

REPORT ON THE RESEARCH ON THE APPLICATION OF PRE-TRIAL DETENTION IN THE REPUBLIC OF MOLDOVA



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REPORT ON THE RESEARCH ON THE APPLICATION OF PRE-TRIAL DETENTION IN THE REPUBLIC OF MOLDOVA

prepared by Erik Svanidze
on the basis of submissions and data collected by
Lilian Apostol
Vasile Cantarji
Ion Chirtoaca
Radu-Florin Geamanu
Ion Graur
Dumitru Obada
Sergiu Ursu

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List of abbreviations

ADR – Alternative Dispute Resolution

CC – Criminal Code

CoE – Council of Europe

CPC – Criminal Procedure Code

ECHR, Convention – Convention for the Protection of Human Rights and Fundamental Freedoms

ECtHR, Court – European Court of Human Rights

SCM – Superior Council of Magistracy

Supreme Court – The Supreme Court of Justice of Moldova

Introduction

The Report on the Research on the Application of Pre-trial Detention in the Republic of Moldova (Report) sets out the research findings of the Council of Europe Programme “Promoting a Human Rights Compliant Criminal Justice System in the Republic of Moldova” funded by the Government of Norway.

The programme 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.

The Report was developed on the basis of data collected and processed within the framework of the research on the application of pre-trial detention in the Republic of Moldova¹ (Research) as defined by the methodology for conducting it (Methodology). The Report consolidates all Research elements. In particular, the Report tackles the results of the examination and analysis of the selected individual judicial decisions and materials of the court hearings on the application of pre-trial detention (Examination of Decisions), as well as relevant overall case-files (Examination of Files).

Moreover, it processes the results of the examination and analysis of the selected judicial decisions, relevant files and materials of the court hearings on the suits claiming compensation for illegal arrests (Examination of Suits).

The Research covers the period from 1 January 2013 till 31 December 2018.

In accordance with the principle of non-engagement in the administration of justice, the Examinations only reviewed completed, non-pending, criminal proceedings (cases) with the final judgments or decisions to discontinue prosecution. This condition was accepted by the Superior Council of Magistracy in its relevant decision.² This requirement affected the chronological scope of the examination, which excluded the decisions taken in 2018.³ It concerned the decisions taken from 2013 to 2017 only. The subsequent judicial practice and state of affairs were addressed through other elements of the Research.

1. For the purposes of the Research the terms ‘preliminary or pre-trial arrest, preventive detention, remand in custody’ are treated as equal and refer to the measure envisaged by Article 185 of the CPC of the Republic of Moldova.

2. See the Decision No 13/1 as of 15 January 2019 in the Annex No.1 to the Methodology.

3. Although some of the decisions rendered in 2018 concerned the proceedings (cases) completed by the time of the Examinations, their number would be insignificant to ensure the appropriate representativeness of the findings.

The raw data was processed and generalised under the guidance of the lead international consultant by the domestic consultant in the field of sociology by drawing up the overall set of correlations and relevant illustrative tables/charts representing the results of the Examinations. The collection of the primary data took place in March – May 2019. The basic generalisation and summary of the raw data were completed by the end of May 2019 and used for structured discussions at the International Conference held on 4 June 2019 in Chisinau, five Panel Discussions with groups of legal professionals, academics, and representatives of NGOs, as well as the consultations with authorities and civil society representatives (Panel Discussions).⁴ The results of the deliberations at these events are incorporated and addressed in the analysis and recommendations suggested below.

The Report also deals with the analysis of the statistics generated by domestic stakeholders (Analysis of Statistics).

On that basis, it correlates the findings and results obtained under the Analysis of the Legislative and Internal Institutional Regulatory Framework (Analysis of Legislation) the Comparative Study on Pre-trial Detention: the Practice of Some Member States of the Council of Europe (Comparative Study), as well as the Analysis of the Questionnaires among Judges, Prosecutors, and Lawyers (Survey) prepared by the relevant consultants. Together with this Report they comprise the set of deliverables under the Research and are presented in one package.

Besides the results of Examinations and their analysis, it offers generalised observations and conclusions as to the state of affairs concerning the applicability of pre-trial detention in the Republic of Moldova with relevant considerations specifically addressing the legislative, practice-related, institutional and capacity building issues. The Report includes specific recommendations to the Moldovan authorities aimed at ensuring that domestic policies, legal framework and practice comply with international standards. In combination with the Methodology, Analysis of Legislation, Comparative Study, and the Survey it comprises the Research File.

The key findings and conclusions are underlined. The recommendations are both underlined and highlighted in bold and italics.

4. Held on 2 and 3 July and 6, 26 and 27 September 2019 respectively.

Chapter I

Examination and analysis of the selected individual decisions on the application of pre-trial detention (Examination of Decisions)

1.1. Operational considerations

The Examination of Decisions tackled the relevant files of investigating judges and appeal courts⁵ that related to application of (or the refusal to order) pre-trial arrest initiated by a motion of prosecutors or defence on pre-trial detention. In particular, the Examination of Decisions dealt with those on

- ▶ initial detention, i.e. initial decisions on the pre-trial arrest by both investigating judges and trial judges (including those issued in absentia and those changing from non-custodial measure);
- ▶ review, decisions on the consideration of motion(s) submitted under Articles 190-195 of the CPC (including by trial judges when considering relevant motions);
- ▶ extension, i.e. decisions extending the detention (including by trial judges);
- ▶ relevant appeals, i.e. decisions rendered on appeal against the initial decisions of applying/refusing the initial one or reviewing it.

As envisaged by the Methodology, the Examination of Decisions was made on the basis of the specifically designed Check-list No 1 that forms an integral part of the Methodology.⁶ It was used as a basis for the work of the four local experts, who examined files and gathered the data obtained in electronic format in gadgets which were loaded with the

5. The Moldovan judiciary processes them and maintains in standalone specific preventive measures-related files.

6. See Annex No 2 to the Methodology.

relevant script provided and subsequently processed by the sociology consultant.⁷ The Examination covered 421 decisions. The mapping of the examined decisions is provided in the table below.

Mapping of the Decisions Examined under Check-list No 1

	2013	2014	2015	2016	2017	Total
Appellate Court Chisinau	4	4	3	4	3	18
Appellate Court Balti	1	1	0	1	1	4
Court Chisinau, Botanica headquarters	10	13	6	11	8	48
Court Chisinau, Buiucani headquarters	13	19	0	5	10	47
Court Chisinau, Centru headquarters	12	19	12	16	16	75
Court Chisinau, Ciocana headquarters	0	0	9	1	13	23
Court Chisinau, Riscani headquarters	3	6	4	4	3	20
Court Balti	2	5	3	3	4	17
Court Anenii Noi	0	5	2	1	2	10
Court Cahul	2	2	1	2	3	10
Court Ceadir-Lunga	2	4	3	2	1	12
Court Cimisia	1	5	3	1	1	11
Court Criuleni	1	4	2	1	2	10
Court Donduseni	0	3	1	3	4	11
Court Falesti	2	2	3	2	3	12
Court Hincesti	1	3	1	4	1	10
Court Nisporeni	1	3	1	3	2	10
Court Ocnita	1	6	2	1	1	11
Court Rezina	1	3	2	2	2	10
Court Soroca	1	5	2	1	2	11
Court Soldanesti	1	4	0	2	3	10
Court Taraclia	1	7	0	1	2	11
Court Ungheni	2	2	2	2	2	10

The decisions covered by the Examination were randomly selected within the general parameters defined in accordance with the sociological (representativeness) requirements in line with the distribution delineated on the basis of the statistical data on the relevant judicial decisions rendered during the Research period and suggested in the Methodology.⁸

7. See in the Methodology the section on the research team therein.

8. See Annex No 5 to the Methodology.

The analysis follows the structure of Check-list No 1, which in turn was designed to address the typical violations identified at the preparatory stage of the Research as the key patterns identified by the ECtHR judgments in cases against Moldova. The structure of Check-lists had been confirmed by other elements of the Research. The structure of the Check-list No 1, data collected, analysis and relevant sections of this Chapter concern the reasonable suspicion, reasons for detention, as well as other itemised repetitive violations of the right to liberty and security of the person already found in other jurisdictions and/or anticipated in respect of Moldova.⁹

Besides the overall (total) figures under the items addressed, for the purposes of the evaluation, as a rule, the data collected was disaggregated, processed and analysed with regard to the types of court (investigating judges and appeals), regional (Chisinau and the rest of the country) and chronological aspects (for tracing the tendencies during the period covered). In addition, the analysis of some items is based on further breakdowns in accordance with additional criteria or correlations.

1.2. Reasonable suspicion

The Examination by the part of Check-list No 1 has specifically focused on the requirement of reasonable suspicion and relevant patterns of violations. In particular, it assessed the state of affairs in terms of appropriateness of addressing and substantiating the factual and legal attributes (and subsequent persistence) of reasonable suspicion in the course of the relevant proceedings and the decisions rendered by the judiciary (investigating judges and appeal courts).¹⁰ Accordingly, this part of the Examination of Decisions and Report evaluates the performance of the parties and judiciary with regard to tackling in general and the quality of the reasoning as to the requirement of reasonable suspicion within the meaning of Article 5 § 1 (c).

The assessment criteria of Check-list No 1 were based on the ECtHR case law and its demands that the resulting judicial reasoning must be concrete, clear and based on the analysis of evidence and particular circumstances of the relevant case; avoiding stereotype formulations and general references, including simple quotations of the ECtHR judgments. The fact that domestic legislation clearly defines reasonable suspicion (Article 6 p. 4/3 of the CPC) and the specific duties to state the reasons (Article 308 (8) p. f) of the CPC) was taken into account.¹¹

Moreover, it was highlighted that evidence and arguments relevant for assessing reasonable suspicion may be based on, but not limited to reports of police officers, victims' testimonies and comprise facts or circumstances proving that the accused might have committed a crime.

9. In addition to the relevant elements of the Methodology, please consult the Analysis of Legislation with further references.

10. For a detailed analysis of the ECtHR judgments in cases against Moldova and the state of their execution consult the materials referenced in the preceding footnote.

11. *Ibid.*

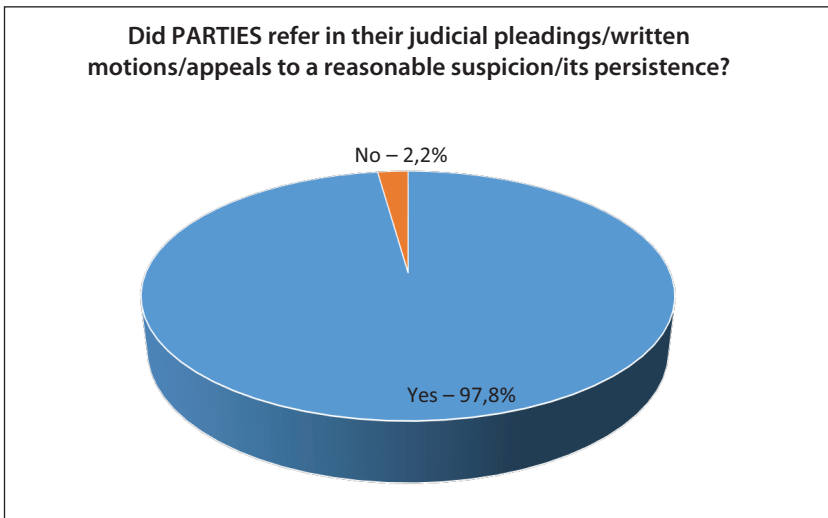
General Considerations

The introductory general question under this part aims to identify **whether in their judicial pleadings, any of the parties referred to written motions, appeals regarding reasonable suspicion and its persistence** (where applicable). The persistence was assessed in the context of continuous detention (its extension).

The data collected under this item has depicted the overall state of affairs that the reasonable suspicion condition became a regular part of the domestic legal framework, which is understood to be a combination of legislation and practice. This was corroborated by the Panel Discussions, as well as the Survey. The latter confirmed that there is an overall understanding of the reasonable suspicion, as either a precondition for the lawful deprivation of liberty and security of the person or as an alleged element with regard to the merits of criminal charges.¹²

Despite the clear, repetitive, and straightforward legislative provisions and corresponding case law of the ECtHR, and considerable domestic practice, there were instances in which this prerequisite was omitted completely.

Chart No 1



12. See the Survey, in particular its parts concerning Questions 10 and 18.

The data disaggregated in accordance with the key parameters suggest the following figures:

Table A

Did PARTIES refer in their judicial pleadings/written motions/appeals to a reasonable suspicion/its persistence?		Yes	No
Total:		97.8%	2.2%
Court type:	Appellate court	100.0%	0.0%
	Court	97.7%	2.3%
Region:	Chisinau	96.5%	3.5%
	Outside	99.4%	0.6%
Year:	2013	98.4%	1.6%
	2014	99.2%	0.8%
	2015	95.2%	4.8%
	2016	98.6%	1.4%
	2017	96.6%	3.4%

The key observations made in this regard relate to the improved performance of appeal courts and investigative judges from the regions that always managed, at least, to refer to the reasonable suspicion.

Prosecution

Check-list No 1 and Examination of Decisions specifically focused on the performance of the parties and judiciary in terms of meeting the standards on addressing the reasonable suspicion requirement. The prosecution-related slot was covered by the primary question (No 11) **whether prosecutors provided evidence, specific argument(s) substantiating reasonable suspicion** and subsequent questions itemising the practice. The Examination of results demonstrate that in a considerable number of instances, prosecutors do not comply with the domestic and ECtHR standards. They failed to do so in 13.6% of the motions and relevant proceedings.

Chart No 2

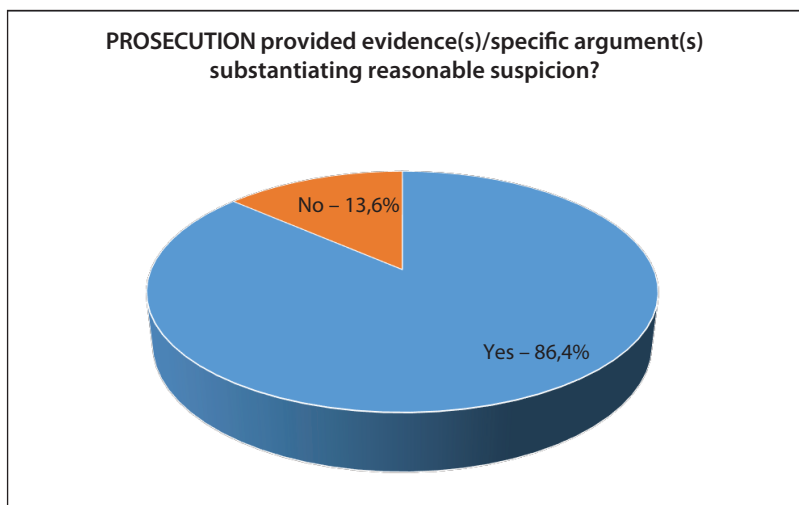


Table B

PROSECUTION provided evidence(s)/specific argument(s) substantiating reasonable suspicion?		Yes	No
Total:		86.4%	13.6%
Court type:	Appellate court	86.4%	13.6%
	Court	86.4%	13.6%
Region:	Chisinau	82.3%	17.7%
	Outside	91.7%	8.3%
Year:	2013	83.9%	16.1%
	2014	90.4%	9.6%
	2015	74,2%	25.8%
	2016	87.7%	12.3%
	2017	89.9%	10.1%

The disaggregated figures suggest that prosecutors from outside Chisinau perform better. There is no difference in this regard between the court instances in which they are involved.

The Examination of Decisions specifically took into account that before June 2016 prosecutors were supposed to substantiate reasonable suspicion under the overall legal framework so as to provide the courts with the necessary reasons and evidence. Since then, Article 308 (6) of the CPC has directly stated that the prosecution must provide them in their motions. The chronological dynamics of the results suggest that there was a certain positive effect of this legislative move. It could be assumed that the further deterioration of the situation with addressing this condition was avoided by the legislative intervention (in addition to other factors and measures possibly taken).

The performance of the prosecution was evaluated in more detail by the subsequent item (Question No 12) specifying **what evidence/circumstances prosecutors invoke to substantiate the suspicion and its persistence**. The data confirmed the following overall trend and some indications of the shortcomings and weaknesses of the practice developed.

Table C

What EVIDENCE/ CIRCUMSTANCE(S) were brought by the PROSECUTION to substantiate the suspicion/its persistence (if any)?		Victim's and/or a witness's testimony	Operative information of the police/ intelligence service and/or police informant	UNDISCLOSED / CLASSIFIED/ SECRET information of the police / intelligence service and/or police informant	Arrest in <i>flagrante delicto</i>	Witness implicating the accused (suspect)	Other
Total:		70.1%	18.0%	0.7%	5.1%	13.6%	66.4%
Court type:	Appellate court	72.7%	22.7%	0.0%	4.5%	0.0%	68.2%
	Court	69.9%	17.7%	0.8%	5.1%	14.4%	66.3%
Region:	Chisinau	61.0%	21.2%	1.3%	6.1%	6.9%	63.6%
	Outside	81.7%	13.9%	0.0%	3.9%	22.2%	70.0%
Year:	2013	66.1%	24.2%	0.0%	3.2%	14.5%	66.1%
	2014	80.8%	14.4%	0.0%	6.4%	12.8%	62.4%
	2015	56.5%	21.0%	0.0%	4.8%	8.1%	74.2%
	2016	67.1%	16.4%	2.7%	4.1%	11.0%	67.1%
	2017	69.7%	18.0%	1.1%	5.6%	20.2%	66.3%

As expected, the absolute majority of motions were corroborated by invoking victims and witness testimonies, including those directly implicating the accused. The proportion of detention in *flagrante delicto* is reasonable and does not suggest that it is unusual, based on the expected frequency of such occasions or relevance of related circumstances and factors.

However, the data confirmed quite a frequent use of operative information of the police/ intelligence services and/or police informants, which is problematic in terms of the sufficiency for justifying reasonable suspicion.¹³ Whilst within the expected margin, the numbers are considerable and suggest ***focussing on the overall issue of the minimum guarantees, including the equality of arms, applicable to the proceedings concerned with the use of operative information and intelligence and related requirements in the future capacity building and methodological interventions.*** On a positive note, prosecutors only exceptionally used undisclosed, classified information of the police,

13. See *Labita v. Italy*, ECtHR [GC] judgment of 06.04.2000, app. N 26772/95, paras. 156 et seq.

intelligence services and/or police informants, a practice almost automatically amounting to a high risk of violating these guarantees.¹⁴

It transpired that apart from the regular witness (victim) statements and other regular points invoked for substantiating reasonable suspicion, prosecutors rely on anticipated apprehension, search, crime scene examination, seizure, identification parade minutes, medical and other expert reports, as well as other evidence. A considerable proportion of the cases, in which the prosecutors limited themselves to regular evidence, could be indicative of a stereotypical approach in this regard.¹⁵

Moreover, the Examination of Decisions revealed instances in which prosecutors merely mentioned the existence of the victim's declaration and the existence of witnesses without providing copies of relevant documents or exact data thereof; motions contained information about sufficient evidence without indicating which exactly; invoked gravity and circumstances of the crime. In combination with the occasional reference to the grounds of arrest this finding suggests that in spite of an overall understanding of the importance of reasonable suspicion, a considerable number of prosecutors (as well as judges and, in particular lawyers) have difficulties in grasping its substance and the practicalities of application.¹⁶

Accordingly, the findings clearly indicate that in spite of the appropriate legislative provisions introduced since 2006 and general awareness,¹⁷ ***prosecutors (as well as other legal professionals) need further and regular capacity building with regard to the substance and specific practicalities of the application of the concept of reasonable suspicion, grounds for detention¹⁸ and relevant legal provisions and nuances of the ECtHR case law. Their trainings should use the itemised results of the Examination and other Research materials.***

Defence

The performance of the defence in terms of handling the reasonable suspicion requirement was specifically tackled by a general and one more specific question. Check list No 1 (Question No 13) inquired **whether the defence addressed evidence/specific argument(s) substantiating reasonable suspicion.** The overall and disaggregated data gathered under this item clearly indicate that there are serious shortcomings as far the level of performance of the defence in operating with the requirement of reasonable suspicion is concerned. It is particularly alarming when assessed in combination with the subsequent question (No 14) that measured to what extent the defence **addressed/rebutted at least key evidence/specific argument(s) put forward by the prosecution and substantiating reasonable suspicion.** The data attests that the defence did not address the specific arguments substantiating reasonable suspicion half the time, as well as failed to confront the prosecution in two thirds of the instances. This proportion is very high. It is a context when the defence is supposed by its very nature to act and contest the motions of the prosecution and focus on the reasonable suspicion, as well as the grounds for detention and other related considerations.

14. See *Ovsjannikov v. Estonia*, ECtHR judgment of 20.02.2014, app. N 1346/12, paras. 64-78.

15. It is hardly realistic that in more than one third of the cases there was no other evidence available for substantiating the suspicion apart from the regular ones.

16. See the Survey, in particular its parts concerning Questions 10 and 18.

17. See the Analysis of Legislation with further references.

18. See the subsequent section of this Report below.

Chart No 3

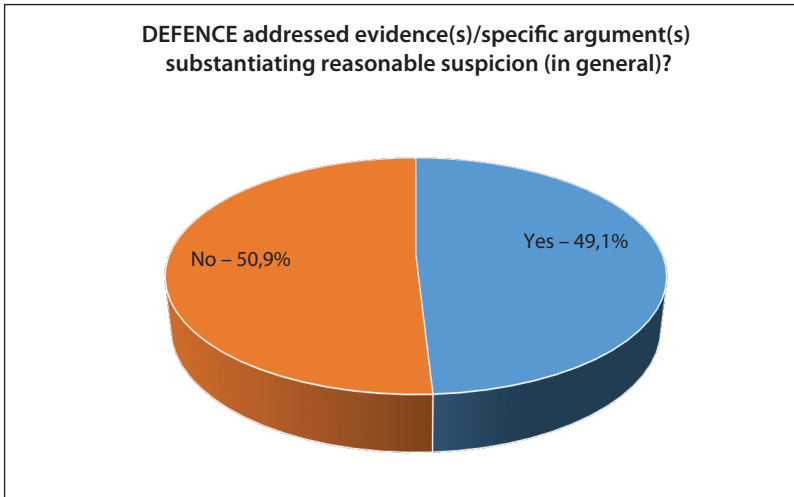
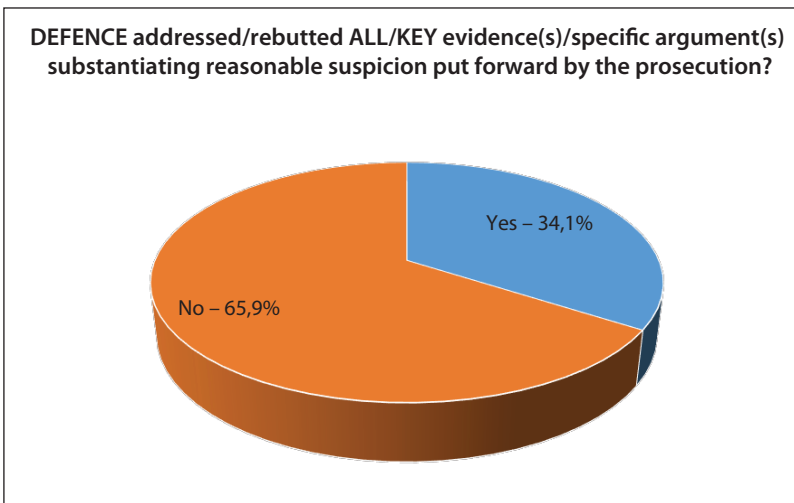


Chart No 4



In 2013 in 45.2% the defence addressed all/key arguments of the prosecution concerning reasonable suspicion, while in 2017 – only in 24.7%. There are some aspects that raise serious concerns when analysing the disaggregated data.

Table D

DEFENCE addressed/rebutted ALL/KEY evidence(s)/ specific argument(s) substantiating reasonable suspicion put forward by the prosecution?		Yes	No
Total:		34.1%	65.9%
Court type:	Appellate court	68.2%	31.8%
	Court	32.1%	67.9%
Region:	Chisinau	41.6%	58.4%
	Outside	24.4%	75.6%
Year:	2013	45.2%	54.8%
	2014	37.6%	62.4%
	2015	30.6%	69.4%
	2016	32.9%	67.1%
	2017	24.7%	75.3%

First of all, there is a considerable difference between Chisinau and the other regions of the country, suggesting that the defence performs worse outside the capital. The same and even more noticeable difference exists in this regard between the proceedings at the first instance (before investigating judges) and on the appeals level. In the latter context, the performance of the defence is almost twice as good. The data corroborates the explanations explicitly suggested by the Panel Discussion with lawyers, as well as partially those offered during the deliberations with other target groups.

In particular, it was stated that the defence is put in a disadvantageous situation by frequent last minute notifications and releases to it of motions of the prosecution and other relevant materials, time constraints and lack of appropriate facilities for meeting the client during police custody and the procedures of the initial application of preventive arrest. Reportedly, this is not always caused by the strict deadlines only. The prosecution (prosecuting officers) often intentionally abuse the lack of regulations as to time that is to be secured for the defence. Reportedly, this is more common for Chisinau where the jurisdiction-related particularities concentrate on the most sensitive cases. Lawyers have more time and prepare better for appeal proceedings. In general, it could be stated that there are indications of persistent practice that undermines the standard of the effective assistance of a lawyer.¹⁹

The participants to the panel discussions suggested possible solutions for remedying the related shortcoming. The proposals included introducing a minimum deadline for notifications to lawyers and submission of motions and related materials, which, however, could lead to an excessive formalisation of the proceedings, in particular those to be completed during the limited time-frame of policy custody (initial ordering of preventive arrest). A flexible criterion similar to the reasonable time requirement would be more

19. See *Lutsenko v. Ukraine*, ECtHR judgment of 03.07.2012, app. N 6492/11, paras. 95 and 96, with further references. As the same time, this does not absolve the lawyers from addressing the elementary points under consideration.

appropriate in this regard. It could be done by ***improving the legal provisions so that they specifically spell out the right of the defence to be provided with meaningful time and facilities for securing its effectiveness in the set of proceedings concerning the application of preventive measures, in particular during the initial period of police custody and relevant hearings, and the resulting obligation to be observed by the prosecution and courts.***²⁰ Although the ECtHR case law is sufficiently clear, a country-specific legislative move of this kind could indeed be required for remedying the reported situation and improving the conditions for a more effective performance by the defence.

