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"PROMOTING A HUMAN RIGHTS COMPLIANT CRIMINAL JUSTICE SYSTEMIN THE REPUBLIC OF MOLDOVA"
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Report on the assessment of needs with respect to the criminal justice system of the Republic of Moldova in the light of the principles of humanisation and restorative justice

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List of Abbreviations

AP	Action Plan
CC	Criminal Code
CoE	Council of Europe
CM	Committee of Ministers
CPC	Criminal Procedure Code
CPT	Committee on Prevention of Torture
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
GC	Grand Chamber
GPO	General Prosecutor's Office
JSRS	Justice Sector Reform Strategy
JSRSAP	Justice Sector Reform Strategy Action Plan
MIA	Ministry of Internal Affairs
MoJ	Ministry of Justice
MTBF	Mid-Term Budgetary Framework
NIJ	National Institute of Justice
NGO's	Non-Governmental Organizations
NPI	National Probation Inspectorate
OECD	Organization for Economic Cooperation and Development
UN	United Nations
UNDP	United Nations Development Programme

I. Introduction

1. The Council of Europe (hereinafter "CoE") is implementing the Project "*Promoting a human rights compliant criminal justice system in the Republic of Moldova*". The project aims at ensuring a higher respect for human rights and the rule of law by assisting the national authorities in building up an efficiently functioning criminal justice system, in line with European human rights standards, and based on the principles of humanization, resocialization and restorative justice. It consists of 4 intermediate outcomes which are grouped in two components. Component 1 focuses on ensuring coherent criminal justice policy based on the principles of humanization, resocialization and restorative justice and capacity enhancement of criminal justice actors. Component 2 is focused on enhancing prison management, rehabilitation and health care services, probation system and alternatives to detention.

2. The current report is compiled in the context of a needs assessment under Component 1 of the project. At the same time a parallel needs assessment is conducted under Component 2, covering probation issues. The aim of the needs assessment under Component 1 is 1) to identify the shortcomings of the criminal justice policy, legal framework and judicial practice of the Republic of Moldova, in the light of the principles of humanization and restorative justice, 2) to provide an analysis of the situation "as is", and 3) to outline the findings and recommendations for actions to be taken to ensure a coherency of the criminal justice policy and legislation in this regard, as well as improvement of the judicial practice as necessary vis-à-vis the compliance with CoE standards and best practices. Thus, the report contains clear targeted findings and recommendations, which will be 'starting point' for the project's interventions.

3. The research conducted by the team of international and national consultants revealed that there are considerable shortcomings which deserve special attention regarding the humanization, resocialization and restorative justice. The assessment focuses on the following four areas of criminal justice:

   - pre-trial preventive measures;
   - the humanization of Criminal Code (hereinafter "CC")[1] regarding the harshness of sanctions and decriminalization of certain categories of offences;
   - the application of alternative sanctions;
   - victim-perpetrator reconciliation.

4. As it will be shown below, pre-trial preventive measures are a concern in the Republic of Moldova. Especially the frequent use of pre-trial detention is problematic in terms of humanization and resocialization. At the same time, other preventive measures that do not involve the deprivation of liberty do not seem to be deployed with the full potential that they entail.

5. The CC seems to follow a harshening tendency in the recent years when it comes to sentencing policy. It appears that imprisonment sentences are raising and there is no

[1] Criminal Code of the Republic of Moldova No. 985 of 18 April 2012.

clear indication whether the hardline approach actually contributes to decreasing criminality rates. Moreover, a needs assessment on humanization would be incomplete without touching upon the issue of decriminalization.

6. The application of alternative sanctions goes to the heart of resocialization aims of criminal justice. It also contributes to the decrease of the prison population which in turn contributes to the humanization of the penitentiary system. The Criminal Code of the Republic of Moldova contains a wide range of alternative sanctions, including suspension of the imprisonment and conditional release from prison. However, the full potential of the alternative sanctions does not seem to have been exploited. This is closely linked with the full operationalization of the National Probation Inspectorate (hereinafter "NPI"), but as already mentioned this report does not focus primarily on Probation. This will be done under component 2 of the Project.

7. Restorative justice in criminal matters is of course mainly about victim-perpetrator reconciliation. Despite a progressive legal framework in place, mediation is still in an embryonic stage when it comes to practice. The advantages of mediation need to be further explored by the Moldovan authorities and parties to criminal proceedings.

8. Although several sub-sector strategies are in place, a cross sector justice strategy is lacking. The last Justice Sector Reform Strategy has expired. At the same time legislation is changing frequently. Therefore, besides the four themes just described, the report briefly touches also upon the policy and legislative framework in the criminal justice in the Republic of Moldova.

9. This needs assessment was conducted by a team of two international experts, namely Mr. Eric Svanidze and Dr. Idlir Peçi, with the valuable assistance of national experts, Dr. Vladimir Grosu and Ms. Lucia Popescu. The opinions expressed in this work are the responsibility of the author(s) and do not necessarily reflect the official policy of the Council of Europe.

II. Methodology

10. This report is based on the findings emanating from desk research and on-site interviews. The desk research was based on a review of the legislative framework of criminal justice, official data from several institutions, policy documents and various reports from the civil society available as of July 2018. The desk research provided for a sound understanding of the status quo regarding the humanization, resocialization and restorative justice in the Republic of Moldova.

11. The team of experts held a fact-finding mission in Chisinau in the period of 21 May to 25 May 2018. The team met with representatives of the following interest groups and institutions:

    - National Administration of Prisons;

- Academia;
- Practicing Lawyers;
- National Probation Inspectorate (hereinafter "NPI");
- Ministry of Internal Affairs (hereinafter "MIA");
- Ministry of Justice (hereinafter "MoJ");
- Supreme Court of Justice;
- Superior Council of Magistrates;
- Superior Council of Prosecutors;
- General Prosecutor's Office (hereinafter "GPO");
- Parliament;
- NGO's;
- International Donors;
- Investigative Judges;
- People's Advocate Office;
- National Institute of Justice (hereinafter "NIJ");
- Council of Mediators

12. It should be noted that the fact-finding mission is not to be considered as an empirical research in the sense of a qualitative or quantitative research. The findings were nevertheless a very good indication of the perceptions regarding the focus areas in practice. They also serve as confirmation of the desk research conducted on the matter.

13. On 6 July 2018 the initial draft Report was presented at the Round Table with the participation of the representatives of the state institutions and legal professionals concerned. The final version of this report was developed in the light of discussions held and subsequent written comments submitted by several national beneficiaries.

14. The findings on the situation in the Republic of Moldova were analyzed in the light of CoE and other international standards on humanization, resocialization and restorative justice. To this end, various international policy documents were consulted. The case-law of the European Court of Human Rights (hereinafter "ECtHR") was also an important source consulted.

III. Criminal Justice Policy and Legislative Framework

CoE and other international standards

15. Policy development and implementation, regulatory impact assessment and other contemporary policy-making and execution instruments are mandatory for all public sectors,[2] including justice in general and criminal justice, in particular. The criminal

[2]See : Glossary of Key Terms in Evaluation and Results Based Management, OECD, 2002,http://www.oecd.org/development/peer-reviews/2754804.pdf;The United Nations Rule of Law Indicators, Implementation Guide and Project Tools, UN, 2011, http://www.un.org/en/events/peacekeepersday/2011/publications/un_rule_of_law_indicators.pdf;

justice-related CoE Committee of Ministers (hereinafter "CM") standard-setting documents, starting from one of the first of them, namely Resolution (67) 5 on Research on prisoners considered from the individual angle, and on the prison community, suggest relevant recommendations. Its paragraph d) emphasises the need for 'research to evaluate results of new measures of criminal policy, and more particularly undertake research when changes are made or contemplated'.

16. Due to their complex and multidimensional character, reforms and advancement of the justice sector, including its criminal limb, are usually handled by means of multilayer policy frameworks, comprising sector-wide, sub-sector-specific, interrelated and institution-related instruments. Some of jurisdictions proceed on the basis of a set sub-sectorial, including criminal justice-specific strategies and action plans.[3]

17. Regarding legislative framework, the principle of legality is considered as the cornerstone of criminal law. This means in the first place that any intervention in the rights and freedoms of an individual should have a legal basis. In terms of the case law of the ECtHR, this requirement is usually expressed in terms such as 'lawful' arrest in the context of Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[4] (hereinafter "ECHR"),[5] or in accordance with the law in the context of Article 8 or 10 ECHR. The principle of legality also entails the principle of legal certainty which requires that the legal basis should be clear in terms of accessibility and foreseeability.[6]

Description of findings and recommendations

18. Having declared the overall objective of setting up an independent, efficient and coordinated justice system, aligned with European standards and good practices related to justice administration and rule of law, as well as with the view of seeking international, including financial support, in early 2010-s the Republic of Moldova has opted for developing justice sector-wide policy framework. In October 2011 the Government approved and on 25 November 2011 the Parliament adopted the Justice Sector Reform Strategy for the years 2011-2016 (hereinafter "JSRS"), which entered into force on 6 January 2012. It was supplemented by the relevant Action Plan (hereinafter "AP") that mirrored its pillar-based structure and provided for more

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Why, What and How to Measure? A User's Guide to Measuring Rule of Law, Justice and Security Programmes, UNDP/Vera Institute, 2014, http://www.undp.org/content/dam/undp/library/crisis%20prevention/UNDP_CPR_ROLMEGuide_August2014.pdf; Impact Assessment Guidelines, 2009, http://ec.europa.eu/governance/impact/doc_en.htm;

Guidelines for EC support to sector programmes, https://ec.europa.eu/europeaid/sites/devco/files/ec-guidelines-support-to-sector-prog-2007-final-en.pdf p. 89.

[3]See the materials on the justice sector reform framework in Georgiahttp://www.justice.gov.ge/Ministry/Index/223; Montenegro: http://www.pravda.gov.me/en/library/strategije?alphabet=lat

[4]The European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 was ratified by the Decision of the Parliament of the Republic of Moldova No.1298 of 24 July 1997.

[5]See below the analysis of preventive arrest and the relevant case law.

[6]*Ibid.*

detailed operational break down of interventions, calendar of implementation, some outcome and itemised output indicators, as well as other elements of the policy framework.[7]

19. The JSRS and AP implementation and monitoring mechanism was envisaged by their relevant provisions (Pillar VII). It consisted of the seven pillar working groups, with the seventh exercising the overarching role over the six thematic ones, the National Council for the Law-Enforcement Bodies Reform for high level coordination among key stakeholders in the sector and the MoJ-based Secretariat.

20. Pillar II concerning Criminal Justice of the JSRS and AP incorporated specific strategic direction 2.5 immediately addressing the humanisation of the criminal justice system in the country. It was entitled 'Humanization of criminal proceedings and strengthening the mechanism for safeguarding the rights of victims' and included three specific intervention areas: 2.5.1. Liberalization of criminal proceedings by using sanctions and non-custodial preventive measures for certain categories of persons and certain offenses; 2.5.2. Creating conditions for wider application of simplified procedures, including methods of alternative settlement of cases; 2.5.3 Strengthening the mechanism for safeguarding victims' rights.

21. The set of relevant activities envisaged by them included: evaluation of the applicability of non-custodial preventive measures; assessing the effectiveness of applying and enforcing custodial and non-custodial criminal penalties; developing a draft amending criminal procedural law with a view to establishing the obligation to simplified procedures, including referring pending cases from the courts to mediators, where reconciliation has resulted in cessation of prosecution, with the safeguarding of victim's rights; changing the state guaranteed mediation mechanism with the view to enhance its functionality; conducting a study on the existing mechanism for safeguarding the rights of victims of offenses, their protection and rehabilitation. The JSRSAP envisaged introduction of relevant amendments to the Criminal, Criminal Procedural, Execution Code[8] and other normative acts that were supposed to be followed by appropriate monitoring of adequacy of the amendments, in particular those concerning the liberalization of the criminal procedure and use of non-custodial measures and sanctions.

22. In principle, *the criminal justice and in particular, its humanization-related range of interventions envisaged by the JSRSAP was adequate* taking into account that they were supplemented by Pillar VI addressing Human rights observance in the justice sector, in particular in penitentiary and probation systems. They provided, *inter alia*, for: introducing a modern concept of probation that contributes to the community safety through effective rehabilitation of offenders into society; ensuring continuity of individualized probation process, starting with presentence stage and ending with post-detention support services and so on.

[7]See: http://justice.gov.md/public/files/file/reforma_sectorul_justitiei/srsj_pa_srsj/PA_SRSJ_adoptaten.pdf
[8]Execution Code No. 443 of 24 December 2004.

