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Meeting: 1348th meeting (June 2019) (DH)

Communication from a NGO (LRCM) (16/04/2019) in the SARBAN group of cases v. the Republic of Moldova (Application No. 3456/05)

Information made available under Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion : 1348^e réunion (juin 2019) (DH)

Communication d'une ONG (LRCM) (16/04/2019) dans le groupe d'affaires SARBAN c. République de Moldova (requête n° 3456/05) (**anglais uniquement**).

Informations mises à disposition en vertu de la Règle 9.2 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.



LEGAL
RESOURCES CENTRE
FROM MOLDOVA

DGI

16 AVR. 2019

SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH

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

Chişinău, 16 April 2019

COMMUNICATION

**in accordance with Rule 9.2 of the Rules of the Committee of Ministers for the supervision
of the execution of judgments and of the terms of friendly settlements**

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 1348th CDDH meeting (4-6 June 2019). 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. This group of cases is previously discussed at the 1294th CDDH meeting (19-21 September 2017). The key recommendations made to the Moldovan authorities at that meeting are resumed as it follows:

- a. provide information on the impact of the 2016 amendments to the Criminal Procedure Code (motivation and procedure of arrest) and development of the judicial practice;
- b. provide information, including decisions of domestic courts, reflecting the examination of evidence from the defence, including hearing of witnesses;
- c. submit information on the measures adopted or envisaged to ensure the possibility to apply for compensation to any person detained in breach of Article 5.

This submission covers only 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.

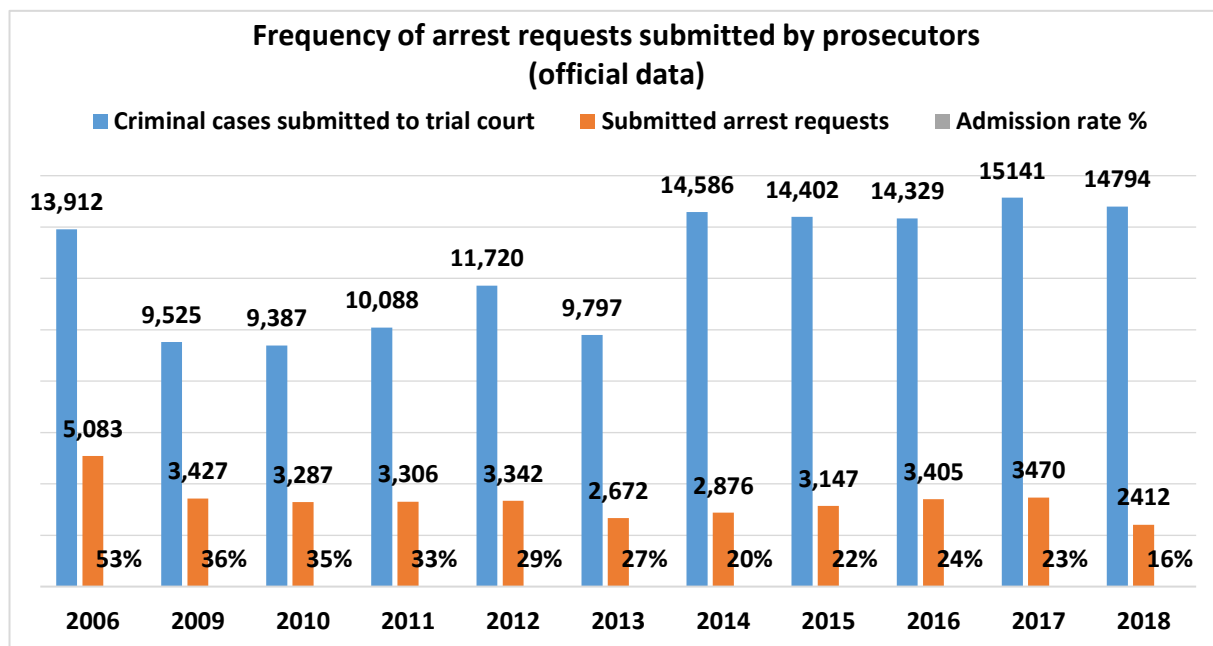
IMPACT OF THE 2016 AMENDMENTS TO THE CRIMINAL PROCEDURE CODE

Sarban was the first Moldovan judgment finding that there was insufficient reasoning of remand judgements. It was delivered in 2005, 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 rather in the deficient judicial practice, which 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](#) concerning the number of submitted arrest requests. It is compared to the number of criminal cases submitted to the trial court

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, the LRCM made [another submission on Sarban group of cases](#).

