LRCM | LEGAL RESOURCES CENTRE FROM MOLDOVA

To the Department for Execution of Judgments of the European Court of Human Rights,
Committee of Ministers of the Council of Europe
Email: DGI-Execution@coe.int

Chișinău, 18 April 2020

COMMUNICATION

in accordance with Rule 9.2 of the Rules for the supervision of the execution of judgments

SARBAN v. MOLDOVA
group of cases

This submission is presented by the Legal Resources Centre from Moldova (LRCM)[1] in the context of consideration of execution by the Republic of Moldova of the *Sarban* group of cases at the 1377th CDDH meeting (2-4 June 2020). The *Sarban* group of cases concerns various violations of the Art. 5 of the European Convention on Human Rights (ECHR), mostly related to pre-trial arrest. Lastly, this group of cases was discussed at the 1348th CDDH meeting (4-6 June 2019). The key recommendations made to the Moldovan authorities at that meeting are resumed as it follows:

a. provide information on the progress made on using alternative measures to arrest;
b. provide information on legislation implementation, including domestic courts case-law concerning the length of time taken to examine *habeas corpus* requests;
c. submit examples of the prosecution and courts practice of as concerns access of the defence to case files;
d. providing information on the impact of the amendments to Law No. 1545-XIII;

On 10 April 2020, the Government of the Republic of Moldova submitted a revised Action Report for the execution of these judgments. It mainly presents the relevant statistics for 2017-2019 concerning the remand procedures. The Government called the Committee of Ministers to closed the monitoring of this Group of cases.

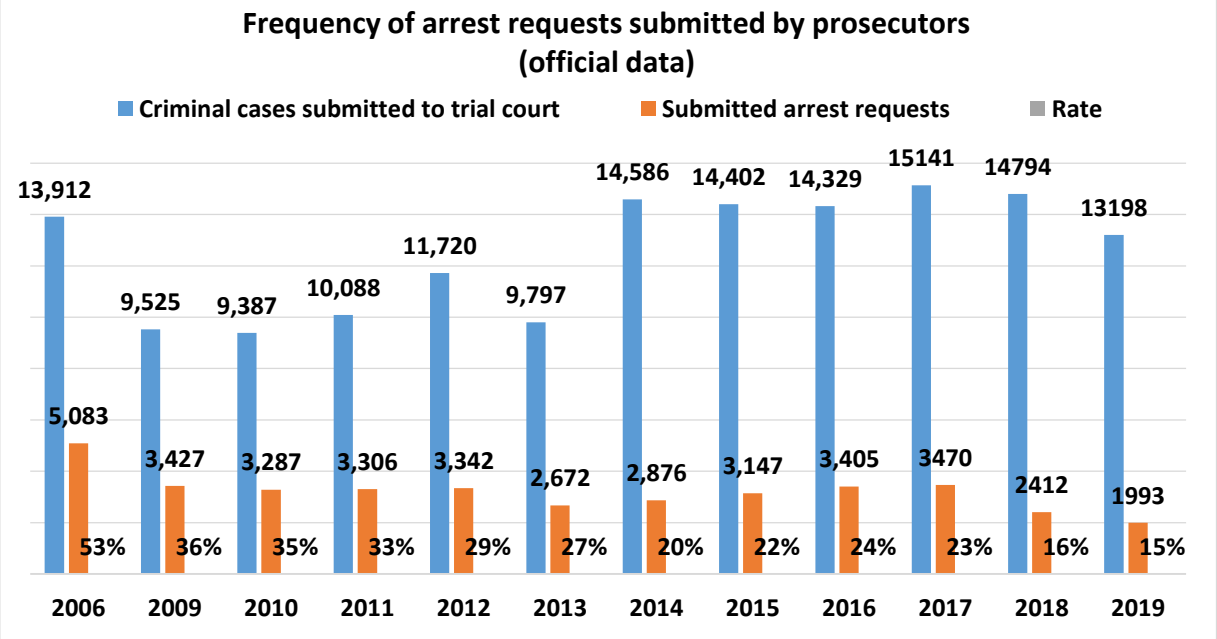
The LRCM submission covers the general measures aimed at preventing the violation of Article 5 paras. 3-5 of the ECHR. It will not address the other issues from the *Sarban* group of cases. Our overarching conclusion is that the 2016 amendment to the legislation did not lead to a substantive improvement of the practice of judges and prosecutors related to remand, as confirmed in a 2020 CoE Report. The data presented by the Governmental Agent, showing Moldova in a positive light, does not match the official statistics. Some amendments to the legislation are desirable, but they will not have a decisive impact on respect of the ECtHR arrest standards. The authorities should take decisive measures to ensure that the judges and prosecutors respect and apply the language and the spirit of the legislation concerning the arrest. The legislation should also be amended to offer the right to compensation for the persons remanded in breach of the ECtHR standards. Despite important legislative measures taken by the Moldovan authorities, they did not fulfil all the obligations related to execution of *Sarban* group of cases. The Committee of Ministers supervision of execution of these judgements should therefore continue.