23. The national monitoring and coordination mechanism has reported about the majority of them being implemented.[9] In particular, the final report on Pillar II of the JSRSAP implementation for 2017 suggests that out of all the outlined actions under Specific directive 2.5, only the monitoring-related activity was just partially implemented. Some of the deliverables, including assessments provided valuable recommendations.[10]At the same time, in view of the importance of ensuring that all the members of the judiciary, including prosecution, state officials, probation and penitentiary staff, legal and other professionals concerned are guided and stimulated in terms of applying the standards in issue, it was unfortunate that the measures envisaged by Specific intervention area 2.4.3 that concerned review of performance indicators of bodies involved in carrying out criminal justice, related activities envisaged for the Probation system (specific intervention area 6.5.1), had not been extended over the penitentiary. The overall consistency of the substantial results of the legislative, institutional, and other reforms, actual state of affairs are assessed in the present and related probation and penitentiary-specific reports developed under the CoE Project in issue. As far as the policy instrument(s) and framework-specific considerations are concerned, it is to be noted that the 2011-16 JSRS and AP lacked an appropriate set of indicators complying with 'Input-Output-Outcome-Impact" typology of the classical result chain. The output-oriented benchmarks did not provide sufficient guidance for effective monitoring and evaluation, in particular, of efficiency of implementation of the interventions. They were mostly limited to a formal assertion of studies, legal amendments and other outputs being produced, without assessing their substantial consistency with the international standards, best practices and other related objectives. Accordingly, in spite of the reported high overall score of formal implementation of the activities envisaged under the interventions under consideration, the current assessment has suggested that they did not result in actual significant and systemic enhancement of the criminal justice system in terms of its humanisation, liberalisation of the criminal procedure and other related objectives. Moreover, there was an actual discontinuation of systemic implementation of the policy instruments in issue, including of the focused, coherent monitoring of the changes aiming at liberalization of the criminal procedure and use of non-custodial measures and sanctions. The institution-specific, fragmented or *ad hoc* assessment reviews conducted by the stakeholders cannot be considered as adequate substitution of a systemic monitoring and evaluation, not to mention the contemporary regulatory impact assessment methodologies.

24. Although the lack of policy instruments concerning the criminal justice, in particular its humanisation and restorative considerations, will be partially remedied by the recently adopted National Action Plan in the field of human rights for the years 2018-2022,[11] it cannot be considered as an alternative to a comprehensive policy instrument in this regard. It does envisage under objective II, activities for addressing the degree of compliance of the national legislation with the international standards regarding the period and the way of applying the provisional detention / preventive arrest and

[9]See:http://justice.gov.md/public/files/file/reforma_sectorul_justitiei/rapoarte/2017/Raport_Pilon_2_2017_FINAL.pdf
[10]See: "Studiuprivindeficiențaexecutăriisancțiunilorîncomunitate", produced under Activity 2.5.1.2 of the JSRSA; .http://probatiune.gov.md/?go=page&p=195
[11]Adopted by the Parliament of the Republic of Moldova Decision No. 89 of 24 May 2018.

eventual modification of the normative framework and implementation of state policy in the field of punishments and deprivation of liberty for social reintegration of detained persons and even a specific goal concerning alternative sanctions. However, in terms of relevant institutional and other relevant interventions it is limited to a general activity of monitoring of implementation of the state policies in penitentiary and probation areas.

25. As to the strategies for development of the penitentiary and probation systems for 2016-2020, they have been adopted by the Government decisions of respectively 30 December 2016 No. 1462 and 1 September 2016 No. 1015. They are supplemented by action plans that provide further itemisation of their implementation. They are not supposed and do not tackle the general, overarching criminal justice and sector wide challenges and issues. Nevertheless, in spite of their functional interrelation as concerning key elements of the criminal justice system and almost parallel development and adoption, they lack necessary mutual integration and linkages.

26. The penitentiary-related strategic documents in issue provide only for concluding partnership agreements with the NPI among other related stakeholders. As to overall substantial advancement of the penitentiary system in line with the principle of humanization, it is immediately concerned with predominantly only by general Objective 4 on introducing progressive imprisonment system.

27. The probation-related strategic documents in their turn, have incorporated more extensive, but still just conceptual reference to the pre-trial and penitentiary limbs of the criminal justice system (by means of outlining the notion of the pre-sentence and penitentiary probations), not to mention the latter in general. In terms of functional interaction and affecting the state of affairs on this level, it provides for important, but still fragmented interaction in the capacity building area and developing mutual methodological materials.

28. Therefore, it is of particular concern that, in spite of the attempted commencement of the next policy cycle in the justice sector,[12] the Moldovan authorities have failed to meaningfully proceed with developing and adopting a set of sector-wide policy instrument beyond a formal extension of the 2011-16 JSRS over 2017.[13] The intermediary so-called Small Justice Reform Concept developed by the preceding minister of justice and endorsed by the current one is of a limited character.[14] It is concerned predominantly with some institutional aspects of functioning of the judiciary and omits to address specifically criminal justice and many other challenges and issues of the sector in general. Besides **proceeding with launching of a meaningful policy cycle in the justice sector by developing and adopting, without further delay, a sector-wide or set of, possibly criminal justice-specific and other sub-sectoral policy instruments, the Moldovan authorities are invited to contemplate use of advanced typology of result-oriented indicators, regulatory impact assessment**

[12]See information available on the MoJ web-page; http://justice.gov.md/pview.php?l=ro&id=31
[13]Adopted by the Parliament of the Republic of Moldova Decision No. 259 of 08.12.2016.
[14]See: http://justice.gov.md/pageview.php?l=ro&idc=715&

approaches/elements and other effective public, legal policy development and implementation techniques and methodologies.

29. The lack of sufficient progress in implementation of the 2011-16 JSRSAP and resultant discontinuation of the related European Union (hereinafter "EU") budget support programme, overall financial and macro-economic constraints have significantly reduced the budgetary funds available for advancing and reforming the criminal justice system. On a positive note, it is to be welcome, that, the Government attempts to follow programme budgeting, Mid-Term Budgetary Framework (hereinafter "MTBF") approaches for this sector. Although only for the selected, reportedly only one, but since 2018 the National Administration of Penitentiaries (former "Department for Penitentiary Institutions"[15]) has been allocated relevant budget line for a prisoners' rehabilitation-related programme. Similar approaches had been tested in the probation system, which, however, remained undeveloped due to the budgetary constraints. Thus, the Moldovan authorities are to be encouraged to **expand programme-based MTBF for criminal justice related policy measures, and actually finance reform-oriented interventions beyond usual financing of the institutions concerned and maintaining their routine functioning.**

30. The analysis which follows in the coming chapters of this report, reveal that the Republic of Moldova has a legislative framework which complies in general terms with standards of humanization and human rights. Certain aspects of the legislation need to be revised. Nevertheless, there is one issue which needs to be stressed from the very outset. This concerns the frequent change of the legislation. A meaningful illustration to this end can be found in both the Criminal Procedure Code (hereinafter "CPC")[16] and CC, which have been amended over 70 times each since their original entry into force. This kind of dynamics could be necessary in the course of reforms, however, as discussed below, some of the moves appeared to be deficient or even controversial. The intensive changes of the key pieces of legislation have resulted in and were further amplified by amendments to the Execution Code, Law on the Penitentiary Administration System[17](recently adopted), Law on organization and functioning of the probation bodies[18] and other related laws. This frequent change of the primary legislation does not contribute to a foreseeable and sustainable legal framework and may constitute a breach to the principle of legal certainty. In this context, **a thorough study is needed in order to determine the way forward and consolidate the legislation with a view to sustainability.** This is closely linked with the need to develop a thorough strategic document as mentioned above.

31. Moreover, in view of the dynamic, multi-disciplinary character and other specifics of the criminal justice systems, as well as its particular fragmentation in the Republic of

[15]The Law on the penitentiary administration system No. 300 of 21 December 2017, entered into force on 16 May 2018, reorganized the Department of Penitentiary Institutions into a new structure - the National Administration of Penitentiaries.
[16]The Criminal Procedure Code No. 122 of 14 March 2003.
[17]Law on the Penitentiary Administration System No.300 of 21 December 2017.
[18]Law on organization and functioning of the probation bodies No. 827 of 10 September 2010.

Moldova, considerable institutional and functional barriers highlighted by many interlocutors, it could be advised **to follow best practices[19] and supplement the proposed set of measures by institutional arrangements for its systematic coordination.**

IV. Pre-trial preventive measures

1.1 Detention on remand[20] and house arrest

ECHR standards[21]

32. Article 5(1)(c) ECHR requires that an arrest or detention is lawful. This means in the first place that any arrest or detention has a legal basis in national law.[22]Domestic law itself must be in conformity with the ECHR, including the general principles expressed or implied therein.[23] To this end the law providing legal grounds for detention on remand shall also meet the requirements of the 'quality of the law', which implies that it must be sufficiently accessible, precise and foreseeable in its application, in order to avoid any risk of arbitrariness.[24] A deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention.[25] As a rule a person charged with an offence must always be released pending trial unless the State can show that there are relevant and sufficient reasons to justify the continued detention.[26]In this sense, alternative preventive measures should be considered before deciding detention on remand.[27] Continued detention can be justified only if considerations of public interest are in place, which notwithstanding the presumption of innocence, outweigh the rule of respect for individual liberty.[28]

33. Besides the lawfulness requirement, Article 5(1)(c) ECHR requires that a reasonable suspicion of having committed an offence is a *condicio sine qua non* for the justification of the detention on remand.[29]The case-law of the ECtHR has moved towards the direction that the existence of a reasonable suspicion is sufficient for the

[19]See the United Kingdom experience and functioning of its Criminal Justice Board: https://www.gov.uk/government/groups/criminal-justice-board.
[20]The Moldovan CPC uses the term 'preventive arrest'. Nevertheless, this report alternatively uses also other terms, such as 'pre-trial detention', 'remand in custody' and 'detention on remand', following the terminology used by the ECtHR or other documents.
[21]The standards referred to in this section are those set out by the case law of the ECtHR. The Recommendation Rec(2006)13 of the Committee of Ministers is also relevant to the matter in discussion. However, the Recommendation follows the case-law of the ECtHR and therefore it is referred here only for the sake of completeness.
[22]*Saadi v. The United Kingdom*, ECtHR [GC] judgment of 29 January 2008, appl. No. 13229/03, para. 67.
[23]*Jecius v. Lithuania*, ECtHR judgment of 31 July 2000, appl No. 34578/97, para. 56.
[24]*Boicenko v. Moldova*, ECtHR judgment of 11 July 2006, appl No. 41088/05, para. 149.
[25]*Saadi v. The United Kingdom*, ECtHR [GC] judgment of 29 January 2008, appl. No. 13229/03, para. 67.
[26]*Smirnova v. Russia*, ECtHR judgment of 24 July 2003, appl No. 46133/99, 48183/99, para. 58.
[27]*Buzadji v Moldova*, ECtHR [GC] judgment of 05 July 2016, app No. 23755/07, para. 87.
[28]See among many authorities *Kudła v. Poland,* ECtHR [GC] judgement of 26 October 2000, app No. 30210/96, para. 110 et seq.
[29]*Ibid.*

initial detention. However, after the elapse of a certain period of time, which can be relatively short in the sense of a few days, the reasonable suspicion will not be enough to justify continuous detention. Other reasons must be produced by the authorities to continue to justify detention.[30]Grounds for reasonable suspicion include information or facts which would satisfy an objective observer that the person concerned may have committed the offence. The reasonable suspicion should be present for the entire duration of the detention on remand.[31] The requirement of reasonable suspicion does not mean that the authorities have obtained sufficient evidence to bring charges, either at the point of arrest or while the defendant is in custody.[32] Neither is it necessary that the person detained should ultimately have been charged or brought before a court for trial. The object of criminal investigation is to confirm or dispel reasonable suspicions which provide the grounds for detention.[33] The fact that a suspicion is held in good faith is insufficient. The detention of an individual must never be imposed for the purpose of making him confess or testify against others or to elicit facts or information which may serve to ground a reasonable suspicion against him.[34]