(meritous cases). According to this statistics, in 2014-2017, the prosecutors were requesting the judges to arrest the accused in 20-24% of meritorious cases. This rate decreased in 2018 to 16%, suggesting that in 2018 the arrest was requested less frequent.



The decrease of the number of arrested persons in 2018 should be treated with cautious. It appears that it was not determined by the change of the attitude of the judiciary. It was rather a result of the Law no. 179 from 26 July 2018, which provided that the arrest can only be applied to persons accused of crimes sanctioned with more than 3 years of imprisonment (before the amendment, the threshold was 1 year).

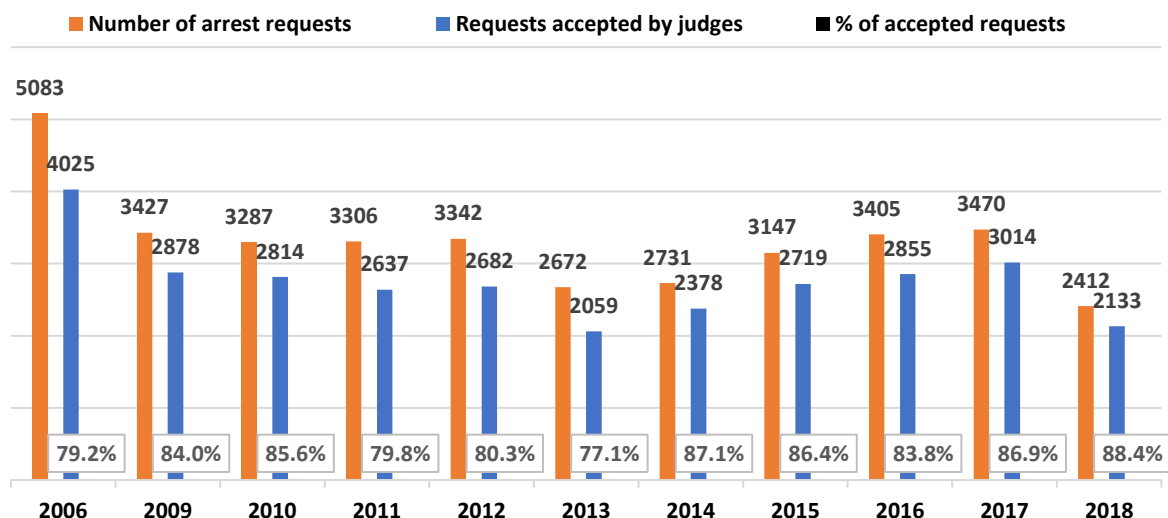
The rate of arrest authorized by judges is more informative for assessing whether the procedural guarantees against unwarranted arrest are applied in practice. The next table presents the official data of the Agency for Court Administration (first instance court) concerning the arrest procedures. In 2017 and 2018 the rate of accepted requests increased compared to the previous year. The rate of arrest requests accepted by investigative judges in 2018 was the highest ever recorded. In the last year, the investigative judges accepted 88.4% of arrest requests, against 77.1% in 2013. The effective rate of arrest is even higher, as many refusals of the investigative judges to order arrest are later quashed by the courts of appeals².

In real figures, the number of arrested persons was constantly increasing between 2013 and 2017. In 2018 it decreased. However, number of persons arrested in 2018 was higher than in 2013 and slightly lower than in 2014.

