

**EXCERPTS FROM THE APPLICATION  
TO THE EUROPEAN COURT FOR HUMAN RIGHTS  
CONCERNING CONVENTION VIOLATIONS WHILE ISSUING  
THE FIRST ARREST WARRANT FOR MR. GREGORIAN BIVOLARU**

**II. EXPOSITION OF FACTS**

Gregorian Bivolaru – who at present is searched at national level, after the Bucharest 5<sup>th</sup> Sector Court of Law issued a warrant of arrest on his name – has been closely watched by the Romanian authorities even since 1972, when he first started to teach yoga in Bucharest.

Since the yoga school founded by Gregorian Bivolaru started and developed under the communist regime, his activity soon became undesirable. In this context, Nicolae Ceaușescu, the communist president of Romania until 1989, banned yoga as well as any other oriental practices. However, Gregorian Bivolaru continued to teach yoga under the close watch of the Romanian *Securitate*, until 1984, when he was imprisoned along with other yoga practitioners.

In 1989 he was again imprisoned and put into a mental institution that was well-known as a prison for political dissidents. After the Romanian Revolution in December 1989, he was released immediately, which proves he had been detained exclusively on political grounds.

After the fall of the communist regime the yoga practice was again permitted and Gregorian Bivolaru along with several yoga practitioners founded the Movement for Spiritual Integration in the Absolute (MISA). The number of yoga practitioners grew gradually up to approximately 35,000 at present, and other yoga schools affiliated to MISA have been opened in over 20 foreign countries (Denmark, Sweden, Hungary, Italy, France, Germany, Holland, USA, Finland, Great Britain, Greece, Czech Republic, India, etc.).

In 1990 Gregorian Bivolaru was awarded a diploma by the International Yoga University Vishwaguru Himalaya in Rishikesh, India, as tribute for his personal contribution in disseminating the yoga practice. He has also been acknowledged as yoga teacher by the School for High Studies within AUPAC (*Alliance Universelle pour la Paix par la Connaissance*) since 1991. In 1995 he got the certificate of “editorial adviser for books on yoga and parapsychology” granted by the Romanian Ministry of Culture.

His contribution as an author is also significant, especially in the fields of the esoteric, naturist therapies, religion and metaphysics: he is author or co-author of over 15 books, 11 translations, over 20 informative brochures on the above-mentioned subjects as well as of several articles published in specialized journals abroad (e.g., *Journal Magazine*).

As Gregorian Bivolaru had again become the target of harassment and discrimination by the Romanian authorities, in 1995 the presidency of MISA was assigned to Nicolae Catrina, in order to prevent the accusations against Gregorian Bivolaru from extending upon MISA and affecting the organization’s image. Since 1995 Gregorian Bivolaru has collaborated as a yoga teacher and has been involved in various spiritual activities initiated and coordinated by MISA.

Approximately in the same period (1995) the Romanian Secret Services (SRI) started to monitor the

activity of Gregorian Bivolaru and MISA, as they considered that the organization he founded, as well as himself, threaten the national security. Thus applying the special procedure provided for in the Law for the National Security no. 51/1991, articles 13-15, the phone conversations of Gregorian Bivolaru and other MISA members have been wire-tapped. As a result of this wire-tapping and also of other similar activities, on the 1<sup>st</sup> of February 1999 the Romanian Secret Services informed the authorities about the perpetration of offenses against state security, such as propaganda in favor of the totalitarian state, provided for in article 166 Penal Code (PC), and the communication of false information, provided for in article 168<sup>1</sup> PC. By the resolution no. 500/P/1999 from the 30<sup>th</sup> of October 2000 the Prosecutors' Office of the Bucharest Court of Appeal decided not to start the penal proceedings. On the 27<sup>th</sup> of May 2002 the Romanian Secret Services communicated again to the Prosecutors' Office of the High Court of Cassation and Justice (Upper Court) the fact that between 1999 and 2002 the persons previously investigated had continued to do in an organized way such actions as alleged in 1999. By the resolution no. 500/P/1999 on the 7<sup>th</sup> of April 2003 it was again decided not to start the penal proceedings, but on the 12<sup>th</sup> of March 2004 the resolution issued one year before was quashed and it was decided to proceed with the investigation.

On the same occasion it was also decided the disjunction of the cause in the Prosecutors' Office dossier no. 500/P/1999 and its connection to the dossier no. 720/P/2003, thus elaborating the controversial prosecution dossier that resulted in charging Gregorian Bivolaru with the offenses of sexual act with a minor, provided for in article 198 PC, sexual perversion, provided for in article 201 PC, sexual corruption, provided for in article 202 PC, traffic with minors, provided for in article 13 referring to article 12 of Law no. 678/2001 concerning the prevention and fight against the traffic with minors, and attempt to illegally cross the Romanian state border, provided for in article 70 of the Emergency Ordinance 105/2001. Against the other persons investigated on account of offenses that endanger the national security of Romania, as well as against Bivolaru himself on account of similar offenses, it was decided the disjunction by the Ordinance no. 720/P/2003 on the 5<sup>th</sup> of April 2004.

On the 12<sup>th</sup> of March 2004 the Prosecutors' Office of the Bucharest Court of Appeal started the *in rem* penal prosecution regarding the offenses provided for in article 11 (b) of Law no. 87/1994 republished with application of article 13 PC, article 7 with application of article 2 (b) points 14 and 18 of Law no. 39/2003 and article 23 (c) of Law no. 656/2002, all of them with application of article 41 par. 2 and article 33 (a) PC, offenses considered by the representatives of the Public Ministry in resolution no. 720/P/2003 on the 12<sup>th</sup> of March 2004 as being committed by members of MISA under the guidance of Gregorian Bivolaru.

*As a result of the fact that "it has been ascertained the existence of data and clues that in several places in Bucharest, administered by persons and companies belonging to MISA or to its members, there have been produced and transmitted via Internet pornographic images in order to get illicit returns, viewings of persons recruited to be sent abroad, there have been sent and received emails about the organization and realization of the respective activities and of payments", on the 18<sup>th</sup> of March 2004 the Romanian authorities initiated an aggressive and abusive campaign resulting in the breaking into 16 private locations belonging to several yoga practitioners, including Mr. Gregorian Bivolaru.*

The Romanian authorities ignored the object of the prosecution dossier on the ground of which the search warrant had been issued, (that is the above-mentioned offenses), and performed a savage search followed by the seizing of tens of personal belonging and even intimate things having no connection with the reason of the search. The persons found at the locations were subject to psychic and even physical torture for many hours. Among these there was also the 17 years old Mădălina Dumitru who, after 13 hours of interrogation, gave a statement turned later on into a complaint by the authorities, complaint that supposedly accused Mr. Bivolaru of sexual relations and sexual perversions, incriminated by article 198 and 201 of the Romanian Penal Code.

The very next day, on the 19<sup>th</sup> of March, Mădălina Dumitru who had unwillingly been transformed into an injured party, withdrew her statement taken under pressure on the 18<sup>th</sup> of March and filed a complaint against the abusive behavior of the prosecutor. The Prosecutors' Office of the Bucharest Court of Appeal ignored both this complaint and her statement to the press that she hadn't had sex with Gregorian Bivolaru, and decided on the 26<sup>th</sup> of March 2004 to start the penal prosecution against Gregorian Bivolaru under the charges of sexual act with a minor provided for in the articles 198 par. 2 and 3 PC and sexual perversions provided for in article 201 par. 2 and 3<sup>1</sup> PC. The Romanian authorities continued to ignore the position of the "new" injured party and on the 1<sup>st</sup> of April 2004 decided a gynecological and anal examination for the girl, who was unwillingly escorted to the Forensic Institute (I.M.L.) by the special police troops (SPIR).

Because all these events had been given extended media coverage, numerous personalities taking the stand to condemn MISA and Bivolaru, on the 28<sup>th</sup> of March, as a result of contradictory news about the interdiction to leave the country, Mr. Gregorian Bivolaru went to Nădlac border point to check whether this was true or not. Mr. Bivolaru considered this necessary since several radio stations had already announced "*Bivolaru has interdiction to leave the country*", although the interdiction was meant for Gabriel Bivolaru, former deputy of the ruling party who had been condemned to 5 years' imprisonment for bank fraud.

The reason for the journey to Nădlac was a planned trip to Hungary. Thus, in order to avoid a possible situation leading to the conclusion that he intended to escape, Bivolaru and a friend, yoga practitioner, Farkas Ferenc Zsolt, tried to get information on his possible interdiction to leave the country from an acquaintance of the latter, a customs officer at the Nădlac customs.

In the customs house, Gregorian Bivolaru and Farkas Ferenc Zsolt were retained and taken into custody. Afterwards they were taken out of the building, photographed and bodily searched. It was decided hastily to start the penal prosecution for offenses provided for in article 70 and 71 of the Emergency Ordinance 105/2001 and a 24 hours' detainment ordinance was issued. Within 24 hours, which is on the 29<sup>th</sup> of March 2004, the competence of the Prosecutors' Office of the Arad Tribunal was declined in favor of the Prosecutors' Office of the Bucharest Court of Appeal, the dossier with the above-mentioned offenses was connected with the one under investigation at the Prosecutors' Office of the Bucharest Court of Appeal. The two were informed of the charge, they gave statements, the start of the penal action for all these offenses was decided, after which the proposal of pre-trial incarceration was made in writing.

The Prosecutors' Office of the Bucharest Court of Appeal sent the dossier and the proposal of pre-trial incarceration to be solved by the Bucharest Tribunal, considering this would be the competent instance since the dossier 720/P/2003 had also as object offenses provided for in article 11 (b) of Law no. 87/1994 republished with application of article 13 PC, article 7 with application of article 2 (b) points 14 and 18 of Law no. 39/2003 and article 23 (c) of Law no. 656/2002, all of them with application of article 41 par. 2 and article 33 (a) PC, offenses given to the tribunal's exclusive competence.