34. Besides the lawfulness and the reasonable suspicion, the case-law of the ECtHR has developed four other basic acceptable reasons for the justification of detention on remand. These reasons are (i) the risk that the accused will fail to appear for trial, or (ii) the risk that the accused, if released, will commit further offences, or (iii) the risk that he will interfere with the course of justice, or (iv) pose a serious threat to public order.[35] Detention on remand cannot be justified merely by a stereotyped quotation these for reasons, even if they are listed in the national legislation as procedural grounds for detention. National courts should substantiate all these reasons and use concrete argument as to why one (or more) of them is present in a concrete case. To establish danger for absconding consideration must be given in particular to the character of the person involved, his morals, his assets, his links with the State in which he is being prosecuted and his international contacts. The seriousness of the offence is not enough to establish the risk for fleeing.[36] Regarding the risk of committing other crimes, it is necessary that this risk be a plausible one. The seriousness of the crime already committed and for which a reasonable suspicion exists is not a plausible risk.[37]The risk of collusion is in itself a temporary one. Authorities may consider it necessary to keep a suspect in prison, at least at the beginning of an investigation, in order to prevent him from tampering with evidence or impeding the investigation. The risk of collusion diminishes with the passing of time and the authorities may not hold the person concerned in detention based on the risk of collusion once the inquiries are

[30]*Buzadji v Moldova,* ECtHR [GC] judgment of 05 July 2016, app No. 23755/07, para. 87 et seq.
[31]*Fox, Campbell and Hartley v. the United Kingdom*, ECtHR judgment of 30 August 1990, app No. 12244/86, 12245/86 12383/86, para. 32.
[32]*Brogan and Others v. the United Kingdom,* ECtHR judgment of 29 November 1988, app No. 11209/84; 11234/84; 11266/84; 11386/85, paras. 29-30, 53.
[33]*Murray v. the United Kingdom,* ECtHR [GC] judgment of 28 October 1994, app No. 14310/88, para 27, 55.
[34]*Cebotari v. Moldova,* ECtHR judgement of 13 November 2007, app No. 35615/06, para. 48.
[35] See among many authorities *Smirnova v. Russia,* ECtHR judgment of 24 July 2003, appl No. 46133/99, 48183/99, para 59.
[36]*W. v. Switzerland,* ECtHR judgment of 26 January 1993, app No. 14379/88, para. 33.
[37]*Clooth v. Belgium,* ECtHR judgment of 12 December 1991, app No. 12718/87, para. 40.

concluded, statements taken and verifications carried out.[38] With respect to distortion of public order, the ECtHR has stated that certain crimes may generate such a commotion in the public that detention on remand may be justified. However, the risk of public disorder should be imminent and can be used only in very exceptional cases and for a limited period of time. Clear and concrete evidence should be produced by the authorities which indicate that the release of the person would cause public disorder. The person should be released once the risk of social disturbances is not preset anymore.[39]

35. Detention on remand may not exceed a reasonable period of time, even if the grounds discussed above are present. To this end, the authorities must examine all the facts arguing for or against the existence of the above-mentioned demand of public interest justifying a departure from the rule in Article 5 ECHR. If the departure from the basic rule is not justified anymore, then the national courts must set the relevant facts out in their decisions on the applications for release.[40]

36. The prolongation of detention should also be based on substantiated grounds and should not be automatic. Also, in cases where domestic judicial authorities prolong detention on remand without giving any consideration to the arguments against it are in breach of Article 5 ECHR.[41]. Under the second limb of Article 5(3), a person charged with an offence must always be released pending trial unless the State can show that there are "relevant and sufficient" reasons to justify his continuing detention.[42]

37. According to the ECtHR case-law, once more recently confirmed and advanced in its Grand Chamber (hereinafter "GC") in *Buzadji* v. *the Republic of Moldova*,[43] house arrest is considered, in view of its degree and intensity, to amount to deprivation of liberty within the meaning of Article 5 of the Convention. All its requirements and standards apply to it accordingly. Although the ECtHR considers that the character of restrictions under a house arrest is significant, it has affirmed that in most cases this measure implies fewer restrictions and a lesser degree of suffering or inconvenience for the detainee than ordinary detention in prison.[44] Accordingly the derivative standards, including Recommendation N° R (99) 22 of the CM to member States concerning Prison Overcrowding and Prison Population Inflation, consider it as an alternative to actual imprisonment.[45]

[38]*W. v. Switzerland,* ECtHR judgment of 26 January 1993, app No. 14379/88, para. 35; *Clooth v. Belgium,* ECtHR judgment of 12 December 1991, app No. 12718/87, para. 43.
[39]*Tiron v. Romania,* ECtHR judgment of 07 April 2009, app No. 17689/03, paras. 40-41.
[40]*Bykov v. Russia,* ECtHR [GC] judgment of 10 March 2009, app No. 4378/02, para. 63.
[41]*Istratii v Moldova*, ECtHR judgment of27 March 2007, app No. 8721/05, 8705/05, 8742/05, para 77; *Holomiovv. Modova*, ECtHR judgment of 07 November 2006, app No. 30649/05, paras. 123-131.
[42]*Sarban v Moldova*, ECtHR judgment of 4 October 2005, app No. 3456/05, para. 95; *Castravet v Moldova*, ECtHR judgment of 13 March 2007, app No. 23393/05, para. 34.
[43]*Buzadji* v. *Moldova*, ECtHR [GC] judgment of 5 July 2016, appl. No. 23755/07, para. 104.
[44]Ibid, para. 112.
[45]Para. 17 of Appendix to it.

Description of findings and recommendations

38. The outlined policy initiatives[46] and some of the legislative developments concerning custodial preventive measures had been designed and taken place respectively in view of the series of ECtHR adverse judgments against the Republic of Moldova indicative of systemic violations of Article 5 of the ECtHR, including its par. 1.c and 3. The key of corresponding violations are being addressed within the framework of their ensued execution, in *Musuc, Gutu, and Sarban* groups of cases. The former two were concerned with unlawful arrest and detention on remand in criminal proceedings not based on a reasonable suspicion that those remanded in custody committed an offence and some other ECHR-related violations.[47]The remaining issues in terms of the required general measures have been merged with the *Sarban* group cases that are addressing different violations of Article 5, including the lack of relevant and sufficient reasons in court decisions ordering or extending the detention on remand.[48]The CM have taken note of the legal amendments specifically providing for the obligation of the prosecuting authority and the court to undertake a "proportionality test" when requesting and deciding on detention on remand; checking the existence of a reasonable suspicion, the requirement that the courts are to reflect in a detention (its continuation) orders the legal basis for the application of detention on remand, with reference to the specific facts and circumstances of the case which gave rise to this measure; explain why other non-custodial preventive measures are insufficient in that specific case; explain the necessity to detain the person according to the conditions and criteria provided by the law; citing arguments of the parties, including the defense; and explaining why these arguments were admitted or rejected by the court, followed by some methodological and capacity building interventions.[49] However, it is indicative that the execution of this group of judgments is still kept under 'enhanced supervision', including in view of the uncertainty in terms of securing relevant and sufficient reasoning, which is mainly a question of judicial practice. It appears that the Court continues to receive new similar complaints. The CM stressed that it is crucial that the strict application of new legislation is ensured and properly monitored by the authorities and is supplemented by continuous training of judges and prosecutors. It is indicative that the authorities were invited to provide further information on the impact of the measures adopted and the development of judicial practice.[50]

39. Prior to an assessment of the appropriateness of the set and range of preventive measures, including interrelation between custodial (preventive and house arrests) and alternatives to them, it is to be noted that in spite of the implied increasing sequence of listing them in Article 175, when elaborating on them, the CPC indicatively changes the order of Articles. As a result, the preventive arrest comes before not only bail and judicial control, which are conceptually construed as a temporary substitution to it, but also is implicitly prioritized against the house arrest. It is not just the wording,

[46]See the preceding section of the report.
[47]See:http://hudoc.exec.coe.int/eng?i=004-6966 ;http://hudoc.exec.coe.int/eng?i=004-6696 .
[48]See: http://hudoc.exec.coe.int/eng?i=004-6712 .
[49]Further review of the legal provisions in issue are suggested below.
[50]See: http://hudoc.exec.coe.int/eng?i=004-6712 .

including part 5 of Article 175 of the CPC specifying that provisional release under judicial control and provisional release on bail are preventive measures that are alternatives to arrest and may be applied only to the persons referred to in the motion to arrest or to an accused/defendant already under arrest, but similar rationale and logic is implied with regard to the house arrest.[51] Thus, it would **be advisable to review the CPC, the legislative techniques and rationale, and spell out the priority of non-custodial preventive measures and establish clear hierarchy in this regard.**

40. Detention on remand is regulated in Chapter II of Title V of the CPC. Article 175 defines the preventive measures that may be applicable in the Republic of Moldova. It also determines the purpose of preventive measures and the circle of persons that can be subject of preventive measures. Article 176 sets out the grounds for the application of preventive measures, including the preventive arrest. According to Article 176(1) CPC, preventive measures may be applied only when there are sufficient, reasonable grounds, supported by evidence, to assume that the suspect/accused/defendant could evade the criminal investigative body or the court, could exert pressure on witnesses, could destroy or damage the means of evidence or could otherwise impede finding the truth in a criminal proceeding, could commit other crimes or that his/her release would cause public disorder.[52] Article 176(3) CPC provides that when settling the issue on the need for a respective preventive measure, the prosecutor and the court shall mandatorily assess and reason if the preventive measure is proportionate to the individual circumstances of the criminal case. The law provides for a detailed account of which individual circumstances shall be taken into account. The reasonable nature of the suspicion and the prejudicial degree of the incriminating act assessed in each individual case, without, however, deciding on the guilt, are also mandatory requirements. According to Article 176 (2) CPC, the custodial preventive measures may be applied for offences for which the law provides for a punishment by imprisonment for a term exceeding one year. This provision is in force since July 2016. Before that, the same provision stated that preventive arrest and alternative measures to arrest may be applied for a grave, particularly serious or exceptionally grave crime. The move is thus to make preventive measures, including preventive arrest more accessible and easy to apply by judges and prosecutors. As a result, the CPC does not make a differentiation among all 11 preventive measures in this regard. Although the gravity of incriminated offence is not of an immediate relevance for selecting a preventive measure, this move is highly questionable in view of the humanization and liberalization of criminal procedure until recently officially declared as objectives of its reform in the Republic of Moldova.[53] The opposite trend and best practices can be illustrated by the recent legislative amendments in Italy. The changes introduced to Article 280 of the CPC by Decree 94/2013. As a result, a pre-trial detention cannot be applied for crimes that can be punished with a maximum sentence of less than five years. Previously this limit was 4 years.[54] In addition to listing some specific

[51] See para. 50 below.
[52] Article 176(1) CPC stipulates that preventive measures may be applied also in order to ensure the enforcement of the judgment.
[53] See para. 20 above
[54] See: https://www.fairtrials.org/wp-content/uploads/The-practice-of-pre-trial-detention-in-Italy1.pdf

circumstances and crimes, the same general level of 5 years is maintained in Romania (Article 223 of the CPC). Besides mandatory bail,[55] the Ukrainian legal framework has established even more complex classification of combinations of grounds for remanding in custody, with the most general limit of the incriminated offence being that it should be punishable by 5 years of imprisonment and above (Article 183 of the CPC). It is recommended, therefore, **upon a comparative study among various CoE countries as to the offences for which preventive arrest is permitted and actual results of alteration of the scope of its applicability in this regard, including in the Republic of Moldova, to adjust the legislative framework on this issue accordingly.**

41. According to Article 177 CPC, both the prosecutor and the court shall deliver a reasoned order and ruling respectively. In general, both the ruling of the court and the order of the prosecutor should be motivated and include information on the offence, the grounds and need for applying the concrete measure, the fulfillment of the criteria set out in Article 176 etc. With respect to remand in custody, Article 185 CPC stipulates that preventive arrest shall be an exceptional measure and shall be ordered only when it is proved that other measures are insufficient to eliminate the risks justifying the application of the arrest. Preventive arrest shall be applied only upon a ruling which includes the reasons justifying the insufficiency of other preventive measures to eliminate the risks that were the ground for application of the preventive arrest. Article 185 sets out three other conditions, in addition to those set out in Article 176 described above, for the application of detention on remand. Accordingly, pre-trial detention may be applied if the accused, defendant does not have a permanent domicile in the Republic of Moldova and if he/she refused to provide information on his/her permanent place of residence; violates the conditions of other preventive measures applied to him/her or violated the protection order in case of domestic violence; there is sufficient evidence that the defendant, being at large, poses an imminent risk to the security and public order.