Furthermore, the data collected and its consideration at the panel discussions confirmed the rather widespread character of the practice of extending the backup of private lawyers by engaging legal-aid lawyers so that both simultaneously take part in the proceedings in question. This situation is to be distinguished from involving legal aid lawyers as an alternative to the non-appearance or other failures of the accused's chosen lawyers.²¹ As shown in the table below, in addition to the rare clear-cut instances of applying such a practice, there are many occasions in which the status of the lawyers engaged is unclear.²²

Table E

DEFENCE		Legal aid	Chosen lawyer	Both	Not clear
Total:		51.8%	33.1%	0.7%	14.4%
Court type:	Appellate court	18.2%	72.7%	0.0%	9.1%
	Court	53.7%	30.8%	08%	14.7%
Region:	Chisinau	40.7%	42.0%	0.4%	16.9%
	Outside	66.1%	21.7%	1.1%	11.1%
Year:	2013	46.8%	37.1%	1.6%	14.5%
	2014	52.8%	32.8%	0.8%	13.6%
	2015	64.5%	22.6%	0.0%	12.9%
	2016	45.2%	38.4%	1.4%	15.1%
	2017	50.6%	33.7%	0.0%	15.7%

The panel discussions with lawyers and civil society representatives suggested that judges prefer to deal with and would often favour legal aid lawyers instead of the private ones, who are readily invited to represent the detainee and would be given just a couple of minutes to prepare. The parallel engagement of both types of lawyers might not

20. It is to be noted that the principle of adversarial proceedings and equality of arms must equally be respected in the proceedings before the appeal court. See *Çatal v. Turkey*, ECtHR judgment of 17.04.2018, app. N 26808/08, paras. 33-34.

21. See *Karachentsev v. Russia*, ECtHR judgment of 17.04.2018, app. N 23229/11, para. 62. Indeed, since detention proceedings require special expedition, a judge may decide not to wait until a detainee avails himself of legal assistance, and the authorities are not obliged to provide him with free legal aid in the context of detention proceedings.

22. Reportedly the lack of clarity is to be attributed to vague recording of this issue in the minutes and documentation available in the files.

immediately amount to a violation of Article 5. However, this is not envisaged by the regulatory framework on the Bar. Moreover, the data collected and its disaggregation between the types of advocates attests to a poorer performance of legal aid lawyers, whose share of the failure to address the key evidence and arguments of the prosecution reaches 58.7 % of the cases (Question No 14). In case of the chosen lawyers, it is considerably lower (26.95 %).²³ This state of affairs is increasing the risk of violating the right in issue.²⁴

Table F

	RESPONSE	Defence				
		Legal aid	Chosen lawyer	Both	Not clear	Total
DEFENCE addressed/rebutted ALL/KEY evidence(s)/specific argument(s) substantiating reasonable suspicion put forward by the prosecution?	Yes	38.6%	45.0%	2.1%	14.3%	100%
	No	58.7%	26.9%	0.0%	14.4%	100%

The Examination data concerning the inadequacies of the performance of lawyers with regard to the reasonable suspicion requirement are to be considered together with the relevant results of the Survey suggesting that advocates have considerable difficulties in handling the issues related to it.²⁵

It would be necessary **to ensure that:**

- ▶ **further targeted capacity building activities are available for lawyers working under the free legal aid scheme and to the members of the Bar on reasonable suspicion and grounds for detention,²⁶ as well as other specific legal provisions and standards concerned with the application of preventive arrest, house arrest and other preventive measures**
- ▶ **defence lawyers (the authority in charge of the free legal aid) and the judiciary are properly guided so to exclude the debatable practice of simultaneous representation of the accused by both private and free legal aid lawyers.**
- ▶ **the quality control system and tools for assessing the performance of free legal aid are designed so to specifically tackle the reasonable suspicion, as well as the grounds of deprivation of liberty and other parameters concerning the application of pre-trial detention.**

23. See this chapter above.

24. *Karachentsev v. Russia*, supra note 22. Moreover, this practice could be questioned in terms of financial implications and efficiency of spending state budgetary allocations designated for the provision of legal aid.

25. See the Survey, in particular its parts concerning Questions 10 and 18.

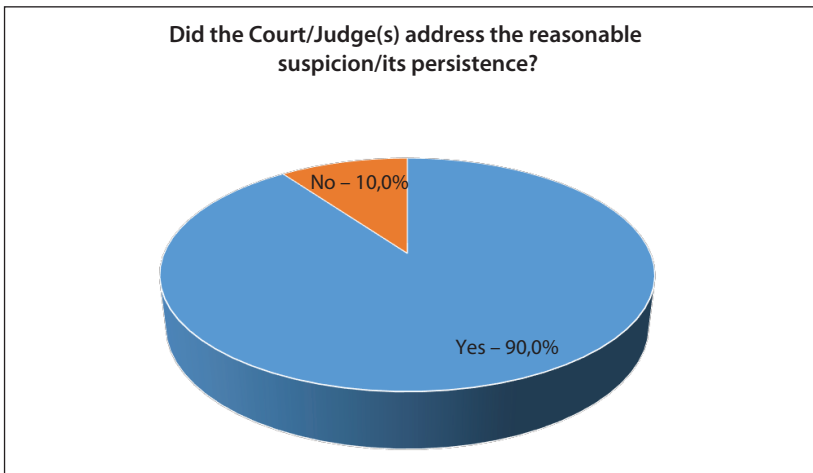
26. See the subsequent section of the Report below.

Judiciary

The Check-list No 1 and Examination of Decisions took full account of the decisive role of the judiciary in securing the resulting compliance with the reasonable suspicion requirements and all other standards under consideration. The set of questions and elements addressed involved a general, specific question and a carefully construed evaluation matrix. The general question: **“Did the Court/Judge(s) address the reasonable suspicion/its persistence?”** was supplemented by indications as to the criteria to be taken into account. In particular, it was stressed that the Examination of Decisions is to identify whether judges separated their assessment of a reasonable suspicion from the grounds for detention. Moreover, in case of continuous detention (its extension), it was required to pay attention to its persistence (reinforcement).

The results demonstrated that judges observe this point better than prosecutors and lawyers. Nevertheless, the level of compliance with the outlined very basic benchmark was still not met in every tenth decision taken.

Chart No 5



The analysis of the data obtained under this item suggested that the omissions concerned are higher in review decisions rendered under Articles 190-195 of the CPC and appeals. The poor performance of the appeal courts in this regard would require particular attention.²⁷

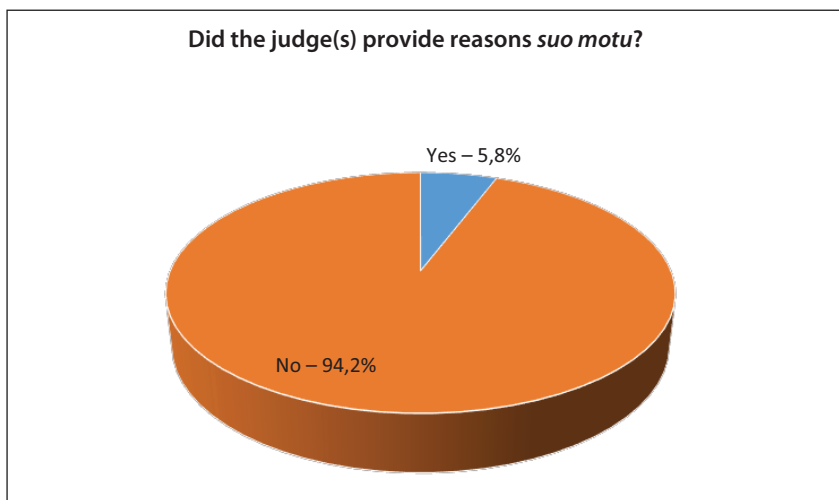
27. See the analysis of the performance of appeal court and relevant recommendations developed below with regard to data suggested in Chart No 7 and Table J respectively.

Table G

		Nature of the COURT RULING (DECISION)?			
		DETENTION (INITIAL)	REVIEW (ARTICLES 190-195) EXTENTION	APPEAL AGAINST (INITIAL) DETENTION / REVIEW / EXTENSION	APPEAL AGAINST REFUSAL
Did the Court/ Judge(s) address the reasonable suspicion/ its persistence?	Yes	91.1%	84.3%	85.7%	100,0%
	No	8.9%	15.7%	14.3%	0.0%

As discussed above, the resulting contribution of all the actors concerned led to the overall level described in Chart No 1 of this Chapter. This result was achieved partially due to the proactive position of judges as measured by the question: **“Did the judge(s) provide reasons *suo motu*?”** It applied to occasions in which the parties did not address the reasonable suspicion at all, but the court, however, addressed the issue. It is to be welcomed that, although not in all the cases, the judiciary has taken the proactive, positive stance and attempted to remedy the omission of the parties.

Chart No 6



It is worth noting the regional difference in Table H and better performance of the judiciary outside Chisinau than in the capital with regard to addressing reasonable suspicion. Furthermore, the appeal courts are more proactive than investigating judges.

Table H

Did the Court/Judge(s) address the reasonable suspicion/its persistence?		Yes	No
Total:		90.0%	10.0%
Court type:	Appellate court	95.5%	4.5%
	Court	89.7%	10.3%
Region:	Chisinau	86.1%	13.9%
	Outside	95.0%	5.0%
Year:	2013	79.0%	21.0%
	2014	94.4%	5.6%
	2015	85.5%	14.5%
	2016	94.5%	5.5%
	2017	91.0%	9.0%

Table I

Did the judge(s) provide reasons <i>suo motu</i> ?		Yes	No
Total:		5.8%	94.2%
Court type:	Appellate court	13.6%	86.4%
	Court	5.4%	94.6%
Region:	Chisinau	6.5%	93.5%
	Outside	5.0%	95.0%
Year:	2013	9.7%	90.3%
	2014	1.6%	98.4%
	2015	6.5%	93.5%
	2016	8.2%	91.8%
	2017	6.7%	93.3%

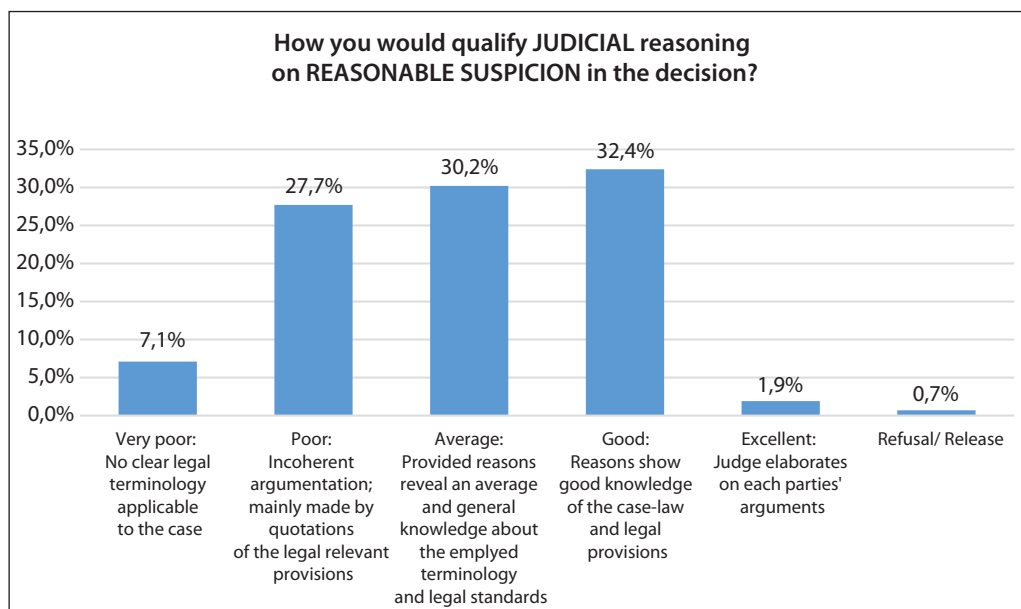
According to the results of the Examination of Suits, the considerable number of breaches that had led to unlawful preventive detention were caused by the reasonable suspicion-related deficiencies.²⁸ In general, it would be advisable ***to suggest that the judiciary increases its proactive role in securing the reasonable suspicion-related requirements and other, including ECtHR case law-based standards applicable to the application of preventive, as well as house arrest, and ensure that they are appropriately addressed by guiding the parties or other acceptable procedural solutions.***

The most significant and detailed evaluation of the compliance of judicial decisions with the reasonable suspicion requirement, in particular, their reasoning, was carried out

²⁸. See the relevant Section of this Report below.

on the basis of a specifically designed matrix. It was incorporated in Check-list No 1 as the question: **“How you would qualify judicial reasoning on reasonable suspicion in the decision?”** together with a five-grade rating scheme comprising the following qualifications: Very poor; Poor; Average; Good; Excellent. Each of the grades was provided with detailed narrative criteria derived from the ECtHR case law and relevant practice²⁹ for guiding the national experts, who examined the decisions and carried out the evaluation. The data obtained suggests the state of affairs that is outlined in the Chart below.

Chart No 7



The rating scheme was designed on the understanding that the excellent and good reasoning would be considered satisfactory, i.e. complying with the ECtHR case law requirements.³⁰ It is particularly alarming that only 34.3 % of (adverse) decisions on the application of the preventive arrest in Moldova offered a satisfactory level of reasoning.

29. See the Check-list No 1 in the Research Methodology for a full description of the indications / criteria introduced with respect to each of the grades.

30. Some of the participants of the panel discussions, in particular lawyers, civil society representatives suggested that only the excellent mark would comply with the ECtHR standard. Nevertheless, it would be too high a benchmark in view of the current case law on this matter, including the judgments against Moldova and their execution. See the Analysis of Legislation and Comparative Study with further references.

Table J

How you would qualify JUDICIAL reasoning on REASONABLE SUSPICION in the decision?		Very poor: No clear legal terminology applicable to the case	Poor: Incoherent argumentation; mainly made by quotations of the relevant legal provisions	Average: Provided reasons reveal an average and general knowledge about the employed terminology and legal standards	Good: Reasons show good knowledge of the case-law and legal provisions	Excellent: Judge elaborates on each parties' arguments	Refusal/ Release
Total:		7.1%	27.7%	30.2%	32.4%	1.9%	0.7%
Court type:	Appellate court	9.1%	45.5%	22.7%	22.7%	0.0%	0.0%
	Court	6.9%	26.7%	30.6%	32.9%	2.1%	0.8%
Region:	Chisinau	8.2%	38.1%	28.1%	24.2%	0.4%	0.9%
	Outside	5.6%	14.4%	32.8%	42.8%	3.9%	0.6%
Year:	2013	11.3%	30.6%	22.6%	33.9%	1.6%	0.0%
	2014	4.0%	28.0%	35.2%	30.4%	0.0%	2.4%
	2015	11.3%	29.0%	32.3%	22.6%	4.8%	0.0%
	2016	8.2%	24.7%	31.5%	32.9%	2.7%	0.0%
	2017	4.5%	27.0%	25.8%	40.4%	2.2%	0.0%

The breakdown of the overall data with regard to the court instances and the regional dimension demonstrates that the quality of reasoning on the suspicion is considerably lower on the appeal level³¹ and in Chisinau. This confirms the overall trend³² and was specifically explained at the Panel Discussions predominantly by the excessive workload.

The representatives of lawyers, academia and some prosecutors indicated that appeal courts, their relevant composition (in particular in Chisinau), consider up to 20 appeals a day with hearings often lasting just 15-20 minutes, the majority of which would concern pre-trial arrests or other preventive measures. In addition, the decisions reportedly are drawn up by court clerks.

The workload is considerable due to the system of challenging the arrest warrant, when the same set of decisions concerning one stage of pre-trial arrest ends up at the appeal level approximately five times (appeal on initial application of arrest, appeal to decisions on consideration of motion(s) submitted under Articles 190-195 of the CPC, appeal on replacing the preventive measure, its extension). A possible solution could include shifting some sets of the review of lawfulness of detention to the jurisdiction of the investigative judges. Indeed Article 5 § 4 does not require the Contracting States to establish a second level of jurisdiction for these purposes and a State which institutes such a system must, in principle, give to the detainees the same guarantees on appeal as at first instance.³³

31. See also data and related comments on Table G above.

32. See disaggregated data under the majority of parameters collected during the Examination and reviewed in this Report.

33. See *Ilmseher v. Germany*, ECtHR [GC] judgment of 04.12.2018, app. NN 10211/12 27505/14, para. 254.

Moreover, there is a practice of restricting review requests by introducing formal timelines for filing them after consideration of the preceding one in other jurisdictions.³⁴

However, taking into account the particularities of the judicial tradition, institutional set-up and other country-specific factors, this solution needs careful consideration, in particular, due to the implied approach of the ECtHR in this regard.³⁵ **The immediate solution for improving the compliance of the judiciary and appeals courts, in particular, with the reasonable suspicion-related requirements and grounds for detention, as well as other, including ECtHR case law-based, standards applicable to ordering preventive as well as house arrest should include targeted and regular capacity building of the relevant members of the judiciary.**³⁶ This solution could be relied on due to the positive trend of improving the quality formed since 2016, with the acceptable level reaching 42.6 %, which could be considered as the cumulative result of some of the preceding legislative and reportedly related capacity building measures.³⁷ This example constitutes clear evidence of the effects of appropriate legislative amendments. In addition, **these measures could be reinforced by relevant organisational, including staffing-related solutions, as well as introducing modern IT including e-case/e-file type solutions.**

The set of judiciary-related items tackled by the Examination of Decisions has comprised an additional question dealing with the specifics of the ECtHR case law treating house arrest as detention within the meaning of Article 5 of the ECHR, as well as the domestic legislation (Article 176 of the CPC) introducing the requirement of reasonable suspicion as a condition for applying any other alternative preventive measure. The data were collected with regard to the item (Question No 17) inquiring whether **the court/judges would apply house arrest or other non-custodial measure when refusing to order or uphold detention on account of the lack of reasonable suspicion.**³⁸

It appeared that the judiciary would still order house arrest in 9.2 % of the cases, when refusing preventive arrest due to the established lack of reasonable suspicion, i.e. in direct violation of the ECtHR case law and its specific judgments against Moldova,³⁹ as well as

34. The amendments to the Estonian Code of Criminal Procedure (which entered into force mainly in 2004 and 2005), according to which a detainee may, within two months, ask the preliminary investigation judge or a court to verify the reasons for the detention. A new request may be submitted two months after the previous one. The preliminary investigating judge must decide on such requests within five days of receipt. See the Comparative Study.

35. See *Khudobin v. Russia*, ECtHR judgment of 24.10.2006, app. N 59696/00, para. 124.

36. This and some other recommendations were construed, where relevant, to avoid their repetition with regard to the grounds of detention and other violations and address them cumulatively.

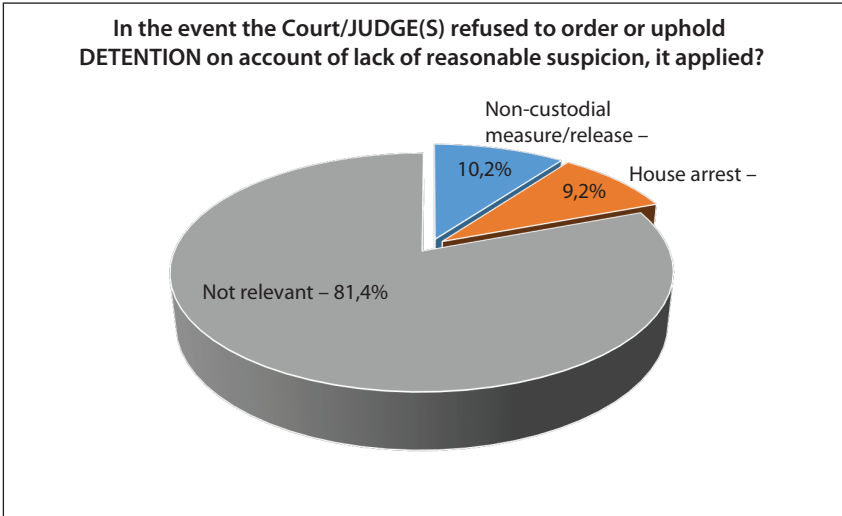
37. Amendments of 2016, by Law no. 100, changed this confusion in the sense that they gave clear definition of a reasonable suspicion in Article 6 lit. 4³) by literally reproducing the ECtHR's test of "objective observer" thus requiring judges while ordering detention to refer to the facts on a case-by-case basis proving or disproving the reasonability of suspicion (Article 176 § (3) p. 1) in the version by Law no. 100/2016). See the Analysis of Legislation with further references.

38. The explanatory guidance to this item suggested in the Check-list No 1 specified that for the purposes of the Research, the decisions of investigation judges and appellate judges will be regarded as equal. Moreover, house arrest is to be conventionally regarded as an alternative measure to the continuous detention, only for the purpose of the Research.

39. *Buzadjii v. the Republic of Moldova*, ECtHR [GC] judgment of 05.07.2016, app. N 23755/07, paras.103-123.

the domestic legislation, when ordering house arrest and the latter, when applying other non-custodial measures in this context. The Survey conducted within the framework of the overall Research also referred to the considerable shortcomings in the proficiency of legal professionals on this and related matters.⁴⁰ While the use of alternatives is a welcome practice, the considerations of lawfulness, require that the ***judiciary is specifically reminded about establishing reasonable suspicion as a requirement for applying house arrest, as well as other preventive measures.***

Chart No 8



As to the distribution of relevant findings, it is worth noting that there are none attributable to the appeal courts and they are more frequent in Chisinau courts. As to the seemingly better performance of the appeal courts in this regard, it is to be highlighted that this state of affairs derives from their adverse stance and high rate of granting motions to apply the preventive detention.⁴¹

40. See the data and comments related to Question and Chart No 14 of the Survey.

41. See the Section on Overall Conclusions below.

Table K

In the event the Court/JUDGE(S) refused to order or uphold DETENTION on account of lack of reasonable suspicion, it applied?		Non-custodial measure/release	House arrest	Not relevant
Total:		10.2%	9.2%	81.4%
Court type:	Appellate court	0.0%	0.0%	100.0%
	Court	10.8%	9.8%	80.4%
Region:	Chisinau	13.0%	12.1%	76.4%
	Outside	6.7%	5.6%	87.8%
Year:	2013	12.9%	12.9%	75.8%
	2014	8.8%	8.0%	83.2%
	2015	9.7%	4.8%	85.5%
	2016	12.3%	6.8%	80.8%
	2017	9.0%	13.5%	80.5%

1.3. Grounds for detention

Similar to the reasonable suspicion requirement, through a special part of Check-list No 1, the Examination of Decisions specifically focused on the requirement of the grounds for detention and the relevant pattern of violations. This part of the Examination of Decisions and Report evaluates the performance of the parties and the judiciary with regard to tackling in general and the quality of reasoning as to the requirement of the grounds of detention within the meaning of Article 5 § 1 (c).

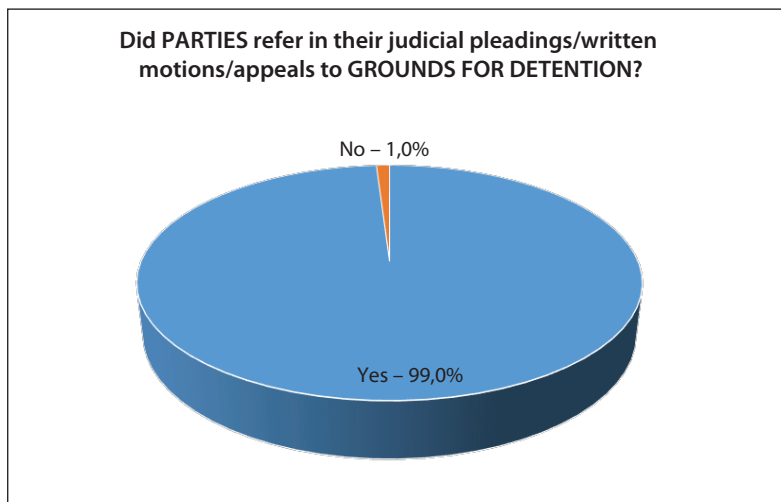
Check-list No 1 was construed and had guided the assessing team so to assert firstly the mere fact of referring to the grounds, meeting the standard, as required by the domestic provisions and the ECtHR case law. It considered that according to Articles 176 and 185 CPC, both the parties and the judges are required to elaborate on and provide sufficient reasoning as to grounds, in accordance with Article 5 § 3 of the ECHR. The assessment criteria were also based on the latter. In particular, it concerned the justification of the existence of any or jointly of the danger of absconding; the risk of illegitimate interference in the administration of justice; the risk of reoffending; the risk of causing public disorder and the need to protect the detainee.⁴²

The introductory general question in this part⁴³ sought to identify **whether in their judicial pleadings, written motions, appeals, the parties referred to the grounds for detention**. The Examination data collected under this item suggested that unlike the reasonable suspicion, the grounds for detention are addressed in the absolute majority of decisions.

42. For a detailed analysis of the ECtHR case law, judgments against Moldova and state of their execution consult the Analysis of Legislation with further references.

43. Question 18 of Check-list No 1. See the Research Methodology attached.

Chart No 9

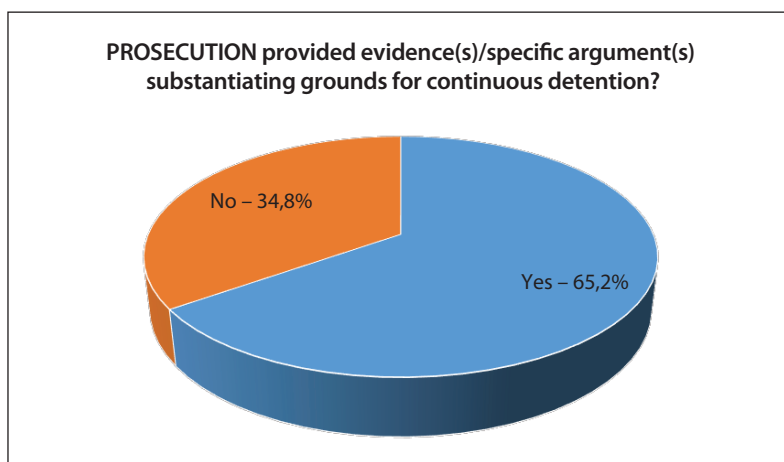


At the same time, the Survey suggested that it still remains difficult for legal professionals to clearly differentiate between substantiating reasonable suspicion and acceptable grounds of detention and process them in practice accordingly.⁴⁴

Prosecution

In particular, question (No 19) **whether the prosecution provided evidence(s)/specific argument(s) substantiating the grounds for continued detention** measured its overall performance in this regard.