On the 30<sup>th</sup> of March 2004 the Bucharest Tribunal considered itself legally constituted and ruled in the dossier no. 1775/2004 the 29 days' incarceration of the two defendants (Decision taken in the Council Chamber on the 30<sup>th</sup> of March 2004). The arrest warrants no. 107/U.P ad no. 108/U.P were issued on the 30<sup>th</sup> of March for Gregorian Bivolaru and respectively for Farkas Ferenc Zsolt. Both appealed. The Bucharest Court of Appeal in the appeal dossier no. 1109/2004 legally observed that the competence of a court can be appreciated according to the offenses for which the incarceration of the defendants was solicited, and not all the offenses under investigation in the same dossier; that is why Decision no. 131/R made in open session on the 1<sup>st</sup> of April 2004 stated that the Bucharest Tribunal is not competent to judge the proposal or pre-trial incarceration and that the 24 hours' arrest had expired. Therefore it was decided to release both of them and to send the proposal of pre-trial incarceration to

be re-judged by the 5<sup>th</sup> District Court of Law, the competent instance in relation with the offenses for which the pre-trial incarceration had been decided.

Although according to article 350 of the Penal Procedure Code the release is to take place immediately, Gregorian Bivolaru was illegally retained 10 more hours in the custody of the Police General Inspectorate.

During the same day, the 1<sup>st</sup> of April, the dossier was sent from the Bucharest Court of Appeal to the 5<sup>th</sup> District Court of Law, where on the very same day the dossier no. 3989/2004 was formed and the court attempted to judge the proposal of pre-trial incarceration in the Council Chamber.

Because of the authorities hurry to judge the proposal of pre-trial incarceration, while the defendants had not yet been released, and also having in view the extensive media coverage of the case, Gregorian Bivolaru's lawyers rejected the whole instance of the 5<sup>th</sup> District Court of Law. As reasons for rejection were invoked the suspect hurry, while the celerity could no longer be explained by the expiry of a preventive measure and moreover, and the impressive number of procedural actions that had been conducted within few days, which gave the lawyers no time to prepare the defense. These were considered as a strong proof of the political pressures, which would hinder the court from objectively judging the case.

The dossier was forwarded to the superior court, respectively the Bucharest Tribunal. Judging the exception request in the dossier no. 1881/2004, the Tribunal stated in the Conclusion pronounced in the Council Chamber on the same day, the 1<sup>st</sup> of April, that there was no incompatibility, and denied the exception request.

Against the conclusion issued by the Bucharest Tribunal the lawyers appealed.

At Bucharest Court of Appeal, in the dossier no. 1177/2004, Gregorian Bivolaru's lawyers invoked the non-constitutionality of the provisions of article 52 par. 2 of the Penal Procedure Code, which states that the examination of the exception request can be done in the absence of the parties, and the instance who judges the exception request must listen to the parties only if considered necessary. Although Gregorian Bivolaru was represented by a lawyer at the Bucharest Tribunal, that judged the exception request, the constitutional provisions are violated by the fact that the defendant was not cited and called to be heard; due to the negative consequences of the denigration in the media and the exaggerate hurry with which the procedures took place, the defendant's rights were violated, especially the right to defense.

The Bucharest Court of Appeal by the Conclusion on the 2<sup>nd</sup> of April 2004 decided the notification of the Constitutional Court and suspended the judgment of the cause until the non-constitutionality exception will be solved.

The Prosecutors' Office of the Bucharest Court of Appeal appealed, thus forming the appeal dossier no. 2196/2004 of the High Court of Cassation and Justice.

The appeal before the High Court of Cassation and Justice was fixed on the 27<sup>th</sup> of April 2004. At this first term the lawyers of Gregorian Bivolaru asked for more time to prepare the defense and to consider the appeal reasons raised by the Prosecutors' Office of the Bucharest Court of Appeal; the instance admitted the request, but set the new term the following day, the 28<sup>th</sup> of April.

The High Court of Cassation and Justice the admitted the appeal of the Prosecutors' Office of the Bucharest Court of Appeal (Decision no. 2283 on the 28<sup>th</sup> of April) therefore decided to send the cause to the Bucharest Court of Appeal for the continuation of the trial.

At the Bucharest Court of Appeal, on the 10<sup>th</sup> of May 2004, in the dossier no. 1551/2004 Gregorian

Bivolaru's lawyers claimed that judges of the Bucharest Court of Appeal could no longer be impartial, given the evolution of the dossier and the already obvious pressure; they considered that somewhere else in the country there will be less interference and pressure on the justice than in Bucharest, and consequently took exception to the whole Bucharest Court of Appeal.

The cause was sent again to the High Court of Cassation and Justice who considered that the exception request was inadmissible and denied it (Conclusion no. 96 on the 12<sup>th</sup> of May 2004 pronounced in the dossier no. 2624/2004).

Gregorian Bivolaru appealed, but this was also denied as insubstantial by the High Court of Cassation and Justice by a panel of nine judges (Decision no. 170 on the 14<sup>th</sup> of May 2004 pronounced in the Council Chamber in the dossier no. 128/2004).

The dossier was sent back to the Bucharest Court of Appeal to solve the appeal declared by Gregorian Bivolaru against the Conclusion on the 1<sup>st</sup> of April 2004 pronounced by the Bucharest Tribunal in the dossier no. 1881/2004. By the Penal Decision no. 963 on the 21<sup>st</sup> of May 2004 pronounced in the dossier no. 1551/2004, the Bucharest Court of Appeal denied the appeal as insubstantial, stating that *"the defendant's statements are insubstantial and are founded on suppositions and unreal perception of the events in which he was involved and having no rightful motivation."*

The dossier went back to the 5<sup>th</sup> District Court of Law in order to solve the proposal of pre-trial incarceration of the defendants in the dossier no. 3989/2004.

By the Conclusion on the 31<sup>st</sup> of May 2004, the 5<sup>th</sup> District Court of Law denied the proposal of pre-trial incarceration of defendant Farkas Ferenc Zsolt and admitted the proposal of pre-trial incarceration of the defendant Gregorian Bivolaru, and issued the warrant of arrest no. 69/U/2004 on the 31<sup>st</sup> of May 2004 for the offense of sexual act with a minor.

At the term the lawyer of Gregorian Bivolaru notified the instance that the judgment of the cause could not proceed because the citation procedure was not legally performed. He informed judges that the defendant – who had been a public person both before and after the excessive exposure to the media of this dossier – no longer inhabited at the addresses previously indicated to the instance, due both to the harassment from reporters and journalists, and to several threats he received. These threats mentioned that he "would be eliminated", and recalled an incident in February 1995, when his apartment was almost destroyed by a devastating fire succeeded by deflagrations and explosions; the explosion partially destroyed the block where Mr. Bivolaru inhabited and would have even killed himself if he had been home. The technical expertise carried out both by firemen and by an independent expert proved that the incident had not been caused by negligence but by a criminal hand. Consequently it was requested the protection of the authorities for the defendant.

The judging instance denied the requests formulated by the defendant's lawyers, appreciating that *"the proposal of pre-trial incarceration would be judged in the absence of defendant Gregorian Bivolaru, who is escaping the prosecution, as lawyer Nițurad Dumitru's statements referring to presumed threats upon his client were not proved, not even by a beginning of evidence..."*.

The lawyers appealed against the decision by which the measure of pre-trial incarceration was decided, and the dossier went back to the Bucharest Tribunal, thus forming the appeal dossier no. 3139/2004.

On the term of the 3<sup>rd</sup> of June 2004, the list with the day's causes was posted without the names of the judges. A few hours later, when the dossier of Gregorian Bivolaru was to be judged, another list appeared, with other judges than the ones in the panel that performed the judging session.

Due to the repeated refusals of the Bucharest courts to take into account any request or argument in favor of Gregorian Bivolaru, and due to the above-mentioned unjustified change of the panel of judges and the secrecy around its composition, the lawyers took to exception the panel of judges.

Obviously the Bucharest Tribunal found no incompatibility ground and denied the exception request on the same day; appeal is declared immediately after this decision in secret session.

The Bucharest Court of Appeal in the appeal dossier no. 1938/2004 accomplished a mere formality by denying the exception as unsubstantiated (Penal Decision no. 969 on the 4<sup>th</sup> of June 2004).

The Bucharest Tribunal, in the previously contested panel of judges, set as judging term the same day, the 4<sup>th</sup> of June 2004, for the appeal declared against the pre-trial incarceration, and started the session only half an hour after the dossier's arrival from the Bucharest Court of Appeal.

Due to the futility of any other request, the deferral of the judging was requested, given the rush in judging such a complex cause, furthermore considering that one of the defendant's lawyers could not be present, being absent from Bucharest at that time.

None of these aspects was considered relevant for the judging instance; on this ground, the entire Bucharest Tribunal was again taken to exception.

On the 5<sup>th</sup> of June one judged both the exception request, by the Bucharest Court of Appeal, and the appeal declared against the conclusion that had denied the exception request, by the High Court of Cassation and Justice.

Taking into account the history of the Gregorian Bivolaru's dossier until the present moment, the instance's impartiality affected by political pressure, and the impatience of the public opinion reflected in tens of pages in almost all the newspapers asking the arrest of Bivolaru, at this time the decision of pre-trial incarceration of the 5<sup>th</sup> District Court of Law remained final, in the absence of the defendant who is considered to be absconding.

### **III. EXPOSITION OF THE CONVENTION VIOLATIONS**

The object of the present complaint is the measure of pre-trial incarceration taken against Gregorian Bivolaru. Consequently, the following will present and argue the violations of the Convention inasmuch as they are related to the measure of pre-trial incarceration. The aspects connected to the cause's merits are to be solved by the Romanian courts, and in case of further violations we will address the Court after exhausting the internal legal proceedings.

#### **1. THE VIOLATION OF THE 8<sup>th</sup> ARTICLE OF THE CONVENTION – THE RIGHT TO PRIVATE AND FAMILY LIFE**

The offenses allegedly committed by Gregorian Bivolaru and related to which the 5<sup>th</sup> District Court of Law was requested to issue of warrant of arrest are: sexual act with a minor, sexual perversion, and attempt to illegally cross the Romanian state border. The instance considered that only in relation with the offense of **sexual act with a minor** there was enough evidence to justify the measure of pre-trial incarceration of Gregorian Bivolaru.