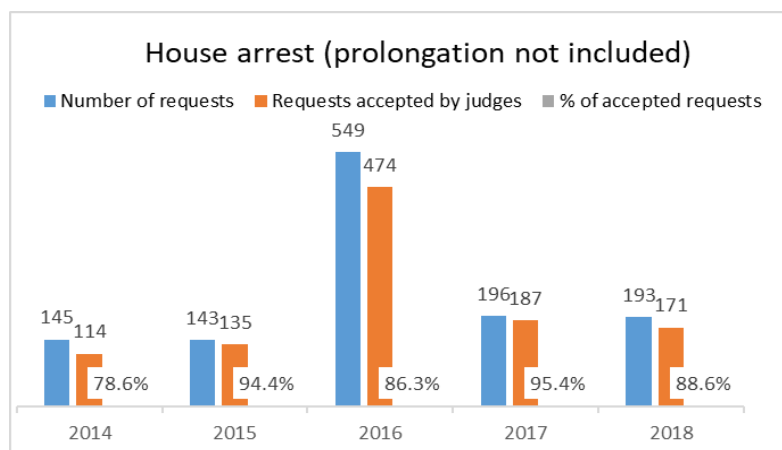
Despite the 2016 substantive amendments to Criminal Procedure Code, incorporating virtually all the procedural guarantees provided by Article 5 of the ECHR, the judicial practice did not improve. The court judgements ordering arrest continue to be poorly motivated, despite to protests of the lawyers. On 26 June 2018, more than 100 lawyers rallied in a protest in front of Chişinău Court of Appeals as a reaction to the courts' excessive practice of applying pre-trial arrest. According to the [Moldovan Bar Council](#), the practice of requesting and warranting pre-trial arrest has turned into a formality. These data, corroborated with the general statistics, indirectly confirm that the admission of arrest motions takes place without a thorough analysis of the reasons for arrest.

² A considerable part of the investigative judge decisions to dismiss the arrest requests is later quashed by the courts of appeal and the arrest is ordered. Between 29 June and 14 July 2017, the Chişinău Bar monitored the examination of appeals in the remand proceedings by the Chişinău Court of Appeals. This court examines more than ¼ of all the remand appeals from Moldova. Out of 200 appeals of the defence, only 4 (2%) have been allowed. Out of 29 appeals of the prosecutors against the refusals to order arrest, 9 (31%) have been allowed and the arrest was ordered.

Examination of arrest requests (prolongation request not included)