Chart No 10



44. See the Survey. In particular its parts concerning Question 15.

The overall performance of the prosecution in this regard appeared to be considerably lower than with respect to reasonable suspicion (13.6 %).⁴⁵ This is particularly worrying due to the negative chronological tendency identified by the disaggregated data since 2014.

Table L

PROSECUTION provided evidence(s)/specific argument(s) substantiating grounds for continuous detention?		Yes	No
Total:		65.2%	34.8%
Court type:	Appellate court	68.2%	31.8%
	Court	65.0%	35.0%
Region:	Chisinau	56.7%	43.3%
	Outside	76.1%	23.9%
Year:	2013	56.5%	43.5%
	2014	72.0%	28.0%
	2015	66.1%	33.9%
	2016	64.4%	35.6%
	2017	61.8%	38.2%

In addition, it has once more confirmed the significantly worse performance of the stakeholders (prosecutors in this case) in Chisinau than in the rest of Moldova.

Mirroring the approach used for the reasonable suspicion requirement, the set of questions related to grounds of detention was continued by question No 20 itemising the grounds invoked. The list of options in terms of the **acceptable grounds the prosecution mostly relied on when making a request to order or extend detention** included the standard ones that are specifically listed in Part 1 Article 176 of the CPC: Risk to flee; Obstruction; Re-offending; Public disorder; and Protection of the detainee. For the purpose of the Research, the list was extended with an open item for identifying deviations from the exhaustive approach of the ECtHR with regard to the relevant grounds.

The results in terms of frequency of the acceptable grounds invoked by the prosecution were expected. They, as well as the disaggregated data do not raise any concerns due to matching the typical rate of their occurrence, apart from the significant increase of the public disorder and protection of the detainee that tripled in comparison to the previous years and was invoked in 13.5% of decisions from 2017. This would merit special attention and **review of the practice in terms of the normally exceptional grounds of causing public disorder and the protection of the detainee for applying preventive detention.**⁴⁶

45. See Chart No 2 above.

46. See *I.A. v. France*, ECtHR judgment of 23.09.1998. app. N 28213/95, para. 104. See also the data on the similar items under the questions tackling performance of lawyers and judiciary.

Chart No 11

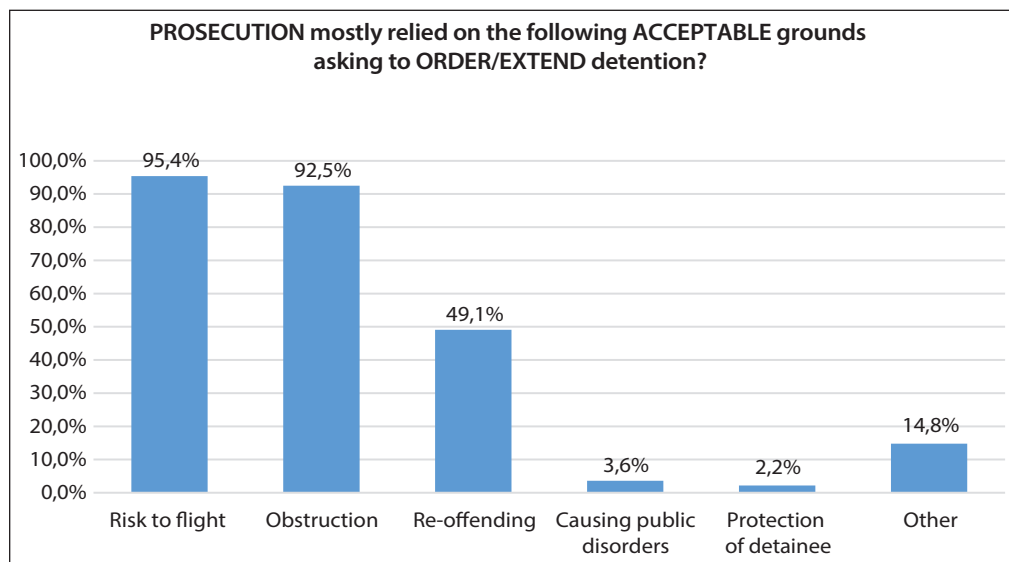


Table M

PROSECUTION mostly relied on the following ACCEPTABLE grounds asking to ORDER/EXTEND detention?		Risk to flight	Obstruction	Re-offending	Causing public disorders	Protection of detainee	Other
Total:		95,4%	92,5%	49,1%	3,6%	2,2%	14,8%
Court type:	Appellate court	100,0%	95,5%	59,1%	0,0%	0,0%	9,1%
	Court	95,1%	92,3%	48,6%	3,9%	2,3%	15,2%
Region:	Chisinau	94,8%	93,9%	48,5%	4,3%	1,3%	17,3%
	Outside	96,1%	90,6%	50,0%	2,8%	3,3%	11,7%
Year:	2013	95,2%	88,7%	40,3%	3,2%	4,8%	16,1%
	2014	93,6%	93,6%	52,8%	1,6%	0,0%	8,0%
	2015	98,4%	82,3%	56,5%	1,6%	1,6%	19,4%
	2016	93,2%	97,3%	42,5%	2,7%	1,4%	12,3%
	2017	97,8%	96,6%	50,6%	9,0%	4,5%	22,5%

The analysis of the other grounds invoked by the prosecutors specified in the open-ended question, i.e. those different from the four acceptable, ECtHR case-law compatible grounds, which peaked in 2017, when they were put forward in almost every fourth decision, shows that the prosecutors indeed have difficulties in understanding the standards and legal provisions in force or they intentionally disregard them.

They included the gravity of the crime, not admitting it, the accused being socially dangerous, need to identify accomplices and other reasons that do not constitute or

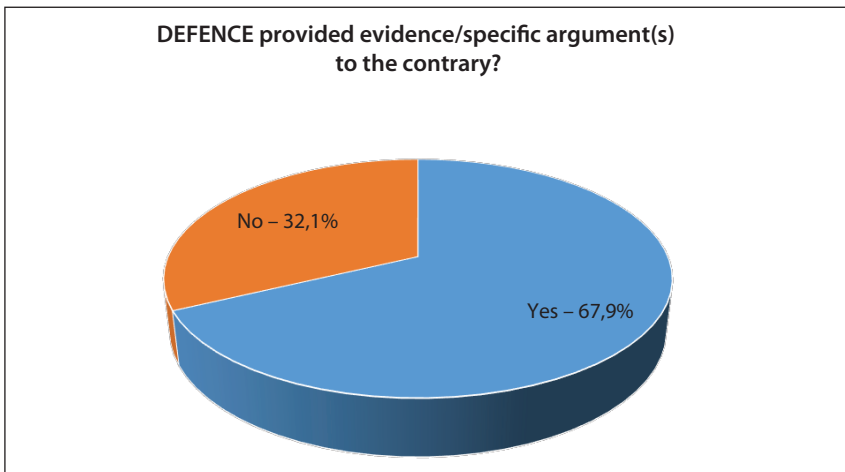
immediately suggest the presence of the acceptable grounds, as well as their simply mentioning, using stereotype wording without any evidence or arguments adduced. This was confirmed by the Survey results.⁴⁷ As in cases of the reasonable suspicion requirement, the **prosecutors (as well as other legal professionals) need further and repeated capacity building with regard to the substance and specific practicalities of the application of the grounds for detention and relevant legal provisions and nuances of the ECtHR case law.**

In addition to **paying appropriate attention to the explaining of the legislative provisions and relevant ECtHR case law, as well as the practicalities of providing relevant evidence and arguments, it is advisable to amend Part 3 of Article 176 of the CPC so that it more specifically emphasises that the circumstances set out in or invoked under it do not absolve from the obligation to substantiate the grounds provided in Part 1 of the same Article.**

Defence

The details of the performance of the parties in terms of addressing the grounds for detention were further evaluated by the three items designed for assessing that of the lawyers. The first of them (Question No 21) was of a general nature and inquired **whether the defence provided evidence/specific argument(s) to the contrary**, i.e. rebutted those invoked by the prosecution concerning the grounds for detention. Although the results are better than under the similar item concerning the reasonable suspicion requirement,⁴⁸ they deteriorate under question (No 23) **whether the defence addressed/rebutted all/ key evidence/specific argument(s) substantiating the grounds for detention put forward by the prosecution**. The latter is more specific and concerns the quality of reaction of the defence to the points put forward by the prosecution. In any case, the identified performance of lawyers also raises serious concerns with regard to this element.

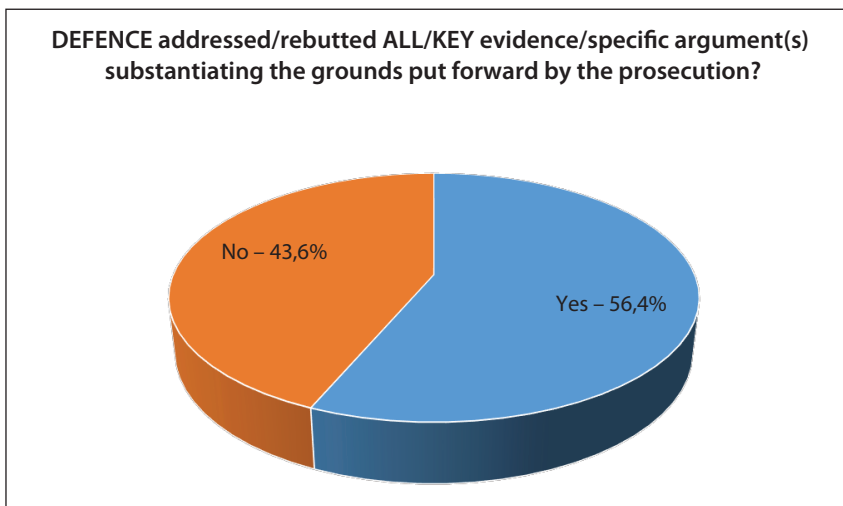
Chart No 12



47. See the Survey.

48. See Chart No 3 and related comments above.

Chart No 13



The itemised data under both questions suggests somewhat different indications in terms of the territorial dimension, whilst other parameters are mostly similar to the corresponding ones identified with regard to the reasonable suspicion and do not require additional consideration and recommendations.⁴⁹

Table N

DEFENCE provided evidence(s)/specific argument(s) to the contrary?		Yes	No
Total:		67.9%	32.1%
Court type:	Appellate court	86.4%	13.6%
	Court	66.8%	33.2%
Region:	Chisinau	73.6%	26.4%
	Outside	60.6%	39.4%
Year:	2013	72.6%	27.4%
	2014	69.6%	30.4%
	2015	59.7%	40.3%
	2016	76.7%	23.3%
	2017	60.7%	39.3%

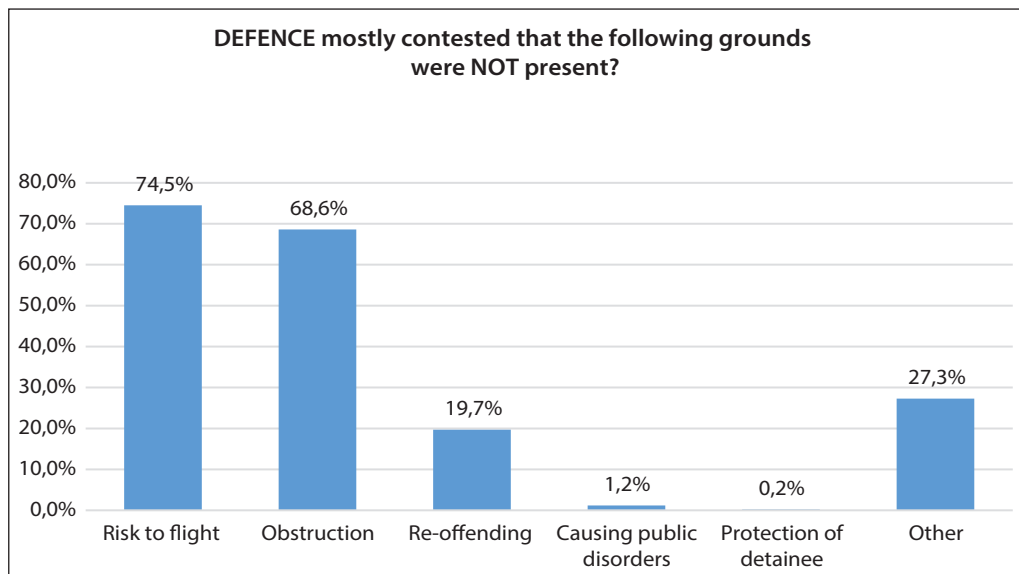
49. See the recommendations suggested regarding the reasonable suspicion requirement.

Table O

DEFENCE addressed/rebutted ALL/KEY evidence/specific argument(s) substantiating the grounds put forward by the prosecution?		Yes	No
Total:		56.4%	43.6%
Court type:	Appellate court	86.4%	13.6%
	Court	54.8%	45.2%
Region:	Chisinau	64.1%	35.9%
	Outside	46.7%	53.3%
Year:	2013	61.3%	38.7%
	2014	58.4%	41.6%
	2015	48.4%	51.6%
	2016	64.4%	35.6%
	2017	49.4%	50.6%

As to the item (Question No 22) on the **grounds the defence mostly rebutted**, the results mirrors the prosecution-related data on the same parameters (as adjusted by the quality of their performance). The same applies to the itemised data under this question, apart from the failure to rebut the public disorder and protection grounds increasingly invoked by prosecutors in 2017.⁵⁰

Chart No 14



50. See Table M above and related comments and recommendation.

Table P

DEFENCE mostly contested that the following grounds were NOT present?		Risk to flight	Obstruction	Re-offending	Causing public disorders	Protection of detainee	Other
Total:		74.5%	68.6%	19.7%	1.2%	0.2%	27.3%
Court type:	Appellate court	100.0%	100.0%	40.9%	0.0%	0.0%	4.5%
	Court	73.0%	66.8%	18.5%	1.3%	0.3%	28.5%
Region:	Chisinau	85.3%	78.8%	22.1%	2.2%	0.4%	19.9%
	Outside	60.6%	55.6%	16.7%	0.0%	0.0%	36.7%
Year:	2013	71.0%	67.7%	19.4%	1.6%	0.0%	25.8%
	2014	73.6%	71.2%	16.8%	0.0%	0.0%	20.0%
	2015	69.4%	59.7%	21.0%	0.0%	0.0%	40.3%
	2016	80.8%	75.3%	23.3%	1.4%	1.4%	17.8%
	2017	76.4%	66.3%	20.2%	3.4%	0.0%	37.1%

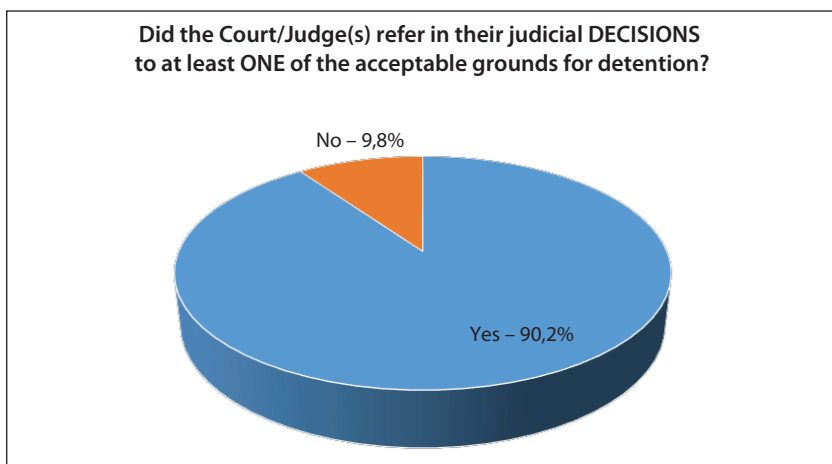
The defence is not supposed to restrict itself to arguments invoked by the prosecutors. It is free to refer to additional reasons against the use of the preventive measure. The open item confirms that lawyers do follow this approach, but their performance should be improved in this regard. In particular, lawyers often merely state that they leave it to the court to decide; assert (in the absence of the accused) that the requested measure should not be ordered since the reason for the absence of the suspect before the court is unknown. Overall, the key deficiency of the defence is the failure to adduce specific arguments or evidence to substantiate its position.

Judiciary

The Examination of Decisions and performance of the judiciary in addressing the grounds of detention were construed along the same lines as the part for reasonable suspicion and the preceding slots on handling the grounds by prosecutors and lawyers, but included an additional question for obtaining more itemised data. The general entry (Question No 24) was similar and inquired: “**Did the Court/Judge(s) refer in their judicial decisions to at least one of the acceptable grounds for detention?**”. Normally the data should give a 100% positive answer due to the mandatory domestic and international law requirements, but the situation is similar to that in the domain of reasonable suspicion.⁵¹ All the related comments and considerations are equally relevant.

51. See Chart No 5 and the related comments above.

Chart No 15



The data disaggregated along the key dimensions used for the purposes of the Research once more proved the general pattern of better performance of judges outside Chisinau and the negative chronological trend. The performance of the appeal courts was better in this respect than that of the investigating judges.

Table Q

Did the Court/Judge(s) refer in their judicial DECISIONS to at least ONE of the acceptable grounds for detention?		Yes	No
Total:		90.2%	9.8%
Court type:	Appellate court	95.5%	4.5%
	Court	89.9%	10.1%
Region:	Chisinau	85.3%	14.7%
	Outside	96.5%	3.5%
Year:	2013	84.7%	15.3%
	2014	95.8%	4.2%
	2015	90.3%	9.7%
	2016	90.0%	10.0%
	2017	86.2%	13.8%

When it comes to the item (questions Nos 24a-f) **on the specific acceptable grounds courts/judge(s) mostly referred to while ordering/extending detention**, the data obtained equally mirrored the prosecution and lawyers-related data on the same parameters. The same applies to the itemised data collected under this question, including the increase in public disorder and protection grounds being used in 2017.⁵²

52. See Charts Nos 11 and 14 and Tables M and P above and related comments and recommendation.

Chart No 16

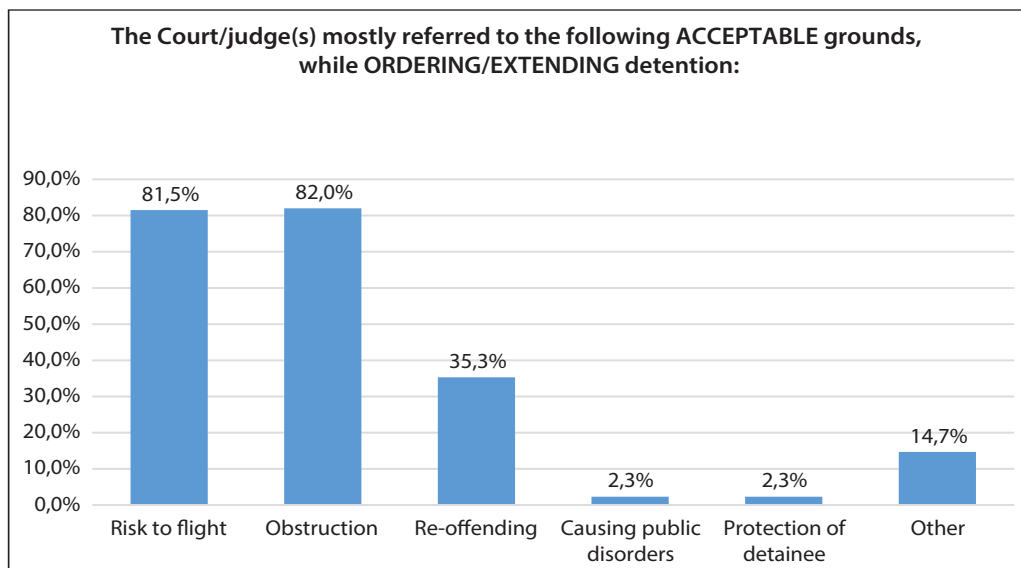


Table R

The Court/judge(s) mostly referred to the following ACCEPTABLE grounds, while ORDERING/EXTENDING detention:		Risk to flight	Obstruction	Re-offending	Causing public disorders	Protection of detainee	Other
Total:		81.5%	82.0%	35.3%	2.3%	2.3%	14.7%
Court type:	Appellate court	95.2%	95.2%	42.9%	0.0%	0.0%	4.8%
	Court	80.7%	81.2%	34.9%	2.4%	2.4%	15.3%
Region:	Chisinau	78.8%	82.0%	35.1%	2.7%	0.9%	19.4%
	Outside	84.9%	82.0%	35.5%	1.7%	4.1%	8.7%
Year:	2013	79.3%	79.3%	32.8%	1.7%	5.2%	19.0%
	2014	75.2%	82.9%	28.2%	0.9%	0.9%	7.7%
	2015	82.3%	71.0%	40.3%	1.6%	1.6%	19.4%
	2016	82.9%	85.7%	34.3%	2.9%	1.4%	18.6%
	2017	89,7%	87.4%	43.7%	4.6%	3.4%	14.9%

In terms of the other grounds invoked by judges in the decisions, their scope was similar to those put forward by prosecutors. The examples include:

- ▶ severity of the crime;
- ▶ referring theoretically to some evidence that had not been provided by the prosecution;
- ▶ declarative and formally mentioning detention in general and pointing out that the detention is provided for in the law - so it is legal to arrest the suspect;

- ▶ quoting legal texts and making conclusions for a concrete case from general legal texts “the crime is severe, as described by the law, so the risk of absconding is present’ detention is necessary in a democratic society”.

These findings were furthered and confirmed by the specific itemised questions (Nos 25 and 26) concerning **unacceptable grounds/reasoning** and **other practices relating to the failure to provide sufficient reasons for detention**. The list included some common and country-specific points. In particular, the former comprised:

- ▶ mere gravity of the crime;
- ▶ special status of the accused;
- ▶ criminal record;
- ▶ Transnistrian region;
- ▶ visa-free regime;
- ▶ stereotypical expressions;
- ▶ prevailing quotations from the Law;
- ▶ reliance on prosecution;
- ▶ silence regarding the parties’ arguments;
- ▶ deterrent effects of detention.

The latter comprised:

- ▶ “Copy-paste”;
- ▶ travel documents as a guarantee;
- ▶ formal review (*habeas corpus*);
- ▶ house arrest treated as an alternative measure.

All of them were supported by further explanations and criteria that guided the local consultants.⁵³ Both lists were followed by open-ended questions as to other grounds and practices respectively.

The data obtained under both questions substantially confirmed that there are considerable deficiencies in understanding or a direct disregard of the relevant standards and legal requirements. In particular, this applies to the four most frequent points under the former question: gravity of the crime; stereotypical expressions; prevailing quotes from the law; reliance on the prosecution. According to the disaggregated data they appear much more frequently in decisions rendered by the appeal courts. In terms of the territorial distribution, the Chisinau courts are twice as much affected by the overreliance on the prosecution than the courts elsewhere in Moldova. The findings suggested by its open-ended question identified that the lack of place of permanent residence was repeatedly referred to.

It would be necessary **to review the straightforward reference to the lack of a place of residence in Moldova, and two other additional grounds for ordering pre-trial detention (a breach of the preceding preventive measures and imminent danger to public order) referred to in Part 2 of Article 185 of the CPC so as to emphasise that they are to be treated as mere indications of the exhaustive list of grounds specified in part.1 of Article 176 of the CPC and relevant ECtHR case law.**

53. See the Methodology, Check-list No 1.

In terms of practices, these are:

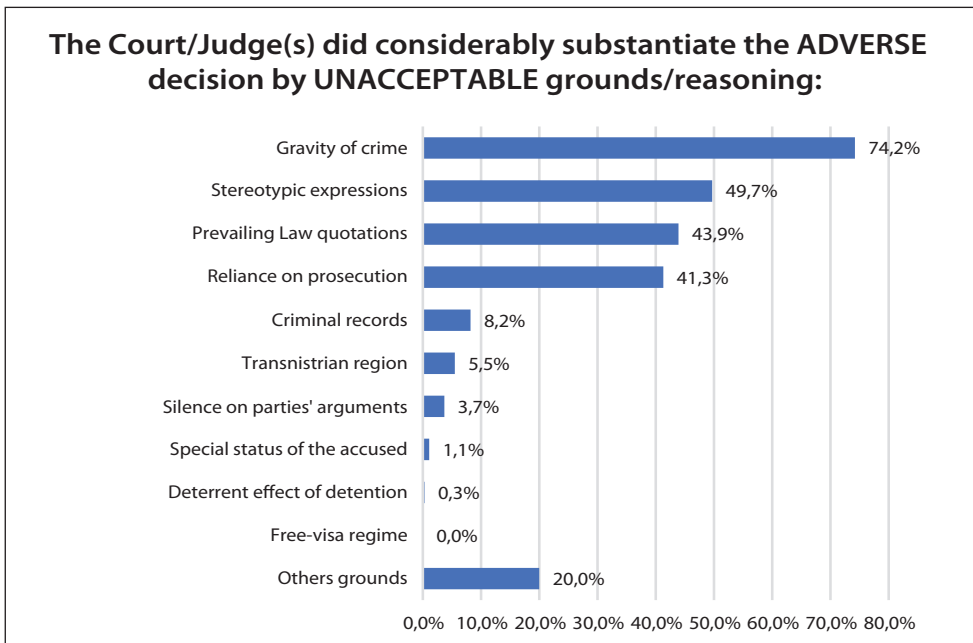
- ▶ copy-pasting, in particular when extending detention. Judges relied mostly on the same grounds repeating them without reviewing them in substance and subsequent decisions were copies or mostly similar to the first and/or previous ones;
- ▶ formal repeating previous decisions and refusing to review the new circumstances indicated in the motions to review them.

