest in the outcome of the case etc.). Lectures should also focus on how to analyse the evidence in its entirety, point out how different pieces of evidence corroborate each
other, how to address inconsistencies. To this end, examples from the practice of courts from various jurisdictions and from international tribunals could be used.

These criteria should then be applied to practical cases. Due to the overwhelming importance of witness evidence in practice, emphasis should be put on witness testimony. Testimonies should be scripted and enacted (either by other participants or drama students, as it is already the practice in trial simulations). Participants should then provide a written assessment of the evidence.

The results should again be discussed in the group and rewritten.

Application of the law to the facts

The possibly most important part of the training – and the one to which, in my opinion, most time should be dedicated to – is the application of the law to the facts. While summarising facts is a skill required for many academic and non-academic professions and assessing evidence is to a large extent an exercise in common sense, applying the law is at the core of the legal profession. It is at the same time the area, in which candidates are the least likely to benefit from training they have received in other contexts.

A striking shortcoming in the judgments analysed for purposes of the report was the failure to break down legal provisions into their legal requirements and to apply these requirements to the facts. As a consequence of this omission, many judgments failed to identify the legal issues arising from the case. In my view, the most important objective of the training provided by the NIJ would be to educate candidates on the basic method of applying the law.

Simple exercises on applying the law to the facts as starting points

The starting point should be, in my opinion, a set of lectures and presentations familiarizing participants with basics of legal methodology (such as syllogism and the technique of subsumption). These should be paired with simple exercises designed to enable participants to practice the process of applying the law based on facts that do not give rise to legal problems. These exercises could be produced on the basis of Moldovan law; they could also be based on legal provisions from other countries or provisions invented for purposes of the exercise – since the main point is not to come to any legal result but to practice the method of applying the law.

Exercises could start by simply asking candidates what exactly the legal requirements contained in a given provision are.

They could then move forward to applying these provisions to the facts.

Example:

Section 823 of the German Civil Code reads as follows:

- A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this.
A is sitting in a bar with his girlfriend. They are drinking red wine. At some point, B enters the bar. A had several arguments with B in the past. He thinks that B is following him and wants to confront him. While he is moving forward angrily, he accidentally pours his entire glass of red wine onto the suit of C, another client of the bar. The stains on the suit cannot be removed and C has to purchase a new suit at the price of 250 €.

**Legal requirements:**
- a person
- causes
- injury
- to an object
- of another person
- negligently
- in an unlawful manner

**Application of the law:**
A is liable to pay compensation to C pursuant to section 823 of the German Civil Code:
- A is a person.
- He damaged an item. By spilling wine over the suit he stained it permanently, rendering it unusable. Thus he damaged the suit.
- The suit was an object.
- It belonged to another person. The suit was owned by C, who is another person.
- A also acted negligently. He did not display the care expected from a person moving about in a bar in which other clients are present.
- His action was also unlawful. No legal justification for his spilling the wine over C’s suit can be discerned.

Thus, all legal requirements are fulfilled. In consequence, A is liable to pay compensation to C.

**Moving on to cases giving rise to legal issues – methods of interpreting the law**

Once participants have gained practice in applying the law to the facts, they could move on to dealing with facts which give rise to legal problems. At the same time, candidates should receive training on methods of interpreting the law; the could then move on to applying the various methods of interpretation to the specific legal problem the case gives rise to. The training should address in particular:
- grammatical interpretation;
- systematic interpretation;
- historical interpretation;
- teleological interpretation.

All of these methods should first be explained on the basis of examples taken from the practice of international courts and then practiced employing hypotheticals specifically designed to enable the interpretation.
Example: Historical interpretation

Since society is changing, the historical interpretation also requires, in addition to dealing with the intentions and objectives of the legislators, an analysis of the historical and social context in which the law was passed. When applying the historical interpretation of the provision one asks what were the motives, values and objectives that compelled the legislator to enact the provision. The historical interpretation refers to the historical backdrop of the law and the way it came into being. Once the historical objective of the provision has been determined, it remains to be analysed, whether it is still applicable and binding in the current context.