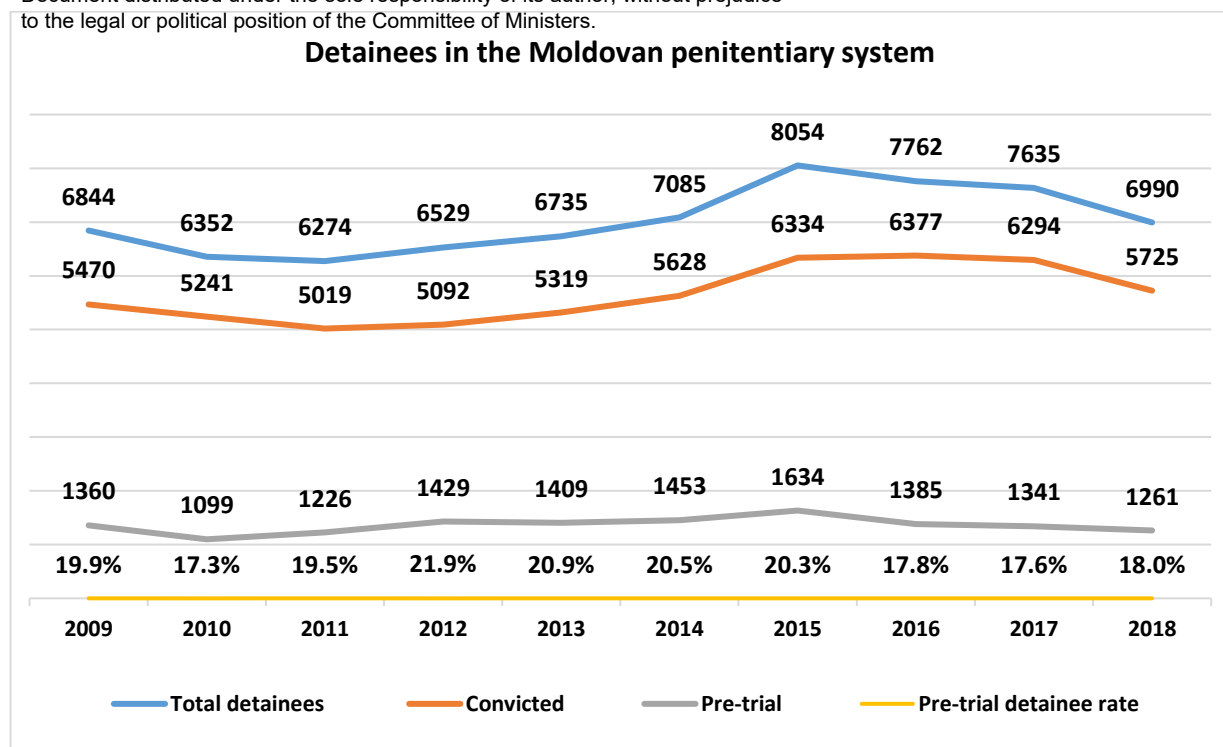


We are not aware of the official statistics available on the application of all preventive measures, but house arrest. The statistics of the Agency for Court Administration for 2014-2018 does not suggest that house arrest has been applied more frequently in the recent years. On the contrary, in 2017, the number of house arrest orders decreased considerably compared to 2016. In 2018 it remained at the same level to 2017. On the other hand, in Moldova the bail is generally applicable only to several cases per year. [In April 2018 the Superior Council of Magistracy \(SCM\) also found](#) that judges rarely apply alternative measures to arrest. This data confirms that no radical change in the applicability of alternatives to arrest took place in Moldova in the recent years. In other words, despite the reduction of the number of the arrested persons in 2018, it does not appear that the judges examine more thoroughly the arrest requests of the prosecutors. On the contrary, the rate of arrests ordered increased.



According to the [2018 SPACE Report](#), Moldova is in the top 5 CoE countries with the highest per capita prison population, almost double above the European average³. [According to the Moldovan authorities](#), at the end of each year, between 16% and 20% of the prison population are pre-trial detainees (see the next table). At the end of 2018, this rate was of 18%, slightly higher than in 2016 and 2017 (the data from the below table may differ of the data on arrested persons from the above tables, as it reflects the number of the detainees on a specific date, including prolongation of arrest, while the data from the above table shown only the number of arrested persons per year). This confirms once again that, in spite the decrease of the number of arrested persons in 2018, there are no reasons to suspect that the practice of judges and prosecutors concerning the arrest procedures improved.

³ See the 2018 SPACE I Prison Populations Report, page 28, available at http://wp.unil.ch/space/files/2019/04/FinalReportSPACEI2018_190402.pdf



The 2017 and 2018 statistics clearly confirms that the 2016 amendments to the legislation did not produce meaningful practical impact yet, although it is in place for nearly 18 months. As a rule, the motions for pretrial arrest made by prosecutors repeat the accusation, while the sections regarding the aspects warranting arrest repeat the provisions of the Criminal Procedure Code.⁴ It is true that, since 2005, the judgements on arrest procedure became longer, but this does not necessarily mean that the judgements are better motivated. Usually, a considerable part of it are the description of facts and of the relevant legal standards. The motives justifying arrest represent the briefest part of the judgement, often presented in a blanket formula, without allowing the accused to understand the reasons for arrest.

INDEPENDENCE AND THE WORKLOAD OF INVESTIGATIVE JUDGES

Between 1997 and 2008, the European Court of Human Rights (ECtHR) has delivered 387 judgments condemning Moldova, finding 549 violations of the ECHR in total. In at least 15% of them (80 violations) concerned Article 5 of the ECHR, out of which 24 concerned insufficient reasoning of the arrest. The high rate of arrest and the superficial examination of remand requests by the judges cannot be explained by the insufficient knowledge of the ECHR. The judges and prosecutors have been expensively trained about the ECHR standards concerning the remand proceedings. Neither it is after 2016 because of the inadequate legislation. There are other factors that determine this reality, such as high workload of the investigative judges, their professional background, as well as the fragile independence of Moldovan judges.