The disaggregated data suggest that these practices are considerably more frequent in the Chisinau courts. In general, this corroborates the recommendations made with regard to the corresponding findings related to the performance of the prosecution.⁵⁴

As to the **application of house arrest, when it is acknowledged that there are no or insufficient grounds to keep the accused in detention**, the findings under this item once more confirm the violations of the standards and domestic legislation identified under the similar situation with the reasonable suspicion requirement. Their frequency is of a comparable level (9.2 and 7.9% respectively).⁵⁵ The disaggregated data is also similar and there are no such occasions in the decisions rendered by appeal courts and their number in the Chisinau courts is higher.⁵⁶

Accordingly, ***the judiciary is to be specifically reminded about the need to establish at least one of the grounds for justifying detention required by the ECtHR and domestic legislation, for ordering house arrest, as well as other preventive measures.***

Chart No 17



54. See comments made to Table M above.

55. See Chart No 8 and related comments.

56. See Table K and related comments.

Chart No 18

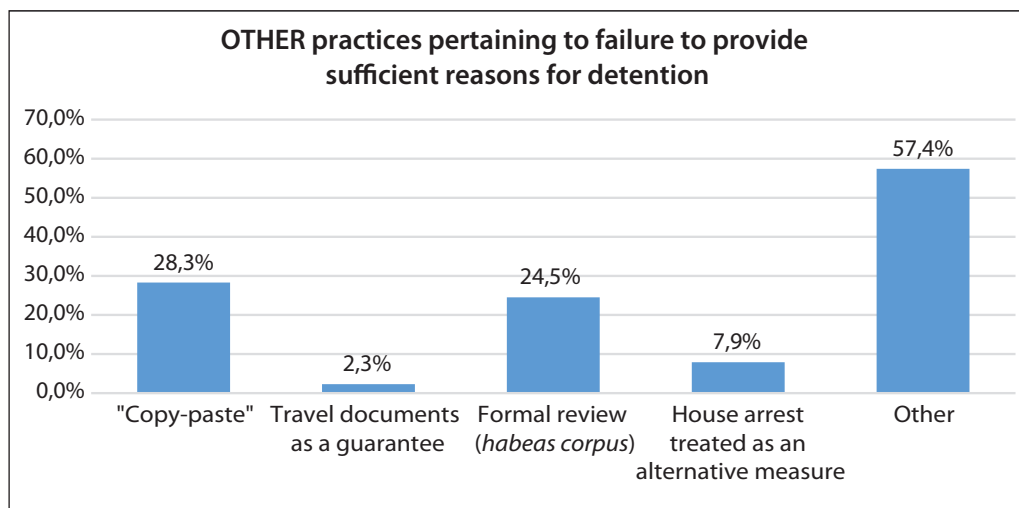


Table S

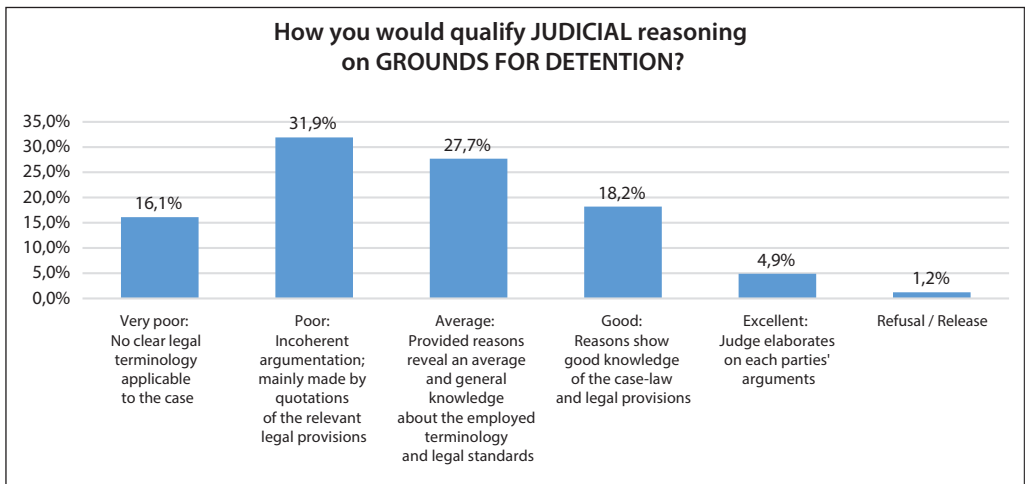
The Court/Judge(s) did considerably substantiate the ADVERSE decision by UNACCEPTABLE grounds/reasoning:		Gravity of crime	Special status of the accused	Criminal records	Transnistrian region	Free-visa regime	Stereotypic expressions	Prevailing Law quotations	Reliance on prosecution	Silence on parties' arguments	Deterrent effect of detention	Others grounds
Total:		74.2%	1.1%	8.2%	5.5%	0.0%	49.7%	43.9%	41.3%	3.7%	0.3%	20.0%
Court type:	Appellate court	100.0%	0.0%	4.8%	0.0%	0.0%	52.4%	71.4%	81.0%	0.0%	0.0%	14.3%
	Court	72.7%	1.1%	8.4%	5.8%	0.0%	49.6%	42.3%	39.0%	3.9%	0.3%	20.3%
Region:	Chisinau	73.6%	1.4%	3.6%	2.7%	0.0%	55.9%	55.9%	53.6%	4.1%	0.0%	24.1%
	Outside	75.0%	0.6%	14.4%	9.4%	0,0%	41.2%	27.5%	24.4%	3.1%	0.6%	14.4%
Year:	2013	66.1%	1.7%	6.8%	10.2%	0,0%	47.5%	44.1%	42.4%	3.4%	0.0%	23.7%
	2014	73.6%	0.9%	8.2%	2.7%	0.0%	49.1%	43.6%	40.0%	3.6%	0.0%	16.4%
	2015	83.1%	0.0%	13.6%	6.8%	0.0%	49.2%	35.6%	40.7%	1.7%	0.0%	20.3%
	2016	77.9%	1.5%	7.4%	5.9%	0.0%	57.4%	45.6%	38.2%	5.9%	1.5%	22.1%
	2017	71.4%	1.2%	6.0%	4.8%	0.0%	46.4%	48.8%	45.2%	3.6%	0.0%	20.2%

Table T

OTHER practices pertaining to failure to provide sufficient reasons for detention:		“Copy-paste”	Travel documents as a guarantee	Formal review (<i>habeas corpus</i>)	House arrest treated as an alternative measure	Other
Total:		28.3%	2.3%	24.5%	7.9%	57.4%
Court type:	Appellate court	18.2%	9.1%	36.4%	0.0%	54.5%
	Court	28.7%	2.0%	24.0%	8.3%	57.5%
Region:	Chisinau	29.0%	2.4%	31.4%	10.1%	53.3%
	Outside	27.1%	2.1%	12.5%	4.2%	64.6%
Year:	2013	23.8%	7.1%	21.4%	19.0%	47.6%
	2014	24.7%	0.0%	24.7%	8.6%	63.0%
	2015	38.9%	2.8%	16.7%	.0%	66.7%
	2016	22.7%	2.3%	25.0%	6.8%	59.1%
	2017	33.9%	1.6%	30,6%	4.8%	50.0%

As it was done with regard to the reasonable suspicion requirement, the most significant and elaborated evaluation of compliance of judicial decisions with the standards on the grounds of detention, in particular their reasoning, was carried out on the basis of the specifically designed matrix. It was incorporated into Check-list No 1 as question No 33: **“How you would qualify judicial reasoning on the grounds for detention in the decision?”** also supported with a five-grade rating scheme comprising the following qualifications: Very poor; Poor; Average; Good; Excellent.⁵⁷ The data obtained has suggested the state of affairs that is outlined in the Chart below.

Chart No 19



57. For further description of the methodology applied see the preceding section of this report, Chart No 7 and corresponding table with disaggregated data.

The rating scheme was construed according to the understanding that excellent and good reasoning would be considered as satisfactory, i.e. complying with the ECtHR case law requirements. Only 23.1 % (which is much worse than 34.3 % identified for the reasonable suspicion) of adverse decisions on orders of preventive arrest in Moldova had a satisfactory level of reasoning as far as the grounds for detention are concerned.

Table U

How you would qualify JUDICIAL reasoning on GROUNDS FOR DETENTION?		Very poor: No clear legal terminology applicable to the case	Poor: Incoherent argumentation; mainly made by quotation of the relevant legal provisions	Average: Provided reasons reveal an average and general knowledge about the employed terminology and legal standards	Good: Reasons show good knowledge of the case-law and legal provisions	Excellent: Judge elaborates on each parties' arguments	Refusal / Release
Total:		16.1%	31.9%	27.7%	18.2%	4.9%	1.2%
Court type:	Appellate court	31.8%	31.8%	27.3%	9.1%	0.0%	0.0%
	Court	15.2%	31.9%	27.8%	18.8%	5.1%	1.3%
Region:	Chisinau	21.2%	35.1%	23.4%	15.2%	3.5%	1.7%
	Outside	9.4%	27.8%	33.3%	22.2%	6.7%	0.6%
Year:	2013	17.7%	40.3%	17.7%	17.7%	1.6%	4.8%
	2014	16.8%	34.4%	26.4%	16.0%	4.8%	1.6%
	2015	19.4%	32.3%	25.8%	16.1%	6.5%	0.0%
	2016	9.6%	35.6%	34.2%	15.1%	5.5%	0.0%
	2017	16.9%	19.1%	32.6%	25.8%	5.6%	0.0%

The breakdown of the overall data with regard to the court instances and regional dimension again confirms the overall trend and demonstrates that the quality of reasoning on the grounds of detention is considerably lower respectively on the appeal level and in Chisinau.⁵⁸ All the comments and recommendations made in this respect under the reasonable suspicion requirement are relevant.⁵⁹

1.4. Proportionality in terms of insufficiency of alternatives

The clear domestic provisions (Articles 185 and 308 (8) of the CPC), in particular after the amendments introduced in 2016 that more accurately addressed the ECtHR case law,⁶⁰ prompted a specific examination of the performance of the parties and judiciary (in terms of handling it in the decisions) as to the substantiation of insufficiency of alternative and non-custodial measures.

58. See also data and related comments on Table G above.

59. See the preceding section of this Report above.

60. See the Analysis of Legislation.

Prosecution

Data under question (No 30) **whether the prosecution provided evidence/specific argument(s) substantiating the insufficiency of alternatives**, and their disaggregation suggested that the performance of the prosecution is very poor, it tackles this barely in half of the proceedings examined.

Chart No 20

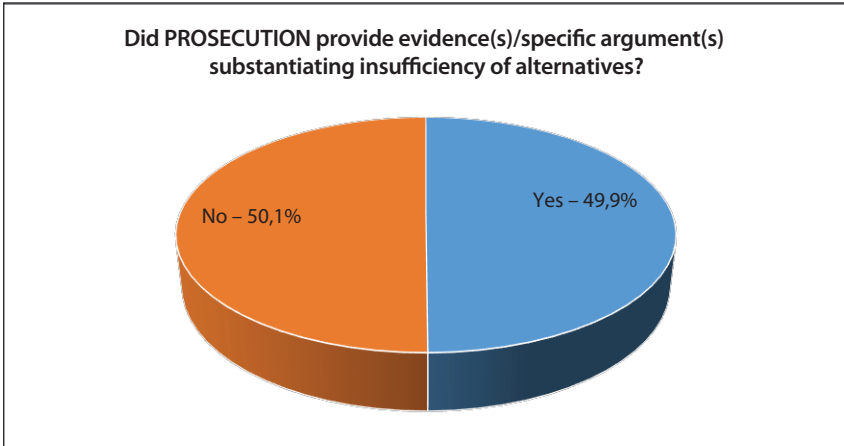


Table W

Did PROSECUTION provide evidence(s)/specific argument(s) substantiating insufficiency of alternatives?		Yes	No
Total:		49.9%	50.1%
Court type:	Appellate court	68.2%	31.8%
	Court	48.8%	51.2%
Region:	Chisinau	44.2%	55.8%
	Outside	57.2%	42.8%
Year:	2013	50.0%	50.0%
	2014	53.6%	46.4%
	2015	41.9%	58.1%
	2016	50.7%	49.3%
	2017	49.4%	50.6%

While the prosecutors outside Chisinau again perform better in this regard, as well as on the appeals level, the above legislative amendments introduced in 2016 did not have a positive effect on the performance of the prosecutors.

Defence

The data under the corresponding question (No 31) **whether the defence provided evidence/specific argument(s) substantiating the insufficiency of alternatives**, and their disaggregation has suggested that the performance of the defence is slightly better in comparison to the prosecution.

Chart No 21

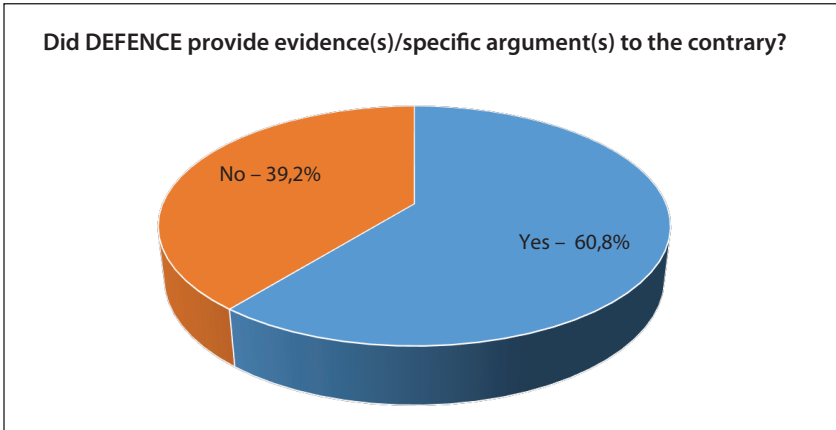


Table X

Did DEFENCE provide evidence(s)/specific argument(s) to the contrary?		Yes	No
Total:		60.8%	39.2%
Court type:	Appellate court	81.8%	18.2%
	Court	59.6%	40.4%
Region:	Chisinau	65.4%	34.6%
	Outside	55.0%	45.0%
Year:	2013	64.5%	35.5%
	2014	64.8%	35.2%
	2015	53.2%	46.8%
	2016	64.4%	35.6%
	2017	55.1%	44.9%

Besides the poorer performance of lawyers outside Chisinau, the most noticeable thing would be the specific data suggesting that the above legislative amendments introduced in 2016 did not have a positive effect on the performance of the lawyers.

Judiciary

The item (Question No 32) which inquired **whether in their decisions judges referred to the insufficiency of alternatives** suggests their poor performance in terms of the compliance of the judiciary with the strengthened provisions as to the exceptional character of preventive detention.

Chart No 22

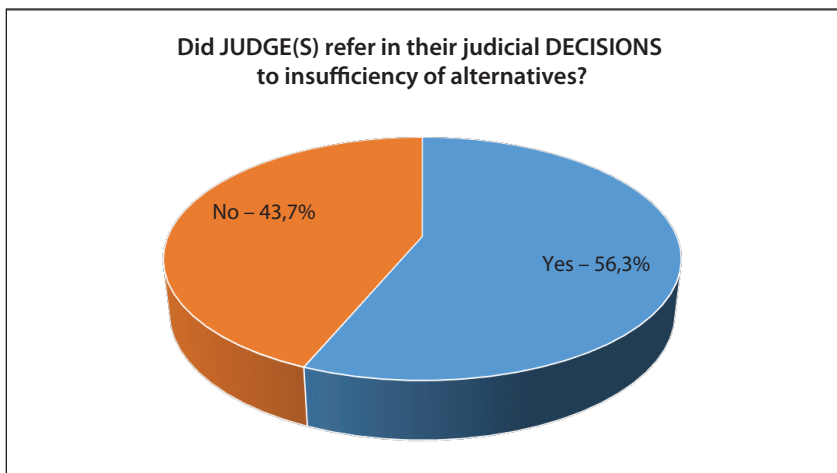


Table Y

Did JUDGE(S) refer in their judicial DECISIONS to insufficiency of alternatives?		Yes	No
Total:		56.3%	43.7%
Court type:	Appellate court	57.1%	42.9%
	Court	56.2%	43.8%
Region:	Chisinau	48.2%	51.8%
	Outside	66.5%	33.5%
Year:	2013	33.9%	66.1%
	2014	51.3%	48.7%
	2015	54.4%	45.6%
	2016	68.6%	31.4%
	2017	69.8%	30.2%

Besides the typical territorial differences (Chisinau courts being worse), the positive chronological trend emerges from the breakdown of the findings. Unlike for prosecutors and lawyers, the legislative amendments from 2016 had a positive impact on addressing the proportionality requirement.

In general, the Examination of Decisions' results confirm that the relevant **legal professionals (lawyers, prosecutors, judges) need focused capacity building with regard to the substance and specific practicalities of the proportionality principle in the application of preventive detention, the relevant legal provisions and nuances of the ECtHR case law.**

Moreover, this is to be coupled with further legislative amendments that would improve the preventive measures framework, its adequacy and scope in terms of the availability of alternative and non-custodial measures. The shortcomings and relevant recommendations were corroborated by the thematic contributions under this research.⁶¹

There was an amendment to the statutory limitation of ordering preventive arrest in August 2018, which partially addressed the recommendation to increase the threshold for using pre-trial detention and house arrest. They are now applicable only if an accused is charged with a crime punishable by more than three years' imprisonment. This development is to be welcomed and could be advanced further.

In the CPC the preventive arrest is implicitly prioritised in comparison to house arrest when it comes to the sequence of relevant CPC Articles. In this regard it would be advisable **to review the CPC, the legislative techniques and rationale, and reinforce the priority of non-custodial preventive measures by establishing a clear hierarchy between them, including by adjusting the sequence of relevant Articles in the CPC.**

The limited range of non-custodial preventive measures, and deficiencies in terms of their use were confirmed by the participants to the panel discussions held within the Research. The range remains insufficient due to the conceptually limited applicability of bail and judicial control measures, which can be invoked only through the preventive arrest or house arrest procedures. The secondary character of bail deviates from the practices of other jurisdictions, including those reviewed under the Comparative Study. There is a need **to amend the legislation and introduce bail and (judicial) control as standalone non-custodial preventive measures.**⁶²

1.5. Other violations

In addition to the strongest patterns of violations, the Research, its methodology and Check-list No 1 in particular, addressed a number of other (potential) breaches that were primarily concerned with statutory limitations.

The Examination results under Questions Nos 34 and 35 (with sub-items) sought to identify **respectively whether appeal/review proceedings justifiably exceeded the three-day statutory time-limit set out in Article 312 (2) of the CPC and whether judicial review under Articles 190-195, and 308, 309 CPC exceeded the requirement of "promptness" within the meaning of Article 5 § 3.** The data obtained did not provide sufficient grounds for generalisation.

61. See Analysis of Legislation and Comparative Study with further references.

62. On the data on use of bail and judicial control see Section 3.1 of this Report below.

Moreover, the assessment criteria indicated in Check-list No 1 suggested that this time-limit could still be exceeded, provided that it is justified due to the specific reasons.⁶³ At the same time, the Examination confirmed that there were isolated instances of non-observance of the timing conditions coupled with a lack of clear reasons. Consequently, it would be advisable ***to remind the judges of the three-day statutory time-limit set out in Article 312 (2) of the CPC and the requirement of “promptness” in judicial review proceedings under Articles 190-195, and 308, 309 of the CPC and specifically address them in the trainings provided.***

There were specific questions that allowed the Examination to address in further detail adversarial proceedings and equality of arms in the context of proceedings with regard to the ordering of pre-trial detention. In particular, the two items (Questions Nos 36, 37) related to **granting the defence request for access to the main criminal case-file submitted by the prosecutor in substantiating his motion** and **the refusal to hear witness or examine other direct evidence as requested by the defence** dealt with the peculiar attributes of these principles. Due to an insignificant number of decisions that did deal with the specific issues, it does not allow for generalisation. The Examination of Decisions identified that there were isolated instances in which the main criminal case files were used by prosecution to substantiate the motions to order preventive arrest coupled with a refusal of access to case-files. It is advisable ***to remind the judges of the need to ensure the equality of arms in terms of the access of the defence to materials used by prosecutors to substantiate a motion to order preventive detention and specifically address it in the trainings provided.***

While the preceding procedural context occurs rarely and depends on the prosecutor's submissions, the latter opportunity presupposes a proactive position on the part of the defence lawyers. The Examination of Decisions has only encountered one such attempt (in 2017) that was nevertheless disregarded by an investigating judge in Chisinau without properly addressing the issue. The deliberations at the Panel Discussions suggested that this opportunity remains largely unused by the lawyers due to insufficient time to prepare for the proceedings and to meaningfully file such motions, as well as the overall lack of legal avenues for the defence to collect evidence in general.

The legal professionals, in particular ***the defence lawyers and judges, should be reminded of the procedural opening to hear witness or examine other direct evidence as requested by the defence and relevant standards deriving from the equality of arms.***

The considerations related to securing the standards as to the public character of the proceedings were addressed by the general item (Question No 38) on **Refusal to grant the publicity of hearings** and subsequent specification to be made by answering the question (No 39) **Whether the defence requested the publicity and, if so how the defence motion was dismissed (solely on the ground that the legislation does not allow it)?** It appeared that there were only isolated requests in 2017 in the proceedings before investigative judges in Chisinau to hold them in public, which were not rejected.

63. Like in the *Haritonov v. Moldova*, ECtHR judgment of 05.07.2011, app. N 15868/07, paras 45-49, when the judges decided on the motion within nine consecutive days of hearings starting from the first held within the three-day time-limit.

The last item under the Examination of Decisions was designed to identify **other violations** besides the patterns and some specific incompatibilities addressed by the preceding questions.

It has suggested that there are significant repetitive breaches of the domestic legislation and requirements of Article 5 of the ECHR. In particular, **specific violations that have to be prevented in the future by means of targeted capacity building and, possibly, disciplinary or other measures, where appropriate, include**

- ▶ **ignoring the statutory limitation for ordering pre-trial detention to juveniles (arrested in spite of being accused of a less serious crime, while this measure can be used against them for serious and graver crimes), other guarantees applicable to them (process held without a psychologist);**
- ▶ **late submissions of the motion to court by the prosecutor (less than three hours before the expiration of 72 hours of police custody);**
- ▶ **invoking the ground of the risk of obstructing the investigation after lengthy preceding pre-trial arrest;**
- ▶ **disregarding the confirmed mental health diagnosis and remanding an accused in a prison.**

Chapter II

Examination and analysis of the selected overall case-files (Examination of Files)

2.1. Operational considerations

The Examination of Files did not concern immediate violations of the domestic legislation or standards developed under Article 5 of the ECHR. Instead, it examined the overall case files to identify the material law and overall procedure-related context for ordering the preliminary detention of an accused. It concerns the

- ▶ legal classification of crimes;
- ▶ overall length of detention;
- ▶ numbers and types of relevant procedural decisions; and
- ▶ other key parameters of criminal prosecutions persons subjected to pre-trial detention.

In accordance with the Methodology, the Examination of Files was processed on the basis of the specifically designed Check-list No 2.⁶⁴ It was used as a basis for the work of the four local experts⁶⁵ who examined the files and gathered the data obtained in electronic format in gadgets loaded with the relevant script provided and then processed by the sociology consultant.⁶⁶ The 102 files covered by the Examination of Files were randomly selected within the general parameters defined in accordance with the sociological (representativeness) requirements.⁶⁷ The mapping of the files covered by the Examination of Files is provided in the table below.

64. See Annex 2 to the Methodology.

65. See the relevant info suggested in the Methodology.

66. See the section on the research team therein.

67. See Annex 5 to the Methodology.

Mapping of the Files Examined under Check-list No 2

	2013	2014	2015	2016	2017	Total
Appellate Court Chisinau	1	0	0	0	0	1
Appellate Court Balti	0	0	0	1	0	1
Pilot survey, Chisinau	2	2	1	2	19	26
Court Chisinau, Botanica headquarters	3	3	0	1	3	10
Court Chisinau, Buiucani headquarters,	3	1	0	2	1	7
Court Chisinau, Centru headquarters,	9	5	5	8	0	27
Court Chisinau, Riscani headquarters,	3	4	0	2	1	10
Court Balti	1	0	1	1	1	4
Court Anenii Noi	0	1	0	0	0	1
Court Cahul	0	1	0	1	1	3
Court Ceadir-Lunga	0	0	0	2	0	2
Court Cimislia	0	1	1	0	0	2
Court Criuleni	1	1	0	0	0	2
Court Donduseni	1	0	0	0	2	3
Court Falesti	1	0	1	2	0	4
Court Hincesti	1	0	0	1	0	2
Court Nisporeni	2	0	0	1	1	4
Court Ocnita	1	0	1	1	0	3
Court Rezina	1	1	1	0	0	3
Court Soroca	0	1	0	1	0	2
Court Soldanesti	0	1	0	0	1	2
Court Taraclia	0	0	1	0	0	1
Court Ungheni	2	0	0	1	0	3

Besides the overall (total) figures under the items addressed, for the purpose of the evaluation, as a rule, the data collected was disaggregated, processed and analysed with regard to types of court (investigating judges and appeal), regional (Chisinau and the rest of Moldova) and chronological aspects (for tracing the tendencies during the period covered).

2.2. Specific findings

Chronologically disaggregated data regarding the questions (Nos 1 and 2) dealing with

- ▶ **dates of the start of the official investigation** (as distinguished from an initiation of criminal procedures against the accused),⁶⁸ and;
- ▶ time **when the accused was informed of the official charges**,

confirm (in Tables AA and AB) that the application of pre-trial arrest is often postponed

- ▶ due to solving a crime,
- ▶ assembling necessary evidence and so on from initiation of the procedures and
- ▶ pressing official charges against the accused.