[1] The Legal Resources Centre from Moldova (LRCM) is a non-profit organization that contributes to strengthening democracy and the rule of law in the Republic of Moldova with emphasis on justice and human rights. We are independent and politically non-affiliated. We published two comprehensive reports on the execution of ECtHR judgments by the Republic of Moldova, for the period 1997 to 2012, and 2013 to 2014. In 2017 and in 2019 LRCM made others submissions on *Sarban* group of cases.

PRACTICE ON ARREST

Sarban was the first Moldovan judgment finding that there was insufficient reasoning of remand judgements. It was delivered almost 14 years ago. Poor motivation of remand judgements is still a serious problem in Moldova, despite the improvement of the legislation in 2016. It generally does not reside in the legislation, but in the deficient judicial practice. This conclusion was also highlighted by a 2020 CoE assessment report. The judicial practice is influenced by the insufficient independence of judges, prosecutorial bias of many investigative judges and by the widespread phenomenon of application of arrest in the past.

The next table presents the official data of the Agency for Court Administration (ACA) concerning the number of submitted arrest requests. It is compared to the number of criminal cases submitted to the trial court (meritous cases) reported by the General Prosecution Office. According to this statistics, in 2014-2017, the prosecutors were submitting judicial arrest requested in 20-24% of meritous cases. This rate decreased to 15% in 2019. However, it is not as low as reported by the Government (1,600). According to ACA, in 2019, the courts received 1,993 remand requests, 25% more than reported by the Governmental Agent.



The reduction of the number of arrest requests in 2018 - 2019 should be treated with cautious. It was not determined by a substantive change of the judicial practice or attitude. It is rather a result of the Law no. 179 from 26 July 2018, which provided that the arrest could only be applied to persons accused of crimes sanctioned with more than 3 years of imprisonment (before the amendment, the threshold was 1 year). In other words, prosecutors have no right anymore to request arrest in certain categories of offenses. The moderated reduction in 2019 compared to 2018 is explained by the removal from power of the autocratic regime in Moldova in June 2019. After the change of the Government in mid-June 2019 and the calls of the new Prime-Minister (dismissed in November 2019) to stop abusive arrests, the number of remand requests dropped. Thus, according to official statistics, 1,073 (55%) of the 1,993 remand requests submitted in 2019 were made in the first half of 2019, when Moldova was governed by an oligarchic regime. This enforces our conclusion about the unwarranted nature of many remand requests and about the lack of sufficient independence of the Moldovan prosecution office. The reduction in 2019 was also determined by a lower number of meritous cases.