A section from the judgement rendered by the US Supreme Court in Jesner v Arab Bank may serve as an example. The judgement regarded the Alien Tort Statute (ATS), a provision from 1789 which reads ‘the district courts shall have original jurisdiction of any civil action by an alien for tort only, committed in violation of the law of nations or treaty of the United States’. Plaintiffs in the case were family members of persons who had been killed in terrorist attacks. They argued that the defendant, the financial institution, had provided financial services to terrorists thus enabling the attacks. According to them, this constituted a violation of the law of nations, for which American courts had jurisdiction on the basis of the aforementioned provision. The defendant contended that US courts had no jurisdiction since it was not incorporated in the years and the defendants were not American citizens.

The Supreme Court held that US courts were not competent to adjudicate the case. The Supreme Court dealt with the historical background in the following manner:

- In the 18th century, international law primarily governed relationships between and among nation-states, but in a few instances, it governed individual conduct occurring outside national borders (for example, “disputes relating to prizes, to shipwrecks, to hostages, and ransom bills”). Id., at 714–715 (internal quotation marks omitted). There was, furthermore, a narrow domain in which “rules binding individuals for the benefit of other individuals overlapped with” the rules governing the relationships between nation-states. Id., at 715. As understood by Blackstone, this domain included “three specific offenses against the law of nations addressed by the criminal law of England: violation of safe conducts, infringement of the rights of ambassadors, and piracy.” Ibid. (citing 4 W. Blackstone, Commentaries on the Laws of England 68 (1769)). “It was this narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs, that was probably on the minds of the men who drafted the ATS.” 542 U. S., at 715.

This history teaches that Congress drafted the ATS “to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations.” Id., at 720. The principal objective of the statute, when first enacted, was to avoid foreign entanglements by ensuring the availability of a federal forum where the failure to provide one might cause another nation to hold the United States responsible for an injury to a foreign citizen.

Another example is the dissenting opinion by Sir Gerald Fitzmaurice in the judgement of the European Court of Human Rights in Marckx v. Belgium. The case concerned provisions of Belgian family law which stipulated that a child born out of wedlock had no legal relationship to his mother
unless the mother expressly acknowledged the child. The applicant was a woman from Belgium who had given birth to a child without being married. She argued that the legal framework in place in Belgium violated various provisions of the European Convention on Human Rights, including the right to family life pursuant to article 8 ECHR. While the majority of the court found a violation, judge Fitzmaurice dissented. He pointed out:

- It is abundantly clear (at least it is to me) – and the nature of the whole background against which the idea of the European Convention on Human Rights was conceived bears out this view – that the main, if not indeed the sole object and intended sphere of application of Article 8 (art. 8), was that of what I will call the “domiciliary protection” of the individual. He and his family were no longer to be subjected to the four o’clock in the morning rat-a-tat on the door; to domestic intrusions, searches and questionings; to examinations, delaying and confiscation of correspondence; to the planting of listening devices (bugging); to restrictions on the use of radio and television; to telephone-tapping or disconnection; to measures of coercion such as cutting off the electricity or water supply; to such abominations as children being required to report upon the activities of their parents, and even sometimes the same for one spouse against another, – in short the whole gamut of fascist and communist inquisitorial practices such as had scarcely been known, at least in Western Europe, since the eras of religious intolerance and oppression, until (ideology replacing religion) they became prevalent again in many countries between the two world wars and subsequently. Such, and not the internal, domestic regulation of family relationships, was the object of Article 8 (art. 8), and it was for the avoidance of these horrors, tyrannies and vexations that “private and family life ... home and... correspondence” were to be respected, and the individual endowed with a right to enjoy that respect – not for the regulation of the civil status of babies.