68. The point under consideration uses year-related data.

However, in addition, an analysis of the timing data reveals some indications for streamlining the application of pre-trial detention and overall criminal justice tools in line with the standards and humanisation principle. Based on the files examined, the longest gap between the start of a case, pressing charges and detention among the files examined amounted to six years and two months (charged *in absentia*) and further five more years until apprehension (as a wanted person). The file concerned a woman subsequently convicted for (non-aggravated) pimping under Part 1 of Article 220 of the CPC in 2015, who had been kept in detention for 13 days and fined. The final charge and sentence in this case suggest that in fact she was wanted for a crime, which would not justify imposing pre-trial arrest. The sanction did not provide for any deprivation of liberty and should have been terminated due to the expiration of the statute of limitations.

This example and some other instances, as well as data obtained under the subsequent points addressed by the Examination of Files corroborate the need for **the prosecution and judiciary to be vigilant and accurate in formulating the initial charges and classifying them in law to avoid unjustified (according to the limitations established in the national legislation) or unnecessary detention.**

Table AA. When has the official investigation started? (Year)

2011	4,8%
2012	8,9%
2013	16,3%
2014	19,5%
2015	9,8%
2016	21,1%
2017	19,5%

Table AB. When official charges were brought to knowledge of the accused? (Year)

2012	9,70%
2013	16,30%
2014	17,90%
2015	9,80%
2016	22,00%
2017	22,00%
2018	2,40%

The gravity of crime is not immediately relevant for the purposes of Article 5 of ECHR and the ECtHR case law which operates with a criminal offence criterion in this regard. Nevertheless, the gravity and specific nature of the charges under the Criminal Code are significant for describing the overall state of affairs regarding ordering pre-trial detention and meeting the domestic threshold, in particular.

The Examination of Files with regard to the points (Question No 5) **concerning the article (the gravest, if several) of the Criminal Code under which the accusation of the detained was qualified** (Chart No 23) and (Question No 6) as to the **gravity of the crime** (Chart No 24) confirmed the expectation that in general, pre-trial arrest is most frequently applied to violent, serious crimes, apart from non-aggravated pimping, which is the most common among less serious crimes. In this and other quite non-isolated occasions, pre-trial detention was also used against an accused even formally charged with less serious crimes.

Moreover, although the Examination of Files did not come across any formal application of pre-trial detention on for the latter category of crimes before July 2016, when the

relevant limitation was lifted,⁶⁹ in 14.8% of the cases examined from the period preceding this amendment, detainees held on remand were finally convicted of a less serious crime. They were held in pre-trial detention on aggravated initial charges that had made it possible to hold them in pre-trial detention. While in individual cases this could depend on the circumstances of the proceedings, the evidence gathered, the overall ratio of such instances could be indicative of the deliberate tactics used for securing the arrests and, possibly, some vested interests.⁷⁰

Chart No 23

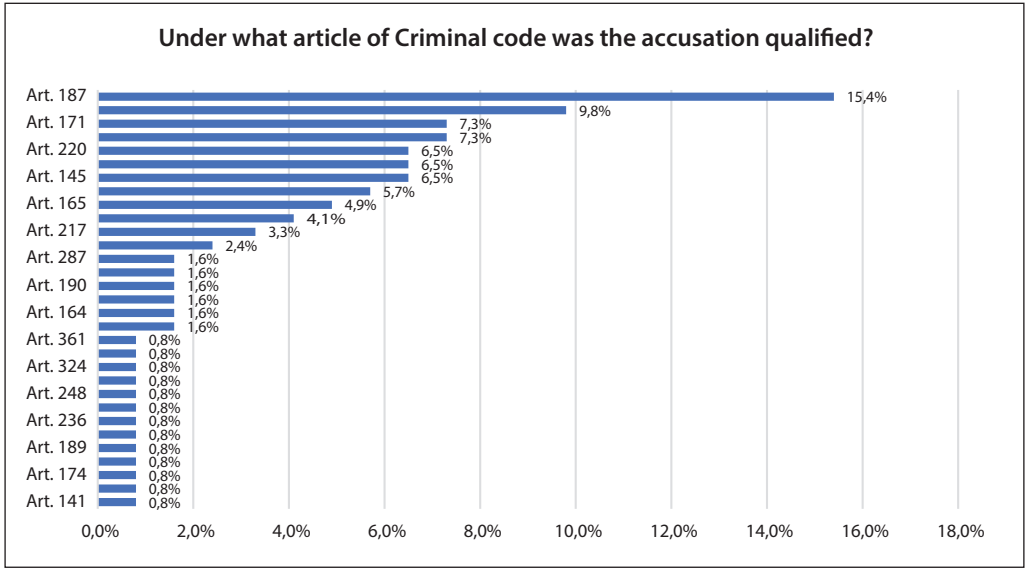
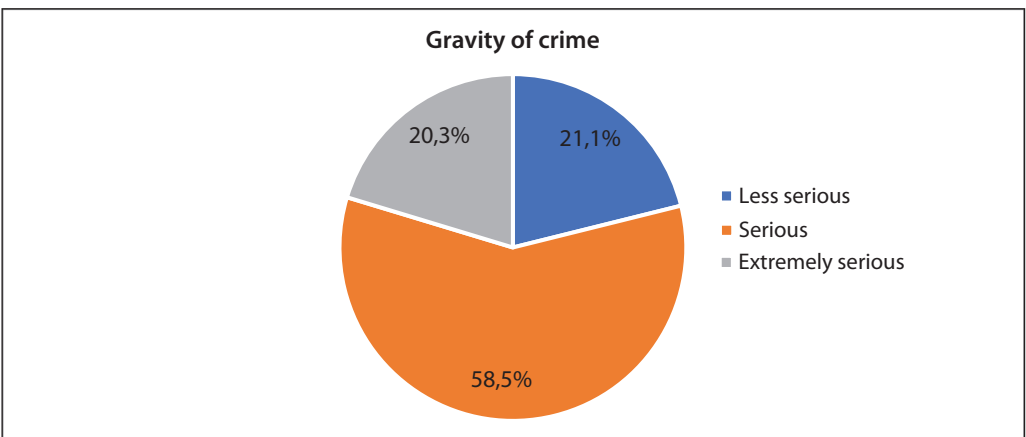


Chart No 24



69. See also the relevant section in the Analysis of Legislation.

70. The finding is covered by the preceding recommendation. See this Report above.

Regarding the outcome of the criminal proceedings, the Examination corroborated the low rate of acquittals or dismissal of charges and termination of prosecution. There was only one instance of acquittal, and one termination of prosecution due to a non-guilty verdict.

The acquittal concerned a defendant charged with violating the inviolability of the domicile (Part 1 of Article 179 of CC) initiated in December 2013, where he was held on remand for 25 days under initially aggravated charges.

The non-guilty verdict concerned a female defendant who was detained for one week in 2015 having been charged with aggravated pimping under Part 2 of Article 220 of CC and the case had been terminated due to the lack of *corpus delicti*.⁷¹

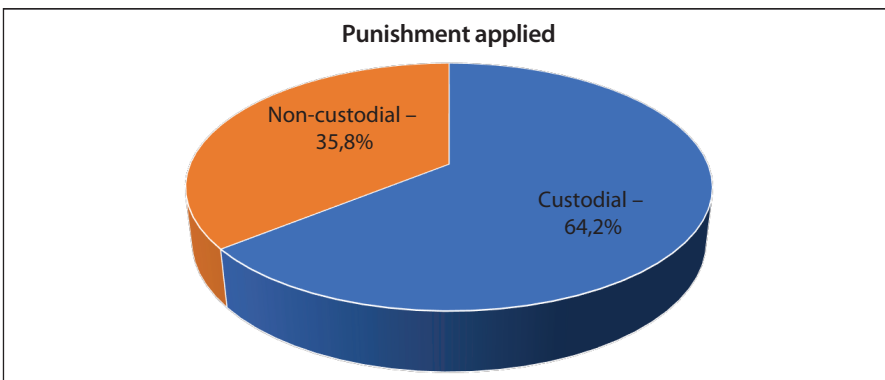
The conviction rate (guilty verdict) identified under Question No 7 on merits (final decisions determining guilt) amounted to 98,4% of the cases examined.⁷²

The data most indicative in this regard is the proportion of non-custodial sentences finally imposed. It was identified under the question (No 8.2) concerning the types of **punishment applied**, incarceration or alternatives (with the latter being certainly welcome).⁷³ Once again, imposing non-custodial sentence is not a direct sign of a violation of the right to liberty and security if the defendant had been detained in the course of the proceedings. However, in combination with the gravity and circumstances of the crime, the relevant data could be regarded as an indication of the overall context of ordering pre-trial arrest and the considerable potential to decrease its use in general.

There are grounds for suggesting that ***the prosecution and the judiciary could be further guided by certain policy or methodological instruments and capacity building measures to ensure that the preventive measures chosen are suitable for***

- ▶ ***the circumstances of the crime;***
- ▶ ***personality of accused; and***
- ▶ ***other factors, including those based on specific examples and analytical material.***

Chart No 25



71. There were two cases, where defendants were subjected to the Law on Amnesty.

72. There was a case terminated due to the death of the accused and two subjected to an amnesty. One more case was terminated due to a settlement between the accused and victims.

73. See also further parameters of the procedures and cases analysed below.

The length of custodial sentences imposed is less relevant for considering the suitability of preventive detention and development of any specific policies in this regard.

Nevertheless, it could be seen as an indirect indicator of its potential or actual excessive use. The Examination of Files concerned this parameter through the item (Question No 8.1) on the **length of the final custodial sentence**, if the conviction resulted in incarceration. Taking into account the insignificance of comparatively short-term imprisonment following conviction, as well as their correlation with the seriousness of the crime (see Chart 26 and Table AC below), this parameter does not suggest any adverse indications on this matter.

Chart No 26

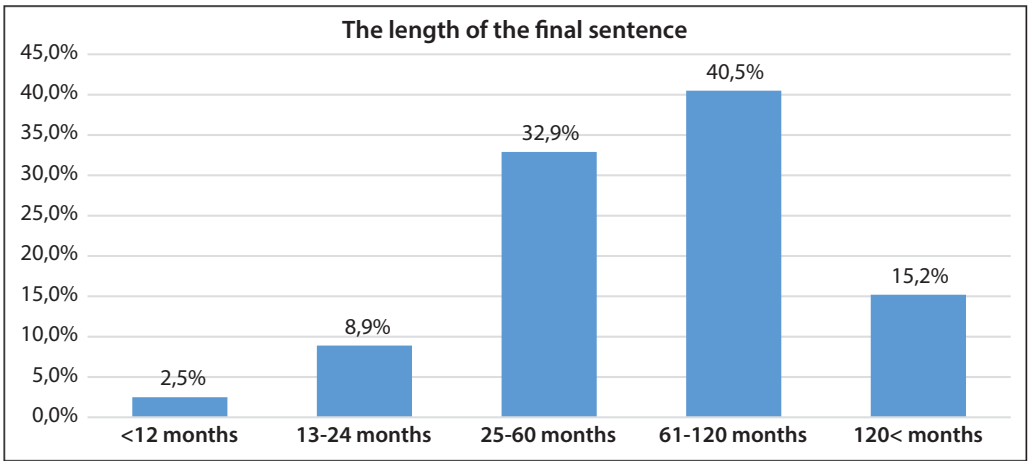


Table AC

		The length of the final sentence			
		<12 months	13-24 months	25-60 months	61-120 months
SERIOUSNESS (accusation)	Less serious	15.4%	76.9%	7.7%	0.0%
	Serious	13.9%	63.9%	16.7%	5.6%
	Extremely serious	4.0%	52.0%	32.0%	12.0%

The Examination of Files also concerned the length of pre-trial detention and extension, as well as release during it. The most important and relevant data indicative of the procedural context of application of preventive and home arrest was gathered under items (Question N9) as to **overall length of detention** (comprising house arrest, where applicable) and **final release** within the period falling under the limb covered by Para 1.c of Article 5 of the ECHR, i.e. up to the 1st instance court judgment, in particular due to the non-extension or ordering a non-custodial preventive measure or sentence leading to a discontinuation of further incarceration of a convict.

While the next chart (No 27) could be seen as an initial indication for assessing the reasonable time requirement (on average it amounted to 4.8 months, which is high), it still suggests that there was a considerable number of pre-trial detentions that lasted one month and less.⁷⁴ Without considering it as an immediate confirmation of the inappropriateness of the pre-trial arrest in these cases, this data should be considered an indication of the real potential for reducing its application further.

Chart No 27

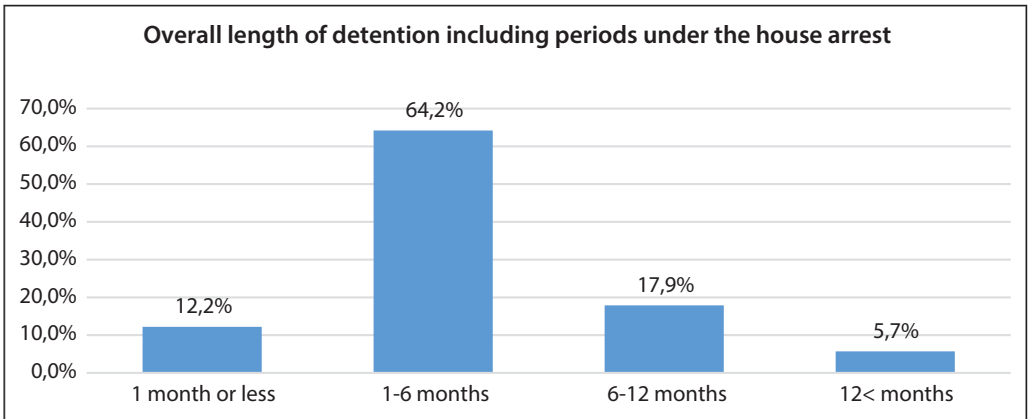
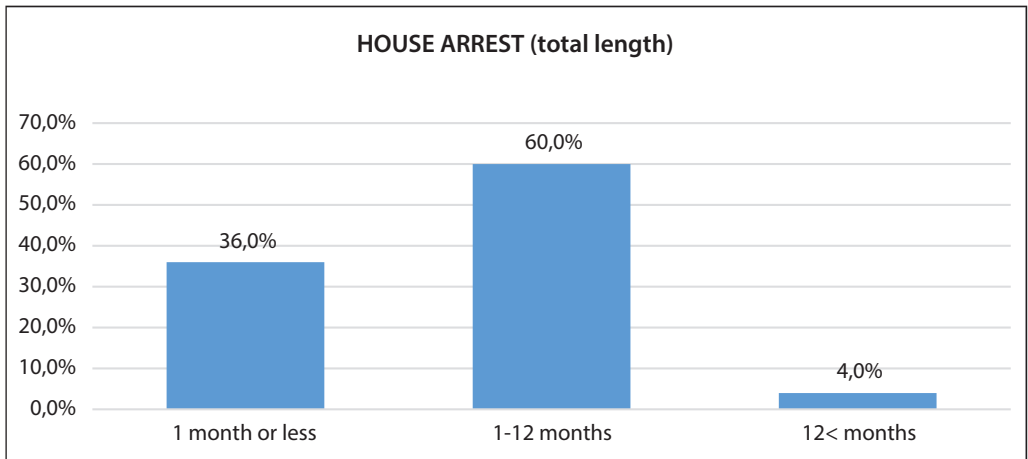


Chart No 28



Moreover, the Examination of Files dealt with a combination of pre-trial detention with house arrest that was identified in 15.7% of files. The length of house arrests applied in combination with pre-trial detention (by preceding or following it) constituted 3.1 months (on average).

74. The preventive detentions exceeding 12 months come from the period preceding the relevant decision of the Constitutional Court. See Legislative Analysis accordingly.

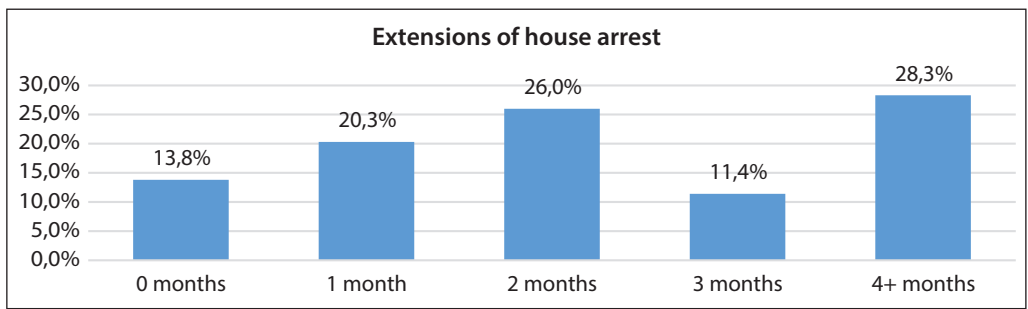
This finding suggests that house arrest serves the purpose well and secures the relevant interests of administration of justice, apart from the rare instances of its breach and should be more widely applied, in particular alongside the wider application of the electronic monitoring system reported by judges participating in the Panel Discussions.

The statistics provided by the Court Administration Agency suggest that the number of motions for applying house arrest was on the decline since 2016. In 2017, 2018 and the first half of 2019 there were 196, 193 and 60 instances of requesting it, with 187, 171, 56 granted, while in 2016 these numbers were 549 and 474 respectively.⁷⁵

These and the previous results related to the applicability of house arrest,⁷⁶ as well as the considerable shortcomings in terms of understanding its status revealed by the Survey,⁷⁷ point out that **authorities should undertake specific legislative and infrastructural measures to ensure the widest and most effective (appropriate) use of house arrest, in particular in combination with electronic monitoring with the substantial (and not just technical) role attached to probation.**

In addition, it should be **supplemented by targeted capacity building of legal professionals in terms of their awareness raising as to the efficiency of the house arrest for satisfying the interests of the administration of justice.**

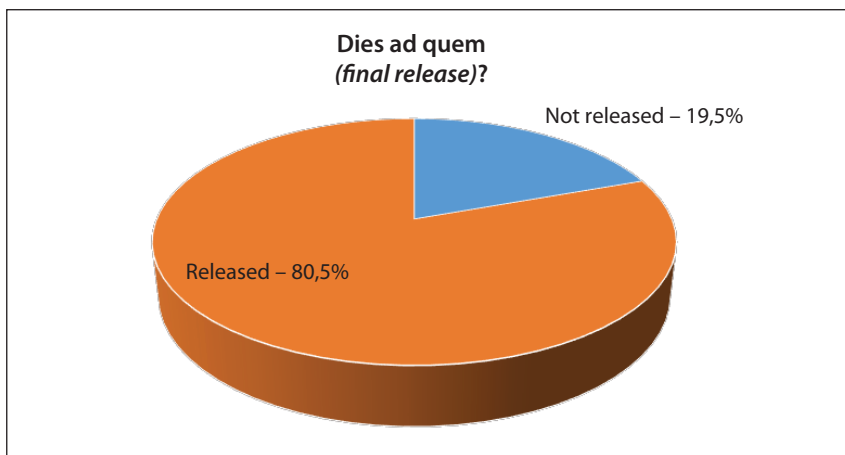
Chart No 29



The same applies to the release data (Chart No 30), which suggests that only 19.5 % of those effectively remained in incarceration by a sentence of imprisonment sentences at the end of the criminal proceedings. This cannot serve as an immediate confirmation of inappropriateness of pre-trial arrest in these cases, but should be considered as an indication of the real potential for reducing its use further, including by implementing the recommendations suggested earlier in this chapter.

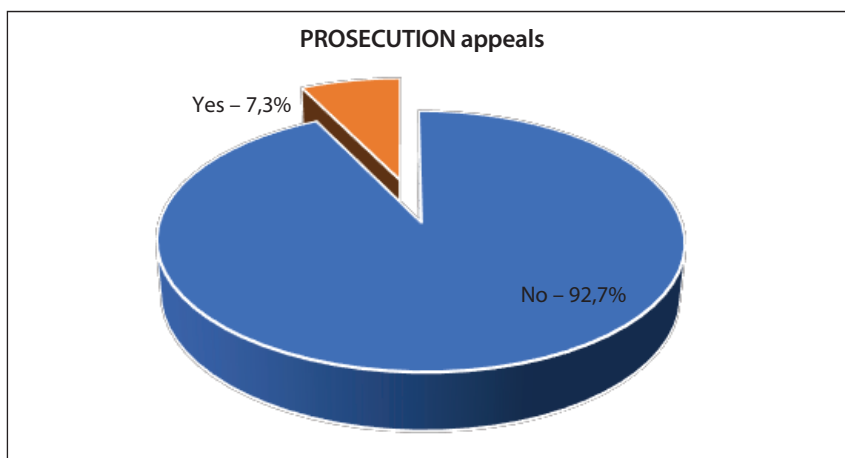
75. See Chapter 5 of this Report.
76. See Chart No 8 and subsequent relevant considerations suggested in Chapter II of this Report.
77. See Question 14-related findings.

Chart No 30



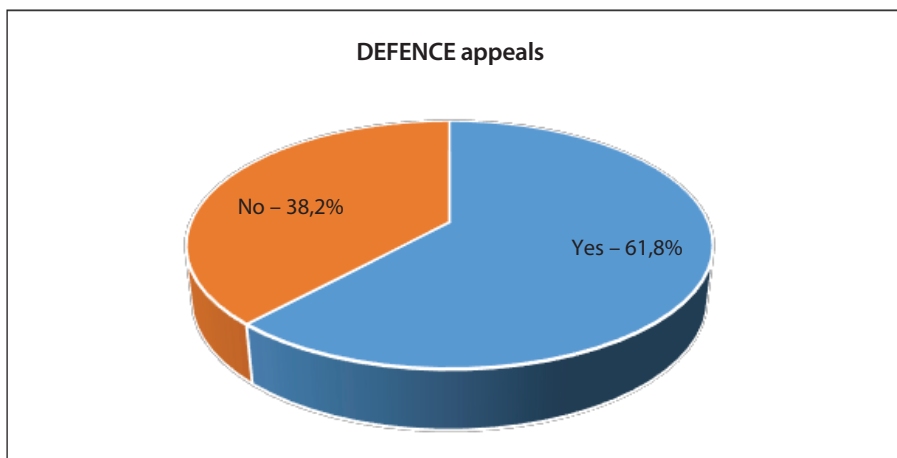
In addition to the frequency of extension of detention, the Examination of Files dealt with (Question No 15) the attitude of the prosecution and defence with regard to appeals (under Article 311 of the CPC) and review of detention (under Articles 190-195 CPC) related to the application of preventive detention. The overall percentage (Chart No 31) setting out the frequency of disapproval by prosecutors of the decisions taken by the judiciary is quite low and sums to 7.3 % of the decisions.⁷⁸ As expected, the same indicator for the defence is much higher (Chart No 32), with the highest number of appeals in one case reaching 10.

Chart No 31



⁷⁸. In some cases, prosecutors appealed a number of decisions.

Chart No 32



As to the motions to review (Question No 16), the same parameter suggests that on average, lawyers initiate them more than twice per case, and 13 was the highest number identified in the files examined. In general, the defence resorted to this procedural option in 60% of the cases. The same indicator concerning prosecutors sums to almost 25% of the cases with the number of reviews initiated not exceeding 2.

The Examination of Files measured the use of bail and judicial control as well as other non-custodial measures in cases when arrest had been already ordered in relation to the accused or defendant. The data collected confirmed the minimal use of bail and judicial control even as a secondary measure, also confirmed by the participants of the Panel Discussions. In the files examined, there was not a single instance in which bail was granted and the detained persons were released under judicial control only in 1.96% of cases. There were no instances of release on personal or organisation's guarantee (under Articles 179-180 of the CPC). The recommendations made to this end are reinforced by these findings.⁷⁹

79. See Section 1.4 of this Report above.

Chapter III

Examination and analysis of the selected judicial decisions, relevant files and materials of the court hearings on the suits claiming compensation for illegal arrests (Examination of Suits)

3.1. Operational considerations

The Examination of Suits tackled completed (non-pending) civil cases concerning claims for compensation for unlawful detention examined by the Moldovan courts during the period covered by the Research.

The Examination of Suits was carried out according to Check-list No 3⁸⁰ and was designed to assess the efficiency of the domestic remedy concerning suits claiming compensation for illegal arrests introduced under Article 525 of the CPC and Law No 1545/1998. It was designed to address the overall proceedings concerning one relevant civil claim examined in all the instances of the courts to assess the effectiveness of this remedy, identify the overall state of affairs and trends. The case-files, processed under this Examination, were selected from the list of the cases compiled on the basis of the data provided by the SCM and courts. It was carried out by the lead local consultant.⁸¹ The Examination of Suits concerned 30 cases of this category processed over the Research period. The uniform respondent was the Ministry of Justice of the Republic of Moldova.

Besides the overall (total) figures under the items addressed, for the purpose of the evaluation, the data collected was disaggregated, processed and analysed with regard to the chronological dimension or compensation amounts, violations identified, and other subject-specific points.

80. See Annex 4 to Methodology

81. See above the Section on the Research team.

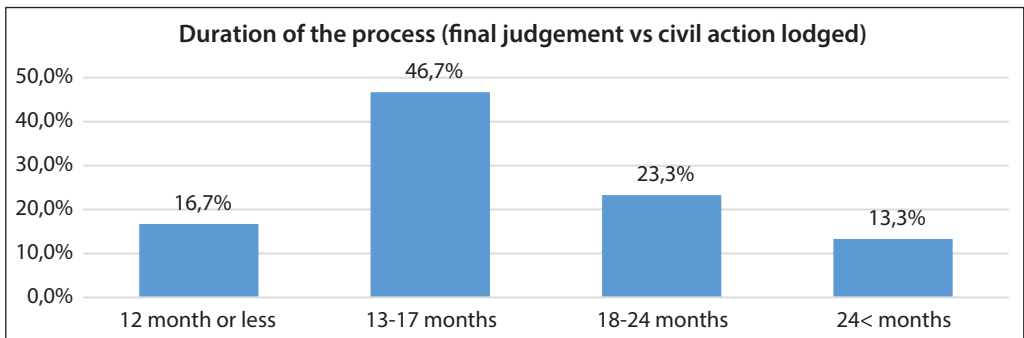
3.2. Substantial findings and analysis

The first substantial item (Questions 2-3) addressed by the Examination of Suits concerned the **overall length of civil proceedings in all three tier jurisdictions**. It was meant to assess the implied reasonable time requirement and efficiency of the remedy in this regard. Although the evaluation did not specifically examine the complexity, performance of the parties and other relevant factors, the data obtained provides considerable grounds for concern.