42. The CPC requires in Article 186 that pre-trial detention may not exceed a reasonable timeframe established depending on the complexity of investigations required to find the truth and considering the obligation of expediency in settling criminal cases where the accused or defendant is under arrest. The preventive arrest may not exceed 30 days and it may be prolonged only if the initial conditions for the application of the preventive arrest are still valid. In addition to that, the judge must examine if, in order to eliminate the risks that determined the application of preventive arrest measure, the application of other measures not depriving of liberty is sufficient or if there are relevant and sufficient grounds to prolong the preventive arrest measure or not. The detention may be prolonged for a period not exceeding 30 days each time and the total duration of the arrest may not exceed 12 months.

43. The legislative framework regulating detention on remand is in general terms in conformity with the requirements of Article 5 ECHR as described above. However, the mandatory requirement, expressed in Article 176(3) CPC, that the prejudicial degree of

[55] See para. 57 below.

the incriminating act assessed in each individual case, without, however, deciding on the guilt, may be problematic in the light of the case law of the ECtHR as described above. As demonstrated above,[56] detention can be justified only if considerations of public interest are in place, which notwithstanding the presumption of innocence, outweigh the rule of respect for individual liberty. Even though, Article 176 CPC requires that the guilt is not determined while ruling on the preventive arrest, the wording used is confusing and it might give rise to misinterpretation which go contrary to the presumption of innocence and impartiality of the judge, which require that there is no prejudice against the defense. Therefore, it is advisable to **review the wording of Article 176(3) CPC so that the presumption of innocence and the impartiality of the judge are fully guaranteed** during the proceedings as whole.

44. The fact-finding mission and various reports[57] revealed that even though the basic elements of the legislation regarding custodial preventive measures have been improved in terms of meeting the ECHR requirements, besides the discussed widening of the scope of its applicability and some other legislative shortcomings in this report, it is the application that, thereof, is concerning. Almost all the institutions and interest groups met, shared the opinion that detention on remand is excessively used or, at least, there is a need to take further measures for ensuring that it is applied in line with the ECHR and other international standards.[58] There are different statistical data produced, using different, institution-specific approaches and methodologies on the use of pre-trial detention. According to the Superior Council of Magistrates, the courts of law in the Republic of Moldova examined in the period 01 January 2017 - 31 December 2017 a total of 3666 motions to apply the preventive measures. There were 3470 motions concerning preventive arrest of which 3014 were granted.[59] The GPO, in its turn, provides data that is limited to its scope of competence within the pre-trial stage. According to it, in 2017 prosecutors requested the preventive arrest of 2843 persons (2674 in 2016); out of which 2430 persons were arrested (2238 in 2016).[60] According to the additional statistics published by the GPO in view of the ongoing public campaign, in total 1576 persons were sent to court under preventive arrest, out of which 1247 persons for a term of arrest up to 3 months, 311 persons – for a term from 3 to 6 months and 18 persons – for a term of more than 6 months.[61]

45. The civil society quotes figures from studies of the MoJ in 2016, according to which 3329 of 3954 motions of preventive arrest were admitted by the courts.[62] Other interest

[56]See para. 33 above.
[57]See for example the report prepared by Promo-Lex and National Endowment for Democracy, *'Right to Freedom and Security of Person in the Republic of Moldova: Retrospective of 2016',* Chisinau 2017.
[58]The GPO did not share this opinion.
[59]Decision no 281/11on the Information Note of the Judicial Inspection subordinated to the Superior Council of Magistracy, with regard to the application of the arrest and house arrest preventive measures by the courts of law in the Republic of Moldova, Chisinau, 25 April 2018.
[60]Report on the Activity of the Prosecutor Office for the Year 2017, page58, http://procuratura.md/file/2018-03-12_Raportul%20Procurorului%20General%202017.pdf.
[61]See: http://www.procuratura.md/md/newslst/1211/1/7569/
[62]See for example the report prepared by Promo-Lex and National Endowment for Democracy, *'Right to Freedom and Security of Person in the Republic of Moldova: Retrospective of 2016',* Chisinau 2017, page 15.

groups, such as lawyers or academics, speak of over 90 % of acceptance of preventive arrest warrants, without actually referring to any statistical data. The statistics available contain different methodologies of data collection and give a diverse picture on the frequency of the use of pre-trial detention. It would be advisable, therefore, to have **a thorough inventory of the use of preventive arrest, based on a unified methodology of data gathering.** Pending introduction of streamlined and coherent statistics, the level of application of preventive arrest can be traced according to the internationally recognised overall index of the number of prisoners not serving final sentences, which in 2016 amounted to 36.6 and was considerably higher than the median for Europe that constituted 22.7.[63] As to the overall chronological dynamics of the level of applicability of preventive arrest, it could be assessed on the basis of the numbers of the same category of prisoners held in penitentiary establishments. Thus, according to the statistical data of the National Administration of Penitentiaries, on 01.01.2018 there were 6294 convicted and 1341 untried (the table uses the term 'preveniti') prisoners. On 01.01.2017 there were 6377 convicted and 1385 untried prisoners. When compared to the number from 2011 that was 1190,[64] and weighted against the rate of registered crimes and their general breakdown during these years,[65]these data are suggestive of **certain deterioration or, at least, that there has been no substantial improvement in terms of the level of applicability of the preventive arrest in the Republic of Moldova over the years, which necessitates more profound review and consistent streamlining of legislation and practice, including in line with the specific recommendations suggested in this report.**

46. Moreover, the earlier and more recent Committee on Prevention of Torture(hereinafter "CPT") findings suggest that the same level of application of the preventive arrest leads to overcrowding of Penitentiary establishment No.13 and other institutions (sections) for holding those remanded in custody (male adults in particular).[66] This exacerbates the inadequacy of conditions of detention found to be structural problem by the series of ECtHR judgments against the Republic of Moldova leading to almost automatic violation of Article 3 of the ECHR for all remand and many sentenced prisoners. It is worth emphasizing that this will certainly have adverse, including financial implications for the state budget, under the new remedy designed for addressing these violations on the domestic level. Within the framework of general measures introduced under the framework of execution of *Ciorap, Paladi* and *Becciev* group of cases, the Moldovan authorities have amended Article 473 and introduced in the CPC Articles 473^{1-4} as to complaints against the administration of the penitentiary institution on and compensatory remedies for conditions of detention seriously affecting the rights of convicts or detainees entering into force as of 1 January 2019.[67]

[63]See Council of Europe Annual Penal Statistics SPACE I – Prison Populations Survey 2016, p.77. http://wp.unil.ch/space/files/2018/03/SPACE-I-2016-Final-Report-180315.pdf. In parallel the report operates with slightly modified index, for which, however (judging from the data available) Moldova did not provide relevant data.
[64]See the Report on the 2011 CPT visit to Moldova, CPT/Inf (2012)3, para. 55.
[65]See para. 67 below.
[66]See the Reports on the 2015 CPT visit to Moldova, CPT/Inf (2016) 16. paras. 43-46; on the 2011 CPT visit to Moldova, CPT/Inf (2012)3, paras. 52-56.
[67]CM/Del/Dec(2018)1310/H46-11, http://hudoc.exec.coe.int/eng?i=CM/Del/Dec(2018)1310/H46-11E

47. Several reasons for the frequent application of preventive arrest are reported. The most common reason stated by almost all interest groups is pressure that judges experience in different ways. Civil society and lawyers claim that a fear exists among judges induced by several cases where judges were sanctioned because of the reluctance to accept motions of the prosecutor regarding preventive arrest. Article 307 of the CC determines the criminal liability of judges for deliberate rulings of a sentence, decision, conclusion or judgment contrary to the law. This provision has been used to prosecute judges for rejecting the application or prolongation of preventive arrest. The case of investigative judge Mr. Dorin Munteanu is illustrative in this case. He was prosecuted on the basis of Article 307 CC after having rejected the prosecution motion to prolong preventive arrest because no justifications on the grounds for application of detention were given. **The existence of the provision of Article 307 CC is worrying and its abrogation or revision in line with the international standards is urgent.[68] Prosecutors should also be free of any risks of sanctioning for seeking non-custodial measures, including not requesting preventive arrest.**

48. The fact-finding mission revealed also that the media and through it the society are also putting pressure on the judges regarding the use of preventive arrest. The overall perception is that judges who do not order pre-trial arrest are corrupt and do not fight crime. **It is advisable to conduct an empirical study on the general perception in the media and society about the use of preventive arrest, the impact thereof on judges and the casual links between the use of preventive arrest and fight against criminality and corruption. Depending on the outcome of such a study, awareness raising campaigns may be organized among media and societal groups on the reverse effects of the use of preventive arrest.**

49. The motivation of the motions of pre-trial detention as well as of the rulings of the courts on the matter does not meet the standards set out by the Moldovan legislation and of the ECtHR. All the cases against the Republic of Moldova at the ECtHR referred to in the previous section concern among others the lack or the insufficiency of the motivation regarding the application and the prolongation of pre-trial detention. The fact-finding mission and reports drafted by the civil society reveal that the motivation remains a problem.[69] The lack of motivation, including the existence of the reasonable suspicion, may give legitimate rise to allegations that preventive arrest is used for reasons other than those provided for in the legislation and the case law of the ECtHR.[70] Another side-effect of the lack of or insufficient motivation is that the prolongation of the preventive arrest has become automatic. Moreover, neither judges nor prosecutors give a profound consideration of the reasons why other alternative preventive measures, which do not involve deprivation of liberty, are not

[68]See Venice Commission's Amicus curie Brief for the Moldovan Constitutional Court on the Criminal liability of judges.http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)002-e

[69]*Ibid.*, at pages 17-22.

[70] For a few examples see *ibid.* See also *Cebotari v. Moldova*, ECtHR judgement of 13 November 2007, app No. 35615/06, para. 48.

applicable.[71]As already mentioned in the beginning of this section, the Moldovan legislation in place is in conformity with the ECHR standards when it comes to the requirement of motivation of the decisions granting or prolonging pre-trial detention. It is worth reiterating in this regard that the CM is maintaining the execution of relevant ECtHR judgments under enhanced supervision, including with the view of ensuring proper reasoning of relevant decisions. Thus, it would be necessary **to carry out an in-depth review of the court practice in terms of appropriateness of the reasoning of preventive arrest (its continuation) orders and their substantiation with the reference to factual and other established circumstances.** The deficiencies identified in practice are also a matter of education. Both initial and continuous trainings at NIJ pay attention to the pre-trial phase. However, **specialized trainings on the ECHR standards on preventive arrest regarding its application in practice and the motivation thereof are needed. For the sake of sustainability, trainings on this matter need to be included into the curricula of the NIJ.**

50. As discussed,[72] in spite of the initial indication of the hierarchy of the preventive measures, in the text of the CPC the house arrest-related provisions are positioned after those concerning the preventive arrest. According to Part 1 of Article 188, house arrest is an isolation of the accused/defendant from society in his/her house in which certain restrictions shall be set. Moreover, although it is rightly, in line with the ECtHR case law, treated as deprivation of liberty, including by the reference to the same grounds required for using the preventive arrest, Part 2 of Article 188 CPC suggests that the house arrest is applicable when total isolation is not rational due to age, health, family status of the accused or any other circumstances. Thus, it is implied that the house arrest is to be used upon establishing that there are grounds for applying preventive arrest. Taking into account that house arrest does not result in incarceration, actual imprisonment of individual and represents a milder regime of deprivation of liberty, **the suggested reinforcement of the hierarchy of the preventive measures, should equally concern the relevant alignment of the preventive and house arrests accordingly.**

51. The additional restrictions and obligations that could be used for increasing efficiency of a house arrest include (in accordance with Parts 3 and 4 of Article 188 of the CPC) respectively: an interdiction from leaving the house; restrictions on telephone conversations, receiving and mailing postings and using other means of communication; an interdiction from communicating with certain persons or hosting people in his/her house and to keep electronic means of control functional or to permanently carry such on their person; to respond to control signals or to send telephonic control signals and to personally appear before the criminal investigative body or the court at a set time. This scope of the restrictions and obligations correspond

[71]See for example the report prepared by Promo-Lex and National Endowment for Democracy, *'Right to Freedom and Security of Person in the Republic of Moldova: Retrospective of 2016',* Chisinau 2017, pages 19-20.
[72] See para. 39 above.