8. Now it is evident that the type of complaint made by the applicants in the present case has absolutely nothing to do with the sort of thing described in the previous paragraph above. They have not been subjected to any of the practices in question, nor did they live under a legal regime according to which such practices were lawful and could at any time be put into action by the authorities. So that (compare the recent Klass case before the Court) the mere possibility of some of them being implemented, e.g. telephone-tapping, opening of correspondence, would have a concrete (because inhibiting) effect upon the applicants’ daily lives. Their complaint is the quite different one (a difference not merely of degree but of kind) that they lived under a legal regime whereby, in the case of illegitimate offspring, no legal relationship between mother and child was recognised as being automatically created by the fact of birth per se – (as opposed to the natural relationship by blood, which of course was duly recognised as existing). It was part of the complaint that this situation in various respects placed the unmarried mother and her “natural” child at a disadvantage as compared with legitimate parents and offspring, even though this could subsequently be corrected (i.e., converted into a relationship recognised in law) by means of steps easy to be taken by the mother, or taken on behalf of the child through the system of guardianship provided by Belgian law and covering such cases. Whether the existence of such a situation would involve a breach of Article 8 (art. 8) (assuming that this provision was applicable to this type of complaint) is a distinct question with which I am not at the moment concerned.

Exercise (...)
Participants should also be familiarized with categories of arguments frequently used in debates such as:

- argumentum e contrario;
- argumentum a fortiori;
- argumentum ad absurdum;
- argumentum a simile.

As pointed out, candidates should then apply the various methods of interpretation to specific cases. Ideally, these cases should be tailored to Moldovan law. However, they could also be based on fictitious legal provisions or provisions taken from other jurisdictions, since the point of the exercise is not to acquire knowledge on black letter law but to learn the method (which applies to any given legal provision).

**Example for an exercise**

**Facts:** Ion Dodon encounters Valeriu Tanase on Pushkin Street in Chisinau. They know each other from before. Ion is the new boyfriend of Valeriu’s former girl-friend. Valeriu is angry at Ion, since he feels that Ion ‘stole’ his girl-friend. He confronts Ion and an argument ensues. Suddenly, Valeriu grabs Ion’s head and smashes it against the wall of a building. Ion suffers a contusion.

**Law:** The provision governing bodily injury reads as follows:

**Section 1 Causing bodily harm**

(1) Whosoever physically assaults or damages the health of another person, shall be liable to imprisonment not exceeding five years or a fine.

(2) The attempt shall be punishable.

**Section 2 Causing bodily harm by dangerous means**

(1) Whosoever causes bodily harm.

1. by administering poison or other noxious substances;
2. by using a weapon or other dangerous instrument;
3. by acting by stealth;
4. by acting jointly with another; or
5. by methods that pose a danger to life,

shall be liable to imprisonment from six months to ten years, in less serious cases to imprisonment from three months to five years.

(2) The attempt shall be punishable.

**Questions:**

What offence did Valeriu commit, if any?

Write the section of the judgment providing arguments for your finding.
In this exercise, candidates would be expected to identify the legal issue whether a wall can be considered a ‘weapon’ or ‘other dangerous instrument’ in the sense of section 2 and whether Valeriu is guilty of causing bodily harm by dangerous means.

The teacher’s manual should point out that problem, possible arguments (for example derived from the grammatical interpretation) and drafts of judgments.

Citations and research

The analysis of judgements as well as training delivered by the American judges revealed that citations are at times not used in a meaningful manner. For this reason, it seems advisable to include a section on legal research and citations in the training. In this section, attention should be paid to the important role the jurisprudence of the European Court of Human Rights plays (or could play) for the legal practice in Moldova. The training on legal research and citations should therefore also address how to use the database of the European Court of Human Rights (‘HUDOC’) and how to utilise the judgements for research and to cite them.

Full judgments

At the end of the training, candidates should draft 2 to 3 full judgements on the basis of files provided to them. This will require them to put the pieces of knowledge acquired during the training together. The judgements should be extensively reviewed and possibly rewritten.

In addition to that, it would be useful to block about a week during the simulated trial training candidates receive, which could be dedicated to reviewing and discussing the style of judgements candidates have written following the simulations. This will help ensure that candidates actually apply the lessons learned during the training in practice.