The Examination of Suits and Panel Discussions once more confirmed that the Ministry of Justice, as a rule, attempts to exhaust all the instances and challenges the decisions up to the cassation level. The relatively straightforward nature of the claims that are based on Law No 1545/1998's limitation as to acquittal or dismissal of the prosecution, the period exceeding 17 months could be considered as an approximate benchmark for handling them at all instances. In 36.6% of the cases there are concerns as to a possible breach of the reasonable time and efficiency standards and resulting deterioration of the situation of the assumed victims.

It could be suggested that ***the judicial authorities and Ministry of Justice as the regular respondent in this category of civil claims are reminded of the reasonable time and related efficiency considerations, as well as that the authorities consider introducing ADR⁸²-based or developing other specific policies and methodology for providing the victims of relevant human rights violations with more expedited remedies.***⁸³

Chart No 33



The recommendation becomes more relevant in view of the results of the Examination of Suits concerning the position of the respondent and its objections dealt with under Questions Nos 13-16 of Check-list No 3. The default objection of the Ministry of Justice and some of its specifics are described in the following tables. The claim was considered admissible only in one case.

82. ADR stands for Alternative Dispute Resolution.

83. See e.g. *Caldas Ramirez de Arrellano v. Spain* (dec.), application N 68874/01, ECHR 2003-I; *Soto Sanchez v. Spain*, ECtHR judgment of 25.11.2003 (available in French only), application N 66990/01, paras. 29-34.

Table AD. Respondent’s Objections (1)

Objections		Count	%
ALL claims manifestly ill-founded/inadmissible	Yes	30	100.0%
	No	0	0.0%
PARTIALLY admissible but excessive concerning amounts	Yes	1	3.3%
	No	29	96.7%

Table AE. Respondent’s Objections (2)

Position		Count	%
Pecuniary	Fully rejected	28	93.3%
	According to national case law in similar cases	2	6.7%
Non-pecuniary	Fully rejected	16	53.3%
	According to ECHR case law	10	33.3%
	According to national case law in similar cases	4	13.3%
Costs and expenses	Fully rejected	30	100.0%
Compensation left at the court’s discretion	Yes	1	3.3%
	No	29	96.7%

The Methodology and, in particular, Check-list No 3, was supported by items (Questions Nos 5-7) designed to identify prosecution offices and courts to which the alleged violations and compensations-related amounts (if awarded) could be attributed. However, taking into account the rationale of the Research, this data was omitted from the Report.

Under Question No 8 the earliest case concerned 2005-2006 and most recent was from 2015. The largest share of the periods involved 2013, when 30% of the cases were examined.

The chronological parameters on the **time of lodging claims and final judgment** (Questions Nos 3-4 and Charts Nos 34 and 35 respectively) illustrate the number of relevant claims processed over the years covered by the Examination of Suits. It is to be noted, that the majority of claims were lodged in 2014 and prior to that this remedy had been invoked considerably less often. This does not call for any immediate intervention apart from ***maintaining efforts in promoting domestic remedies against this and other human rights violations.***

Chart No 34

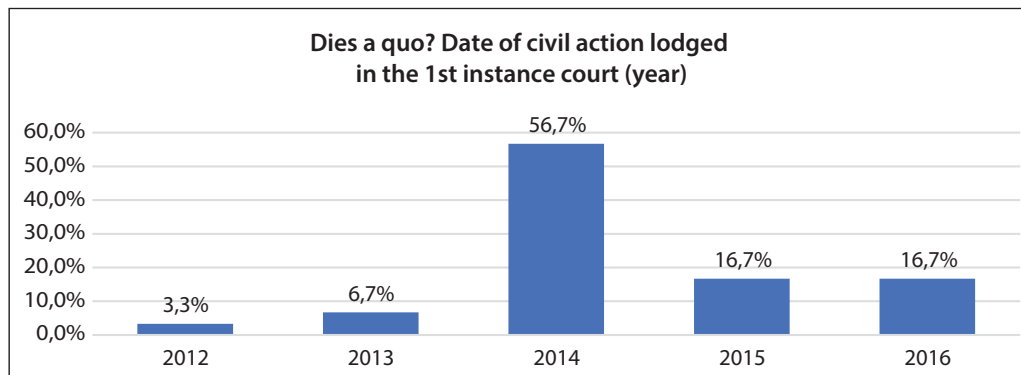
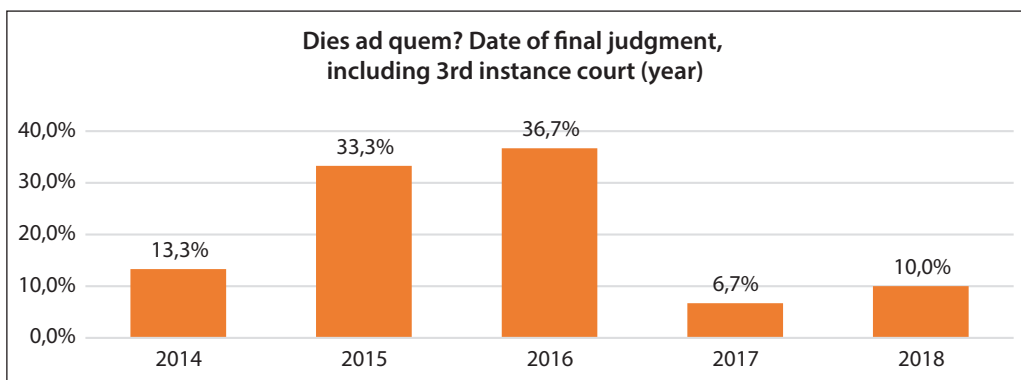


Chart No 35



One of the criteria for ascertaining both the pecuniary and non-pecuniary damage caused and adequate compensation for the unlawful detention is related to its length. It is taken into account by the ECtHR which, in addition, has specified that the amount of compensation awarded cannot be considerably lower than that awarded by the Court in similar cases.⁸⁴ However, there is no simplistic approach indicative of a daily rate. The following data was provided in relation to the length of detention found unlawful and subject to compensation.

84. *Ganea v. Moldova*, ECtHR judgment of 17 May 2011, App. No. 2474/06, paras. 14-31 (available in French), see also Guide to good practice in respect of domestic remedies (adopted by the Committee of Ministers on 18 September 2013), Directorate General Human Rights and Rule of Law Council of Europe, 2013, p. 22-24.

Table AF

Length	Count	%
Under 30 days	5	20.0%
30 – 60 days	6	24.0%
1-12 months	12	48.0%
Over 12 months	2	12.0%
Mean (days)	145	
Median (days)	70	

The Methodology and Examination of Claims were construed so to focus on the substance and itemisation of the merits of the claims and judgments, as well as their reasoning and relevant factors taken into account, when requesting and awarding compensation.

The questions (Nos 9-11, 19-21, and 25-26) respectively were formulated to identify their breakdown in terms of considering the **lack of reasonable suspicion; grounds for detention, including their specific categories; and other violations rendering the detention unlawful;** as well as, **reasons provided for awarding compensation.**

The data obtained (Chart No 36) suggests that the claims and accordingly acquittals were substantiated often by reasonable suspicion-related arguments, but mostly by other procedural violations. Deficiencies concerning the grounds for detention were rarely invoked by the claimants in this regard. Specific grounds addressed were related to the risk to flee, obstruction to the administration of justice (only one occasion of each). In one case they were invoked in general, without spelling out any one of them.

As to the merits of judgments, substantial violations found by courts, their diversity and distribution appeared to be of an even narrower scope (Chart No 37). This state of affairs is, presumably, predetermined by the acquittal-based criterion incorporated in Law No 1545/1998. In the circumstances, the breaches of different provisions and requirements that had to be complied with when ordering pre-trial arrest become of secondary importance. At the same time, their range and cumulative effect do contribute to the suffering of the victim.

The details of the violation of the right to liberty and security could be of immediate relevance for establishing a violation of the prohibition of ill-treatment since they are often intertwined in the context of deprivation of liberty. These considerations are also relevant for calculating the damages, in particular, non-pecuniary. This approach is implied in the ECtHR case-law and followed in cases, in which it proceeds with an assessment of the cumulative effect of different factors and violations of human rights concerned and requires explicit itemisation.⁸⁵ According to the data, this was not appropriately done.

85. The ECtHR case law clearly suggests that the element of ‘mental anguish caused by the unlawful nature of detention’ is one of the factors to be considered in this regard. See *Trepashkin v Russia*, ECtHR judgment of 19.07.2007, application N 36898/03, para. 94 with further references.

Chart No 36

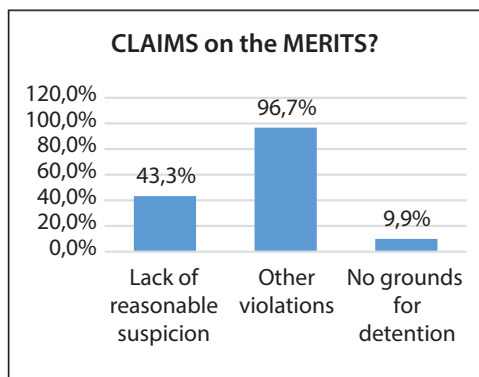
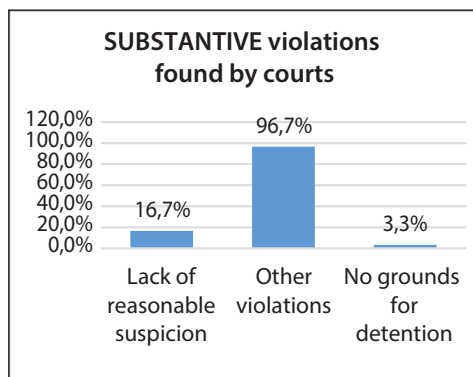


Chart No 37



As a result, the items and data on **special reasons for compensation and other justifications for non-pecuniary damages and compensation** (Questions Nos 25 and 26 and Tables AG and AH respectively) suggest that the very specific requirements of reasonable suspicion and grounds for detention, which are decisive for ensuring the lawfulness of pre-trial detention under the domestic legislation and Article 5 of the ECHR, remain even less addressed and taken into account for the purposes of calculating and awarding compensation. Although, almost all judgments seem refer to the psychological suffering, it is used in unspecified manner and does not provide sufficient itemisation.

Table AG. SPECIAL reasons for compensation

Factors and reasons	Count	%
Unlawfulness due to acquittal	15	50.0%
Lack of reasonable suspicion	3	10.0%
Unlawfulness due to other procedural shortcomings	24	80.0%
Lack of one or more of 4 acceptable grounds for detention	0	0.0%

Table AH. Other non-pecuniary justifications

Factors and reasons	Count	%
Humiliation	9	30.0%
Presumption of innocence	3	10.0%
Loss of reputation	5	16.7%
Detention in inhuman conditions	1	3.3%
Health problems	4	13.3%
Labour rights	0	0.0%
Other reasons	23	76.7%
<i>Including Gravity of psychological suffering</i>	21	70.1%
<i>None of the above</i>	2	6.6%

To provide an adequate redress to victims of unlawful detention, violations of the right to liberty and security one needs to consider other factors which cause pecuniary and non-pecuniary damage. According to the Survey results, there is a great variety in the level of understanding the legal professionals of even the very essence of the scope of the remedy and the appropriate redress and compensation in cases of violations.⁸⁶ **To provide adequate (effective) redress the domestic proceedings have to properly identify and address key violations of the domestic provisions and international standards (if different) with regard to**

- ▶ **the justification and application of pre-trial detention,**
- ▶ **other factors contributing to damage, including any relevant suffering.**

Lawyers and members of the judiciary should benefit from targeted capacity building interventions accordingly.

The Methodology and Examination of Suits respectively addressed the monetary parameters of the claims and compensation awarded (Questions Nos 12 and 22 and Tables AI and AJ respectively). The Examination data (gathered under Question No 17) indicated that although there had not been a negative decision, the final decisions taken in all the cases only partially upheld the claims.

Table AI. CLAIMED as COMPENSATION (total amount)

	Mean	Median	Maximum	Minimum
Pecuniary	1.499.310	3.232	43.925.441	6.464
Non-pecuniary	840.385	541.780	5.749.999	20.000
Costs and expenses	14.055	2.000	169.222	1.000
A LUMP sum (only if not divided)	16.667	0	500.000	500.000
Total	2.370.417	606.479	44.073.428	31.000

Table AJ. COMPENSATION awarded (total amount)

	Mean	Median	Maximum	Minimum
Pecuniary	68.010	47.000	343.253	10.000
Non-pecuniary	69.997	0	1.500.000	350
Costs and expenses	42.167	30.000	170.000	5.000
A LUMP sum (only if not divided)	6.374	3.500	60.240	1.000
Total	186.548,13	99.000,00	1.500.000,00	20.000,00

86. See Survey, the findings and deliberations with regard to Question 19 with further references.

Due to the case-specific factors, procedural and evidential considerations, significant fluctuation of the rate of the Moldovan currency and other variables, it is impossible to proceed with further generalisations as to the adequacy of the compensation awarded. The only very approximate indication as to its consistency with the ECtHR approach could be gauged by the mean parameters of non-pecuniary damages compensated. The mean amount of compensation divided by the mean number of days of unlawful detention would amount to 482.73 MDL. Taking into account the adjustments applicable to short and long-term deprivation of liberty, this sum is clearly much lower than the amounts awarded by the ECtHR.

There are sufficient indications of the need to review domestic practice with regard to the amounts of compensation awarded for unlawful pre-trial detention (in breach of the right to liberty and security standards) and bringing it in line with that awarded by ECtHR judgments in relevant cases against Moldova.

The Examination of Suits confirmed the limited character of the remedy provided by Article 525 of the CPC and Law No 1545/1998 and that it does not comply with the ECtHR case-law according to which in order to constitute an effective remedy, an award of compensation for unlawful detention must not depend on the ultimate acquittal or exoneration of the detainee.⁸⁷

The Examination of Suits (under items Nos 18a and b) confirmed that no suit was filed and compensation awarded without an acquittal or dismissal of the charges against the claimant. There is a basic understanding among the legal professionals, in particular lawyers, as to the required scope of the remedy, which is currently conditional on an acquittal or dismissal of prosecution. Taking into account the best practices, including those outlined in the Comparative Study and other materials,⁸⁸ it would be necessary **to remove the provision of Law No 1545/1998 that in order to seek compensation for unlawful arrest there must be an acquittal, dismissal of charges or any other unlawfulness of detention established.**

87. *Nechiporuk and Yonkalo v. Ukraine*, ECtHR judgment of 21 April 2011, app. N 42310/04, para. 231.

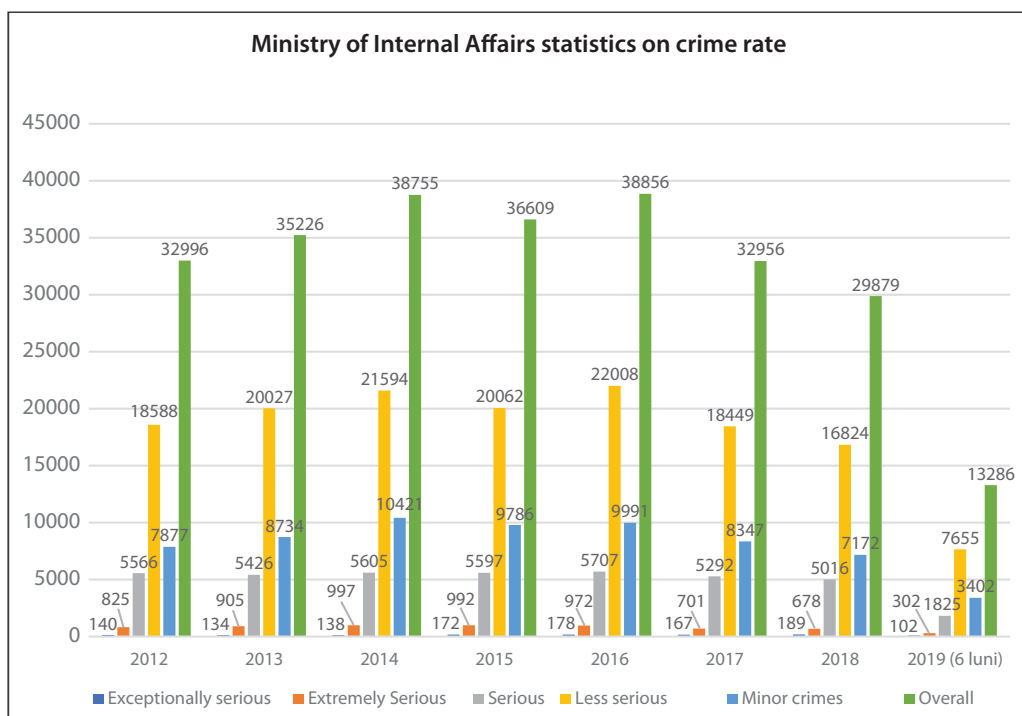
88. See the relevant section of the Comparative Study concerning Romania, see also Guide to good practice in respect of domestic remedies (adopted by the Committee of Ministers on 18 September 2013), Directorate General Human Rights and Rule of Law Council of Europe, 2013, p. 23-24.

Chapter IV

Analysis of the Official Statistics

The analysis is based on statistical data provided by the counterparts – Courts Administration Agency, General Prosecutor’s Office, and Ministry of Internal Affairs. The statistics related to penitentiaries was taken from the official web page of the National Administration of Penitentiaries.⁸⁹

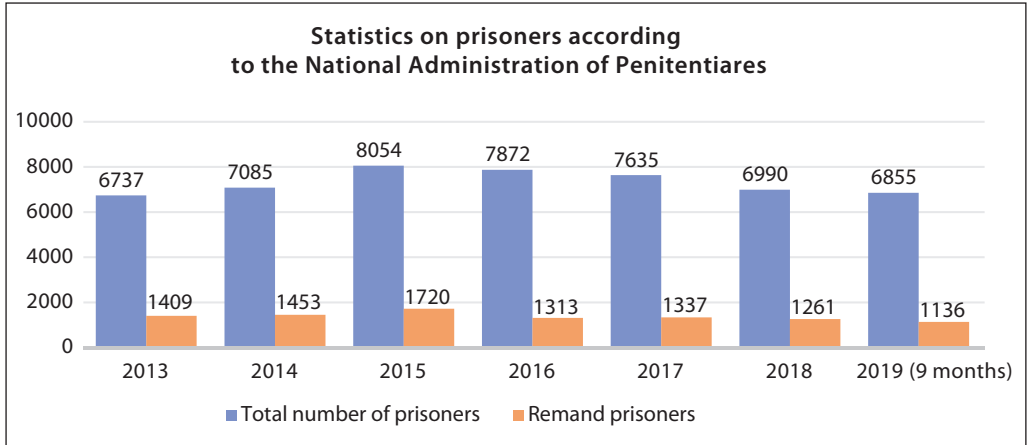
Chart No 38



89. See <http://anp.gov.md/randomrapoarte-de-bilant-simestriale-anualerapoarte-de-bilant-simestriale-anualerapoarte-de-bilant>

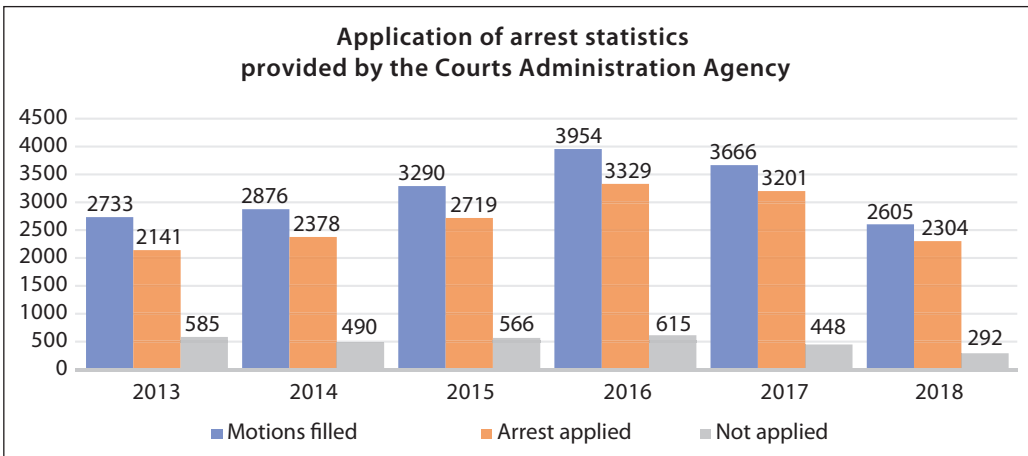
While the crime rates are mostly steady, with a decreasing trend since 2017, there was a significant decrease in the number of persons held on remand in 2018 and 2019 (9 months), compared to previous periods.⁹⁰

Chart No 39



As to the data on ordering preventive arrest provided by the Courts Administration Agency, it indicated a significant drop in the number of preventive arrests ordered equal to 29% in the course of 2018 (in comparison to 2017) that was maintained in the first half of 2019 (see the chart below).

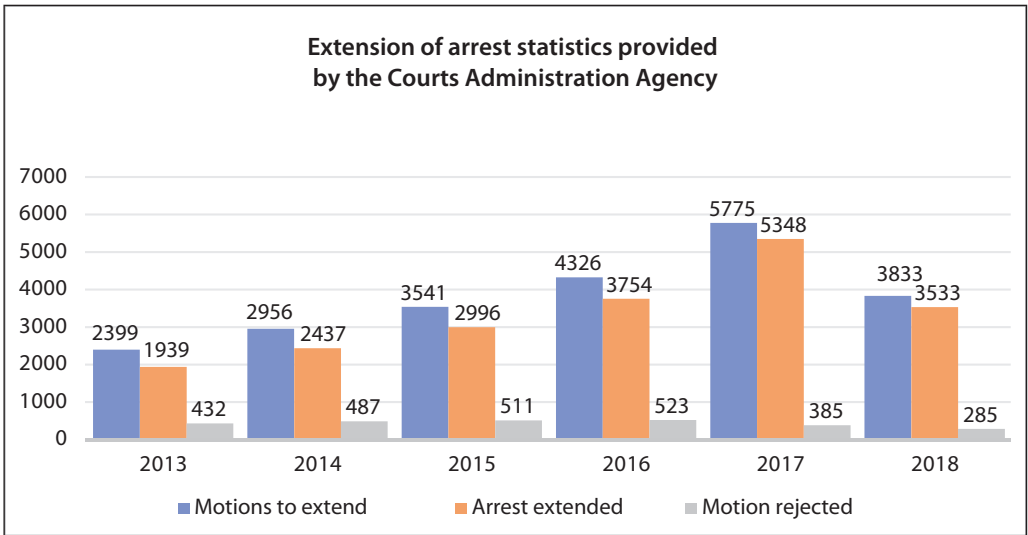
Chart No 40



90. The numbers include the inmates convicted by courts of the first instance against whom the sentence had not entered in force or notified to the penitentiary administration.

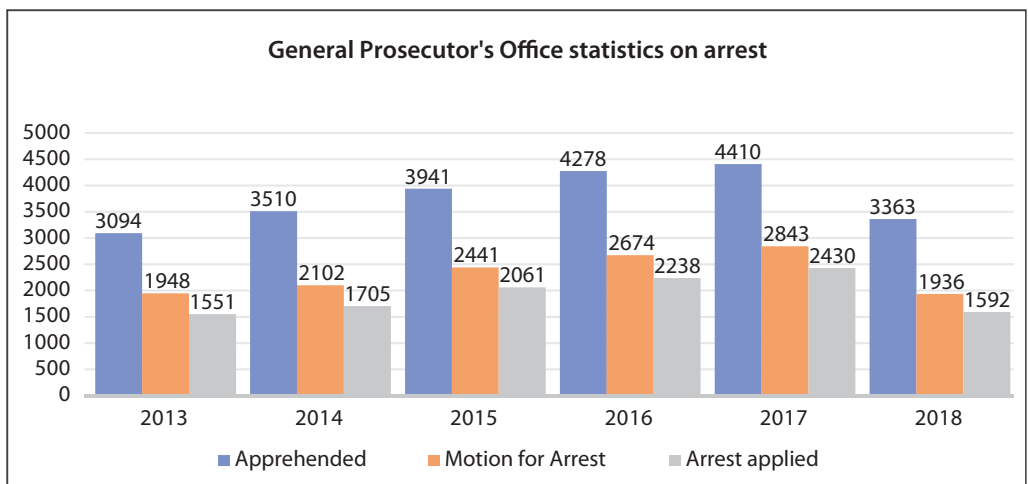
In addition, there was a decrease in the number of extensions of preventive arrest. The data is provided in the following chart.

Chart No 41



The data provided by the General Prosecutor’s Office differ due to the institution-specific methodology applied (it concerns only the period up to commencement of a trial), but also confirm the positive trend of a decrease in the number of preventive arrests in Moldova since early 2018.

Chart No 42



The representatives of the Prosecution service claimed during the panel discussions that these dynamics can be attributed to

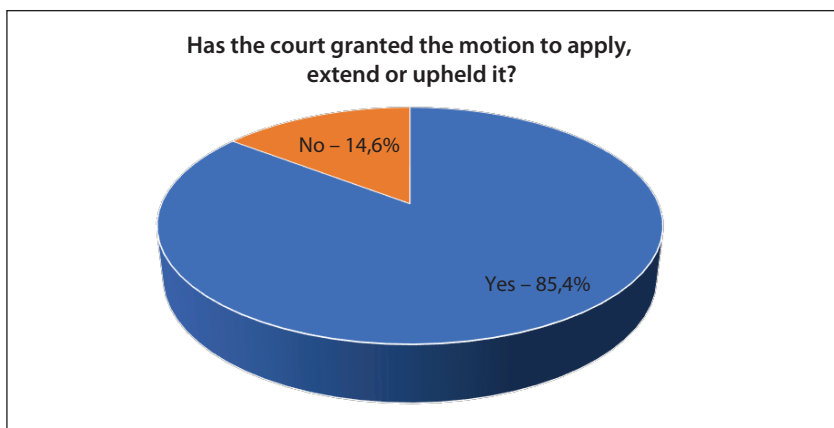
- ▶ change in the policies applied by the prosecution; and
- ▶ decrease of the pressure on the judiciary, including due to the discontinuation of a political interference and forces reportedly exercised through different informal and formal methods.