The evidence that supported the proposal of the measure the pre-trial incarceration no. 720/P/2003 on the 29<sup>th</sup> of March 2004 made by the Prosecutors' Office of the Bucharest Court of Appeal as to the offense for which the arrest was decided are the following:

- Complaint and statements of the injured party Mădălina Dumitru.
- Complaint and statements of the witness Dumitru Tanta – the mother of minor Mădălina Dumitru.
- Statements of witnesses Ilie Luminita, Iordache Marin, Iordache Florentina, Dumitru Ionela Cristina, and Farcas Maria Mirona.
- Notebook belonging to the injured party Mădălina Dumitru, from which it was judged that she had performed sexual acts and sexual perversions with the defendant Gregorian Bivolaru, as well as information related to the fact that he gave her money and other goods.
- Photos with the injured party Mădălina Dumitru, both nude and barely dressed; some of these photos were taken from the defendant's apartment on str. Constantin Mușat nr. 1, bl. 16, sc. A, ap. 3, sector 5.
- A video cassette with erotic images, showing the victim Mădălina Dumitru while performing a dance in the presence of the defendant; this proof means was taken at the search effected in the building on str. Sergent Turturică nr. 123, sector 5.
- House search report from the 18<sup>th</sup> of March 2004, showing among other things the finding of the victim Mădălina Dumitru with the witness Farcas Maria Mirona at the location on str. Vasile Grozavu nr. 2, sector 5, as well as the seizing of a large number of video cassettes and other magnetic based materials containing so-called pornographic materials.

Afterwards, at the judging instance, the Prosecutors' Office of the Bucharest Court of Appeal completed the evidence with the transcript records of the phone conversations between the defendant and the minor Mădălina Dumitru, intercepted by the Romanian Secret Services (SRI) on the basis of the authorizations requested and granted under Law no. 51/1991 concerning the Romanian national security.

Therefore, we consider that the Article 8 of the Convention was violated in the following 4 distinct situations:

### **I. The violation of the Article 8 by the fact that the evidence was illegally obtained by violating the provisions of the penal procedure code**

The above-mentioned evidence was obtained during the raids on the 18<sup>th</sup> of March 2004; almost all the statements were obtained after these searches, and after approximately 13 hours of interrogation under psychological and physical pressure; as to Mădălina Dumitru, she was also threatened by a gun and her statement was transformed by the Romanian authorities into a complaint, by which they pretend she accused him of sexual acts and sexual perversions provided for in articles 198 and 201 of the Romanian Penal Code.

Thus, although the search warrants had been issued in the dossier 720/P/2003 which had as object at that time the offenses of association in a organized group, money laundering and tax evasion, **the way in which the searches were conducted flagrantly breaks the provisions of both the Romanian Penal Procedure Code, articles 100-109, and also the Article 8 of the Convention.**

**Although the search warrant clearly specified that there should be seized only things “containing computer data, information referring to international traffic or data referring to users”, the judicial body seized personal and even intimate objects, thus violating the provisions of article 105 par. 2 of the Penal Procedure Code – “the judicial body is liable to confine himself to taking only objects and documents in connection to the committed deed”, as well as Article 8 of the Convention.**

Among the seized objects, namely money, books, medicines, CDs, audio and video cassettes etc, there was also a notebook belonging to minor Mădălina Dumitru, photos of her and a video cassette which the Prosecutors' Office of the Bucharest Court of Appeal brought as proof, the cassette showing her while dancing in the presence of the defendant, images labeled by the authorities as “erotic”.

The confiscation of these objects was done while **flagrantly breaking the law**, as they had no connection with the facts allegedly committed and for which the search warrant had been issued. As a proof there are over 300 statements of persons who were in the searched buildings and whose objects were arbitrarily taken and, out of unknown reasons, no longer returned. The statements are to be found in Appendix 1. In addition, this fact was also extensively covered in the newspapers: “*Two truckloads of evidence taken from the MISA head office*” from Evenimentul Zilei on the 20<sup>th</sup> of March, “*Police took from the MISA head office five trucks with porno cassettes, money, jewels and documents*” from Realitatea Românească on the 20<sup>th</sup> of March, “*They confiscated five trucks of documents, money, jewels and plants from the MISA adepts*” from Ziua on the 20<sup>th</sup> of March. As it also appears in the above-mentioned titles, **the authorities justified the illegal confiscation of objects and documents by calling them proofs in the penal dossier.**

## **II. The violation of the Article 8 by the unjustified releasing to the press and by making public aspects concerning personal and intimate life, and also by calumnious statements affecting the person’s image and dignity**

In the absence of any legal provision, aspects concerning the personal and intimate life of both Mădălina Dumitru and Gregorian Bivolaru were made public. **Moreover, the found documents were intensely discussed in the media, published in the newspapers, the meaning of some notes was exaggerated and mocked by the authorities in order to provoke an extremely negative public reaction against Gregorian Bivolaru.**

**Moreover – although the minor Mădălina Dumitru, under pressure and psychic torture, gave a statement to the Police (statement which was turned into a complaint and which she retracted the very next day), although she repeatedly asked to be allowed to give another statement - which was denied -, after which she even made a penal complaint against the abusive way she had been treated, still the newspapers incorrectly announced that Bivolaru had been accused by the minor of sexual acts and sexual perversions.** Excerpts from the press articles published in the most important newspapers during March 2004 can be found in Appendix 2.

## **III. The violation of the Article 8 by releasing illegally intercepted phone conversations to the press**

The use of the wire-taped conversations between Gregorian Bivolaru and Mădălina Dumitru also violated the provisions of the Article 8 of the Convention.

As already mentioned, the authorization to intercept phone conversations was granted by Law no. 51/1991 concerning the state security. This norm provides a special procedure, as derogation from the common law represented by the provisions of the Romanian Penal Procedure Code. Under this special procedure the interception must be done only by the state authorities with attributions in the field of national security, respectively the Romanian Secret Services, and the interception authorization must



comprise, according to article 13 par. 4 of Law no. 51/1991, the following: **approval for the communication categories that may be intercepted, the category of information, documents and objects that may be obtained**, the person's identity, if known, whose communications will be wire-taped or who has data, information, documents or objects that must be obtained, the authority empowered with the execution, the general description of the place where the warrant will be executed, the warrant's validity. Thus the Romanian Secret Services (SRI) should have limited themselves to wire-taping the conversations in connection with its limited field of activity, respectively the state security. And this is emphasized by the article 4 paragraph 2 from the Law of the state security, in accordance with the provisions of article 8 of the Convention, "*no person can be the object either of interference in his personal life, in his domain or property or in his correspondence or communications, or of harm to his honor or reputation, if he does not commit a deed constituting, according to this law, a threat to the national security*", and article 16 also states that "*the means to obtain the information must not harm, in any way, the fundamental rights and freedoms of the citizens, their personal life, their honor or reputation, nor make them subject to illegal confinements. Any person is protected by law against such interference or harms. The ones guilty for initiating, transmitting or executing such measures without a legal ground, as well as for the abusive application of the measures of prevention, discovery or countering of threats to the national security shall account for it civilly, administratively or penally, as appropriate*".

Consequently the Romanian Secret Services should have limited themselves to taping phone conversations relevant to the national security. It is thus obvious that illegally obtained records cannot be used as evidence in another penal dossier.

Furthermore, the legal duration for a wire-taping warrant cannot exceed 6 months, according to article 13 par. 5 of Law no. 51/1991, with the possibility to extend it by request in well-substantiated cases, by the general prosecutor, but without exceeding 3 months each time.

The extension of the warrant duration is done under the same conditions in which it was initially issued. This means the examination, every time one requests the mandate extension, of the material obtained by the authorities which carried on the procedures, and one must see whether:

1. The grounds to justify the initial authorization are still valid
2. The factual elements provided by the use of the initially authorized procedures give information or clues to justify the continuation of their use.
3. There are or not factual elements referring to situations that would constitute threats to the national security.

Taking into consideration the fact that the first conversations presented as evidence were taped on the 13<sup>th</sup> of November 2002 and there was a 2 years' period until the disposition of the measure of incarceration, and regarding the threat to national security the investigation is in progress, we consider the extension of the warrant was done abusively, while violating the legal provisions, if we consider that all this time there was no evidence shown for an eventual incrimination whatsoever.

**As a result of the above-mentioned, it is obvious that the evidence which underlay the disposition of the pre-trial incarceration was illegally obtained while breaking the legal provisions, thus violating the fundamental right to personal life, as provided for in article 8 of the Convention, article 12 of the Universal Declaration of Human Rights, and article 26 of the Constitution of Romania.**

#### **IV. The violation of Article 8 by the picture taking and video shooting at Nădlac customs**

By claiming that Gregorian Bivolaru, accompanied by Farkas Ferenc Zsolt, tried to cross the Romanian state border illegally, the two were arrested, photographed and filmed. The authorities, respectively the Nădlac Customs Police, justified their actions by pretending the photos and the film would be evidence for the acknowledging of the *flagrante delicto*.

The reason why Mr. Bivolaru went to the customs office on the 28<sup>th</sup> of March was to verify whether or not he had an interdiction to leave the country. As already mentioned, he had planned even before the start of the prosecution a trip to Hungary. Few days before the Nădlac incident the authorities, quoted by Mediafax news agency announced that “*Bivolaru had an interdiction to leave the country*”. As he did not know whether the news concerned him or rather Gabriel Bivolaru, the latter having been condemned in absence for bank fraud, Mr. Gregorian Bivolaru, even before presenting himself for the customs formalities – and especially in order to avoid a serious incident – tried to find out who was really concerned by this interdiction. It is also worthy to mention that, due to the excessive media coverage, Mr. Gregorian Bivolaru wished not to be recognized and wore a black wig. In the customs office he was no longer wearing the wig, but the wig was in the car he came with.