to the international standards and best practices.[73] Nevertheless, the data on its application, in particular, in combination with electronic monitoring that represents the most advanced technical tool for increasing its efficiency, suggest, that it is not sufficiently used. Thus, according to the latest statistics, in 2017 house arrest was applied against 457,[74] with just occasional electronic monitoring of accused/defendants. On 30 June 2017 there were only 2 electronically monitored individuals under house arrest.[75] Moreover, there are legislative inconsistencies concerning its application. In particular, while Article 302 of the Executive Code, still provides for the bodies of internal affairs, and not probation, to be responsible for executing electronic monitoring of persons under the house arrest, the latter has been entitled to apply it under the preventive measures by virtue of amendments to Part 7 of Article 271^1, i.e. the provisions (Chapter XXIV) concerning execution of suspended and conditional sentences, relevant early release. Thus, its role is diminished to acting as just technical hub. Moreover, the discussions with a number of interlocutors, including representatives of the NPI, suggest that in addition to a limited number (in case of significant increase of its use) of necessary equipment, it is the lack of awareness of judges and prosecutors of actual efficiency and potential of electronic monitoring that is limiting its application even well below the available number of necessary equipment. It is to be recommended, therefore, that besides and in parallel to the overall awareness and capacity building of judges and prosecutors,[76] **the authorities should undertake specific legislative and infrastructural interventions securing the wider and effective (appropriate) use of house arrest, in particular in combination with electronic monitoring arrangements with the substantial (and not just technical) role attached to the probation.**

1.2 Use of other preventive measures including bail

CoE and other international standards

52. Besides the discussed clear guidance provided by the ECHR Article 5, its paragraph 3 and related case-law of the ECtHR, as to the police custody and the exceptional use of pre-trial detention, provide specific standards with regard to the presumption in favor of bail and other alternatives. In particular, when deciding whether a person should be

[73]The contemporary practices in terms of legislative and practical weight attached to a combination of house arrest and electronic monitoring can be well illustrated by the recent developments in Italy in this regard. In addition to the general principle of substantiating insufficiency of other individual or combined preventive measures, in 2015 its Article 275 has been amended to specifically include the requirement that while ordering pre-trial detention the judge must state the specific reasons why it considers unsuitable, in this case, house arrest with electronic monitoring.

[74]See statistics on use of preventive arrest below.

[75]The official online data available on the dedicated web-page of the National Probation Inspectorate http://probatiune.gov.md/?go=page&p=212, accessed on 30 June 2018. Besides the house arrest-related electronic monitoring, the probation used it with regard to 38 sentenced clients. Currently, the capacity of the NPI on electronic monitoring is estimated around 100 persons in total.

[76]Relevant general recommendation as to capacity building of judges and prosecutors actual and potential efficiency and overall framework of alternatives to imprisonment and detention is suggested below, in para. 83 of the current report.

released or detained, the authorities are obliged to consider alternative measures of ensuring his appearance at trial[77], § 140. Article 5.3 has been read as laying down that "release may be conditioned by guarantees to appear for trial".[78]

53. As to the bail itself, the ECtHR specifies that it may only be required as long as reasons justifying detention prevail. It is designed to ensure not the reparation of loss but, in particular, the appearance of the accused at the hearing. Its amount must therefore be assessed principally by reference to [the accused], his assets and his relationship with the persons who are to provide the security, in other words to the degree of confidence that is possible that the prospect of loss of the security or of action against the guarantors in case of his non-appearance at the trial will act as a sufficient deterrent to dispel any wish on his part to abscond. If the risk of absconding can be avoided by bail or other guarantees, the accused must be released, bearing in mind that where a lighter sentence could be anticipated, the reduced incentive for the accused to abscond should be taken into account. Furthermore, the amount set for bail must be duly justified in the decision fixing it and must take into account the means of the accused. In that connection, the domestic courts are to assess the accused person's capacity to pay the sum required. While the amount of the bail must be assessed principally by reference to the accused and his assets it does not seem unreasonable, in certain circumstances, to take into account also the amount of the loss imputed to him.[79]

54. The derivative standards on alternatives to remand in custody are further provided in a number of CoE CM Recommendations, including the most recent addressing this issue Recommendation CM/Rec (2017) 3 of the Committee of Ministers to member States on the European Rules on community sanctions and measures. Its para. 2 provides for the basic principle that national law shall provide for a sufficient range of suitably varied community sanctions and measures and these shall be made available to be used in practice. In the Explanatory text to it, it is specified that the measures commonly in use according to this principle include alternatives to pre-trial detention, such as requiring a suspect to reside at a specified address and or to be supervised and assisted by an agency specified by a judicial authority.

Description of findings and recommendations

55. The range of preventive measures alternative to deprivation of liberty envisaged by the CPC (its Article 175 and relevant measure-specific provisions) include: an interdiction from leaving the locality; an interdiction from leaving the country; a personal guarantee; the guarantee of an organization; a temporary revocation of a license to operate means of transport; transferring a serviceperson under supervision; transferring a juvenile under supervision; provisional release under judicial control; provisional release on bail. According to Article 175 of the Execution Code and its measure-

[77] *Idalov v. Russia*, ECtHR [GC] judgment of 22 May 2012, appl. No. 5826/03, para. 140.
[78] *Lelièvre*v. *Belgium*, ECtHR judgment of 8 November 2007, appl. No. 11287/03, para. 97.
[79] *Mangouras v. Spain*, ECtHR [GC] judgment of 28September 2010, appl. No. 12050/04, paras. 79-81.

specific Articles, the measures are executed by the police, except of those concerned with guarantees and supervisions.

56. Taking into account the nature of the right to liberty and security, relevant international standards, humanization, as well as cost efficiency and other considerations, relevant requirements aim at reducing the number of persons deprived of their liberty by providing as wide as possible range of efficient alternatives. Thus, the proportion of remand in custody in comparison to prosecutions handled is indicative, but not decisive in this regard. The 2017 data released by the GPO in the course of preparation of this report suggest that there were 19320 preventive measures applied to suspects or accused persons, including obligation to present oneself to the criminal investigation body or court concerned 6364 persons; interdiction from leaving the locality – 5375 persons; interdiction from leaving the country – 4445 persons; preventive arrest - 2465 persons, including those who escaped from criminal investigation bodies – 205 cases; other preventive measures (a temporary revocation of a license to operate means of transport, a personal guarantee, the guarantee of an organization, transfer under supervision) - 36 persons. Indicatively there were no data available as to the applicability of bail. As to provisional release under judicial control, it was applied to 177 persons.[80]

57. In terms of the range of the non-custodial preventive measures, it is insufficient due to the conceptually limited applicability of bail and judicial control measures, which are applicable only through the preventive arrest or house arrest procedures. It is indicative that these measures are construed by the use of the term 'release'. Moreover, the official Russian version of the CPC operates with the term 'временное', which corresponds to 'temporary'. This format of the measures is one of reasons of their insignificant application reported during the assessment mission. This is confirmed by the most recent research on applicability of preventive arrest carried out by the Superior Council of Magistracy.[81] Moreover, they are used predominantly at subsequent stages, instead of further extension of remand periods and not as an alternative at the initial application of the preventive arrest. This (secondary character of bail, which is applicable only in the context of and only upon the preventive arrest being thought) deviates from the prevailing practices of other jurisdictions, including neighboring countries. Thus, Articles 216-217 of the CPC of Romania provide for judicial control on bail as a self-sufficient preventive measure. Ukrainian CPC envisages bail and control as standalone preventive measures (Articles 176, 178, 182, 194). Moreover, the latter (in Article 183) provides for a mandatory identification of bail as automatic alternative to remand in custody.[82] There is **a need, therefore, to introduce bail and (judicial) control as standalone non-custodial preventive measures.[83]**

[80]See: http://www.procuratura.md/md/newslst/1211/1/7569/
[81]See the preceding section of the report.
[82]The exceptions concern (grave) violent crimes, crimes concerned with a loss of life, and preceding violations of bail.
[83]See also Article 200 of the CPC of Georgia, Article 257 of the CPC of Latvia and so on.

58. The scope of the (judicial) control measures comprising the obligations (Article191(3) of the CPC: not to leave the place of his/her domicile other than under specific conditions; to notify about any change of domicile; not to appear in specifically determined places; to appear whenever summoned; not to contact specific persons; not to commit any actions preventing the finding of the truth in a criminal proceeding; not to drive vehicles or not to practice a profession used by him/her in the commission of the crime; to leave his/her passport with the investigative judge or the court) is in general adequate. However, they could be **supplemented by the obligation to undergo drug, alcoholic or other addictions-related programmes or treatment**, as it is practiced in other jurisdictions.[84]Moreover, taking into account the probation-related potential and actual application of similar measures to convicted persons, as well as the considerations of limiting interactions of the police with the accused (defendants), **the (judicial) control, as well as other non-custodial preventive measures, as it has been done with regard to electronic monitoring arrangements,[85] should be executed by the probation.**

59. As far as the conditions of the bail are concerned, the current provisions are deficient and incompatible with the ECtHR case law due to a direct linkage of it to the measure securing the recovery of the damage caused by the crime and is envisaged for securing payment of pecuniary compensation awarded for repairing the damage caused by the offence and payment of the fine. (Part 1 of Article 192, Part 3 of Article 192[1] of the CPC). As discussed, the ECtHR case law provides for indirect consideration of the damages as one of factors that could be indicative of the risks taken into account for selecting relevant measures.[86] Thus, the **bail conditions are to be construed without a direct linkage to the amount of loss imputed to the accused (defendant).**

60. In terms of the amount of bail, the CPC provides for limits from 300 to 100,000 conventional units. Although some jurisdictions opt for limiting and scaling the amounts of bail,[87] the practice suggests that due to the diversity of means available to the persons concerned, their formal limitation restricts its applicability and efficiency to those in (extreme) need or to the contrary. The same considerations support maintaining its diversity in terms of not limiting it to only the monetary form, as it is, reportedly, predominantly applied in practice. For extending applicability and efficiency of bail it could be recommended **to lift formal limits of the amount of bail and maintain a possibility for its non-monetary forms (immovable property and other non-monetary assets) in practice.**

V. Humanization of Criminal Code[88]

[84]E.g. Ukraine. Para. 5 of Article 194 of the CPC.
[85]See the preceding section of this report.
[86]See para. 53 above.
[87]E.g. Article 143 of the CPC of the Republic of Armenia; Article 106 of the CPC of the Russian Federation.
[88]The section concerns overall adequacy of the criminal sanctions, punitive rationale and other considerations of sanctioning, and imprisonment in particular. Alternatives to it are addressed below, in the section on alternative sanctions.

1.1 Harshness of sanctions

CoE and other international standards

61. The general principle is that offences and the relevant penalties must be clearly defined by law, where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable.[89] In addition to it, the international legal framework, the ECHR, ECtHR case law, and derivative CoE standards, as the most advanced and relevant standards in terms of the formal prohibition of certain categories of criminal sanctions,[90] explicitly provide for the prohibition of the death penalty,[91] irreducible life sentence,[92] and corporal punishments.[93] At the same time, the harshness of criminal sanctions, as, in general, a State's choice of a specific criminal-justice system, including sentence review and release arrangements, have been left outside the scope of the ECtHR supervision.[94]

62. As to the range, types of criminal sanctions, length of imprisonment, and criminal justice policies pursued in this regard, similarly to alternative punishments, as well as the penitentiary, punitive and overall criminal justice systems and policies, they are primarily guided[95] by the general requirement of reconciling the interests and considerations of retribution, general and individual prevention, protection of the public and rehabilitation, with the latter being formally introduced in the core of the international human rights standards by Article 10.3 of the International Covenant on Civil and Political Rights.[96] Starting from the United Nations Standard Minimum Rules for the Treatment of Prisoners (1957)[97] up to the most recent CoE related set of standards, in particular, Recommendation CM/Rec (2017) 3 of the CM to member States on the European Rules on community sanctions and measures[98] the harshness of criminal sanctions is to be in proportion to the seriousness of the offence for which persons have been sentenced and shall take into account their individual circumstances, accordingly. Sentencing rationales should be consistent with modern and humane crime