The overall statistical parameter addressed by the Examinations and relevant Check-lists (No 1 in particular, question No 7) concerned the rate at which the judiciary granted prosecution motions to order, extend or uphold preventive arrest. This parameter is not immediately symptomatic of its unjustified application or relevant violations, but is a significant indicator of the

- ▶ overall performance of the parties; and
- ▶ stance of the judiciary.

It was one of the most discussed pieces of data in the course of the debates and public discussions held in Moldova. The deliberations at the Panel Discussions, in particular those held with the representatives of the prosecution and judiciary, indicated that the rate of the motions granted could be predetermined by the performance of prosecutors.

Chart No 43



The disaggregated data highlights the absolute (100%) support of the appeal courts of requests by the prosecution to uphold or order arrest. The Panel Discussions with lawyers, academia and civil society representatives specifically emphasised this finding and suggested that it confirmed the state of affairs in this regard. At the same time the rate of rejections by investigative judges from Chisinau whilst insignificant, is still higher however than elsewhere in Moldova.⁹¹

91. See Chapter 2 of the Report above.

Table AK

Has the court granted the motion to apply, extend or upheld it?		Yes	No
Total:		85.4%	14.6%
Court type:	Appellate court	100.0%	0.0%
	Court	84.5%	15.5%
Region:	Chisinau	82.6%	17.4%
	Outside	88.9%	11.1%
Year:	2013	82.3%	17.7%
	2014	83.2%	16.8%
	2015	88.7%	11.3%
	2016	84.9%	15.1%
	2017	88.6%	11.4%

As to the most recent statistics provided by the Courts Administration Agency and the General Prosecutor's Office, the relevant rate in 2018 (for motions regarding both initial applications end extension) was 90.5%, and in the first half of 2019 it amounted 94.2%. At the same time, the same rate according to the data provided by the General Prosecutors' Office was 82.2% and 88% respectively. The statistical data and supporting explanations provided by the authorities concerned once more confirmed the need in ***developing and introducing a cross-cutting unified (common) methodology of data gathering and analysis concerning pre-trial arrest for all the institutions involved in its application, including by means of incorporating the elements suggested by this Research.***

Overall conclusion

In the period 2013-2017 pre-trial detention **was excessively used in the Republic of Moldova** due to the systemic shortcomings and deficiencies of the legal system as well as the policies deliberately pursued by the authorities, including judiciary and prosecution.

The use of pre-trial detention would be significantly reduced (with a more efficient administration of justice and ensuring other relevant considerations) **by:**

- ▶ **abandoning the controversial legislative moves and failures to remedy the remaining inconsistencies undermining the legal framework** that was designed in line with the basic requirements and standards of the right to liberty and security, in particular, Article 5 of the ECHR and the relevant case law of the ECtHR;
- ▶ **improving performance of the judiciary and parties to the proceedings** in compliance with specific requirements of domestic legislation and international standards concerning reasonable suspicion, grounds for detention and other requirements, in particular, appropriate reasoning of judicial decisions;
- ▶ **increasing institutional support and consistent capacity building** interventions for the members of judiciary, prosecutors and lawyers;
- ▶ **carrying out profound research and analytical endeavours to further review and adjust the state of affairs on applicability of pre-trial detention.**

The most recent developments, reportedly facilitated by the public debates and discussions and some legislative moves, reviewed and commented on in the Report, alongside relevant policy declarations made in mid-2019,⁹² **led to certain improvements in terms of the level of applicability of preventive arrest in the Republic of Moldova.** These efforts need to be subject to **further review and consistent streamlining of legislation and practice, including in line with the specific recommendations suggested in the Report and other Research materials, as well as regular use of the suggested methodology and tools in the future.**

92. See the press-release of 28 June 2019 by the Minister of Justice on the excessive use of pre-trial arrest. <http://www.justice.gov.md/libview.php?l=ro&idc=4&id=4407> accessed on 29.06.2019.

Recommendations

The recommendations are conditionally grouped in blocks with primary focus on relevant limbs of interventions. All of them, however, require concerted interventions of relevant authorities (judiciary, prosecution and lawyers' institutions). They should comprise a set of complex, consolidated legislative (with regard to some of the elements of the regulatory framework), methodological (in terms of remedying the practice), organisational and other capacity building measures.

Legislative interventions to address:

- ▶ Inadequacy of legal regulations on the right of the defence to be provided with meaningful time and facilities for securing its effectiveness in the set of procedures concerning application of preventive measures, in particular during the initial period of police custody and relevant hearing, and resultant obligation to be observed by the prosecution and courts;
- ▶ Insufficient clarity of legislative provisions and practice of providing relevant evidence and arguments in terms of the grounds for detention, their exhaustive character, and their interrelation with circumstances enumerated in or invoked under Part 3 of Article 176 of the CPC, so that they should not be seen as absolving from substantiating the grounds provided in Part 1 of the same Article;
- ▶ Straightforward reference to the lack of place of residence in Moldova, and two other additional grounds for applying pre-trial detention (a breach of preceding preventive measures and imminent danger to public order) referred to in Part 2 of Article 185 of the CPC that are not always treated as just indications of the exhaustive list of grounds specified in part.1 of Article 176 of the CPC and relevant ECtHR case law;
- ▶ Deficient legislative techniques and the need to reinforce the priority of non-custodial preventive measures by establishing clear hierarchy between them, including by means of adjusting the sequence of relevant Articles in the CPC;
- ▶ Bail and (judicial) control being not available as standalone non-custodial preventive measures;
- ▶ Scarcity of advanced specific legislative provisions and infrastructural basis for securing 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 combined with awareness raising on the efficiency of the house arrest for securing the interests of administration of justice and mitigation of risks contemplated under the grounds of detention;

- ▶ Inappropriate limitation currently provided for by Law No 1545/1998 concerning a prior finding in a form of acquittal or dismissal of charges or any other unlawfulness of detention for seeking a compensation for an unlawful arrest;
- ▶ Lack of additional measures for securing reasonable time and related efficiency considerations, as well as introduction of ADR⁹³-based or other specific policies and methodology for providing the victims of relevant human rights violations with more expedited remedies;

Methodological and practice-related interventions to address:

- ▶ Prevailing incompliance of the judiciary, in particular, with the obligation to provide adequate justifications as to reasonable suspicion and grounds for detention, as well as other, including ECtHR case law-based, standards applicable to preventive as well as house arrest;
- ▶ Considerable disregard by prosecutors and judges and lack of proficiency in securing the substance and specific practicalities of application of the concept of reasonable suspicion, grounds for detention and relevant legal provisions and requirements of the ECtHR case law;
- ▶ Insufficient application of minimum guarantees, including the equality of arms, applicable to the procedures concerned with the use of operative information and intelligence and related requirements;
- ▶ Comparatively frequent application of the ground of causing public disorders and protection of detainee for applying preventive detention;
- ▶ Need in ensuring adjustment of the selection of preventive measures to the specifics of crimes, personality of accused and other factors, including based on specific examples and analytical material;
- ▶ Need to reinforce the proactive role of judiciary in securing that the parties appropriately address reasonable suspicion-related requirements and other, including ECtHR case law-based standards applicable to the application of preventive, as well as house arrest;
- ▶ Potentially inadequate domestic practice with regard to the amounts of compensations awarded for unlawful (in breach of the right to liberty and security standards) pre-trial detention;

Capacity building interventions to address:

- ▶ Not uncommon disregard by the judiciary of the requirement of establishment of reasonable suspicion for applying house arrest, as well as other preventive measures;
- ▶ Inadequacies in understanding by the legal professionals (lawyers, prosecutors, judges) of the substance and specific practicalities of applying the proportionality principle;

93. ADR stands for Alternative Dispute Resolution.

- ▶ Frequent ignorance by the judiciary of the obligation to establish at least one of the grounds for justifying detention required by the ECtHR and domestic legislation for applying house arrest, as well as other preventive measures;
- ▶ Occasional inobservance of the 3-day statutory time-limit envisaged by Article 312 (2) of the CPC and requirement of “promptness” in judicial review proceedings under Articles 190-195, and 308, 309 of the CPC;
- ▶ Need to fully ensure equality of arms in terms of access of the defence to materials used by prosecutors for substantiating a motion to apply preventive detention;
- ▶ Underuse by the defence lawyers of and judges’ inaction under the procedural opening to hear witness or examine other direct evidence and relevant standards deriving from the equality of arms;
- ▶ Isolated instances of disregard of the statutory limitation of applicability of pre-trial detention to juveniles (arrested in spite of being accused of less serious crime, while this measure can be used against them for serious and graver crimes), other guarantees applicable to them (process held without a psychologist); belated submission of the motion to court by the prosecutor (less than three hours before the expiration of 72 hours of police custody); invoking the ground of the risk of obstructing investigation after 10 months of preceding pre-trial arrest; disrespect of the confirmed mental health diagnosis and remanding an accused in a prison;
- ▶ Need in better identification and addressing key violations of the domestic provisions and international standards (if different) with regard to justification and application of pre-trial detention, as well as other factors contributing to damages, including intensity of mental suffering caused;

Specific lawyers-oriented interventions to address:

- ▶ Lack of proficiency of lawyers working under the free legal aid and members of the Bar concerning their role in tackling reasonable suspicion and grounds for detention, as well as other specific legal provisions and standards on application of preventive arrest, as well as house arrest and other preventive measures;
- ▶ Debatable practice of simultaneous representation of accused both by private and free legal aid lawyers;
- ▶ Need to advance quality control system and tools for assessing performance of free legal aid so that they specifically tackle the reasonable suspicion, as well as grounds of deprivation of liberty and other parameters concerning the application of pre-trial detention;

Other interventions to address:

- ▶ Need in relevant organisational, including staffing levels-related measures (in particular on the appeal courts level);
- ▶ Lack of contemporary IT including e-case/e-file type solutions;
- ▶ Inexistence of a cross-cutting unified (common) methodology of data gathering and analysis concerning pre-trial arrest for the all institutions involved in its application.

Annex No 1

Methodology
for Conducting the Research
on the Application of Pre-trial Detention
in the Republic of Moldova
as of May 2019

I. General Part

1.1. Overall objective

The **Research on the application of pre-trial detention in the Republic of Moldova** (Research) is conducted in order to assess the overall compatibility of the application of pre-trial detention with the right to liberty and security, as provided for by Article 5 of the European Convention on Human Rights (ECHR) and the European Court of Human Rights (ECtHR) case-law. It is designed to identify the actual impact of the domestic legislative framework and related developments on the practices of the prosecution and courts, as well as the efficiency of the defence in the application of pre-trial detention.

The application of pre-trial detention is considered challenging since the entry into force of the Criminal Procedure Code (CPC) in 2003. For the purposes of the Research, the term 'pre-trial detention' is understood as a preventive measure defined in Article 185 of the CPC. It corresponds to the measure defined in other jurisdictions (in English or as translated) as 'remand in custody', 'detention on remand' etc. In its judgments in respect of the Republic of Moldova, the ECtHR has found a series of violations of the right to liberty and security guaranteed by Article 5 of the Convention.

The initial judgments, dating from 2005 to 2008, including *Șarban, Paladi, Modârca, Boicenco, Holomiov, David, Mușuc*, etc., identified the patterns of repetitive violations. The execution of these judgments was or is still supervised by the Committee of Ministers of the Council of Europe in relation to the execution of the ECtHR judgements.¹ The measures undertaken by the Republic of Moldova to implement these judgments appear to be insufficient and sometimes have been controversial, including the frequent amendments to legislation.² This, in turn, has led to subsequent judgments of the ECtHR or communicated cases concerning violations of the right to liberty and security of the person by the Republic of Moldova. More recent cases include *Dogotar; Miron; Mătășaru and Savițchi; Ceaicovschi, Iurcovschi and others; Cucu and others*, etc.

There were several reports and studies that used different methodologies, including desk research and an analysis of the national legal framework in the light of international standards, comparative legal analysis, analysis of the prosecutors' motions and relevant court decisions on applying pre-trial detention, official statistical data provided by the

1. See the ECtHR judgments' execution database: <http://hudoc.exec.coe.int/eng?i=004-6966>; <http://hudoc.exec.coe.int/eng?i=004-6696>; <http://hudoc.exec.coe.int/eng?i=004-6712> (with further references). See also section 2.3 of the Methodology below.
2. See the Assessment Report, paras. 38-51.

national authorities etc.³ However, there is a need for research that would combine a comprehensive approach with the engagement of the stakeholders.

The Research is carried out under the Council of Europe Programme “Promoting a human rights compliant criminal justice system in the Republic of Moldova” (Programme). It is a follow-up to the 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 (Assessment Report)⁴ and draws on the relevant recommendation of that report as to a thorough inventory of the use of pre-trial detention on the basis of a unified methodology of data gathering. The Assessment Report argued that pre-trial preventive measures are of a considerable concern in the Republic of Moldova. More specifically, the frequent use of pre-trial detention is problematic in terms of humanization and resocialization. There has been no substantial improvement in terms of the level of applicability of the pre-trial detention in the Republic of Moldova over the years, which necessitates more profound review and consistent streamlining of legislation and practice.⁵

The results of the Research will be processed in a comprehensive report, which will incorporate the observations and findings, as well as relevant conclusions with recommendations. The ultimate objective of the Research is to support the Moldovan authorities in ensuring that the domestic policies and legal framework fully complies with the international standards in the area by determining and addressing the root-causes and reasons for the allegedly frequent application of pre-trial detention.

1.2. Specific considerations

The methods selected and adjusted for the Research strive to:

- ▶ provide holistic and objective generalised information and an analysis of the application of pre-trial detention;
- ▶ raise awareness of the authorities, legal professionals and society at large with regard to the role which pre-trial detention shall play in a criminal justice system which complies with human rights standards;
- ▶ assist the national authorities to identify the needs with regard to the regulation of pre-trial detention and its application in the light of compliance with the ECHR standards;
- ▶ provide the national authorities with a methodology and instruments for a further assessment of the application of pre-trial detention with regard to Article 5 of the ECHR.

3. [Decisions on Arrest issued by Investigative Judges in the Republic of Moldova. An Assessment from the International Point of View](#), (Soros Foundation,2011); [Report on respect of the right to freedom during the criminal investigation in the Republic of Moldova](#), (Soros Foundation, 2013); Pre-trial Arrest in the Republic of Moldova and in European Countries, (Soros Foundation, 2014); [The reform of the investigative judge institution in the Republic of Moldova](#), (Soros Foundation, 2015); [Alternative Preventive Measures to Pre-Trial Detention](#) (Soros Foundation, 2016); [Report on “The right to freedom and security of person in the Republic of Moldova”](#), Promo Lex, 2016; Evaluation [Report “Action 2.5.1 of the JSRS 2011-2016 Liberalization of criminal proceedings by using sanctions and non-custodial preventive measures for certain categories of persons and certain offenses”](#), NORLAM (2016); [Study of the legislation and practice of applying preventive measures and other procedural coercive measures, focusing on preventive arrest, home arrest and release on bail](#).

4. Available at: <https://rm.coe.int/2018-08-16-needs-assessment-report-component-1-final-eng/16808e2c00>

5. *Ibid*, paras. 4 and 45.

1.3. Guiding principles

The Research, its Methodology and instruments were designed in line with the following principles:

- ▶ objectivity and impartiality;
- ▶ confidentiality;
- ▶ non-involvement in the (criminal) proceedings and administration of justice in individual cases;
- ▶ accuracy and precision;
- ▶ no conflict of interest.⁶

In terms of the subject-specific approaches, the Research builds upon the Council of Europe's "Pre-Trial Detention Assessment Tool".⁷

By adhering to the Research's framework, being engaged as the Council of Europe consultants, the experts involved in the Research undertake to provide accurate and truthful information, to preserve the confidentiality of data and to have no conflicts of interest in carrying out the relevant assignments.

1.4. Research team

The Research methodology and tools have been designed by international (one lead⁸ and one thematic⁹) and supporting national¹⁰ consultants, engaged by the Council of Europe. A group of four local consultants, two selected by the Council of Europe and two by the National Institute of Justice, will carry out the analysis of the finalised criminal case-files and the national courts' practice. The team of local consultants is assisted by a national consultant in the field of sociology,¹¹ engaged by the Council of Europe.

In particular, the lead international consultant is responsible for:

- 1) developing the methodology and checking the form of lists and questionnaires for conducting the Research;
- 2) taking a lead in analysing the data compiled by the group of local consultants as mentioned under chapters 2.3, 2.4 and 2.5 of the Methodology;¹²
- 3) taking a lead in performing desk research of the national and international standards, statistical data and information provided by the national authorities;
- 4) participating in relevant expert discussions, panels etc. throughout the Research implementation process;
- 5) guiding and consolidating the contributions of the other consultants engaged in the Research; and
- 6) drafting the overall Research report and drawing up recommendations.

6. These are aligned with internationally recognized principles, in particular those specified in the UN Manual on Human Rights Monitoring, Chapter 2: Basic principles on human rights monitoring, available at: <https://www.ohchr.org/Documents/Publications/Chapter02-MHRM.pdf> 18

7. Available at: <https://rm.coe.int/pre-trial-detention-assessment-tool/168075ae06>

8. Mr. Erik Svanidze, Council of Europe international consultant.

9. Mr Radu-Florin Geamanu, Council of Europe international consultant.

10. Mr. Lilian Apostol and Mr. Ion Graur, Council of Europe supporting national consultants.

11. Mr. Vasile Cantarji, Council of Europe national consultant in the field of sociology.

12. See relevant sections of the Methodology below.

The international thematic consultant is responsible for:

- 1) carrying out a comparative study among Council of Europe's Member-States as to types of offences and other formal limitations of the applicability of pre-trial detention;
- 2) developing an additional analysis in this regard to be annexed to and set out in the Research Report;
- 3) contributing to the relevant expert discussions, panels etc. throughout the Research implementation process whenever required.

The supporting national consultants are responsible for:

- 1) providing input to the design of the Research methodology;
- 2) contributing to carrying out desk research of the national legal framework, statistical data and information provided by the national authorities and preparing relevant written reviews;
- 3) correlating the results of the elements of the Research and developing the domestic framework-specific written contribution to the Final Report;
- 4) contributing to relevant expert discussions, panels etc. throughout the Research implementation process whenever required.

The group of four local consultants are responsible for:

- 1) examining the relevant files and audio recordings;
- 2) filling in the prepared check-list forms in cooperation with a sociology consultant and submitting them to the Council of Europe project team as mentioned under chapter 2.3 and 2.4 of the Methodology¹³;
- 3) liaising with the Council of Europe project team on the logistics and other technicalities of this examination;
- 4) providing expert advice and clarifications in processing the collected data as mentioned under chapters 2.3, 2.4 and 2.5 of the Methodology¹⁴;
- 5) participating in relevant expert discussions throughout the Research implementation process.

The supporting national consultant in the field of sociology is responsible for:

- 1) ensuring that the Research meets the rigour, representativeness and other sociological requirements;
- 2) developing the mapping and technical solutions as mentioned in chapter 2.3 of the Methodology¹⁵; and
- 3) contributing to the development of the Methodology by processing the data and developing relevant illustrative tables/charts on the results as mentioned in chapters 2.3, 2.4, and 2.5 of the Methodology.

The consultants are backstopped by the Programme Team as specified in the Methodology and other Research-related documents.

13. See relevant sections of the Methodology below.

14. See relevant sections of the Methodology below.

15. See relevant sections of the Methodology below.

1.5. Scope and elements

The Research covers the period from **1 January 2013 to 31 December 2018**¹⁶.

The Research is designed to explore the *de facto* jurisdiction of the Republic of Moldova.

The Research (starting from the development of the methodology and its constituent tools/instruments up to a presentation of the final comprehensive report) was scheduled from **December 2018 to December 2019**¹⁷.

In order to ensure its multi-dimensional character and an appropriate range of data, the Research applies a set of collection, analysis and generalization methods (elements):

- Analysis of legal and intra-institutional regulatory frameworks;
- Analysis of the statistics generated by domestic stakeholders, as well as quantitative data compiled in the course of the Research;
- Examination and analysis of the selected individual judicial decisions and audio recordings of the court hearings on the application of pre-trial detention, as well as the relevant overall case-files;
- Examination and analysis of the selected judicial decisions, relevant files and audio recordings of the court hearings on the suits claiming compensation for illegal arrests;
- Survey (by designed questionnaires) on the matters of concern among judges, prosecutors and lawyers;
- Panel discussions with groups of legal professionals, academics, and representatives of NGOs; consultations with authorities and civil society representatives;
- Consolidation of data obtained and findings made by the above elements, analysis and development of a comprehensive report on the Research.

1.6. Contributing parties

The Council of Europe Programme “Promoting a human rights compliant criminal justice system in the Republic of Moldova” (Component 1) is responsible for:

- 1) the overall coordination and supervision of the process of the implementation of the Research;
- 2) securing the commitment to the Research of the relevant national authorities;
- 3) provision of international and local expert assistance and their performance as specified by the Methodology;
- 4) adherence to the timeframe and plan of the Research;
- 5) cooperation with the national stakeholders and the consultants during the implementation period and facilitation of the Research process, including by providing support to the joint-intermediate expert meetings;

16. Due to the condition of covering the completed cases only, components 2.4 and 2.5 do not examine the decisions and cases from 2018. The period up to mid-2019 is covered by the remaining Research components.

17. For the schedule of specific elements and activities see the relevant sections of the Methodology below.

- 6) administrative support to the organization of the survey by questionnaires among judges, prosecutors, lawyers, as well as the collection of the statistical data and information from the Ministry of Justice and their submission to the international consultant for analysis; and
- 7) finalising/revising/approving/translating and distributing the final report to the authorities.

Superior Council of Magistracy (SCM) is expected to:

- 1) grant the Research Team access to the documentation (files) and audio recordings of the court hearings in the format specified in the Methodology following the Council of Europe's official request;
- 2) provide (access to) all relevant judicial guiding documents, summaries of court practice, reports, statistical data, etc. that will be used during the desk-based analysis and research;
- 3) facilitate the distribution of the questionnaires to and ensure the engagement of judges interested in contributing to the Research;
- 4) address and deal with notifications from the Research team in the event of a reduced level of cooperation by the court staff and members of the judiciary;
- 5) participate in relevant expert discussions/panels throughout the Research implementation process. The SCM decision on the request from the Council of Europe Office in Chisinau to provide assistance and access of the Council's consultants to some statistical data and case-files for conducting the Research on the application of the pre-trial detention N 13/01 of 15.01.2019 is annexed to the methodology (Annex 1).

Ministry of Justice (MoJ) is expected to:

- 1) provide statistical data on persons detained in the penitentiary institutions of the Republic of Moldova;
- 2) provide information to the Research team on the cases initiated against the Ministry of Justice based on Law 1545/1998 for recovering damages/compensation for illegal arrests or in case of acquittals;
- 3) ensure the participation of the Ministry representatives in relevant expert discussions/panels throughout the Research implementation process.

Supreme Court of Justice (SCJ) is expected to:

- 1) provide access to all relevant judicial guiding documents, summary of court practice, reports, statistical data, etc. that will be used during the desk-based analysis/research;
- 2) facilitate the distribution of the questionnaires to and engagement of its judges interested in contributing to the Research; and
- 3) participate in relevant expert discussions/panels throughout the Research implementation process.

National Institute of Justice (NIJ) is expected to:

- 1) identify the potential local consultants for examining and analysing the selected individual decisions, relevant files and audio recordings of the court hearings on the application of pre-trial detention, to be engaged by the Council of Europe;
- 2) participate in relevant expert discussions/panels throughout the Research implementation process.

General Prosecutor's Office (GPO) is expected to:

- 1) inform all relevant prosecution offices about the Research;
- 2) provide (access to) internal regulations, guidelines, reports, statistical data, etc. relevant to the Research;
- 3) facilitate the distribution of the questionnaires to and engagement of prosecutors interested in contributing to the Research; and
- 4) participate in relevant expert discussions/panels throughout the Research implementation process.

Ministry of Internal Affairs (MIA) is expected to:

- 1) provide access to internal regulations, guidelines, reports, statistical data, etc. relevant to the Research; and
- 2) participate in relevant expert discussions/panels throughout the Research implementation process.

Lawyers Union of the Republic of Moldova is expected to:

- 1) inform lawyers about the Research;
- 2) provide (access to) internal regulations, guidelines, reports, statistical data, etc. relevant to the Research;
- 3) facilitate the distribution of questionnaires to and engagement of lawyers interested in contributing to the Research; and
- 4) participating in relevant expert discussions/panels throughout the Research implementation process.

Justice issues-related /Human Rights NGOs active in the relevant matters are expected to:

- 1) provide reports, and other materials relevant to the Research; and
- 2) participate in relevant expert discussions/panels throughout the Research implementation process.

II. Special Part

2.1. Analysis of legal and intra-institutional regulatory frameworks

The analysis is conducted by the lead international consultant supported by a thematic international and supporting national consultant(s). It will concern the ECHR-based standards as to quality (clarity, foreseeability, and, possibly, accessibility), as well as the overall appropriateness of legal techniques and coherence of:

- a) the primary legislation, in particular criminal procedure, criminal (substantive law) and other relevant legislation; including as to the available general and specific (civil/administrative) remedies for illegal arrest and other violation(s) affecting the applicability of preventive arrest and its interrelation with other preventive measures; the current state of affairs and its dynamics during the period covered by the Research (i.e. significant amendments to the relevant legal framework adopted in 2012, 2016 and 2018); its impact on the frequency of the application of preliminary detention and compliance with the right to liberty and security of the person, as well as the efficiency of remedies in relation to its violation(s);
- b) the relevant secondary legislation, intra-institutional regulatory framework, guidelines, reports, summaries of the national case-law of the Constitutional Court, Supreme Court of Justice, relevant decisions of the Superior Council of Magistracy, including the disciplinary practices against members of the judiciary, etc.

The analysis involves the ECtHR case-law on Article 5 of the ECHR in respect of the Republic of Moldova and documents of the Committee of Ministers as regards the execution of relevant (groups of) cases¹⁸.

In addition, it comprises a comparative study among members of the Council of Europe as to offences and other formal limitations of the applicability of the preventive arrest (detention), including the relevant analysis of the existing domestic legal framework, to be developed by an international thematic consultant. The study is to be completed by **mid-June 2019**.