When the authorities started to photograph the so-called offenders, Mr. Bivolaru was asked to put on the wig and then he was photographed and filmed with this appearance. Moreover, after being escorted to Nădlac Customs Police, in the office where he gave statements later on, the policemen again asked him to put on the wig and photographed him.

From the existing photos in the dossier, pages 913-919, one can clearly see that Gregorian Bivolaru was not wearing any wig when he entered the customs house, nor when the customs policemen asked for his passport, and still after this he appeared on the video cassette as wearing a black wig. At page 919 there is a photo of Gregorian Bivolaru in the Police office exactly in the moment when he obeyed and put on the wig. On this photo the following date is printed: the 29<sup>th</sup> of March 2004, 21:11 o'clock. The photos are attached in Appendix 3.

The Penal Procedure Code, in its 4<sup>th</sup> Title called “Special Procedures”, in Chapter I which covers the prosecution and judgment of flagrant offenses, provides in article 467 the way to establish such offenses. Thus it states: “*Paragraph 1 – The penal authority draws up a protocol in which he records the ascertained things related to the committed deed. In the protocol he also records the statements of the offender and of the other heard persons. Paragraph 2 – If necessary, the penal authority also gathers other evidence*” etc.

By no means can paragraph 2 be interpreted as giving the judicial authority the right to film or photograph, because the Penal Procedure Code in the Section “Audio and video interceptions and recordings”, in articles 91<sup>1</sup> – 91<sup>6</sup> regulates the procedure of using these specific means of evidence; their usage is effective only on the basis of the justified authorization of the judging instance at the prosecutor’s request, and only for the series of offenses listed at article 91<sup>1</sup> par. 2. In article 91<sup>5</sup> it is specified that the recording of images must observe the authorization procedure.

As to the above-mentioned, **it unequivocally results that the photos and video shoots taken by the Nădlac Customs Police on the 29<sup>th</sup> of March 2004 violated the legal provisions in order to denigrate and humiliate Mr. Gregorian Bivolaru through negative publicity on his account, against his will, thus violating the provisions of the Article 8 of the Convention, as well as his right to own image, honor and dignity.**

## **2. VIOLATION OF THE ARTICLE 5 OF THE CONVENTION – THE RIGHT TO FREEDOM AND SECURITY**

According to Article 5 of the Convention, every person has the right to freedom and security. The limitation of the right to freedom and security can be exerted only in certain strictly determined cases and by observing the legal provisions. We consider that in the present case the Article 5 was violated on 8 different occasions.

### **I. The violation of the Article 5 by the fact that the bodily search of Gregorian Bivolaru by the Nădlac Customs Police had not been disposed by any judging instance**

As ascertained in the report no. 3727 on the 28<sup>th</sup> of March 2004, drawn up by the Nădlac Customs Police and available at page 909 of the dossier, “*before being taken to the selection and administrative detention room, the two were subject to a search*”. At page 920 there is also Gregorian Bivolaru’s search record on the 28<sup>th</sup> of March 2004, itemizing the belongings he had upon him.

In the Penal Procedure Code, articles 100-111 provide for the procedure of bodily and domiciliary search. Thus article 100 stipulates that the search can only be disposed by the judging instance at the request of the prosecutor, during the penal prosecution, or *ex officio* during the judgment. The same article specifies that the search can also be disposed by the prosecutor in urgent and consistently justified cases, during the penal prosecution, and the prosecutor is compelled to immediately inform the instance about it.

Also in paragraph 4 of the same article, it is specified that searches can also be carried out before starting the penal prosecution in the case of flagrant offenses. This however is the only derogation from the imperative norms provided for in the previously mentioned texts. Consequently, a search can even be carried out before the prosecutor decides the starting of the penal prosecution, especially in the case of flagrant offenses. However, **the law accepts no derogation as to the judicial authority that must perform the search.** In this respect, the Nădlac Customs Police defied the imperative provisions of the law. **The ability to perform searches as well as arrests is – according to the European Convention on Human Rights – a competence of the judge or of another judicial authority, as they represent a limitation of the individual’s freedom and security, and this can only be performed by a representative of the Judicial Power.**

Although the Article 5 of the Convention is not specific as to the search procedure, the text should be interpreted as including the search into the provisions on detention, **because the procedure is a limitation of liberty.**

**Moreover, the Romanian authorities did not even accomplish the procedure of bringing the accused before a judge, the only thing that the prosecutor did was to dispose the starting of the penal proceedings against Gregorian Bivolaru and Farkas Ferenc Zsolt.**

### **II. Violation of the Article 5 by the fact that Gregorian Bivolaru was detained for 24 hours without being brought before a judge.**

Another serious violation of the Article 5 of the Convention is the measure of detainment taken by the Nădlac Customs Police. The reason for which the Romanian authorities took the measure of arrest is the supposed flagrant of Gregorian Bivolaru while trying to abscond – by fraudulently crossing the Romanian state border. The motive perfectly fits in the provisions of article 5 paragraph 1 letter c of the Convention, which states that “*No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law... c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his*

*committing an offence or fleeing after having done so*". Paragraph 1, as quoted above, is completed with the provisions of paragraph 3 of the same article 5 of the Convention, which stipulates that ***"everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."***

As to the provision of this article of the Convention, the Romanian Penal Procedure Code specifies that the detainment measure can also be taken by the penal investigation body; this is mentioned both in article 143, concerning the preventive measures, and in article 468, concerning the procedure in the case of flagrant offenses. The only obligation of the penal investigation body is to inform the prosecutor about the taking of the preventive measure of detainment (article 143, paragraph 1, final thesis, Penal Procedure Code). Or, **the quoted text of the Convention, while providing the obligation of bringing before a judge or another judicial body, refers both to the measure of arrest and to the one of detainment.**

In this respect, we consider that article 5 paragraph 3 of the Convention was violated, the Court having the obligation – as it was also retained in the case Butkevivius vs Lithuania, by the Decision on the 26<sup>th</sup> of March 2002 – to establish whether the internal legislation itself is according to the Convention, including the general principles expressed or implied by it.

Moreover, the European Court for Human Rights has previously pronounced on the violation by the Romanian state of article 5 par. 3 of the Convention by the Decision on the 3<sup>rd</sup> of June 2003 in the case Pantea vs Romania, **when it was stated that the measure of pre-trial incarceration cannot be decided by the prosecutor.**

As a consequence, as of the 1<sup>st</sup> of July 2003 the Romanian Penal Procedure Code was modified by the Law no. 281/2003, according to the recommendation of the European Court for Human Rights in the above-mentioned case. However, the Romanian legislator did not modify the Penal Procedure Code in conformity with the provisions of article 5 paragraph 3 of the Convention, which also refers to the measure of detainment, but according to the decision pronounced in the case Pantea vs Romania, **which discussed only the measure of pre-trial incarceration, in conformity with the way petitioner Pantea formulated his complaint.** If the Court was not asked to also give a ruling in Pantea case on the measure of detainment, that doesn't mean the Romanian authorities have the right to violate the provisions of article 5 paragraph 3 of the Convention.

**As to the above-mentioned facts, taking into account that Gregorian Bivolaru was detained for 24 hours without being brought before a judge for another reason but to discuss the measure of pre-trial incarceration, we consider the provisions of the Convention were violated, namely article 5 paragraph 3.**

### **III. The violation of article 5 paragraph 4 by lack of possibility to appeal the detention ordinance**

Thus, article 5 paragraph 4 of the Convention provides: *"Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful"*. Nevertheless **the Romanian Penal Procedure Code does not provide for the possibility of appealing the detention ordinance in the section concerning the measure of preventive detention, articles 143-144.**

The misalignment between the Romanian Penal Procedure Code and the European Convention for

Human Rights derives from the haste in which the Romanian authorities matched the dispositions of the two normative acts, in order that that judicial system in Romania could no longer be criticized. In this respect one may clearly ascertain the obvious lack of interest of the Romanian authorities concerning the fundamental human rights. The Romanian authorities clearly misunderstand the fact that any limitation or restriction of these rights can only be effected by a judge or another magistrate.

**Thus the right of the detained to appeal is denied**, under the condition in which the Convention – aside from the mention of article 5 paragraph 4 which refers in particular to the measure of arrest or detention – dedicates a distinct article, namely article 13, which states that “*everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.*”

**Therefore, both the provisions of article 5 paragraph 4 and article 13 of the Convention are obviously violated.**

#### **IV. The violation of article 5 by the inconsistency of the motives that underlay the taking of the detention measure**

As to the grounds of the detention measure, article 5 paragraph 1 (c) of the Convention mentions: “*No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ... c) The lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so*”.

The Romanian authorities, respectively the Nădlac Border Police, have decided the measure of detention motivating they had caught Gregorian Bivolaru and Farkas Ferenc Zsolt in flagrant while trying to illegally cross the Romanian state border.

From the very first statements taken by the Nădlac customs police from both Bivolaru and Farkas, they both denied having been caught while walking “*from the exit of the customs building and who passed by the Nădlac customs office towards the Hungarian border passing the border check points, where the travel papers are checked in view of entering the country, at approximately 10-15 meters, without presenting themselves to the mentioned check point in order to hand in their passports for checking*”, as it was recorded in the protocol no. 3727 on the 28<sup>th</sup> of March 2004, dossier no. 1620/P/2004 of the Prosecutors' Office of the Arad Court of Law. Both of them declared that the customs police detained them in the customs office, where they went to find out whether the information that Gregorian Bivolaru had been confined to the border was true or not. Likewise, they both declared that they had been taken outside the customs office by the police, and they were filmed, in order to “prove” that they tried to commit the crime provided for in article 70 of the Government's Emergency Ordinance no. 105/2001. Their statements are contradicted by witness Doru Biris, respectively the clerk to whom Bivolaru along with Farkas went to find out whether Gregorian Bivolaru was confined to the border or not.