Standard formats for judgments – the German example

Introduction

The German civil procedure code stipulates the elements judgements have to contain in art. 313, which reads as follows:

**Section 313**

Form and content of the judgment

(1) The judgment shall set out:

1. The designation of the parties, their legal representatives, and the attorneys of record;
2. The designation of the court and the names of the judges contributing to the decision;
3. The date on which the court proceedings were declared terminated;
4. The operative provisions of a judgment;
5. The merits of the case;
6. The reasons on which a ruling is based.
(2) The section addressing the facts and the merits of the case is to summarise, in brief and based on the essential content, the claims asserted and the means of challenge or defence brought before the court, highlighting the petitions filed. The details of the circumstances and facts as well as the status of the dispute thus far are to be included by reference being made to the written pleadings, the records of the hearings, and other documents.

(3) The reasoning for the judgment shall contain a brief summary of the considerations of the facts and circumstances of the case and the legal aspects on which the decision is based.

Thus, while the law governs the necessary content of judgements, it does not stipulate how this content should be arranged or structured in the judgment. However, there is vast jurisprudence clarifying the requirements judicial decisions have to meet further. In addition to that, tradition and legal education shape the way German judges draft their decisions. All judges (and all attorneys and prosecutors) undergo the same legal education during which they are accustomed with the structure of judgments and legal decisions and trained extensively on using it. This has resulted in a unified practice of writing judgments. Virtually all judges structure their judgements in the same way. This makes it easy for courts dealing with appeals and attorneys to gain an overview of the case.

**General approach to the case**

The structure German judges apply has to be understood against the backdrop of the overall approach to cases they adopt. Therefore, this approach should be briefly explained.

In general, the parties to a civil procedure submit two different sets of facts.

Litigation is initiated by the plaintiff’s filing a civil action with the court. This civil action contains an account of events (necessarily) and observations on the legal assessment of the purported facts (often). As a rule, the plaintiff will enclose evidence (in particular documents) in support of their claim or name witnesses and experts he proposes to hear. The court will forward the civil action to the respondent and invite him to submit his observations. The respondent will submit his own version of the facts and his submissions on the legal assessment. The respondent, too, would often enclose evidence supporting his defence or indicate witnesses or experts to be heard.

In most cases, the sets of facts purported by the parties will differ to varying degrees. Rather than contemplating which of the accounts presented by the parties is more persuasive or taking evidence, a German judge will look at the parties’ submissions separately. In a first step the judge will assume that all facts put forward by the plaintiff are correct. Operating on the basis of this assumption, the judge assesses the legal merits of the plaintiff’s case. In other words, the judge scrutinizes if the plaintiff would be legally entitled to what he seeks to obtain (compensation, handing over of objects etc.) in case his factual submission were correct. If the answer to that question is affirmative, the judge considers the civil action ‘conclusive’ (‘schlüssig’); if it is negative, the civil action is called ‘inconclusive’.

The process of assessing whether a claim is conclusive, is guided by a set of questions:

- who
- wants what
The answers to these questions provide, in the mind of German judges, the structure by which to approach the analysis of the case. The questions ‘who’ and from ‘whom’ are obviously determined by the parties to the proceedings. It is the claimant who wants something from the defendant. This ‘something’ is indicated in the civil action the plaintiff has filed. He may want a certain sum of money, the handing over of an item, the retraction of a statement or that the defendant abstains from a certain behaviour.

The key-question is whether there is a legal basis for the plaintiff’s claim. When assessing whether the plaintiff has a legitimate claim, the judge is not bound by the legal submissions or arguments the plaintiff or his legal representative put forward. The judge is the master of the legal characterization given to the facts (occasionally, it may turn out that the plaintiff is indeed entitled to what he claims, but on completely different grounds than he submitted). Consequently, the judge peruses the entire body of German law for provisions which might form a basis for the plaintiff’s legal claim. Most legal provisions are structured in such a way that they tie a legal consequence to certain requirements being fulfilled: if x, then y; if certain conditions are met, the legal consequence will be as set out in the provision.