The number of arrests authorized by judges is more informative for assessing whether the procedural guarantees against unwarranted arrest are applied in practice. The next table presents the official data (first instance court) concerning the outcome of the arrest procedures. In 2019 the number of arrested persons was the lowest in the last decade. However, the arrest rate was the highest ever recorded

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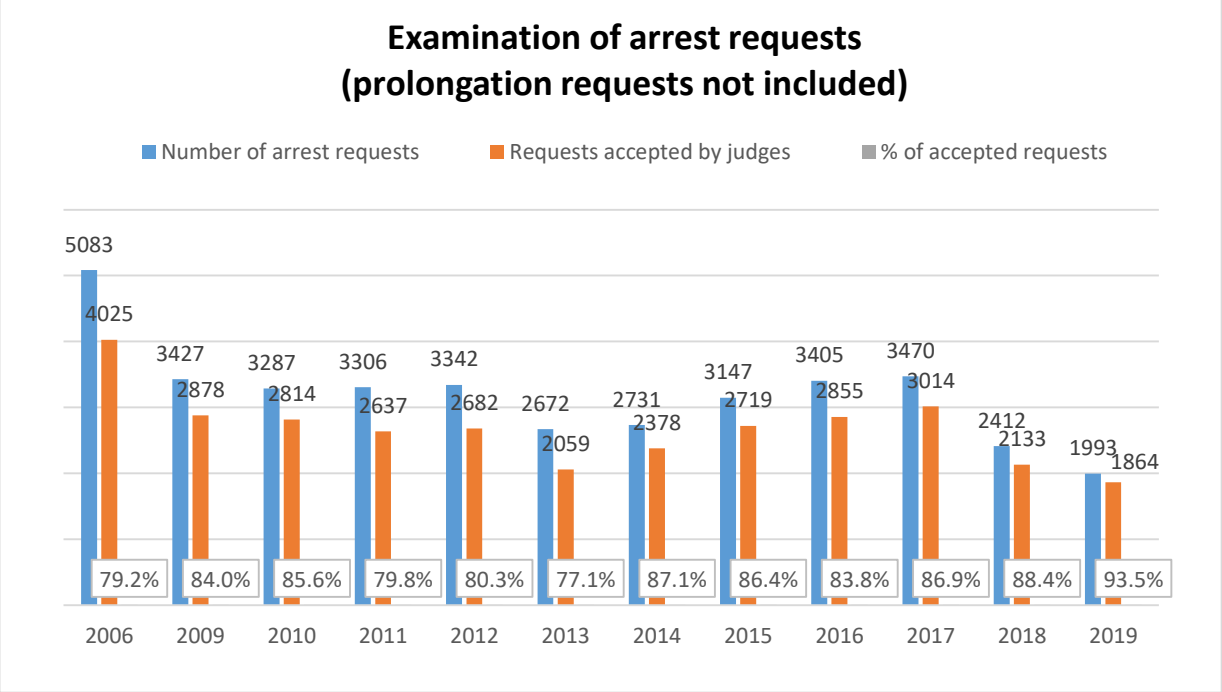
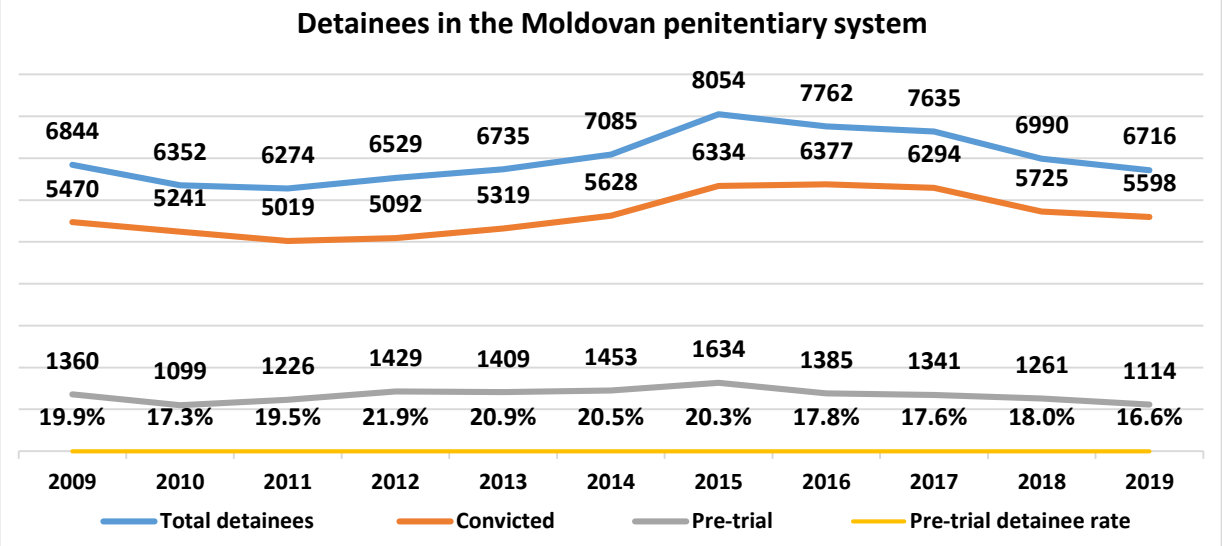
(93.5%). Moreover, out of 1,864 persons remanded in 2019 (the Government reported only 1,403 arrests), 1,006 (55%) were arrested in the first half of 2019. Should the trend from the first half of 2019 continue, the rate of arrests in 2019 would have been higher than in 2018.