In his statement, which can be found on page 976 of the dossier, the witness Doru Biris, as also stated in the indictment on page 29, “*due to a name confusion he informed him that the defendant Gregorian Bivolaru is confined to the border and cannot leave Romania*”. The justification that he would have mistaken him with Gabriel Bivolaru, searched for 60 million dollars bank fraud, is unsustainable because article 53 paragraph 1 of the Government's Emergency Ordinance no. 105/2001 provides that the following data concerning the persons confined to the border is requested:

- “a) name and first name, previous name, pseudonyms or nick-names in case they are separately registered;**
- b) specific objective and inalterable physical marks;**
- c) the first letter of the second first name;**
- d) date and place of birth;**
- e) sex**
- f) citizenship;**
- g) the mention that the persons in question are armed, according to the case;**
- h) the mention that the persons in question are violent, according to the case;**
- i) the reason of the notification;**
- j) the measure to be taken.”**

If we take into account the fact that Doru Biris was handed in the passport of Gregorian Bivolaru in order to precisely check whether the latter was consigned to the border or not, and also taking into account the multitude of data found in the Nădlac customs computer, **the “confusion” cannot be considered but an intentional misleading**, which continues the series of authorities’ attempts to make up evidence against Gregorian Bivolaru at any cost.

**And all this because in other circumstances Gregorian Bivolaru would have had absolutely no reason whatsoever to attempt the illegal crossing of the border, since no preventive measure concerning him had been disposed out of lack of evidence. In other words he could have easily crossed the border without anybody raising any objection.**

The misleading seems fully motivated if we consider that, consequent to the abusive house search performed by the representatives of the Prosecutors' Office of the Bucharest Court of Appeal, no evidence had been produced to support the accusations against Gregorian Bivolaru, approximately 300 persons filed complaints against the searches, and if we also take into account the excessive coverage by the media of the alleged offenses of sexual act with a minor and sexual perversions – facts which have been contested by the very alleged injured party, minor Mădălina Dumitru. **By this manoeuvre, the Romanian authorities found a perfect justification in order to decide the arrest of Bivolaru, namely his attempt to escape penal prosecution.**

The evidence sustaining the statement that the authorities willingly generated a confusion in order to facilitate a set up is the statement given in a live intervention by reporter Christian Levant on the B1TV channel: *“that is why I am saying that it is a diversion [...] because today in the press conference we were told that the penal prosecution against Gregorian Bivolaru had not started[...] but later on we called Mediafax and we asked, they told us the news [that Bivolaru is searched nationally] was not true, but they were ordered to communicate it [...] this is what they told both to me and to a colleague of mine”*.

**Another argument in this respect is the simple fact that between the beginning of the penal prosecution regarding the commission of offenses of sexual act with a minor and sexual perversion and the incident at Nădlac border point, the Prosecutors' Office of the Bucharest Court of Appeal found no reason to request the measure of pre-trial incarceration. In this respect, the 5<sup>th</sup> District Court of Law, justifying the conclusion from the 31<sup>st</sup> of May 2004, shows that it cannot take the measure of the pre-trial incarceration for the commission of neither the offense of illegally crossing the border, nor the offense of sexual perversions, but the measure of the pre-trial incarceration for the offense of sexual act with a minor is justified as the defendant tried to escape the penal prosecution, represented a public danger and there were indications that he would exert pressure on the injured party or that would attempt a fraudulent agreement with her. It must be said that in what concerns these two aspects (that he would exert pressure on the injured party or would attempt a fraudulent agreement with her) no evidence whatsoever was either**

produced or discussed during the court session.

#### **V. The violation of Article 5 by the fact that the Nădlac Border Point Police violated the legal dispositions concerning the duration of the detention measure**

A final aspect concerning the detention measure decided by Nădlac customs police refers to its duration. According to article 468 of the Penal Procedure Code, in the case of flagrant offenses “*the defendant is detained. The detention lasts for 24 hours*”. The logic of this regulation is that at the time of *flagrante delicto*, the offense is practically proven and the perpetrator is to be prosecuted and convicted; thus, there is no reason why he would not be withheld immediately. The regulation effectively represents an imperative norm.

Nevertheless, between the date when they were approached by the police authorities and “caught” in *flagrante delicto*, respectively the 28<sup>th</sup> of March 2004 at 20:30, and the 29<sup>th</sup> of March 2003, 6:00, when the measure of detention was “officially” decided, both Gregorian Bivolaru and Farkas Ferenc Zsolt were kept in the offices of Nădlac border point in order to give statements. Surprisingly though, even if article 144 of the Romanian Penal Procedure Code states that, “*the measure of detention can last at most 24 hours. From this duration it is taken out the time during which the person was deprived of freedom as a consequence of the administrative measure of taking the person to the police office, provided for in article 21 (b) of the Law no. 218/2002 regarding the organization and the activity of the Romanian Police*”, the time between the 28<sup>th</sup> of March 20:30 and the 29<sup>th</sup> of March 6:00 has not been deduced from the measure of the detention. Besides, this should have started on the 28<sup>th</sup> of March 2004 20:30, as provided for in article 468 of the Romanian Penal Procedure Code; so, in this context, its enforcement beginning with 6:00 on the 29<sup>th</sup> of March 2004 was done while violating the legal provisions.

This is proved by the very Protocol of starting the penal prosecution issued by the Nădlac customs police and which is dated the 28<sup>th</sup> of March and can be referred to at page 907 of the dossier.

It is therefore obvious the violation of article 5 paragraph 1 of the Convention which states that a person cannot be deprived of freedom except for certain cases and only while observing the legal provisions.

#### **VI. The violation of Article 5 by the fact that the magistrates decided the measure of pre-trial incarceration although there was no evidence to justify the depriving of freedom of Gregorian Bivolaru**

In this respect, even if all the measures against Gregorian Bivolaru until the time of the pre-trial incarceration would have been taken while observing the legal provisions and while offering him all the guarantees provided for in the Romanian Penal Procedure Code, the Romanian Constitution, and even the European Convention of the Human Rights, the main obligation of the magistrates remains to ascertain whether or not there are serious grounds for taking this serious measure against the defendant, or the penal prosecution can proceed without the depriving of freedom of the latter.

Analyzing the merits of the Proposal of pre-trial incarceration of the Prosecutors' Office of the Bucharest Court of Appeal and the Conclusion on the 31<sup>st</sup> of May 2004 pronounced in the dossier no. 3989/2004 by the 5<sup>th</sup> District Court of Law, it is noticed that there is no reason to justify such a measure.

As mentioned above, the evidence used by the prosecution was either illegally obtained (the personal

notebook of minor Mădălina Dumitru, nude pictures with her, the video cassette on which she was performing a dance, the protocol of “finding” in the building on no. 2, Vasile Grozavu str., sector 5, all of them illegally seized during the house search on the 18<sup>th</sup> of March 2004, as was proven above, as well as the phone conversations wire-taped under the law of national security), or have no real base (the complaint of the minor Mădălina Dumitru, which she contests herself) or are argued against by the documents in the dossier.

This latest category includes the complaints of Dumitru Tanța, mother of the minor Mădălina Dumitru, who went to the police authorities in Costinești, claiming that her daughter had disappeared, was held by force, was being abused etc. **Although these complaints were used by the Prosecutor’s Office of the Bucharest Court of Appeal in support of the prosecution, in the dossier there are reports of the chief policeman Răileanu Puiu of the Police Office Costinești from the 15<sup>th</sup> of August 2003 and the 22<sup>nd</sup> of March 2004 in which he states that the complaints handed in by Dumitru Tanța and recorded as penal case were to be quashed, since afterwards minor Mădălina Dumitru presented herself willingly at the police station and declared they were not true. She said to the police authorities that she had transferred to the Economic College in Bucharest in agreement with her mother and consequently chief policeman Răileanu Puiu, noting she was neither a fugitive nor unwillingly detained in Bucharest, recommended the quash of the case.**

**Moreover, in the dossier at pages 205-221 there are documents proving that the transfer of minor Mădălina Dumitru from the Economic College in Mangalia to the Economic College in Bucharest was made with the approval, at the request and in the presence of her mother.**

As to the evidence that would justify the arrest measure, there should be also mentioned that **the documents in the dossier (pages 143-147) representing the records of the exits from and entries into the country of minor Mădălina Dumitru together with Gregorian Bivolaru, do not prove in any way either that he abused his authority in order to obtain sexual favours from the minor, or that he gave her money or other facilities to the same purpose.**

Leaving aside the tendentiousness of such statements as “record of finding inside the building...”, there is obviously no evidence to justify the decision by the judging instance of the pre-trial incarceration, and consequently the authorities violated the provisions of article 5 paragraph 1 (b) of the Convention.

## **VII. The violation of Article 5 by the fact that Gregorian Bivolaru was detained into custody another 10 hours after the magistrates had disposed his release**

The Bucharest Court of Appeal, in the Decision no. 131/R pronounced in open session on the 1<sup>st</sup> of April 2004, established that the Bucharest Tribunal had not been competent to judge the proposal of pre-trial incarceration, that the measure of 24 hours' detention had expired and consequently decided **the release** of the two defendants and forwarded the cause to the 5<sup>th</sup> District Court of Law in order to rejudge the proposal of pre-trial incarceration, as this was the legally competent instance concerning the offenses for which the pre-trial incarceration was requested.

Although the release is effective **immediately** according to article 350 of the Penal Procedure Code, Gregorian Bivolaru **was detained another approximately 10 hours in the arrest of the Police General Inspectorate.**



### **VIII. The violation of article 5 by the fact that the measure of pre-trial incarceration was maintained without being legally prolonged**

The most recent violation of article 5 of the European Convention for Human Rights was done by the Bucharest Tribunal – the 1<sup>st</sup> Penal Section in the dossier no. 2320/2004.

After charging Gregorian Bivolaru with the offenses for which it was previously requested the measure of pre-trial incarceration, as well as with other offenses, on the basis of article 300<sup>1</sup> of the Penal Procedure Code, on the day of going to law, the court, on the basis of the obligation established by the above-mentioned article, proceeded, before the first judging term, to checking the regularity of the taking of the measure or of the prolonging of the preventive detention.