The judge selects those provisions laying down a consequence corresponding to the outcome claimed by the plaintiff. If, for example, the plaintiff claims compensation for damages, the judge will peruse all legal provisions which stipulate that a person is entitled to compensation. That does not mean that the judge will consider every legal provision one by one and examine in-depth whether its requirements are fulfilled. Rather, his legal training enables him to identify relatively quickly a small number of provisions (in many cases only one) which merit a more detailed analysis. The identification of relevant provisions is aided by structures of the law the judge is familiar with. For example, claims for compensation can be roughly divided into claims based on a contractual relationship between parties and claims based on tort law. If no contractual relationship can be inferred from the facts the plaintiff contends, possible bases for his claim for compensation can be narrowed down to tort claims. Tort claims can be divided into sub-categories applying which the judge sieves out more provisions until he finally reaches a small number of provisions warranting closer scrutiny. Judges have ample training in this process, since the identification of potential legal grounds for claims and their analysis is a core element of legal education in Germany, in which law students are trained from day one of their studies. Thus, the process comes natural to them and is not cumbersome.

Once the provisions requiring a more detailed analysis are identified, the judge will examine whether each of the requirements of this provision are fulfilled and thus form an opinion on whether the civil action is conclusive.

**Facts the plaintiff alleges do not support his legal claim (civil action 'inconclusive')**

If the judge concludes that that is not the case, this finding has two consequences.

Firstly, the judge will pay limited attention to the facts the defendant contends. The civil procedure in Germany is governed by the ‘party principle’: it is incumbent on the plaintiff to
make his case, \textit{i.e.} to allege all the facts which are necessary to substantiate that he is entitled to the claim he tries to enforce with his civil action. If the plaintiff fails to do so, his civil action is ripe for dismissal. In that case, it is not relevant what facts the defendant alleges, for it is clear that the civil action will not succeed regardless of his contentions (the judge will still cite the defendant’s contentions in the judgement – see below – but they do not have any bearing on the outcome of the trial).

Secondly (and importantly), the judge will not take any evidence. In civil proceedings, parties are obligated to proffer proof for the facts they purport. The judges will only assess the evidence as to whether it supports the factual allegations submitted by the parties. He will not scrutinize whether the means of evidence proposed by a party lead to the establishment of additional facts which, albeit not purported by the plaintiff, form a basis for his legal claim. For example, the judge will not examine a witness and try to elicit facts additional to those the plaintiff suggests to see if these facts might fulfil the requirements of a legal provision which is favourable to the plaintiff. As a consequence of this, taking evidence is superfluous in cases in which the factual allegations in the civil action are not conclusive. At best, the evidence the plaintiff proposes could establish that the account of events he submitted in his legal action is correct. Even so, this will not help his civil action to succeed if the facts he submits do not form a sufficient basis for his legal claim. Therefore, no evidence is required; the civil action can be rejected purely on the basis of the plaintiff’s account of the facts.

\textbf{Facts the plaintiff alleges do support his legal claim (civil action is ‘conclusive’)}

As stated above, a civil action is considered ‘conclusive’ if the facts the plaintiff submits, assuming they are true, form a sufficient basis for the plaintiff’s claim; \textit{i.e.} they meet all requirements of at least one legal provision which prescribes a legal consequence (e.g. payment of compensation) consistent with the outcome the plaintiff desires. If the judge comes to the conclusion that the plaintiff’s civil action is conclusive, he will analyse the defendant’s response. In most cases, the accounts of facts submitted by the plaintiff and by the defendant will be consistent to some extent and differ only with regard to certain aspects of facts. For example, if the parties argue about who is at fault for a traffic accident, they will probably agree that an accident took place, when and where it happened, that both of them were involved, on which of the parties drove what car etc. They might, however, disagree on who had priority, at what speed they drove, for whom the traffic light was showing green etc.