This data confirms that no substantive change in the applicability of arrest took place in Moldova in the recent years. Despite the reduction of the number of the arrested persons, it does not appear that the judges examine more thoroughly the remand requests. On the contrary, the rate of accepted arrest requests increased to historical maximums – 93.5%. Such high figures themselves raise serious questions as to the efficiency of the judicial control over the arrest procedures.



The 2020 CoE Report highlighted (pp. 41-44) that only in 23.1% of analysed cases adverse decisions on orders of preventive arrest in Moldova had a satisfactory level of judicial reasoning as far as the grounds for detention are concerned. In most of cases, judges use "copy-paste", particularly when extending detention. Judges relied on the same grounds repeating them without reviewing them in substance and subsequent decisions were copies or mostly similar to previous ones, or refusing to review the new circumstances indicated in the motions to review them.

The high number of prison population can be an indicator of excessive use of arrest. According to the 2019 SPACE Report, Moldova is in the top 7 CoE countries with the highest per capita prison population.



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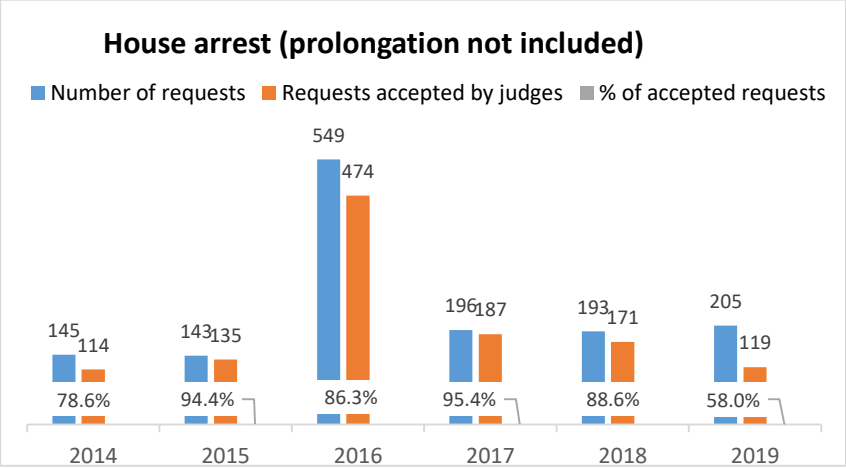
It has 197 detainees per 100,000 inhabitants, while the European median is 106,1[2]. According to the last report of the Moldovan Penitentiary Department, on 31 December 2019, 16,6% of prison population were pre-trial detainees (see the next table). This rate slightly decreased compared to 2017-2018.

ALTERNATIVES TO ARREST

The national legislation (Articles 185 and 308 (8) of the Code of Criminal Procedure (CCP), as amended in 2016) provides in clear terms that the remand should be applied as an exceptional measure, when alternatives to remand are not sufficient to mitigate the risks justifying the arrest.