Consequently it was unjustly ignored the point of view of Gregorian Bivolaru's lawyers according to which the instance, on the basis of article 300<sup>1</sup> of the Penal Procedure Code, cannot maintain the measure of preventive detention taken on the 31<sup>st</sup> of May 2004 **without having previously prolonged it every 30 days**, according to articles 155-159 of the Penal Procedure Code. As a result, the Bucharest Tribunal, while defying the above-mentioned legal provisions, disposed the maintenance of an detention state although it was not effective on the day of its pronouncing, respectively the 19<sup>th</sup> of August 2004.

The reasons for the Decision on the 19<sup>th</sup> of August 2004 pronounced by the Bucharest Tribunal, the 1<sup>st</sup> Penal Section, are contradictory, because it states that “...*the instance has the obligation to rule on... maintaining* (the measure of pre-trial incarceration) *even if the warrant of arrest was not effected*” without noticing, although the defenders had specified it, that it cannot maintain a not effected preventive measure if it was not previously prolonged. The instance was inconsistent while motivating the maintaining of the measure of pre-trial incarceration and actually argues for the obligation to prolong the measure during the penal proceedings without effecting the warrant of arrest, considering that the checking of the legality of the measure (and its prolonging) is necessary because “*situations can occur in which one could establish that the reasons which led to the measure of pre-trial incarceration ceased and there are no new reasons, in which case this measure can be revoked and it is of no importance whether or not the warrant was carried on*”.

That is why the Decision on the 19<sup>th</sup> of August 2004, pronounced by the Bucharest Tribunal, illegally maintained the measure of pre-trial incarceration on the basis of article 300<sup>1</sup> paragraph 3 of the Penal Procedure Code, by denying the defense's request to admit the inadmissibility of the continuation of the pre-trial incarceration at that time and consequently to establish the cessation by right of the measure of pre-trial incarceration according to article 140 paragraph 1 (a) of the Penal Procedure Code.

The maintaining of the measure of pre-trial incarceration of the defendant Gregorian Bivolaru by the Decision on the 19<sup>th</sup> of August 2004 was also illegally decided while **brutally violating the procedure concerning the citation of the defendant**. More precisely, although the defendant is searched by the Police at country level, and at that time he did not live at the address in Bucharest, no. 4 Sergent Turturică Str., bl. 70B, scara 1, ap. 2, sector 5, even since May 2004, as results also from the information in the dossier, the court illegally cites him at an address where he no longer lives, thus flagrantly violating the provisions of article 177 paragraph 4 Penal Procedure Code, which stipulates the citation to be posted at the door of the Local Council on whose jurisdiction the offense was committed “*if one does not know the address where the defendant inhabits*”.

The judicial decision pronounced in the absence of a party illegally cited results in its cassation according to article 385v15 point 2 (c) of the Romanian Penal Procedure Code and consequently the cassation of all its decisions including the continuation of the measure of pre-trial incarceration.

By ignoring all the above-mentioned supporting facts, concerning both the merits and the procedures, Bucharest Court of Appeal denied the appeal as unsubstantial (dossier no. 2989/2004). A judicial paradox was also the fact that the appeal court admitted as illegal the citation of Gregorian Bivolaru at the address where he no longer inhabits and decided the legal citation by posted at the door of the 5<sup>th</sup> District Local Council, for the term of 27<sup>th</sup> September 2004, when the cause was judged. Nevertheless, the instance inexplicably denied the appeal and forgot the legal citation of the defendant in what concerns the merits – which was implicitly acknowledged by the Bucharest Court of Appeal.

**Consequently we appreciate that the right to freedom of Gregorian Bivolaru was flagrantly violated by illegally maintaining the measure of pre-trial incarceration.**

### **3. VIOLATION OF THE ARTICLE 6 OF THE CONVENTION – RIGHT TO A FAIR TRIAL**

As to a fair and public trial within a reasonable time, by an independent and impartial court established by law, with all the other guarantees, as provided for in article 6 of the Convention, these provisions were violated in 6 different situations.

#### **I. The violation of the Article 6 by not observing the presumption of innocence**

First of all it must be said that in the Romanian judicial system the presumption of innocence, stipulated by the Romanian Penal Procedure Code in article 5<sup>2</sup>, by the Romanian Constitution in article 23, but especially by the European Convention for Human Rights, remains an empty concept that the courts do not take into account. The entire theory according to which *in dubio pro reo* must be applied every time when there is not enough evidence showing the guilt of the charged, especially in penal matters, remains a beautiful speech of the lawyers with no impact or relevance in a penal trial whatsoever.

In this context, after the violent actions of the Romanian authorities, which were meant to “*stem the criminal potential represented by Bivolaru*”, there were also numerous official persons who publicly and shamelessly stated that Gregorian Bivolaru was guilty of the offenses attributed to him by the Prosecutors' Office of the Bucharest Court of Appeal.

As a first example, Raj Tunaru, deputy of the ruling party, requested in the session of the Chamber of Deputies on the 23<sup>rd</sup> of March 2004: “***I insistently ask the investigation authorities, especially the General Prosecutor of Romania, to issue urgently a warrant of arrest according to the legislation in force, and this to be prolonged by the judges, according to the law, until evidence will be produced in order to arrest the bastard [Gregorian Bivolaru]***”.

After the Bucharest Court of Appeal had to decide the release of Gregorian Bivolaru on the 1<sup>st</sup> of April 2004, due to the fact that the prosecutors had wrongly appreciated the norms related to competence and invested the Bucharest Tribunal instead of the 5<sup>th</sup> District Court of Law with the solving of the request of pre-trial incarceration, **numerous officials found it proper to come out and express their disapproval towards the release, clearly passing the message according to which simultaneously with the cause rejudging by the 5<sup>th</sup> District Court of Law, the measure of pre-trial incarceration should be also ruled.**

**Ioan Rus, the minister of Administration and Internal Affairs**, was quoted by several newspapers:

- Ziua – the 5<sup>th</sup> of April 2004 – “***I consider as strange the release of Gregorian Bivolaru on procedure reasons.***”

- Național – the 5<sup>th</sup> of April 2004 – *“I consider as strange the release of Gregorian Bivolaru on procedure reasons.”*
- Realitatea Românească – the 5<sup>th</sup> of April 2004 – *“Ioan Rus wants Grieg in jail.”*
- Național – the 2<sup>nd</sup> of April 2004 – *“Ioan Rus [declared that] M.I.S.A. has been watched since 1995, but the specialists within MAI (the Ministry of Administration and Internal Affairs) decided it is time to intervene.”*

**Bogdan Drăghici, the president of the National Federation of Civil Servants,** quoted by the newspaper Jurnalul Național on the 1<sup>st</sup> of April 2004, the same day when the Bucharest Court of Appeal decided the release of Bivolaru and his judging by the competent instance: *“In Romania there are over 100 important civil servants, especially within the structures of the Ministry of Administration and Internal Affairs and even in the Government’ General Secretariat, who protect M.I.S.A. or are M.I.S.A. members. At the level of the central administration, in Bucharest there are tens of such employees.”* The same Bogdan Drăghici declared for the Ziua newspaper on the 31<sup>st</sup> of April 2004: *“There are tens of employees in the whole country. Not only in this ministry did M.I.S.A. members infiltrate, but also in others such as the Government’ General Secretariat. We now gather information from all our branches and we will release them to the press as soon as possible. [...] as persons from the central state institution, the Government, have been the main protection suppliers of Gregorian Bivolaru. [...] The companies of important members or followers of the Bivolaru's organization were doing illegal economic activities. For these services, including the protection and information from the state institution, the employees have received material benefits [...] and sexual favours.”*

The same day when the release of Gregorian Bivolaru on procedural reasons was decided, that is the 1<sup>st</sup> of April 2004, the newspaper Curierul Național writes: *“Radu Timofte (chief of the Romanian Secret Services), the secret chief of M.I.S.A. Confidential sources close to the investigators declared last night [...] that there is certain evidence that the S.R.I. head belongs to the yogi movement. [...] President Ion Iliescu calld urgently the Supreme Council for the Country Defense (CSAT) where they will discuss the replacement of Radu Timofte.”*

A larger number of such statements and newspaper excerpts can be found in Appendix 2.

Considering all these statements which came to support the accusations of the Prosecutors' Office of the Bucharest Court of Appeal, to emphasize the necessity to arrest Bivolaru and to manipulate the public opinion and instigate it to hatred and despise towards his activity and the organization he founded – the presumption of innocence cannot subsist. **Moreover, although the pre-trial incarceration was requested for the serious offenses for which the investigation is till in proffress (propaganda in favor of the totalitarian state, communication of false information, association in an organized criminal group, money laundering, tax evasion, pornography, pedophilia etc.), all the quoted officials tried to manipulate the public opinion by stating that the measure of pre-trial incarceration is necessary for the committing of these offenses and not for the ones for which the preventive measure was really asked. In this way, they created antipathy, despise and even hatred towards Gregorian Bivolaru, meant to justify the disproportionate and illegal measure in relation to the evidence gathered in the dossier.**

The most serious problem is the fact that not only the public opinion has been influenced, but also the courts; they were accused of being “indulgent” towards Bivolaru due to the presumed influence he had upon them through different MISA members. Consequently they seriously ignored the fundamental rights of the defendant in order to solve as quickly as possible this controversial dossier and to satisfy the state representatives and the public opinion. The same meaning has also the motivation of the judicial decision on the measure of pre-trial incarceration: *“The notorious reaction of the public (who took note of the committing of serious*

*penal facts against a minor) has resuscitated a certain public disorder that justify the taking of a drastic measure towards defendant Gregorian Bivolaru, without denying the presumption of innocence to which the defendant is entitled until a final sentence. The letting at large of the defendant really disturbs the public order.”*

How can the judges talk about observing the presumption of innocence while disposing the most drastic preventive measure only to satisfy the public opinion intoxicated by the public statements of the Prosecutors' Office, which affirmed they took 5 trucks of hard evidence without mentioning they took the most personal belongings, which mocked a practice recognized in all the democratic countries – yoga – by releasing to the press accusations sustained by nothing, not even by the presumed victim, and which, after 10 years of careful monitoring by the Secret Services, considers investigations still need to be carried on in order to produce evidence for charging Bivolaru with such serious offenses?!