[89] *Achour*v. *France*, ECtHR [GC] judgment of 29 March 2006, app. 67335/01, para. 41.
[90] For the purposes of the assessment the criminal sanctions, their types, are distinguished from certain methods, elements, conditions of their execution that could amount to breaches of the prohibition of ill-treatment, other human rights and international standards. See the section on its methodology above.
[91] Protocols 6 and 13 to the ECHR are ratified by Moldova accordingly.
[92] *Murray* v. *Netherlands*, ECtHR [GC] judgment of 26 April 2016, app. 10511/10, http://hudoc.echr.coe.int/eng?i=001-162614
[93] *See Tyrer*v. *UK*, ECtHR judgment of 25 April 1078, app. 5856/72, http://hudoc.echr.coe.int/eng?i=001-57587
[94] *Kafkaris*v.*Cyprus*, ECtHR [GC] judgment of 12 February 2008, app. 21906/04, para. 99.
[95] The assessment omits to operate with the cost efficiency and other pragmatic arguments, as well as the efficiency of alternatives to harsher sanctioning and imprisonment for addressing the preventive and protective, rehabilitation objectives.
[96] International Covenant on Civil and Political Rights of 16 December 1966 ratified by the Parliament of the Republic of Moldova Decision No.217-XII of 28 July 1990.
[97] The purpose and justification of a sentence of imprisonment or a similar measure of deprivation of liberty is ultimately to protect society against crime. This end can only be achieved if the period of imprisonment is used to ensure, so far as possible, that upon his return to society the offender is not only willing but able to lead a law-abiding and self-supporting life.
[98] Para. 3 of the Recommendation.

policies, in particular in respect of reducing the use of imprisonment, expanding the use of community sanctions and measures, pursuing policies of decriminalization, using measures of diversion such as mediation, and of ensuring the compensation of victims.[99]

Description of findings and recommendations

63. The CC[100] complies with the outlined international standards banning the specific types of punishments, including the life imprisonment without a meaningful perspective of reduction. According to Articles 71 and 91(para. 5) respectively it is applicable to adult mails for committing exceptionally grave crimes and convicted to it are subject to early conditional release after spending not less than 30 years of imprisonment. The latter provision has not been applied in practice, reportedly due to none of life-sentenced prisoners having complied with the requirement concerned. The overall analysis suggests that the CC does provide for life imprisonment for excessively wide range or inappropriate crimes, in comparison to other jurisdictions. It is envisaged with an alternative to fixed-term imprisonment for crimes against peace, humanity, war crimes, aggravated murder, aggravated rape, trafficking in human beings (children), terrorist act and other corresponding crimes, for 18 *corpus delicti* in total. The total number of lifers by 1.01.2018 constituted 123.[101] In addition to the increasing the opportunities for benefitting from the progressive imprisonment scheme and integration into general prison population,[102] there is a need to **take necessary further regulatory and administrative, as well as capacity building measures for ensuring that such sentences are both *de jure* and *de facto* reducible, as required by the ECtHR case law.[103]**

64. While the appropriateness of the range of alternatives to imprisonment is discussed below, it is to be noted that the range of sanctions applicable to physical persons[104] include fines; deprivation of the right to hold certain positions or to practice certain activities; annulment of military rank (as an additional punishment), special titles, qualification (classification) degrees, ands state distinctions; community service; imprisonment and life imprisonment. Except of the two latter sanctions, the remaining ones can be applied as additional or in certain combinations, including the community service as an obligation under conditional period (Article 62 of the CC).

[99]Recommendation R (92) 17 of the Committee of Ministers to member States Concerning Consistency in Sentencing, para. A.6.
[100]The assessment does not concern the Code of Administrative contraventions, providing for the petty crimes/minor transgressions of criminal character, as not essential for the humanization of the criminal justice system. It is to be mentioned, however, that the Code and its implementation has benefited from reduction of application of the administrative imprisonment (arrest).
[101]See: https://drive.google.com/file/d/1zHSjvjzrRHTOlNdt9cYRqxnWDAuli2Hf/view.
[102]See the Report on the 2015 CPT visit to the Repblic of Moldova, CPT/Inf (2016) 16. paras. 47, 84-90.
[103]Supra note 54, para. 103.
[104]The CC envisages criminal responsibility of legal persons and relevant range of sanctions, which, however, do not significantly concern the humanization of the system.

65. The criminal justice system of the Republic of Moldova, its CC, follows the usual approach of addressing the retribution, general and individual prevention considerations by providing for categorization of crimes depending upon their prejudicial nature and degrees into minor, less serious, serious, especially serious, and exceptionally serious crimes that are punishable up to 2,5,12 years inclusively, above 12 years and life imprisonment respectively (Article 16 of the CC). Due to the specifics of national jurisdictions, overall legal traditions, relativity of similar categorization, criminological and other factors, there are no internationally accepted scaling schemes. This categorization in general[105] does not raise any specific concerns, accordingly. It complies, in general terms, with the relevant provisions on grading of offences into degrees of seriousness and other basic requirements of the Recommendation R (92) 17 of the CM to member States Concerning Consistency in Sentencing.[106]

66. Imprisonment comprising a forced isolation of the person from his/her normal living environment and confinement in a penitentiary for a certain term (Article70 of the CC) is the most common punishment that is envisaged in 615 sanctions under *corpus delicti* provided for the CC. It ranges from 3 months to 20 years and 25 years as the final punishment in a case of a cumulation of crimes. The maximum imprisonment (20 years) is envisaged in 34 sanctions with the most frequent lower level being 12 years, corresponding to the outlined general classification of crimes, which occasionally starts from 10, 15 and 16 years presumably depending on the overall gravity of crimes and other related considerations.

67. The general overall recent statistics suggest that along with the overall number of registered crimes in 2011- 2017 constituting per anum 35124, 36615, 38157, 41786, 39782, 41921, 35581 (with the recent annual decrease amounting 15%), comparative trends with regard to serious, especially serious, and exceptionally serious crimes; the number of convicted persons(by the judgments of the court of the first instance) in 2014-17 comprising 9505, 11070, 9560, and 9957 respectively,[107] the number of convicted persons serving imprisonment by the beginning of 2016, 2017 and 2018 remained substantially unchanged: 6157, 6377, 6294. Together with the numbers of unsentenced inmates (under remand in custody) it amounts to the situation where the Republic of Moldova has one of the highest incarceration indexes among Council of Europe member states. For years it is remaining around 220 inmates per 100000 inhabitants.[108] These indications suggest that, among other factors, **the harshness of the imprisonment-related and overall criminal sanctions, their range, types, application, actual conviction to imprisonment are to be reviewed.**

[105]Due to the scope of the assessment, it did not concern comparative review of specific crimes.
[106]Para. B.2 of the Recommendation.
[107]See "Raport privind activitatea procuraturii pentru anul 2017"; "Raport privind activitatea procuraturii pentru anul 2016"; http://www.procuratura.md/md/d2004/; Informative notes of the National Administration of Penitentiaries: http://penitenciar.gov.md/ro/statistica
[108]Council of Europe Annual Penal Statistics SPACE I – Prison Populations Survey 2016, p.51. http://wp.unil.ch/space/files/2018/03/SPACE-I-2016-Final-Report-180315.pdf, the Report on the 2015 CPT visit to Moldova, CPT/Inf (2016) 16. para. 45.

68. One of the most noticeable harshening of criminal sanctions have been introduced by Law on amending the Criminal Code of the Republic of Moldova No. 119 of 23.05.2013 that concerned increase of the terms of imprisonment for deliberate murder, kidnapping and other general violent crimes presumably prompted by the adverse dynamics of relevant crimes.

69. There has not been regular review of the appropriateness of the range of sanctions envisaged by the CC and efficiency of their actual application for securing the preventive and security considerations. In general, there is a need to **advance the analytical efforts, range and disaggregation of statistical data on sanctioning and overall criminal justice system; research should be done regularly to measure accurately the extent of variations in sentencing with reference to the offences punished, the persons sentenced and the procedures followed, this research should pay special attention to the effect of sentencing reforms and relevant dynamics.**[109]

70. In line with the relevant standards, the results of **profound research(es) should be used for suggesting legislative amendments, where necessary and adjusting the sentencing manuals, schemes[110] with regard to the sanctioning parameters, with particular justification and emphasis on rehabilitative and humanization considerations**.

71. The outlined grading of offences into degrees of seriousness, establishment of ranges of available sentences for a crime, and the standard set of grounds for exemption, specifying it for accomplices and other basic rules of criminal responsibility,[111]are further supplemented with individualization and other itemization instruments and provisions, as required by the standards and overall sentencing rationale inbuilt in criminal justice systems.[112]

72. While the preceding deliberations could be seen as suggesting auxiliary remedy for ensuring appropriate sentencing and avoiding unjustified harshening of sanctions in specific cases, the existing range of individualization tools provided by the CC is considerably deficient in terms of compatibility with the international standards and best practices concerning delimitation of minimum sentences. According to Recommendation R (92) 17 of the Committee of Ministers to member States Concerning Consistency in Sentencing they should ensure that minimum penalties, where applicable, do not prevent the court from taking account of particular circumstances in the individual case.[113] By establishing the minimum period of

[109]See Recommendation R (92) 17 of the Committee of Ministers to member States Concerning Consistency in Sentencing, paras. I.1 and 2, J.1-5; CoE Recommendation Rec(99)22 concerning prison overcrowding and prison population inflation and practices of other jurisdictions, paras. 5,45; Recommendation CM/Rec (2017) 3 of the Committee of Ministers to member States on the European Rules on community sanctions and measures, paras. 98-14 and so on.
[110]Moldovan judiciary has been equipped with a sentencing methodology developed with the support of ABAROLI.
[111]Chapters III-VI of the CC.
[112]Recommendation R (92) 17 of the Committee of Ministers to member States Concerning Consistency in Sentencing, sections B, C, D.
[113]Paras. B.1 and 2 of the Recommendation.

imprisonment of 3 months the CC excludes a possibility for using shorter periods of imprisonment, where just a couple of weeks could be appropriate if a non-custodial sanction cannot be contemplated. Moreover, the CC has introduced formal limitations for applying mitigating circumstances within the range of specific sanctions, including fine, imprisonment up to 10 years, life imprisonment (Article 78). Coupled with the Article 79 of the CC establishing specific rigid criteria, regarded as exceptional circumstances, for applying more lenient punishment than the sanction envisaged for the crime concerned and the atmosphere of certain fear created by the prosecution of and other actions taken against judges for applying milder measures or otherwise rendering illegitimate decision (crime envisaged by Article 307 of the CC) the **provisions in issue amount to introducing legal and practical obstacles for applying less stringent sanctions and should be reviewed.**

1.2 Decriminalization

CoE and other international standards

73. The very nature of the public policies, legislation, including the criminal justice sphere, require that relevant fields of regulation, including criminological and other factors, state of affairs should be under permanent monitoring, research[114] suggesting needed adjustments of the practice and, if necessary, legislative amendments. In addition to that, the humanization and related considerations constituting the rationale of the outlined international standards[115] and best practices require that states should consider the possibility of *decriminalizing* certain types of offences or reclassifying them so that they do not attract penalties entailing the deprivation of liberty.[116]

Description of findings and recommendations

74. There have been 71 sets of amendments introduced to the CC since its re-publication in 2009 that consolidated all the preceding modifications incorporated after its adoption in 2002. Many of the amendments concerned introduction of new or modified *corpus delicti* (more than 50), some of which were prompted by the international commitments, e.g. Article 135[1] Crimes against Humanity, 166[1] Torture, Inhuman and Degrading Treatment, certain economic, public or other country-specific, as well as criminological developments, e.g. Article 245[11] Violation of legislation concerning optional pension funds etc., Article 164[1] Abduction of a minor by close relatives).

75. As to decriminalization, since 2009 there were some insignificant developments in terms of removing *specific corpus delicti* that concerned the evasion from submitting declarations on income and property or the deliberate indication of incorrect data, including by high ranking officials (former parts 1 and 2 of Article330[1] of the CC).[117]

[114]See para. 62 above with further references to international standards.
[115]See the section on methodology, as well as paras. 46-47 above.
[116]CoE Recommendation Rec(99)22 concerning prison overcrowding and prison population inflation, para. 4 (emphasis added).
[117]Other removals of certain Articles from the Special Part of the CC (e.g. 143, 309[1], 389-393 and so on) were carried out with re-grouping, introducing corresponding *corpus delicti* under other Articles, i.e. without substantially

The most noticeable removal of certain elements of the remaining *corpus delicti* that reportedly affected relevant statistics, including in terms of the number of criminal prosecutions and convictions, concerned the modifications of domestic violence-related framework, which, *inter alia*, removed the verbal element from its scope.[118]Thus, for ensuring adequate use of the discussed potential for humanization of the criminal justice system, including with regard to offences with corresponding administrative contraventions and other conceivable categories of or specific crimes and *corpus delicti*, it would be necessary to carry out (and subsequently periodically repeat) **profound research(es) for suggesting and subsequent implementation of legislative and related decriminalization-oriented interventions**.