We are not aware of comprehensive official statistics on the application of alternatives to remand, except house arrest. The statistics of the ACA (which substantially differs of the ones presented by the Governmental Agent) suggest that house in Moldova rarely applied in Moldova. For example, in 2019 the prosecutors submitted 1,993 remand requests. The number of house arrest requests was 10 times smaller (205).

On the other hand, in 2017-2019, the number of house arrest requests decreased considerably compared to 2016. Moreover, in 2019, 42% of these requests were dismissed.



The bail is generally not applicable in Moldova (according to 2019 GPO report, **in 2019 the bail was applied to one person only**). The 2020 CoE Report recommended to amend the legislation and introduce bail and (judicial) control as standalone non-custodial preventive measures (currently they can be ordered by the judge only if the remand request is dismissed).

The 2020 CoE Report highlighted (pp. 44-48) that in 51% of analysed cases the prosecutors did not provide specific arguments substantiating insufficiency of alternatives. In 44% of cases, the judges did not analyse this aspect either. The report concluded that the 2016 amendments to the CCP did not a positive effect on the performance of prosecutors and lawyers.

This Report also highlighted the deficient legislative techniques and the need to reinforce the priority of noncustodial preventive measures by establishing clear hierarchy between them, including by means of adjusting the sequence of relevant Articles in the CCP.

The data from this section confirm that authorities should take considerable measures to ensure the wide application of alternatives to remand. Electronic monitoring of persons released from detention is already applicable in Moldova. However, its application is limited, despite wide technical possibilities available.

LENGTH OF EXAMINATION OF *HABEAS CORPUS* REQUESTS

The Code of Criminal Procedure does not provide a time limit for the judge to solve *habeas corpus* request made by the defence. While no official statistics on this issue is available, the lack of short time-limits for examination of the habeas corpus request may result in the redundancy of examination,

[2] See the 2019 SPACE I Prison Populations Report, page 30, available at http://wp.unil.ch/space/files/2020/04/200405_FinalReport_SPACE_I_2019.pdf

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bearing in mind that the remand is ordered in Moldova for 30 a maximum of 30 days. The Moldovan CCP should be amended accordingly.

The statement of the Governmental Agent, based on interpretation of the CCP, that the habeas corpus requests are examined in 3 days from submission is not supported by consistent practical examples. The practice is that the examination of habeas corpus requests in 3 days happens exceptionally rare. In numerous cases, the habeas corpus request is not examined at all, as the period of the remand expires and the judges is called to deal with the prolongation of the remand.

ACCESS OF DEFENCE TO THE CASE-FILE AND HEARING OF WITNESSES

In its revised Action Report, the Government mentioned that defence has full and unconditional access to the case files on application and extension of pre-trial detention. The CoE experts found cases when the judges were presented the entire criminal case-file, which is unavailable to the defence as long as the investigation is pending. As a result, the defence did not have access to all the materials presented by the prosecutor to the judge in support of the arrest request. The CoE 2020 Report highlighted the need to fully ensure equality of arms in terms of access of the defence to materials used by prosecutors for substantiating a motion to apply preventive detention.

The CoE experts could not find any example in the cases examined by them where the witnesses were heard in the remand procedures. They also did not establish any case of a request of the defence to hear a witness. This can be explained, to some extent, by the constant refusal of judges, until the amendments to the CCP from 2016, to grant such requests. In 2017-2019 the investigative judges generally did not grant the requests of the defence to hear witnesses in the remand procedure. This hesitance was triggered, inter alia, by a criminal case opened in 2017 against an investigative judge for hearing a witness in the remand procedures. The Supreme Council of Magistracy authorized this investigation, the judge was suspending from office for 2 years and the case was sent to trial. The judge was eventually acquitted, but the case had the expected effect on judges dealing with remand procedures.

COMPENSATION FOR THE BREACH OF ARTICLE 5

The Moldovan legislation (Law no. 1545-XIII) grant the right to claim damages for the breach of Article 5 of the ECHR only upon acquittal. The ECtHR already found this situation to be contrary to Article 5 para. 5 of the ECHR. At the 1294th CDDH meeting the Moldovan authorities were requested to ensure 5 the possibility to any person detained in breach of Article 5 to apply for compensation. We are not aware of any measure taken by the Moldovan authorities in that respect, while the Law no. 1545-XIII was not amended to provide such a right.