The violation of the presumption of innocence is obvious when – defying the article 202 of the Romanian Penal Procedure Code that states that *“the penal authority is obliged to produce the necessary evidence in order to find out the truth and justly judge the case. The penal authority gathers evidence both against and in favor of the charged or the defendant. The obligations provided for in the previous paragraph shall be carried on even if the charged or the defendant confess the deed”* – the prosecutors turned a statement into a complaint for an offense of sexual act with a minor in the version that incriminates the abuse of authority in order to obtain sexual favors. It must be emphasized this is the statement given after 13 hours of interrogation following the searches; this can be referred to at pages 116-117 of the cause dossier. **Moreover, the minor never accused to have had sexual relations with Gregorian Bivolaru and declared before tens of reporters that she has a fiance whom she intends to marry; she even tried to explain this during the judging of the request of pre-trial incarceration.**

**Considering all these things, the violation of article 6 paragraph 2 of the Convention is obvious.**

## **II. Violation of article 6 by the fact that Gregorian Bivolaru was not judged by an independent and impartial instance.**

Another aspect concerning the violation of article 6, paragraph 1 of the Convention concerns the composition of the panel of judges.

**In order to judge the case on the 1<sup>st</sup> of April 2004 a panel of judges was formed that was held secret until entering in the judging room and, furthermore, the judge assigned to be the president of the panel was the president of the 5<sup>th</sup> District Court of Law, Mrs. Mihaela Andrei. This violates the provision of article 6 of the Convention, which states that *“any person has the right to an equitable judgment... by an independent and impartial instance instituted by law”*. Note that, according to Law no. 92/1992 republished in 1997, **the court presidents are appointed by the Minister of Justice by direct order which is published in the Romanian Official Gazette.****

**Furthermore, the first panel of judges who ruled on the 30<sup>th</sup> of March 2004 as to the warrant of arrest of Gregorian Bivolaru, at Bucharest Tribunal, was presided by judge Antonela Costache who has, like judge Mihaela Andrei, an administrative position within the instance, the Presidency of the 2<sup>nd</sup> Penal Section, to which the dossier was assigned.**

The fact that after ascertaining the incompetence of the Bucharest Tribunal for solving the request of pre-trial incarceration and after sending the cause to be re-judged by the 5<sup>th</sup> District Court of Law, it

was considered necessary to assign a judge with an administrative position within that instance for the presidency of the panel, and after the Bucharest Tribunal had constituted a panel of judges on the same criteria, raises big question marks about the way this dossier was managed.

**The subordination to the Government is obvious in this context**; if we also consider the statements of some Government members, as quoted above, the violation of article 6 paragraph 1 of the Convention becomes obvious. Moreover, **the disciplinary action against judicial bodies is exercised by the Minister of Justice, the penal action is also exercised by the Minister of Justice** (article 91 paragraph 2 of Law no. 92/1992 republished in 1997), **the Minister of Justice can give direct and compulsory orders to the prosecutors, in view of respecting and applying the law** (article 33, article 34 of Law no. 92/1992 republished in 1997), according to Regulation no. 9 for the working of the Superior Counsel of Magistracy, **the Minister of Justice can suspend by direct order any prosecutor or judge etc.**

In this respect there have been numerous debates in the press, on TV and even in the Romanian Parliament, and consequently on the 1<sup>st</sup> of October 2004 the new law of judicial organization will come into force, by which the judges are taken out of the Government's tutelage, following the requests of the European Union. This approach of the Romanian authorities proves the above-mentioned and **is basically a recognition of the fact that until the above-mentioned date, there were no independent and impartial instances in Romania.**

However, on the 31<sup>st</sup> of May 2004, when the measure of pre-trial incarceration of Gregorian Bivolaru was judged and decided, Law no. 92/1992 was still in force and, as already mentioned, the panel of judges was presided by the instance's president. The fact that the instance of the 5<sup>th</sup> District Court of Law was challenged had no relevance; the Bucharest Tribunal and the Bucharest Court of Appeal accomplished only a formality by denying the invoked arguments.

### **III. Violation of Article 6 by the fact that the haste to judge Bivolaru's case led to repeated violation of the right to defense**

Article 6 paragraph 3.b states: *"Everyone charged with a criminal offence has the following minimum rights: ...b) to have adequate time and facilities for the preparation of his defence"*. However, after the Bucharest Court of Appeal released the charged, when the instances could no longer motivate their haste by their wish to solve the pre-trial incarceration request before the expiration of the detention measure, the judgment terms were set the same day for different instances in spite of the lawyers' repeated request to be given a reasonable time to prepare the defense. Thus, after the Bucharest Court of Appeal had to acknowledge on the 1<sup>st</sup> of April the prosecutors' mistake and to release the defendant due to the expiration of the detention measure, **during the same day** the dossier was sent from the Bucharest Court of Appeal to the 5<sup>th</sup> District Court of Law, where still the same day the dossier no. 3989/2004 was put together, and they tried to rule on the proposal of pre-trial incarceration in the Council Chamber. Because of the instance's refusal to respect the right to defense and because of the suspicions concerning the way the made up the panel of judges, Gregorian Bivolaru's lawyers had no other solution but to challenge the whole instance of the 5<sup>th</sup> District Court of Law.

As rejection grounds, they showed the instance the fact that all this extreme haste in the situation in which the celerity could no longer be motivated by the expiration of a preventive measure, and because within a few days an impressive number of procedures was carried on, that could not be carefully examined by the defendants' lawyers in order to prepare the defense – these were considered valid reasons to suspect there was political pressure and other kinds of pressure, so the instance could no longer rule objectively upon the case.

The dossier is forwarded to the superior instance, which is the Bucharest Tribunal; judging the challenge request in the dossier no. 1881/2004, the Bucharest Tribunal ruled by the Conclusion pronounced in the Council Chamber the same day, the 1<sup>st</sup> of April 2004, that there was no incompatibility and denied the rejection request.

The conclusion issued by the Bucharest Tribunal was appealed.

At Bucharest Court of Appeal, in the dossier no. 1177/2004, Gregorian Bivolaru's lawyers invoked the non-constitutionality of the provisions of article 52 par. 2 of the Penal Procedure Code, which states that the examination of the exception request can be done in the absence of the parties, and the instance who judges the exception request must listen to the parties only if considered necessary. Although Gregorian Bivolaru was represented by a lawyer at the Bucharest Tribunal, that judged the exception request, the constitutional provisions are violated by the fact that the defendant was not cited and called to be heard; due to the negative consequences of the denigration in the media and the exaggerate hurry with which the procedures took place, the defendant's rights were violated, especially the right to defense.

The Bucharest Court of Appeal by the Conclusion on the 2<sup>nd</sup> of April 2004 decided the notification of the Constitutional Court and suspended the judgment of the cause until the non-constitutionality exception will be solved.

The Prosecutors' Office of the Bucharest Court of Appeal appealed, thus forming the appeal dossier no. 2196/2004 of the High Court of Cassation and Justice.

The appeal before the High Court of Cassation and Justice was established on the 27<sup>th</sup> of April 2004. At this first term the lawyers of Gregorian Bivolaru asked for more time to prepare the defense and to consider the appeal reasons raised by the Prosecutors' Office of the Bucharest Court of Appeal; the instance admitted the request, but set the new term the following day, the 28<sup>th</sup> of April.

The High Court of Cassation and Justice admitted the appeal of the Prosecutors' Office of the Bucharest Court of Appeal (Decision no. 2283 on the 28<sup>th</sup> of April) therefore decided to send the cause to the Bucharest Court of Appeal for the continuation of the trial. This happened while at the supreme court Gregorian Bivolaru's lawyers invoked the non-constitutionality of the provisions of article 385<sup>2</sup> and article 362 paragraph 1.a of the Penal Procedure Code, on which basis the prosecutor can attack with appeal or recourse the decisions. This was motivated by the fact that the mentioned texts are in contradiction with the principles governing the whole activity of the Public Ministry, which are the principles of legality, impartiality and hierarchical control, as long as exercising the appeal by the prosecutor is not subject to the confirmation of the hierarchically superior prosecutor.

The High Court of Cassation and Justice, despite the provisions of Law no. 47/1992, republished, which states that the instances before which non-constitutionality exceptions are raised are obliged to refer to the Constitutional Court, ruled in this respect and denied the exception.

At the Bucharest Court of Appeal, on the 10<sup>th</sup> of May 2004, in the dossier no. 1551/2004 Gregorian Bivolaru's lawyers claimed that judges of the Bucharest Court of Appeal could no longer be impartial, given the evolution of the dossier and the already obvious pressure; they considered that somewhere else in the country there will be less interference and pressure on the justice than in Bucharest, and consequently took exception to the whole Bucharest Court of Appeal.

The cause was sent again to the High Court of Cassation and Justice who considered that the exception request was inadmissible and denied it (Conclusion no. 96 on the 12<sup>th</sup> of May 2004 pronounced in the

dossier no. 2624/2004).

Gregorian Bivolaru appealed, but this was also denied as insubstantial by the High Court of Cassation and Justice by a panel of nine judges (Decision no. 170 on the 14<sup>th</sup> of May 2004 pronounced in the Council Chamber in the dossier no. 128/2004).

**The rush through so many proceedings in such a short time led to the effective hindrance of the defense preparation, the courts categorically refused to take into account this fundamental right of the defendant, right that is also provided for in principle by the Romanian Penal Procedure Code in article 6.**

The right to defense was seriously violated if we consider that during one single day, that is the 29<sup>th</sup> of March 2004, the Nădlac customs police decide the measure of detention, the dossier was sent to Bucharest, the dossier of the Prosecutors' Office pendant to the Arad Court of Appeal was connected to the dossier of the Prosecutors' Office pendant to the Bucharest Court of Appeal, it was decided the start of the penal proceedings for three offenses (attempt to fraudulently cross the Romanian state border, sexual act with a minor, sexual perversions), and the proposal of pre-trial incarceration was drafted by the same Prosecutors' Office pendant to the Bucharest Court of Appeal.