The judge will examine both accounts of the facts and identify which of the facts are in dispute between the parties. Then, again, he will proceed on the basis of the assumption that all the factual allegations the defendant makes – in so far as they differ from the plaintiff’s allegations – are correct and assess whether these facts alter the legal evaluation of the plaintiff’s civil action. In other words, the judge assesses whether the defendant’s allegations, assuming they were true, would make a difference from a legal perspective. If, for example, the plaintiff seeks compensation for damages, the judge has concluded in a first step that the civil action is conclusive. Thus, the plaintiff would be entitled to the compensation he seeks. The judge scrutinizes whether the plaintiff would not be entitled to compensation if the factual allegations by the defendant were true. If that is not the case, the defendant’s contentions are labelled ‘irrelevant’.
The defendant’s allegations being irrelevant has an important consequence: taking evidence is not required. As pointed out above, it is incumbent on the parties to submit the facts they deem necessary to support their legal position and to propose the evidence to prove these facts. The judge will not conduct further investigation or check whether additional facts transpire from the evidence proposed. Once it has become clear that the account of events suggested by the defendant, even assuming that it was true, would not alter the legal evaluation, there is no point in dealing with this evidence. If, to stick with the example given above, the plaintiff would still succeed with his claim for compensation even assuming that the facts alleged by the defendant are right, it is unnecessary to prove the defendant’s allegations true or false.

If, on the other hand, the defendant’s submissions are ‘relevant’, this means that the examination of evidence is required. The accounts of facts asserted by the plaintiff and the defendant differ from each other, and this difference has legal consequences. The outcome of the trial will turn on which facts the judge considers to have been established on the basis of the evidence examined. It is noteworthy, though, that not all facts in regard to which the accounts by the plaintiff and the defendant differ have to be clarified. The necessity of taking evidence is limited by the legal relevance of the facts to be established. The facts suggested by the plaintiff and the defendant might differ in some points, which would not impact the outcome of the trial (i.e. they are ‘irrelevant’). The examination of evidence is only required in regard to those facts which are in dispute and which affect the outcome of the trial.

Thus, the examination of evidence (in particular of witnesses and expert witnesses) is reduced to the amount necessary and sufficient to decide on the merits of the case. The approach allows the judge to focus on important aspects of the case and saves the court’s resources.

**Legal provisions facilitating this approach**

As can be seen from the above, it is pivotal to German judges’ approach to a case to distinguish between non-contentious facts and facts which are in dispute (this distinction is also reflected in the reasoning of judgments; see below). Therefore, it is important to gain clarity at an early stage of the proceedings on what sets of facts the parties submit and which of the facts contended by one party are denied by the other. This enables the judge to identify crucial matters of fact and law early on in the proceedings, to provide directions to the parties where appropriate and to organize the hearing.

The German Civil Procedure Code contains several provisions seeking to ensure that the parties’ position on the facts become clear in a timely fashion. One of them is section 138 of the Civil Procedure Code, which reads as follows:

**Section 138**

**Obligation to make declarations as to facts; obligation to tell the truth**

1. The parties are to make their declarations as to the facts and circumstances fully and completely and are obligated to tell the truth.
2. Each party is to react in substance to the facts alleged by the opponent.
3. Facts that are not expressly disputed are to be deemed as having been acknowledged unless the intention to dispute them is evident from the other declarations made by the party.
(4) A party may declare its lack of knowledge only where this concerns facts that were neither actions taken by the party itself, nor within its ken.

The provision obliges both parties to a procedure to give a full account of the facts as they perceive them and to respond to allegations as to the facts brought forward by the opposing party. This ensures that the judge gains a full picture of what facts are in dispute and what facts the parties agree upon. In addition to that, the provision prescribes that a party is considered to stipulate to facts it does not expressly contest. It is therefore incumbent on the parties to explicitly reject factual allegations on the part of the opposing party they consider untrue or incorrect. Thus, the judge is enabled to identify in regard to which facts the accounts submitted by the parties differ.

Judges also have the possibility to set the parties deadlines to submit their factual allegations. Failure to meet these deadlines may prompt the judge to ignore the submission filed after the deadline. This ensures that the judge knows at an early stage of the procedure what the parties' submissions are; in particular, it prevents parties from submitting facts in incremental steps and adjust their submissions to the way the trial unfolds. Also, it helps to secure the right to a trial within reasonable time enshrined in article 6 ECHR. The relevant provision is section 296 of the German Civil Procedure Code, which reads:

Section 296
Refusal to accept submissions made late

(1) Any means of challenge or defence submitted only after the deadline imposed in its regard (section 273 (2) number 1 and, insofar as this deadline has been set to a specific party, number 5, section 275 (1), first sentence, subsection (3) and subsection (4), section 276 (1), second sentence, subsection (3), section 277) are to be admitted at the court’s discretion and conviction only if admitting them to the proceedings would not delay the process of dealing with and terminating the legal dispute, or if the party provides sufficient excuse for such delay.