The Governmental Agent commented in his last action report that it is possible to claim such a compensation by invoking directly Article 5 para. 5. He also admitted that there is no such a judicial practice yet. The lack of practice is not surprising, bearing in mind that a person is remanded pursuant a court decision, which is presumed to be legal as long as it is not overturned. Without a quashing of that decision, the compensation is impossible to obtain even in theory, as the establishment of the illegality is a *sine qua non* condition for the right to compensation.

Even assuming that such a right exists, it has been established by the ECtHR in more than 10 judgements that the compensations awarded by the Moldovan judges for the breach of the convention were manifestly insufficient. The practice of awarding nominal compensations for the breach of human rights is still wide spread in Moldova. The existence of this serious problem was admitted by the Governmental Agent himself in 2018. As it appears from the 2020 action report of the Government, no trainings were provided to judges on this matter.

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INDEPENDENCE OF INVESTIGATIVE JUDGES

According to a 2019 survey conducted among Moldovan lawyers (14% of all lawyers were questioned), 81% of them did not believe that Moldovan judges are independent. 64% of the respondents considered that judges' solutions are not adopted without external influence and that the following subjects influence judges: politicians (91%), prosecutors (83%), other judges (68%) and the Supreme Council of Magistracy (65%).

There are 42-45 investigative judges in Moldova. Although the number of investigative judges has not increased very much in the last decade, their workload increased by more than 250%. Since 2017, this is only 50% of their workload. The remaining 50% are misdemeanour cases. It is not unusual for an investigative judge from Chisinau to deal with 5-8 arrest requests per day, in addition to search and special investigation procedures. It is hard to expect from investigative judges thorough examination of arrest procedures with such a workload.

On the other hand, any judge in Moldova can be appointed as investigative judge, even a newly appointed one. It is hard to expect from a newly appointed judge to act independently, particularly bearing in mind that Moldovan judges should be reappointed after first 5 year of office. The reappointment is not an automatic procedure and was often decided by the President after consulting the prosecution office, local authorities, the intelligence service and police. Furthermore, the investigative judges should take complicated decision, in a short time, without the defence being present, on very intrusive measures. On the other hand, the Moldovan judiciary does not have a strong record of independent judges. In this context, it is unrealistic to expect that the newly appointed judges are in the position to serve properly as investigative judges. This problem was recognized by the Moldovan Parliament in 2016, when the minimum threshold of 3 years of experience as a judge was introduced[3]. It was excluded in 2018 without any explanation. Furthermore, only few experienced judges accepted to be appointed as investigative judge. As a result, most of the investigative judges are former prosecutors or criminal investigators, or judges without any experience or with a very short experience as a judge. This explains in full why the control of the investigative judges in Moldova is insufficient.

RECOMMENDATIONS

We call the Committee of Ministers to recommend the Moldovan authorities take all measures necessary to ensure that:

a. Moldovan judges and prosecutors respect in practice the guarantees of Article 5 of the Convention, in particular the verification of the reasonable suspicion of the crime and examination of all the relevant evidence brought before them;

b. alternatives to remand are effectively used in practice;

c. investigative judges enjoy full independence in practice, including that the legal requirements for appointment as investigative judge offer sufficient guarantees for their independence and efficiency;

d. the workload of investigative judges is balanced to permit a thorough examination of cases put before them;

e. any person detained in breach of Article 5 is entitled to compensation, irrespective of the verdict on the merits of the charges brought against him/her.

We further call the Committee of Minsters not to close the supervision of execution of the *Sarban* group of cases and keept it under enhanced procedure.

[3] The mandatory requirement of at least 3 years of experience of a judge, introduced in 2016, was removed from the law on 12 January 2018 (Law no.315, of 22 December 2017, in force from 12 January 2018). The Parliament advanced no justification for this amendment. It appears that is was done at the request of the SCM, as many experienced judges refused to work as investigative judge.

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