VI. Non-custodial sanctions and other punitive alternatives[119]

76. The humanization and rehabilitation/re-socialization-oriented international standards concerning non-custodial sanctions have been recently reinforced in Recommendation CM/Rec (2017) 3 of the Committee of Ministers to member States on the European Rules on community sanctions and measures, previously consolidated in the Recommendations CM/Rec (2010) 1 on the Council of Europe Probation Rules, and CM/Rec (2003) 22 on conditional release (parole), prior to it. In general, they follow the rationale of humanization and increasing efficiency of the criminal justice policies, reconciling the preventive, security and other considerations involved, and require that states should ensure appropriate use of the alternatives to imprisonment. Due to the nuanced and partially overlapping scopes of these and other sets of international standards in issue and notions operated by them, for the purposes of the current section and report in general, the terms 'non-custodial sanctions' and 'alternatives to imprisonment' comprise and refer to penal punishments unrelated to deprivation of liberty, as well as corresponding alternatives to execution of imprisonment as a sanction in full or in part under individualized post-release conditions.[120]

77. In addition to the non-custodial sanctions, the range of alternatives provided for by the Moldovan legislation include: conviction with a conditional suspension of execution of punishment; conditional exemption from punishment prior to the term of expiration; substitution of the unexecuted part of imprisonment with a milder form of punishment; exemption from punishment of juveniles; exemption from punishment due to a situation change; exemption from executing the punishment of seriously ill persons;

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removing them from the scope of criminal responsibility. The assessment did not concern the ongoing, reportedly controversial, discussions and proposals as to decriminalization of economic crimes in Moldova.

[118]See "Raport privind activitatea procuraturii pentru anul 2017":http://www.procuratura.md/md/d2004/

[119]The assessment in issue and current report accordingly are concerned with the conceptual and structural evaluation of the criminal justice system in the country. The Project's composite intervention also comprises parallel targeted assessments of the probation and penitentiary. For actual institutional, operative, and practical execution of criminal sanctions, application of imprisonment, non-custodial sanctions and parole, see relevant reports.

[120]The alternatives to prosecution / criminal responsibility in the Republic of Moldova are reviewed in the following section of the report. As to plea bargaining, although it provides for the reduction of a sentence by 1/3 of the maximum punishment set for this crime (Article 80 of the CC), it is not considered as a provision primarily addressing the expected effects of non-custodial sanctions. On its increased use in Moldova, see "Raport privind activitatea procuraturii pentru anul 2017":http://www.procuratura.md/md/d2004/

deferral of the execution of punishment for pregnant women and women who have children under the age of 8. Since December 2015 the CC and related legislation[121] have been indicatively supplemented with the probation-related terminology. In particular, instead of 'conditional' for civilian convicts, it uses the term 'probation period' and so on. Thus, it specifically and rightly links application of the alternatives in issue to the more advanced contemporary understanding of corresponding framework and service. This overall development is in line with the outlined standards.

78. The range of conditions applied in case of suspension of execution of imprisonment and early release from it that included the obligations not change his/her domicile or place of residence without the consent of a competent body; not to attend certain places; undergo certain treatment for addiction to alcohol, drugs, toxic substances, or for a venereal disease; provide financial support to the victim's family; compensate for the damage, has been appropriately supplemented by participation in probation programmes, (unpaid) community work, and electronic monitoring. Introduction of these new conditions increases the potential of the criminal justice system, and in particular, probation in meeting their two-fold objective of rehabilitation/resocialization of the offenders along with preventing recidivism and securing the safety of society.[122] The range of conditions corresponds to the outlined international standards, including para.8 of Recommendation Rec (2003)22 on conditional release (parole).

79. The immediate **gap in the existing range of non-custodial sanctions to be remedied is constituted by the absence of probation/parole as an independent sanction without the pronouncement of the sentence to imprisonment,** as envisaged by the international standards, in particular, CM/Rec (2017) 3 on the European Rules on community sanctions and measures.

80. Moreover, the current format of the parole/probation, i.e. conditional suspended sentence and early conditional release are permitted upon strict formal criteria implying primarily punitive considerations. The former can be applied respectively in case of setting imprisonment for up to 5 years for crimes committed with intent and up to 7 years for negligent crimes (Article 90); and the latter - after serving at least half of the term, but not less than 90 days, of imprisonment set for the commission of a minor or of a less serious crime, two thirds - for the commission of a serious crime, extremely serious or an exceptionally serious crime (Article 91).[123] Similar approach is maintained with regard to substitution of the unexecuted part of imprisonment with a milder form of punishment, where the formal limitations concern its applicability to medium gravity and milder crimes and after serving 1/3 of the term.

[121]Law No. 138 of 03.12.2015.
[122]The package of legislative amendments concerned the Law of Probation, Execution Code, CPC and significantly expanded provisions on resocialization, assistance and consultancy, post-penitentiary assistance, probation programmes and other advanced instruments and probation measures. As discussed, the detailed assessment of their application is provided under parallel exercise and relevant report.
[123]The conditions applicable to life-sentenced prisoners are discussed above (in para.48).

81. The controversy and hastiness of legislative and policy developments could be well-illustrated by the series of recent changes of the eligibility criteria for conditional exemption from punishment prior to the term of its expiration. By Law on amending and completing some legislative acts No. 82 of 29.05.2014 the outlined strict formal crime-related eligibility requirements were supplemented by stringent also formal not necessarily corroborating personality-related inaptness to comply with probation conditions and criminal justice objectives. The mentioned legislative amendments that introduced these requirements have been expanded and advanced even further by controversial exclusionary norms concerning self-mutilation, suicide attempts, as well as formal emphasis on violations of the regime or effective disciplinary punishments and so on. The legislative changes in issue evidently were prompted by the prison order and related considerations, these interests are better secured by increased trust towards penitentiary administration, raising professionalism and applying methods following contemporary penal thinking and approaches. The criticism of these amendments has resulted in some reverse changes introduced by Law on amending and completing some legislative acts No. 163 of 20.07.2017 that, *inter alia*, have conditioned it by compliance with individual sentence serving programme, extension of milder formal requirements to persons, who committed the crime when 21 years old, reducing from 3/4 to 2/3 the term to be completed for commission of an extremely serious or an exceptionally serious crime and of the punishment applied to a person who was previously conditionally exempted from punishment preterm. Some similar amendments have been introduced to Article 92 providing for substitution of the unexecuted part of punishment with a milder one and other punitive alternatives. In particular, their range has been extended by a conviction to an imprisonment with partial conditional suspension of execution of imprisonment that envisages an immediate split of the term into an actual term of imprisonment to be served with automatic suspension of its remaining period. However, it has a limited formal application (can be used in case of conviction for up to grave crimes) and is not conditioned by requirements to be observed during the actual term of imprisonment.

82. Although the international texts do envisage some formal (types of crimes, minimum term etc.)eligibility criteria,[124] it could be, therefore, advised to follow the overall rationale of the outlined standards, best practices and consider further **lifting or alleviating formal crime- and personality-related requirements with the emphasis being put on the prisoner's ability to refrain from re-offending, comply with the probation conditions and contemporary criminal justice objectives in general by means of using reliable risk assessment methods, effective offender supervisors and a range of proven programmes.**

83. The assessment mission, including interaction with penitentiary and probation professionals, suggested that besides the indicated legal obstacles and limitations, effective use of parole and non-custodial sanctions in general is determined by lack of awareness of judges, as well as prosecutors and other legal professionals concerning actual capacities of probation, efficiency of available means, legal and other instruments. The most recent statistical data suggest that the level of decisions by

[124]Paras. 5, 6 of Recommendation Rec (2003)22 on conditional release (parole).

penitentiary commissions to support early conditional release (under Article 91 of the CC) and substitution of the unexecuted part of imprisonment with a milder form of punishment (under Article 92 of the CC) constitutes 46 % (out of 1286 considered, 589 were supported in 5 months of 2018). Out of the 170 direct applications to courts submitted under the alternative (immediate) judicial avenue, only 69 were granted by judges and or 5.3% lead to actual release. Thus, there would be a need to **carry out set of targeted capacity building activities for relevant members of judiciary, as well as prosecutors and other legal professionals on probation-related issues, its actual and potential efficiency and overall framework of alternatives to imprisonment (and detention).**

VII. Victim-perpetrator reconciliation, Mediation in Criminal Matters and other alternatives to prosecution

CoE and other international standards

84. The Council of Europe, Recommendation No. R (99) 19 of the Committee of Ministers to member states concerning mediation in penal matters, promotes mediation in criminal matters and sets out the guidelines (as an appendix) for victim-perpetrator mediation process. The Guidelines provide for the principles of mediation, main of which is a free consent of the parties to participate in mediation (Article 1). Other principles guiding the mediation process include confidentiality of mediation proceedings, and general autonomy of mediation from criminal proceedings (Articles 2,5). A possibility to refer the case for the assistance of mediator shall be made available at all stages of criminal proceedings (Article 4). In all cases, the mediation process is secured by all available fundamental safeguards applicable to fair criminal proceedings, such as assistance of a lawyer or interpreter, or parental assistance for minors (Article 8). Under no circumstances participation in mediation can be recognized as an evidence of admitting guilt within criminal proceedings (Article 14).

85. The Guidelines also define the role of criminal justice authorities in the mediation process. Accordingly, authorities are entitled to decide to refer a criminal case for mediation as well as assess the outcome of mediation procedure (Article 9). Criminal justice authorities must be informed of the outcome of the mediation process within a reasonable time limit (Article 16). Before referring the case to mediation, judicial authorities shall fully inform all the parties of their rights, the nature of the mediation process, and possible consequences of mediation (Article 10).

86. Another aim of the Guidelines is to determine some general standards on how mediation services should operate, including autonomy of mediation bodies which can be subject to monitoring by competent bodies (Articles 20, 21). Mediators shall carry out the mediation process in an impartial manner, base themselves on the facts of the case and be guided by the interests of the parties (Article 26). Before taking up mediation duties, mediators shall receive initial training, which will secure that mediators on duty do possess all the necessary skills of working with victims and have basic knowledge of criminal justice system (Article 24). Upon achieving an agreement

(which can be only obtained voluntarily with full consent of both parties (Article 31)), the mediator shall report to mediation authorities on the steps taken and the outcome of mediation (Article 32). However, the contents of the mediation shall remain confidential (Article 32).

87. The *Basic Principles on the use of restorative justice programmes in criminal matters*, adopted by the Economic Social Council (ECOSOC), constitutes one of the basic documents adopted within the United Nations framework with a view to regulate victim-offender relationship beyond criminal procedure.[125] The Basic Principles seek primarily to formulate global standards in the field of mediation and restorative justice. Their para. 20 recommends that Member States should consider the formulation of national strategies and policies aimed at the development of restorative justice and at the promotion of a culture favorable to the use of restorative justice among law enforcement, judicial and social authorities, as well as local communities. Para. 6 stipulates that restorative justice programmes should be generally available at all stages of the criminal justice process. Again, the basic standard of restorative justice programmes presupposes a free consent of both parties to participate in such a programme. Such participation should not be used as admission of guilt or any other evidence in criminal proceedings. Fundamental procedural safeguards are an inalienable inherent part of a restorative justice programme, including the right to consult a lawyer, and be informed of their rights, the nature of the process and consequences of the process. Other principals include confidentiality of the proceedings and judicial supervision of the process, where the results of the reconciliation process can be incorporated in judgments of decisions resulting from criminal proceedings.

Description of findings and recommendations

88. The CPC provides for the possibility to seek mediation and reconciliation in criminal cases throughout a wide range of Articles, starting with those determining the rights of the parties, the obligation of the prosecutor as well as in various moments of the procedure. Law on Mediation No. 137 of 3 July 2015 regulates the profession of mediators and their organization. The legislative framework is in conformity with the CoE and International standards set out above. All the above-mentioned standards and principles are reflected in the legal framework. Nevertheless, the fact-finding mission revealed that despite a legislative framework in place, mediation in criminal matters in the Republic of Moldova is almost non-existent. The Law on Mediation is quite recent.

89. The same goes for the necessary legal framework in the CPC, which was introduced in 2016.Until then, the CPC provided (in Articles 52, 57, 219, 276) just for an obligation of the prosecutor or criminal investigation officer to inform the accused about and the possibility to mediation for resolving civil claims within the criminal procedure and criminal prosecution initiated upon the victim's complaint. The Law No. 211 dated 29.07.2016 has introduced Article 344^1 and related set of provision as to the trial-stage based settlement of a case under mediation or parties' reconciliation procedure into the

[125]Res. 2000/14, U.N. Doc. E/2000/INF/2/Add.2 at 35 (2000).