(2) The court may refuse to admit any means of challenge or defence that, in contravention of the stipulations made in section 282 (1), are not submitted in due time or that, in contravention of the stipulations of section 282 (2), are not communicated in due time, if it finds at its discretion and conviction that admitting them to the proceedings would delay the process of dealing with and terminating the legal dispute, and that the delay is the result of gross negligence.

(3) Any objections made, at too late a time, concerning the admissibility of the complaint and that the defendant may elect to forgo, are to be admitted only if the defendant provides sufficient excuse for the delay.

(4) In the cases set out in subsections (1) and (3), the grounds precluding culpability are to be substantiated should the court so require.

Structure of judgments
Details of the parties to the proceedings

At the outset, the judgment provides the details of the parties to the proceedings. It identifies them by their name and address; if the parties are legal persons, it also includes the names of the
natural persons representing the legal person and their addresses. If the parties are represented by counsel, it also states the names and addresses of the attorneys acting on behalf of the parties. This is to avoid misunderstanding as to against whom the judgment is valid and to ensure that enforcement proceedings which may be required are conducted against the right persons.

**Operative Part**

The second part of a judgment is the operative part, containing the actual ruling. This part of the judgement specifies the parties’ obligations arising from the judgement. The operative part is the basis for enforcement proceedings. The enforcement agent will enforce whatever is stated in the operative part of the judgment. Therefore, precise wording is of utmost important.

Finding the accurate wording is usually simple when payments are concerned – the judgment just states the amount payable, the interest and the due date. However, phrasing the operative part accurately may be quite intricate in cases in which the court obliges one of the parties to perform an action or to abstain from it or to hand over an item.

**Account of facts and claims**

Section 313 of the Civil Procedure Code stipulates that the judgment have to contain an account of the facts of the case; it also sets out that it has to state the parties’ claims. While the way in which this account is structured is not set out in the law, a unified practice has developed (see above).

As pointed out, when German judges approach a case, they start by sorting out what facts are in dispute between the parties and what facts are not. This approach is reflected in the way they structure the account of facts in the judgment. First, the judgment provides a summary of the facts not in dispute between the parties. These may be facts alleged in the briefs submitted by both parties or facts purported by one party and not explicitly rejected by the other party (see above regarding section 138 of the Civil Procedure Code).

The summary is limited strictly to the facts. At this stage, the judge strictly abstains from legal qualifications of actions or a legal assessment of the facts. Legal terms are only used when the legal qualification of certain actions cannot be in dispute (e.g., the judge might refer to an agreement between two parties as ‘purchase agreement’ when it is clear that there was an agreement regarding a purchase and none of the parties denies this).

Having summarized the facts not in dispute between the parties, the judges provides a summary of the facts contended by the plaintiff (but contested by the defendant).

Then he states the plaintiff’s claim or motion. The claim is repeated verbatim; this is important. As pointed out, the civil procedure is guided by the party principle. This implies, among other things, that it is the parties’ decision what they request the court to do or with what aim they initiate civil proceedings. The parties’ claims define what the court may grant. For example, if a plaintiff demands 5,000 € in compensation, the court is unable to rule that the plaintiff should receive 7,000 €. The plaintiff’s claim constitutes the upper limit of what the court may grant. Therefore, the judgement has to clarify what exactly the parties request the court to do.
The judgement states what the plaintiff’s claim is. After that, it states what the defendant’s claim is. Thus, the opposing submissions are cited directly next to each other at a central position within the judgment, which makes it easy for the reader to identify them.

After citing the defendant’s motion, the judge summarizes the defendant’s factual allegations as far as they are disputed between the parties. The facts purported by both parties are thus stated close to the respective motions they seek to substantiate.