**In the same very busy day the General Prosecutor of the Prosecutors' Office pendant to the Bucharest Court of Appeal found the time to solve the complaints of the minor Mădălina Dumitru against the way the search and the interrogation were performed, and by the Resolution no. 977/VIII-1/2004 on the 29<sup>th</sup> of March 2004, stated that her requests could not be taken into account; this time her capacity of minor didn't grant her any favour; her statements were contested and she was practically obliged to take the role of injured party, although she denied it.** It is probably a national or even international premiere that a presumed injured party affirms denies this capacity while the authorities contradict her, saying that her statements cannot be taken into account.

**It is very hard to believe that the prosecutors had the necessary time to study the dossier in all its complexity, as it has an impressive number of pages, in order to analyze the evidence and to draw up the above-mentioned documents, so that the rights of the accused be also observed and the proceedings be correctly conducted as provided for in the Romanian Penal Procedure Code, such as the right to defense and the personal freedom; furthermore, it is also hard to believe they also had the time to hand in the dossier to the General Prosecutor in order to study and analyze attentively whether minor Mădălina Dumitru's complaint was well-grounded or not.**

It is also worth to mention that between the 29<sup>th</sup> of March 2004, when the Prosecutors' Office pendant to the Bucharest Court of Appeal requested the measure of pre-trial incarceration, and June 2004, when the Conclusion of the 5<sup>th</sup> District Court of Law by which the measure of pre-trial incarceration was decided remained final, the prosecutors continued the investigation of the merits and as various procedural documents were issued they were added to the initial dossier. In all this period, the defenders requested several times, according to article 172 Penal Procedure Code, to be called for every act of penal investigation, but the claims handed in through the registry got too late to the prosecutors, others disappeared, sometimes the prosecutors themselves "could not be found"; thus, **the judicial bodies proceeded to various investigations in the absence of the defenders.** The proving documents can be found at pages 1087-1123 of the dossier.

**In this context, it is even easier to understand the instances' refusal to grant reasonable terms for the preparation and the assurance of Gregorian Bivolaru's defense.**

**The flagrant violation of article 6, paragraph 3.b of the Convention is therefore more than obvious.**

#### **IV. Violation of Article 6 by the fact that the judgment was not suspended in order to allow the Constitutional Court to judge the exception of non-constitutionality**

When the exception of non-constitutionality of the provisions of article 52 of the Penal Procedure Code was invoked, the judging instance was obliged, according to Law no. 47/1992 concerning the organization and working of the Constitutional Court, **to suspend the judgment and to send the cause to be solved by the Constitutional Court, the only one empowered to rule as to the constitutionality of the provisions of a law.**

The Law of the Constitutional Court provides that an exception of non-constitutionality can be denied by judging instances only if it is considered inadmissible because it does not concern a law or an ordinance, it was not invoked by the court, the parties or the prosecutor, or it was subject to a prior constitutional check (prior to the enforcement of the law or ordinance), or the Court had already ruled on the invoked text and declared it not constitutional. **In Bivolaru cause none of these points that could have justified the denial of the non-constitutionality was applicable, and the High Court of Cassation and Justice admitted the appeal of the Prosecutors' Office against the conclusion of the Bucharest Court of Appeal by effectively pronouncing in place of the competent instance as to the constitutionality of article 52 of the Penal Procedure Code, as one can easily see in Decision no. 2283 in dossier 2196/2004 of the High Court of Cassation and Justice – Penal Section. *A fortiori* the High Court of Cassation and Justice flagrantly violated the legal provisions by **drastically denying the non-constitutionality exception invoked.****

The High Court of Cassation and Justice, by the Decision no. 2283 on the 28<sup>th</sup> of April 2004, also refused to send the dossier to the Constitutional Court after at the supreme court Gregorian Bivolaru's lawyers invoked the non-constitutionality of the provisions of articles 385<sup>2</sup> and 362 paragraph 1.a of the Penal Procedure Code, on which basis the prosecutor can attack with appeal or recourse the ruling. This was motivated by the fact that the mentioned texts are in contradiction with the principles governing the whole activity of the Public Ministry, which are the principles of legality, impartiality and hierarchic control, as long as exercising the attack by the prosecutor is not subject to the confirmation by the hierarchically superior prosecutor.

**Despite the provisions of Law no. 47/1992, republished, which states that the instances before which the non-constitutionality exceptions are raised are obliged to go to the Constitutional Court, the High Court of Cassation and Justice pronounced ruled and denied it.**

#### **V. Violation of Article 6 by the fact that the objections raised during the solving of the request of pre-trial incarceration were ignored without arguments**

It is useless to comment the way in which the instances pronounced every time upon the objections formulated during the solving of the request of pre-trial incarceration; in none of the judicial decisions there were arguments on why Bivolaru's affirmations were repeatedly ignored. The argument invoked by the judging instances, that the challenge reason provided for in article 48.d of the Penal Procedure Code, which provides that "*the judge is incompatible if in the respective cause, ...d)there are circumstances showing he is interested in any form, he, the husband, or a close relative*" could not be taken into account, is a natural consequence of its subordination to the executive power, as shown above. **Consequently, acknowledging that the objection reason is valid in this case would have meant to acknowledge not only that the instances (as already notoriously known in Romania) are neither independent not impartial, but also that the "Bivolaru dossier" was truly instrumented in a such manner to give satisfaction to the certain members of the Government**



who had publicly expressed their opinions.

**VI. Violation of Article 6 by the fact that the authorities justified the measure of pre-trial incarceration by the so-called attempt to escape, without taking into account the submitted evidence**

The 5<sup>th</sup> District Court of Law decided the measure of pre-trial incarceration claiming that Gregorian Bivolaru has been escaping, although his lawyers sustained **the defendant is hiding as he received threats that made him consider his life in danger**. In this respect they handed in the declarations of two acquaintances of Bivolaru, certified by the lawyer, in which they testify the defendant received threats saying “*he was going to be eliminated*”. Gregorian Bivolaru had serious reasons to take such threats seriously, considering his past when he had been the victim of a criminal action and he is still alive thanks to the fact that he was not at home when the explosion took place. The lawyers continuously asked the judging instances for the defendant’s protection, taking into consideration the authorities haven’t taken any measure in this respect up to the present moment.

However, the judging instance appreciated this newly-occurred situation represented only affirmations meant to delay the trial and, without taking into account the statements in the media, the filed declarations and the simple fact that by guaranteeing his protection they could ensure Bivolaru’s presence at the trial, concluded that the affirmations are not proven and, with no other analysis, decided the measure of pre-trial incarceration concluding the defendant was escaping the prosecution.

**This is another reason to ask the European Court for Human Rights to acknowledge the violation of article 6 paragraph 3.b of the Convention, which stipulates the right to defense.**

**4. VIOLATION OF ARTICLE 13 OF THE CONVENTION – THE RIGHT TO EFFECTIVE REMEDY**

We consider that this right was violated by the fact that **the Romanian Penal Procedure Code at the section dedicated to the measure of pre-trial incarceration, articles 143-144, does not stipulate the possibility to appeal to the detention ordinance.**

The non-concordance of the text in the Romanian Penal Procedure Code with the one provided for in the European Convention for Human Rights derives from the haste of the Romanian authorities to correlate the provisions of the two normative acts, so that no more critics be addressed to the judicial system in Romania.

**Consequently the detained is denied the right to a way of going to the law, thus violating the provisions of both article 5 paragraph 4 and article 13 of the Convention.**

**IV. EXPOSITION OF THE WAY OF OBSERVING ARTICLE 35, PARAGRAPH 1 OF THE EUROPEAN CONVENTION FOR HUMAN RIGHTS**

As to the facts presented at points II and III of this complaint, we mention that the measure of pre-trial incarceration remained final after the appeal ruling by the Bucharest Tribunal, that ascertained the legality of the Decision of the 5<sup>th</sup> District Court of Law on the 31<sup>st</sup> of May 2004.

Consequently, the Conclusion on the 31<sup>st</sup> of May 2004 issued by the 5<sup>th</sup> District Court of Law in the dossier of pre-trial incarceration no. 3989/2004 remained final.

The Decision of Bucharest Tribunal in the appeal dossier against the pre-trial incarceration no. 3139/2004 was taken on the 18<sup>th</sup> of June 2004, consequently the 6 months' term stipulated in article 35, paragraph 1 of the Convention is observed.

As to the maintenance of the measure of pre-trial incarceration after the suing at law, the conclusion on the 19<sup>th</sup> of August 2004 of the Bucharest Tribunal in the dossier no. 2320/2004 remained final after the denial of the appeal by the Bucharest Court of Appeal in the Decision on the 27<sup>th</sup> of September 2004, ruled in the appeal dossier 2989/2004.

It must also be noted that article 149<sup>1</sup> of the Romanian Penal Procedure Code stipulates only two levels for the procedure of pre-trial incarceration, and the conclusion by which the measure of pre-trial incarceration is disposed can be attacked only with appeal. The decision remains final after exhausting the appeal way of attack and can no longer be attacked but in extraordinary circumstances and under grounds restrictedly listed by the Romanian Penal Procedure Code (articles 386-408).

## **V. EXPOSITION OF THE REQUEST OBJECT AND PROVISORY CLAIMS IN VIEW OF AN EQUITABLE SATISFACTION**

As to all the violations of the Convention listed in chapter III of this complaint, we ask the European Court for Human Rights to certify the above-listed articles as true violations and to grant as moral and material compensation in the amount of 500,000 EURO (five hundred thousand EURO).

On the basis of rule 41 of the Court Regulation, we also kindly ask the President of the European Court for Human Rights to decide the ruling with priority upon this case.

**We base the priority request on the fact that the measure of pre-trial incarceration is prolonged every 30 days and the ascertainment of the Convention violations is of capital importance for Gregorian Bivolaru's freedom. Furthermore, the eventual decision of the Court will lead to the observance of the law and of the fundamental human rights during the judgment of the merits.**

## **VI. OTHER INTERNATIONAL INSTANCES WHICH HAVE EXAMINED THE CASE**

**We mention that the present case has not been forwarded for investigation or analysis to any other international court.**