CPC. They echo Article 109 of the CC and envisage that they are applicable for a minor or less serious crime and in case of juveniles – also a serious crime, and in cases that are initiated upon the victim's complaint.

90. In spite of the considerable legislative amendments, there have been only sporadic attempts to apply mediation in criminal procedures. Although the CPC (s/par. 24^1 of Part 1 of Article 52) has stipulated that the prosecutor has the duty to provide, at the request of the mediator, the information from the case file, necessary for carrying out the mediation process (without damaging the criminal investigation), it is not furnished with the duty to provide the parties with the list of mediators. The following is an illustrative example given by a mediator:
'*A female accused person places a request for information to the prosecutor asking for a list of mediators. The prosecutor informs that there is the possibility to mediation but there is no obligation to the prosecutor to provide information neither is the prosecutor involved in the procedure.'*
The perception of all the interest groups is that little to nothing is known about the mediation, its benefits and the procedure. It is therefore necessary to have **regular trainings organized for judges, prosecutors and investigators on the procedural aspects of mediation as well as its benefits.** The perception is also that lawyers are not interested in mediation because of the possible competition. However, this is not true since mediation foresees proper legal representation, which means that lawyers are overseeing a sector which is yet to be explored by them. **Awareness raising campaigns and capacity building among lawyers is also of an outmost importance.**

91. The Law on Mediation requires that mediators obtain both initial and continuous training. There are some certified organizations such as State University which provide initial training, but there is no continuous training provided currently despite the increased interest. To this end**, support is needed to set up sustainable continuous training mechanisms which fulfill the requirements of the law and of international standards.**

92. Mediation is guaranteed free of charge by the State if certain conditions are fulfilled. However, neither a mechanism nor a scheme is in place to guarantee this obligation. **The Council of Mediators together with the MoJ may be assisted to set up a proper mechanism which guarantees free of charge mediation.**

93. Currently mediation and reconciliation are possible only for the outlined scope of offenses, and as emphasized only at the trial stage.[126] The quoted para. 6 of the Basic Principles suggest that there are within a criminal justice system four main points at which a restorative justice process can be successfully initiated: (a) at the police level (pre-charge); (b) prosecution level (post-charge, but usually before a trial), (c) at the court level (either at the pretrial or sentencing stages; and, (d) corrections (as an alternative to incarceration, as part of or in addition to, a non-custodial sentence, during incarceration, or upon release from prison. In some countries, restorative interventions

[126]See Article 109 CC and Article 344^1 CPC.

are possible in parallel to the prosecution. At any one of these points, an opportunity can be created for officials to use their discretionary powers and refer an offender to a restorative justice programme.[127] Therefore, there might be a need **to look into the possibility to widen the scope of application of mediation and other restorative justice instruments and programmes, including in terms of their introduction throughout the criminal justice system. Moreover, the role of the judge in mediation in criminal proceedings may be further reviewed.**

94. One more point concerns the provisions of Article 59 of the CC and the other related provisions of the CPC, namely the conditional suspension of the criminal prosecution. It is one of alternatives to prosecution and is a useful instrument, offender-oriented remedy, which, however currently is applicable up to crimes of medium gravity. Moreover, it lacks specific provisions on the conditions that could be imposed upon the accused. **It is advisable to widen the scope of the application of Article 59 of the CC to include other offences and specify the conditions that could be introduced upon the consent of the accused.**

VIII. Conclusions and Recommendations

95. This report has assessed the needs of the criminal justice system in the Republic of Moldova from the perspective of humanization, resocialization and restorative justice. The assessment focused on four aspects of criminal justice, which have demonstrated deficiencies over the years, and namely:

- pre-trial preventive measures;
- the humanization of CC regarding the harshness of sanctions and decriminalization of certain categories of offences;
- the application of alternative sanctions;
- victim-perpetrator reconciliation.

The assessment touches also upon the policy and legislative framework of criminal justice in the Republic of Moldova and suggests that the outlined **legislative moves, developments of the judicial and related practice, other measures and interventions have remained fragmented, sometimes insufficient, and, occasionally, controversial, and would require further streamlined considerable reforms for ensuring humanization of the criminal justice, advancement of its resocialization-related and restorative dimensions in line with the international standards and best practices.**

96. Each relevant section of the report makes a careful analysis of the current situation against CoE and other international standards and concrete conclusions and recommendations are included. The recommendations can be grouped into five main categories. Accordingly, there is a need for strategic and budgetary planning,

[127] See Handbook on Restorative Justice Programmes, Criminal Justice Handbook Series, United Nations Office on Drugs and Crime (UNODC), UNITED NATIONS New York, 2006, p. 13, with further references.

legislative interventions, research, capacity building and awareness raising, data processing.

97. With the view of addressing the dynamic, multi-disciplinary character and other specifics of the criminal justice systems, as well as the need in overcoming its fragmentation, remaining institutional and functional barriers in the Republic of Moldova, it is advised to follow best practices and supplement the proposed set of measures by institutional arrangements for its systematic coordination.

Strategic planning and Budgetary support

98. The assessment revealed that the JSRS has expired, including its prolongation. Therefore, the Moldovan authorities need proceed with launching a meaningful policy cycle in the justice sector by developing and adopting, without further delay, a sector-wide or set of, possibly criminal justice-specific and other sub-sectoral policy instruments. To this end, use should be made of advanced typology of result-oriented indicators, regulatory impact assessment approaches/elements and other effective public, legal policy development and implementation techniques and methodologies.

99. Policy considerations go hand in hand with budgetary planning. This means that there is a need for extending the use of MTBF for criminal justice related policy measures, and actually finance reform-oriented interventions beyond usual financing of the institutions concerned and maintaining their routine functioning. Special attention should be paid to the financing of electronic monitoring and establishment of a functioning mechanism and scheme for free mediation.

Legislative interventions

100. Legislative interventions are needed in all areas which are assessed under this report. While most of them concern primary legislation, administrative or regulatory measures, in the form of soft law are necessary as well.

101. In view of certain deterioration or, at least, lack of substantial improvement in terms of the level of applicability of the preventive arrest in the Republic of Moldova over the years, and related need for more profound review and consistent streamlining of the legislation and practice, the following legislative and related interventions concerning the *pre-trial preventive measures* are required:

- Adjustment of the scope of incriminated offences for which preliminary arrest can be applied(upon a comparative study among various CoE countries and careful assessment of results of alteration of the scope of its applicability in this regard).

- The legislative amendments to the CPC, Execution Code and other legislative acts, as well as infrastructural measures are to be taken for securing the wider effective (appropriate) use of house arrest, in particular in combination with

electronic monitoring arrangements with the substantial (and not just technical) role attached to the probation.

- The wording of Article 176(3) CPC, which requires that the prejudicial degree of the incriminating act is assessed in each individual case, should be reviewed so that the impartiality of the judge and the presumption of innocence are fully guaranteed throughout the whole process.

- Article 307 CC should be abrogated or at least revised urgently so that any possibility of using criminal proceedings against judges for not applying preventive arrest is eliminated.

- It is advisable to review the CPC, the legislative techniques and rationale, and spell out the priority of non-custodial preventive measures, as well as the relevant alignment of the preventive and house arrests, and establish clear hierarchy in this regard.

- Judicial control measures should be supplemented by the obligation to undergo drug, alcoholic or other addictions-related programmes or treatment. At the same time judicial control measures and other non-custodial preventive measures should be executed/supervised by the probation service.

- Bail and judicial control need to be regulated so as to be able to be imposed as a standalone non-custodial preventive measure. Moreover, bail conditions are to be construed without a direct linkage to the amount of loss imputed to the accused (defendant). In order to make it more effective and widely applicable, the formal limits of the amount of bail should be lifted and a possibility for its non-monetary form (immovable property and other non-monetary assets) should be applicable in practice.

102. The legal regime in the Republic of Moldova could be more humane by introducing several amendments which can contribute to reducing the *harshness of criminal sanctions*. To this end a general recommendation is to review the harshness of the imprisonment-related and overall criminal sanctions, their range, types, application, actual conviction to imprisonment. However, the following more specific interventions are also needed:

- Provisions which amount to introducing legal and practical obstacles for applying less stringent sanctions should be reviewed.

- Effective regulatory and administrative measures should be in place to make sure that life imprisonment is both de jure and de facto reducible, as required by the ECtHR case law.

103. The legal framework regarding *alternative sanctions* could also be reviewed in order to comply with the international standards. Probation/parole should be introduced as an independent sanction without the pronouncement of the sentence to imprisonment. Moreover, probation/parole could be more effective by lifting or further alleviation formal crime- and personality-related requirements with the emphasis being put on the prisoner's ability to refrain from re-offending, comply with the probation conditions and contemporary criminal justice objectives in general by means of using reliable risk assessment methods, effective offender supervisors and a range of proven programmes.

104. Regarding the *victim-perpetrator reconciliation* it is advisable to look into the possibility to widen the scope of application of mediation and other restorative justice instruments and programmes, including in terms of their introduction throughout the criminal justice system. Moreover, the role of the judge in mediation in criminal proceedings may be further reviewed.

105. Moreover, these measures are to be supplemented by widening the scope of the application of alternatives to prosecution, in particular its conditional suspension that could be extended over graver offences and specify the conditions that could be introduced upon the consent of the accused.

Research

106. Research is needed on several matters. Depending on the outcome of it, further legislative measures or awareness raising campaigns could be proposed. The following constitutes research which can lead to further legislative initiatives:

- A thorough study is needed in order to determine the way forward and consolidate the legislation with a view to sustainability.

- An in-depth review of the court practice in terms of appropriateness of the reasoning of preventive arrest (its continuation) orders and their substantiation with the reference to factual and other established circumstances.

- A comparative study among various CoE countries on the offences for which preventive arrest is permitted may reveal a need for revision of the CPC in this respect.

- Profound research should be used for suggesting legislative amendments, where necessary and adjusting the sentencing manuals, schemes with regard to the sanctioning parameters, with particular justification and emphasis on rehabilitative and humanisation considerations.

- Profound research is needed for suggesting decriminalization-oriented interventions. This should be of course accompanied with subsequent implementation of legislative interventions.

107. Research could also lead to a need for awareness raising. This is the case with the use of preventive arrest, where it is advisable to conduct an empirical study on the general perception in the media and society about the use of preventive arrest, the impact thereof on judges and the casual links between the use of preventive arrest and fight against criminality and corruption. Depending on the outcome of such a study, awareness raising campaigns may be organized among media and societal groups on the reverse effects of the use of preventive arrest.

Capacity building and awareness raising

108. Besides the legislative interventions, capacity building and awareness raising may be effective means towards humanization and liberalization of criminal justice in the Republic of Moldova. Moreover, in certain areas, the problems identified are not related to the legislation, which in itself complies with international standards. The issues identified are often related to lack of proper education and lack of proper dissemination of information. It should be noted that for the sake of sustainability, capacity building needs recommended in this report could be incorporated into the relevant curricula of the NIJ. The capacity building and awareness raising activities needed can be summarized as follows:

- Specialized trainings on the ECHR standards on preventive arrest regarding its application in practice and the motivation thereof are needed.

- There is a need on capacity building of judges and prosecutors regarding the possibilities that electronic monitoring offers, not only for home arrest but also for other alternative preventive pre-trial measures. This can be combined with a set of targeted capacity building activities for relevant members of judiciary, as well as prosecutors and other legal professionals on probation-related issues, its actual and potential efficiency and overall framework of alternatives to imprisonment (and detention).

- Capacity building measures for ensuring that life imprisonment sentences are both de jure and de facto reducible, as required by the ECtHR case law are needed.

- Regular trainings organized for judges, prosecutors, investigators and lawyers on the procedural aspects of mediation as well as awareness raising campaigns on its benefits are a must.

- Support is needed to set up sustainable continuous training mechanisms which fulfill the requirements of the law and of international standards.

Data gathering

109. The gathering and processing of data for statistical purposes is very important in every jurisdiction. There are many statistical data available in the criminal justice system in the Republic of Moldova. Therefore, it is necessary to advance the analytical efforts, range and disaggregation of statistical data on the overall criminal justice system in general and on sanctioning and the preventive arrest, in particular. With regard to the latter, a thorough inventory of its use, based on a unified methodology of data gathering is needed. Moreover, research should be done regularly to measure accurately the extent of variations in sentencing with reference to the offences punished, the persons sentenced and the procedures followed; this research should pay special attention to the effect of sentencing reforms and relevant dynamics.