**Reasoning**

Then the judge provides the reasoning of the decision. In this part, he assesses the facts in legal terms and weighs the evidence. As pointed out above, German judges start examining the plaintiff’s claim by identifying legal provisions whose outcome corresponds to what the plaintiff requests. If their judgement comes to the conclusion that the plaintiff’s claim has a basis in law, the reasoning will focus on the provision which forms that basis. It starts by stating that the plaintiff’s request is justified and indicate the provision on the basis of which it is justified. The judgment will then deal with the requirement of this provision one by one and substantiate why, in the judge’s view, they are met. He will assess the evidence when discussing the requirement to which the evidence pertains.

- **Example:** The plaintiff claims that the defendant has injured him in a physical altercation. He claims that he took a walk in the park, when the defendant and the defendant’s girlfriend passed by. He avers that the defendant, without any discernible reason, started shouting at him and accusing him of ‘staring shamelessly’ at his girlfriend. The plaintiff contends further that the defendant attacked him without even waiting for an answer and punched him in the face. He demands compensation for his medical bills.

  The defendant does not deny that he punched the plaintiff. However, he claims that he acted in defence of his girlfriend. The defendant purports that the plaintiff first looked intensely at the woman and, after she had passed him, touched her behind. As a reaction to this, he punched the plaintiff.

  Having heard evidence from the girlfriend and two passers-by who witnessed the incident in the park, the judge comes to the conclusion that the plaintiff’s account of the event is true. He is of the view, that the plaintiff is entitled to compensation pursuant to section 823 of the Civil Code, which reads as follows:

  **Liability in damages**

  (1) A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this.

  (2) The same duty is held by a person who commits a breach of a statute that is intended to protect another person. If, according to the contents of the statute, it may also be breached without fault, then liability to compensation only exists in the case of fault.

  **Thus, the requirements which have to be fulfilled are:**

  - a person
  - injures a good mentioned in the provision
• acting negligently or intentionally
• in an unlawful manner
• and causes damage.

The question, whether the defendant acted as a reaction to the plaintiff’s touching his girlfriend inappropriately is a matter of lawfulness. Should the defendant’s account of the incident be accurate, that would imply that the defendant’s action was legally justified as lawful defence. (This is why his claim that the plaintiff touched his girlfriend is ‘relevant’ and evidence on that issue had to be taken).

If, for purposes of this example, the judge concludes that the plaintiff’s account is true, the reasoning of the judgment might read as follows:

The plaintiff has a claim to compensation pursuant to section 823 of the Civil Code.

The defendant is a person.

He injured the plaintiff’s body, which is a good protected by section 823 of the Civil Code. It is not in dispute between the parties that the defendant punched the plaintiff in the face, thus causing physical harm to him.

The defendant also acted intentionally. Both parties have submitted that the defendant throw a punch at the plaintiff aiming to hurt and injure him.

The defendant also acted in an unlawful manner. His action is not justified as defence pursuant to section 228 of the Civil Code. The court could not gain the conviction that the plaintiff molested the defendant’s girlfriend and that the defendant acted to stop him doing so. Witness A and witness B both have testified that they did not see the plaintiff touching witness C, the defendant’s girlfriend. Both of them stated that they were walking behind the defendant and would have noticed the plaintiff’s touching witness C. The court considers their testimony reliable, because they independently from each other gave consistent and detailed accounts of the events. The court also deems them credible since they have not interest in the outcome of the trial. The court was not convinced, on the other hand, by the testimony of witness C, the defendant’s girlfriend. She testified that the plaintiff had touched her after passing her. However, she proved unable to provide details as to how and how long the plaintiff touched her. She was also very insecure when delivering her testimony and several times looked at the defendant as if expecting guidance as to what to testify. In view of that and of her personal interest in the outcome of the trial, the court does not consider her testimony sufficiently persuasive to shatter the conviction formed on the basis of the testimony by A and B. Consequently, there was no situation of self-defence. The defendant acted unlawfully.

He also caused damage. The plaintiff had to undergo medical treatment for his injury, incurring medical bills in the amount of 2.000 €. The defendant is liable for that damage pursuant to section 823 of the Civil Code.