According to a [2019 International Commission of Jurists \(ICJ\) report](#), during the 2018 mission, the ICJ delegation was presented with witness statements and stories of judges living often in a condition of fear: fear to express their opinions on the situation of the judiciary; fear of criminal prosecution for issuing a decision contrary to the desiderata of the prosecutor's office or the people in power; fear of dismissal proceedings or ruining their career for expressing their views in disagreement with the judicial *nomenklatura* and the hierarchy that exists in practice, even if abolished in law.

The ICJ delegation was informed that investigative judges routinely and perfunctorily approve all requests of pre-trial detention. The ICJ report mentions the [case of Judge Dorin Munteanu](#), who was criminally charged on 31 January 2017, under Article 307 of the Criminal Code (willful rendering of an

⁴ LRCM, report: "Reforming the Institution of the Investigative Judge in the Republic of Moldova," 2015, available at <https://crjm.org/wp-content/uploads/2015/01/CRJM-Raport-JI-28-01-2015.pdf>, p. 27.

unlawful judicial act), for having rejected a request of a prosecutor for pre-trial detention. In [a press release](#), the General Prosecutor's Office (GPO) mentioned that the judgement to dismiss the arrest was illegal, as it was based on the statements of a witness who was heard in the arrest procedures and on the fact that the judge found that the incriminated act was not a fraud. According to GPO, this is illegal. We are struck by the position of the PGO, is it a duty the investigative judge to verify, in the context of remand procedure, if a reasonable suspicion of a crime exists and to examine all the evidence relevant for arrest procedures. After 31 January 2017, the investigative judges generally discontinued hearing witnesses and deal with the issue of reasonable suspicion in the remand procedures.

The ICJ report further mentions that the delegation was told that, since Dorin Munteanu case, unofficial practices are beginning to be used for investigative judges with lists sent to them weekly on which pre-trial requests to approve or reject in order not to have any consequences. There will be not so many judges taking the risk to dismiss the remand requests of the prosecutors in these circumstances. According to a [2018 survey conducted among lawyers](#) (14% of all lawyers from Moldova were questioned), 81% of the respondents did not think that Moldovan judges are independent. 64% of respondents considered that judges' solutions are not adopted without external influence and that the following main subjects influence judges: politicians (91%), prosecutors (83%), other judges (68%) and the SCM (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%. Thus, in 2006 investigative judges examined 20,670 procedures, while in 2017 - 56,404⁵. 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.

Any judge in Moldova can be appointed as investigative judge, even a newly appointed one. It is hard to expect from such judges that they will 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 and the police. Furthermore, the investigative judges should take complicated decision, in a short time, without the defence being present, on very intrusive measures for private life. 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 introduced⁶. 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 short experience as a judge.

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 For more details, see LRCM, Fifteen Years of Investigative Judges: Achievements and Prospects for the Future, 2018, available at https://crjm.org/wp-content/uploads/2019/04/Judec%C4%83torii-de-instruc%C5%A3ie_ENG_web.pdf

⁶ 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 on justification for this amendment.

to the legal or political position of the Committee of Ministers.
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.

RECOMMENDATIONS

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

- a. investigative judges enjoy full independence in practice and not only in law and to end any pressure on them;
- b. the legal requirement for appointment as investigative judge, particularly experience and the previous professional background, provides for sufficient guarantees that an appointed investigative judge can effectively exercise its duties,
- c. the Moldova judges and prosecutors respect in practice the guarantees of Article 5 of the Convention, in particular in respect of verification of the reasonable suspicion of the crime and examination of all the relevant evidence brought before them;
- d. the workload of instigative judges is calibrated to permit thorough examination of cases put before them;
- e. Moldovan authorities ensure the possibility to any person detained in breach of Article 5 to apply for 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 keep it under enhanced procedure.