The analysis is completed by **early July 2019**, including in terms of its review in the light of the data obtained in relation to the other elements of the Research. Its results are to constitute an integral part of the final Report.¹⁹

18. See above Section 1.1 of the General Part of the Methodology.

19. See Section 2.6 below.

2.2. Analysis of the statistical data generated by the domestic stakeholders

The analysis is conducted by the supporting national consultant under the guidance of the lead international consultant. It will focus on the data obtained and compiled during the on-site research and/or submitted by the domestic authorities upon request. Such data includes:

- a) judicial decisions and other procedural interventions (prosecutors', lawyers' motions), data on persons under preventive arrest compiled by courts (Superior Council of Magistracy), Ministry of Justice (National Administration of Penitentiaries), General Prosecutor's Office, Ministry of Internal Affairs (criminal investigators' service), other investigative agencies²⁰, as well as the overall and disaggregated crime rate statistics maintained by the Ministry of Internal Affairs;
- b) statistical data concerning the sums of compensation for non-pecuniary damage awarded by Moldovan courts for illegal arrest (Law No 1545/1998 *on compensation for damage caused by illegal acts by the criminal investigation authorities, prosecution and courts*);
- c) statistical data as to the relevant violations of Article 5 of the ECHR established by the ECtHR (including by friendly settlements) and amounts of compensation awarded to the applicants within the same period.

The initial analysis is due by **mid-June 2019** and fully completed in terms of its update and correlation in the light of data obtained in relation to the other elements of the Research by **early July 2019**. Its results are to constitute an integral part of the final Report²¹.

2.3. Examination and analysis of the selected individual decisions and audio recordings of the court hearings regarding the application of pre-trial detention, as well as relevant overall case-files

The examination reviews only completed, non-pending, criminal proceedings and cases ending in final judgments or decisions to discontinue prosecution:

I. Investigation judges' files and audio recordings of the related court hearings, related to prosecutors' and/or defence motions on question of preventive measures in criminal proceedings ordering and/or extending pre-trial detention (preventive measures-related files)

II. Primary criminal case-files on criminal investigations and trials (overall case-files).

The first limb of the examination is addressed by compiling **Check-list No 1**²² that has been designed to address the main patterns identified by the ECtHR judgments against the Republic of Moldova, i.e. lack of reasonable suspicion that the accused person has committed the offence; insufficient reasons for decisions concerning the applicant's

20. The interrelation of the dynamics of data concerned with the developments under the domestic framework is set out in Section 1.2 of the Methodology.

21. See Section 2.7.

22. See Annex 2.

detention on remand and its extension; limited access of arrested persons and lawyers to all the materials in the case-file submitted by the prosecution and relied upon by courts to support the need for detention etc. The methodology and Check-list No. 1 are designed to examine the specific detention-related court decisions (judgments) rendered by the first-instance and appeal courts' judges.

The second limb of the examination is addressed by compiling **Check-list No. 2**²³ that has been designed to identify the material law and overall procedure-related context on the applicability of preliminary detention in a particular situation of an accused person. It concerns the legal classification of criminal offences, overall length of detention, numbers and types of relevant procedural decisions and other key parameters of criminal prosecutions of individuals subjected to pre-trial detention.

The examination is carried out by filling in the relevant check-lists in accordance with the incorporated instructions. The check-lists are an integral part of the Research methodology.

Thus, the examination provides structured data and analytical indications as to the typical violations, primarily concerning the reasonable suspicion and reasons for detention with reference to patterns already identified by the ECtHR judgments against Moldova. In addition, it carries out an evaluation of other already found or anticipated violations of the right to liberty and security of the person that are specifically itemised in the check-lists.

The accused-related data (overall characteristics of the criminal and trial proceedings) are necessary to identify the state of play in terms of the applicability of pre-trial detention within the context of the nature of criminal offences, final sanctions imposed, length of detentions and other factors illustrating general trends and practices and suggesting necessary policy adjustments.

The decisions covered by **the first limb** (decisions-related Check-list No 1) are randomly selected within the general parameters defined according to the sociological (representativeness) requirements in numbers, their chronological and geographical distribution identified against the statistical data on judicial decisions rendered during the Research period. The examination of the **mapping under the first limb** is outlined in the chart annexed to the Methodology²⁴.

The overall case-files covered by **the second limb** (the accused-related Check-list No 2) are also randomly selected within the general parameters, defined according to the sociological (representativeness) requirements in numbers, their chronological and geographical distribution so that they correspond, as far as possible, to the statistical data on the number of the accused persons subjected to pre-trial detention proceedings during the Research period. To the extent possible, their geographical and chronological distribution will be captured by the Research. The relevant parameters examined under **the second limb** are outlined in the table annexed to the Methodology.²⁵

23. See Annex 3.

24. See Annex 5.

25. However, in order to ensure the appropriate representativeness of the examination, this logistical arrangement should not specifically concern other decisions examined with regard to the same accused. This and other conditions are further specified in the annexed Check-lists.

The examination is carried out by the four local consultants under the conditions established by the relevant SCM decision²⁶ and the Methodology. The examination of decisions and overall case-files by filling in Check-lists Nos. 1 and 2, is distributed among the four local consultants according to the logistical Plan in line with the examination mapping and the table respectively.²⁷

The check-list(s) are completed in an electronic format by the gadgets loaded with a relevant script and, thus, submitted to the Programme Team as digital files.

The check-list(s) are processed and generalized under the guidance of the lead international consultant by the domestic consultant in the field of sociology, by drawing up the overall set of correlations and relevant illustrative tables/charts representing the results of the examination.²⁸ They are assisted by (one of) the supporting national consultant(s).²⁹ The supporting national consultants' comment on the processed data accordingly.³⁰

The examination of case-files and completion of check-lists No 1 and No 2, i.e. **collection of the primary data**, is commenced by through a **five-day pilot stage** as of the **beginning of March 2019** and concluded by **mid-May 2019**.

The **basic generalization** and **summary of the initial data** under the examination is to be completed by the **end of May 2019**.

The **processing and fully itemized analysis** of the initial Check-lists-based data is to be completed by the **end of June 2019**.

2.4. Examination and analysis of the selected judicial rulings, relevant files and audio recordings of the court hearings on the civil actions claiming compensation for illegal arrests

The examination concerns:

- ▶ Completed (non-pending) civil cases concerning claims for compensation for unlawful detention examined by the Moldovan courts during the period covered by the Research.

The examination is carried out according to **Check-list No 3**³¹ designed to assess the efficiency of the specific domestic remedy concerning suits claiming compensation for illegal arrests introduced by Article 525 of the CPC and Law No 1545/1998. It is designed to address the overall proceedings concerning one relevant civil claim examined at all instances of the courts in order to assess the effectiveness of this remedy and identify the overall state of affairs and trends.

26. See Annex 1.

27. The Plan takes into account the current distribution of court archives.

28. See above the Section on the Research team.

29. *Ibid.*

30. *Ibid.*

31. See Annex 4.

The Check-list is completed and processed in accordance with the incorporated instructions³² and is an integral part of the Research methodology.

The casefiles, processed under this examination, are selected from the list of the cases compiled on the basis of the data provided by the SCM and the courts. It is carried out by (one of) the local consultant(s)³³. The examination should concern all or at least the majority of the cases in this category processed during the Research period.

The check-list is processed and generalized under the guidance of the lead international consultant by the domestic consultant in the field of sociology by drawing up the overall set of correlations and relevant illustrative tables/charts representing the results of the relevant examination³⁴. They are assisted by (one of) the supporting national consultant(s)³⁵. The national consultants commented on the processed data.³⁶

The examination of the files and the completion of Check-list No 3, i.e. **collection of the initial data** is to be concluded by the **end of May 2019**.

The **basic generalization and summary of the initial data** under the present examination is to be completed by **Mid-June 2019**.

The **processing and full itemized analysis** of the initial Check-lists-based data is to be completed by the **end of June 2019**.

2.5. Survey (by means of questionnaires) on the matters about which judges, prosecutors and lawyers were concerned

The survey is based on and carried out through the use of the Questionnaire³⁷, which is considered as an integral part of the Research methodology. The Questionnaire is universal and applies to anonymous questioning of all the legal professionals involved in the relevant proceedings.

They are processed in paper format during the events held within the Research or Project framework, or, alternatively, separately distributed and arrangements made for collection (outsourced to a legal entity or individual service providers). The minimum number of Questionnaires *per* category of legal professionals immediately engaged in pre-trial detention proceedings is as follows: 50 prosecutors; 50 judges; 100 lawyers.

The Questionnaires completed in a paper format are returned to/collected by the Programme Team. They are processed and generalized under the guidance of the lead international consultant by the domestic consultant in the field of sociology by drawing up the overall set of correlations and relevant illustrative tables/charts representing

32. See Annex 2.

33. See above the Section on the Research team.

34. See above the Section on the Research team.

35. See above the Section on the Research team.

36. See above the Section on the Research team.

37. See Annex 6.

the results of the examination³⁸. They are assisted by (one of) the supporting national consultant(s)³⁹. The national consultants commented on the processed data.⁴⁰

The completion of the Questionnaires is to be completed by the **end of June 2019**.

The **processing and full itemized analysis** of the initial data is to be completed by **mid-July 2019**.

At the same time, this element of the Research can be considered as optional. In the event of time constraints and due to financial considerations, its rationale could be addressed by panel discussions envisaged by the Research.⁴¹

2.6. Panels, consultations with authorities, and civil society representatives

The Research includes a set of **one-day moderated panel discussions** with up to 10-12 representatives immediately engaged in pre-trial detention proceedings of each category representatives of legal professionals and civil society and academics (five in total: judges, prosecutors, lawyers, SCOs and academics).

The panel discussions are held in order to discuss the initial-quantitative results following the implementation of other Research elements provided by Sections 2.1-2.5 above. They aim to generate proposals and recommendations for the final report. The lead international consultant will moderate and sum up the panel discussions with the assistance of (one of) the supporting national consultant(s).

The set of panel discussions is carried out in **mid-July 2019**.

2.7. Consolidation of data obtained and findings made by means of the research elements, their analysis and development of a final comprehensive report on the Research

The final Report is developed by the lead international consultant with the support and contribution of the Research Team, as outlined in the Methodology.

The Report comprises sections and addresses the results, findings under the Research following the implementation of Sections 2.1-2.6. It also comprises a section with generalised observations and conclusions as to the state of affairs concerning the applicability of pre-trial detention in the Republic of Moldova (with sub-sections specifically addressing the legislative, practice-related, institutional and capacity building issues).

The Report will include specific recommendations to the Moldovan authorities aiming at ensuring that the domestic policies, legal framework, including the practice comply with the international standards.

38. See above the Section on the Research team.

39. Ibid.

40. Ibid.

41. See the subsequent Section of the Methodology.

The draft of the Report, in its advanced version, is to be circulated for final consultations with the relevant authorities⁴² by **early August 2019**.

The consultations would include immediate discussions and/or written consultations concerning the draft Report. They are completed by addressing, where appropriate, their results by the lead international consultant in the Report in **early September 2019**.

42. See above the Section on the Contributing Parties.

Annex 1. Superior Council of Magistracy Decision

CONSILIUL SUPERIOR AL MAGISTRATURII

2009, mun. Chișinău, str. M. Eminescu, 5
www.csm.md; email: aparatul@csm.md
tel.: 022-990-990, fax: 022-22-73-20



ВЫСШИЙ СОВЕТ МАГИСТРАТУРЫ

2009, г. Кишинэу, ул. М. Еминеску, 5
www.csm.md; email: aparatul@csm.md
тел.: 022-990-990, факс: 022-22-73-20

HOTĂRÂRE

cu privire la demersul Oficiului Consiliului Europei la Chișinău, referitor la asistența și accesul consultanților la anumite date statistice și dosare pentru cercetarea privind aplicarea arestului preventiv

15 ianuarie 2019
nr. 13/1

mun. Chișinău

Examănând demersul Oficiului Consiliului Europei la Chișinău, referitor la asistența și accesul consultanților la anumite date statistice și dosare pentru cercetarea privind aplicarea arestului preventiv, luând act de informația membrului CSM, Anatolie Galben, Plenul Consiliului Superior al Magistraturii

CONSTATĂ:

La Consiliul Superior al Magistraturii a parvenit demersul Oficiului Consiliului Europei la Chișinău, prin care se solicită acordarea asistenței și accesului consultanților Consiliului Europei la anumite date statistice și dosare pentru cercetarea vastă privind aplicarea arestului preventiv.

Potrivit demersului cercetarea a fost inițiată în cadrul Programului Consiliului Europei "Promovarea unui sistem de justiție penală bazat pe respectarea drepturilor omului în Republica Moldova", scopul fiind evaluarea în mod obiectiv a practicii naționale în aplicarea arestului preventiv și a corespunderii a acesteia cu standardele Convenției Europene a Drepturilor Omului.

În acest sens, efectuarea cercetării este planificată pentru lunile ianuarie-aprilie 2019, astfel, solicitând-se accesul la următoarele date statistice relevante și anume:

-datele statistice privind practica judiciară a judecătorilor de instrucție și a curților de apel privind aplicarea și / sau extinderea măsurilor preventive, în special a arestului preventiv și a arestului la domiciliu, pentru perioada 2012-2018, inclusiv;

-datele statistice privind practica judiciară la toate nivelurile de competență în materie civilă privind cererile de compensare a prejudiciilor morale pentru o arestare ilegală în temeiul Legii nr. 1545, pentru perioada 2012-2018 inclusiv.

-materialele dosarelor judecătorilor de instrucție cu înregistrările audio aferente a ședințelor de judecată referitoare la demersurile procurorilor și/sau avocaților cu privire la măsurile preventive în procesul penal: de exemplu, aplicarea și/sau prelungirea arestului preventiv, arestului la domiciliu, eliberarea pe cauțiune sau sub control judiciar, aplicarea măsurilor speciale de constrângere medicală, ș.a.

(dosarele judecătorilor de instrucție cu privire la măsurile preventive);

-dosarele penale de bază (finalizate), inclusiv înregistrările audio a ședințelor de judecată corespunzătoare, unde cel puțin unul dintre inculpați a fost deținut pe parcursul judecării în fond în continuarea arestului aplicat la faza de urmărire penală, potrivit dosarelor sus-menționate ale judecătorilor de instrucție, obiect al acestei cercetări;

- cauzele civile terminate (care nu sunt pe rolul instanțelor) examinate în principal sau în conexiune cu acțiunile civile de compensare a prejudiciilor urmare a arestului ilegal, înaintate în baza art. 525 a Codului de procedură penală și/sau a Legii nr. 1545 și soluționate de instanțele din Republica Moldova în aceeași perioadă de referință (2012- 2018).

Prin urmare, Plenul CSM relevă că, cercetarea va fi efectuată de un grup de consultanți internaționali și locali care au fost selectați de Consiliul Europei și Institutul National al Justiției.

Consultanții locali urmează să analizeze dosarele și înregistrările audio ale audierilor din instanță prin selectarea aleatorie a dosarelor, ce se va efectua în baza criteriilor de asigurare a corespunderii și reprezentării, precum și a repartizării geografice echitabile a instanțelor în diferite regiuni ale Republicii Moldova.

Având în vedere volumul de lucru exagerat al angajaților instanțelor judecătorești, precum și resursele financiare austere, CSM menționează că în bugetul instanțelor nu sunt prevăzute resurse financiare suficiente pentru angajații instanțelor care vor acorda suportul pentru efectuarea cercetării în vederea aplicării arestului preventiv.

Astfel, cheltuielile pentru acțiunile de cercetare (copii de pe dosare, scanarea dosarelor, plata pentru ore suplimentare de muncă ale angajaților instanțelor precum și alte cheltuieli ce țin de acțiunile vizate supra) urmează a fi suportate de Programul "Promovarea unui sistem de justiție penală bazat pe respectarea drepturilor omului în Republica Moldova" al Consiliului Europei.

Conform art. 24 alin. (1) și (2) din Legea cu privire la Consiliul Superior al Magistraturii, Plenul Consiliului Superior al Magistraturii adoptă hotărâri cu votul deschis al majorității membrilor săi.

Prin urmare, în conformitate cu prevederile legale enunțate și ținând cont de importanța cercetării ce urmează a fi efectuată de consultații naționale și internaționale ai Consiliului Europei, precum și în rezultatul procedurii de votare a membrilor CSM prezenți la ședință, cu 9 (nouă) voturi "pro" Plenul Consiliului Superior al Magistraturii, admite demersul Oficiului Consiliului Europei la Chișinău, referitor la asistența și accesul consultanților la anumite date statistice și dosare pentru cercetarea privind aplicarea arestului preventiv.

Învederând cele expuse, Plenul Consiliului Superior al Magistraturii, în temeiul art. 4, 17, 24 și 25 din Legea cu privire la Consiliul Superior al Magistraturii,

HOTĂRĂȘTE:

1. Se admite demersul Oficiului Consiliului Europei la Chișinău, referitor la asistența și accesul consultaților la anumite date statistice și dosare pentru cercetare privind aplicarea arestului preventiv.

2. Prezenta Hotărâre poate fi contestată la Curtea Supremă de Justiție de orice persoană interesată, în termen de 15 zile din data comunicării.


3. Copia de pe prezenta Hotărâre se remite pentru informare Oficiului Consiliului Europei la Chișinău și se publică pe pagina web a Consiliului Superior al Magistraturii (www.csm.md).

Președintele ședinței Plenului
Consiliului Superior al Magistraturii



Victor MICU

Annex 2. Check-list No 1 DETENTION DECISION-RELATED

Comments, explanations and reference to national legislation		Check-in
<p>INSTRUCTIONS. <i>This Check-List is to be considered as a separate file generated in the system (by means of the gadget). Use it for each detention-related court decision (ruling). Complete and generate a separate file for each Check-List. Introduce only verified data, in the format required by the cell. For other questions and inquiries contact the Project Team. Do not copy the decisions or documents from the files examined. Do not engage the court staff in review or give them any tasks to do except providing the files.</i></p>		
RESEARCH DATA Decision-related		
1	Check List No.	...N1 -...
1a	IDENTIFICATION DETAILS OF THE ACCUSED	
1b	Reference to Check-list(s) 2 or 3	...N2 -... ...N3 -...
DECISION-SPECIFIC DATA		
2	APPELLATE COURT (appellate jurisdiction)	
3	COURT (investigating judge)	

4	DATE and No. of the COURT RULING	The date of the court ruling examined and its (court ruling) No		
5	Nature of the COURT RULING (DECISION)	<p><u>Initial detention</u> – first decision on the application of pre-trial arrest by investigating judges, as well as trial judges (issued in absentia, changing from non-custodial measure etc).</p> <p><u>Review</u> – decision on consideration of motion(s) submitted under Articles 190-195 of the CPC (including by trial judges when considering relevant motions)</p> <p><u>Extension</u> - decision extending the detention (including by trial judges)</p> <p>Tick the relevant (double check in the left column if refused or discontinued detention). If left blank – the detention was applied, maintained, extended.</p> <p><u>Relevant Appeals</u> - decisions rendered on appeal against the initial decisions applying/refusal the initial one or reviewing it.</p> <p>Tick for those that granted appeals (changing the initial). If left blank – no changes to the initial decision.</p>		DETENTION (INITIAL) REVIEW (ARTICLES 190-195) EXTENSION APPEAL AGAINST (INITIAL) DETENTION / REVIEW / EXTENSION APPEAL AGAINST REFUSAL
6	Qualification in law of the relevant crime(s) (as in the decision)	Indicate Article, part, paragraph of the Criminal Code		
7	Has the court granted the motion to apply, extended or upheld it	Tick the box if 'yes'		
8	PROSECUTION (office branch)	What Prosecution branch is responsible for the remand proceedings? Do not confuse with the branch that initiated investigations or initiated remand proceedings but referred the case lately to another prosecution branch (** what is meant by "lately"?).		

9	DEFENCE (legal aid, chosen or both)	For Research purposes it may be relevant to distinguish whether the defense has been provided quality services and whether the legal aid influences the remand proceeding.
9a	Legal aid	Only LEGAL AID was provided in all remand proceedings. Tick the box if "Yes"
9b	Chosen lawyer	Only CHOSEN LAWYER was employed in all remand proceedings. Tick the box if "Yes"
9c	Both	Legal aid was provided during first stages of the proceedings and then the lawyer was chosen. Tick the box if "Yes"
9d	Not clear	
THEMATIC SURVEY / SUBSTANTIVE ISSUES		
TYPICAL VIOLATIONS (the ECtHR case-law against Moldova that appears to reveal SYSTEMIC patterns of violations)		
REASONABLE SUSPICION (Article 5 § 1 (c)) Refusal or silence of investigating judges / Courts of Appeal to examine the applicants' arguments on lack of a reasonable suspicion (Musuc, Cebotari, Stepuleac).		
<p>The aim of this Section is only to assess whether there have been any reasoning and/or reference to a reasonable suspicion IN GENERAL pending the remand proceedings. It looks into the quality of judicial reasoning concerning "reasonable suspicion" within the meaning of Article 5 § 1 (c). According to the ECtHR, judicial reasoning must be concrete, clearly articulated and based on the analysis of evidence and particular circumstances of the given case. Stereotypic and general references, such as simple quotations of the ECtHR judgments are unacceptable. The domestic legislation clearly defines reasonable suspicion (see Article 6 p.4/3 CPC) along with the judicial duty to address and specify reasons concerning it (see Article 308 (8) p. f) CPC).</p>		

10	Did PARTIES in their judicial pleadings/written motions/appeals refer to a reasonable suspicion/its persistence?	<p>Tick the box if “Yes” Distinguish between the evidence substantiating / disproving reasonable suspicion and that referring to grounds for continuous detention, under Article 5 § 3 (see below). Evidence and arguments relevant for assessing reasonable suspicion may be based on, but not limited to reports of police officers, victims’ testimonies and comprise facts or circumstances proving that the accused might have committed a crime. The persistence is to be assessed in continuous detention (its extension).</p>	
11	PROSECUTION provided evidence/specific argument(s) substantiating reasonable suspicion?	<p>Article 308 (6) CPC. As of June 2016, prosecution must provide reasons and evidence substantiating reasonable suspicion. Please check whether the prosecutorial motions and its pleadings satisfy this requirement. Before June 2016, please check whether prosecution did this suo motu. Tick the box if “Yes”</p>	
12	What EVIDENCE/ CIRCUMSTANCE(S) were brought by the PROSECUTION to substantiate the suspicion/ its persistence (if any)?	<p>Could be sole or cumulative or none. Tick the box if “Yes”</p>	
12a	Victim’s and/or a witness’s testimony	<p>Tick the box if “Yes”</p>	
12b	Operative information of the police/intelligence service and/or police informant	<p>Tick the box if “Yes”</p>	
12c	UNDISCLOSED / CLASSIFIED/ SECRET information of the police/ intelligence service and/or police informant	<p>Tick the box if “Yes”</p>	

12d	Arrest <i>in flagrante delicto</i>	Tick the box if "Yes"	
12e	Witness implicating the accused (suspect)	Tick the box if "Yes"	
12f	Other (please specify, briefly, what particular facts were referred for substantiation of the grounds for remand)	Tick the box if "Yes"	
13	DEFENCE addressed evidence/specific argument(s) substantiating reasonable suspicion (in general)	Tick the box if "Yes"	
14	DEFENCE addressed/ rebutted ALL/KEY evidence/ specific argument(s) substantiating reasonable suspicion <u>put forward by the prosecution</u>	Tick the box if "Yes" (if they did not address/ rebut the key ones at least, consider it as 'No').	
15	Did the Court/Judge(s) address the reasonable suspicion/its persistence?	Observe accurately, whether the judges separated their assessment of a reasonable suspicion from the grounds for detention. Its persistence (reinforcement) is to be assessed in continuous detention (its extension). Tick the box if "Yes" (i.e. court/judge(s) substantiated the decision by the suspicion-related considerations).	
16	Did the judge(s) provide reasons suo motu?	This situation is applicable only when parties DID NOT CONTEST or ARGUE regarding "reasonable suspicion" but the court/ judge(s) however elaborated on it. Tick the box if "Yes"	

<p>How you would you qualify <u>JUDICIAL</u> reasoning on REASONABLE SUSPICION in the decision?</p>		<p>See below the explanation of the criteria applicable to your assessment. Applicable also to the decisions refusing or discontinuing detention.</p> <p>Tick the relevant box below.</p>
16a	Very poor	No clear legal terminology applicable to the case; quotes of legal authorities manifestly irrelevant for the case; copy-paste phenomena; many errors and even grammatical inconsistencies; a reader is unable to understand the text and to follow the reasoning; very formal attitude and authoritative language giving an impression of an arbitrary decision; no clear coherence and clarity of arguments; etc.
16b	Poor	Incoherent argumentation; mainly made by quotations of the relevant legal provisions, without attempting to apply them in the case; a judge was unable to present his reasoning into the context of legal reasoning and arguments of the parties; no explanations of meaning and application of legal authorities; quotes of legal authorities do not bring any added value to the judicial reasoning and it could be easily ignored as if it does not exist;
16c	Average	Provided reasons which reveal an average and general knowledge about the employed terminology and legal standards; however, judge confuses legal standards and human rights issues (e.g. he joins his reasoning on reasonable suspicion with grounds for continued detention (e.g. risk to flee, obstruction etc.)), or employs other irrelevant standards (e.g. such as presumption of innocence confusing it with presumption of liberty, etc.).
16d	Good	Reasons show a good knowledge of the case-law and legal provisions; judge mainly elaborates on his own assessment and applies this reasoning in casu, but he remains silent on the parties' arguments, imposing his authoritative opinion.
16e	Excellent	Judge elaborates on each parties' arguments (prosecution and defense) and adds his own argumentation applied in case.

If the Court/JUDGE(S) refused to order or uphold DETENTION due to the lack of reasonable suspicion , it applied:	<i>It could be both: application of another non-custodial measure or release. For the purposes of the Research, the decisions of investigation judge and appellate judges will be regarded as equal. Also, house arrest will be conventionally regarded as an alternative measure to the continuous detention, only for the purpose of the Research, i.e. to see whether the practice of judges has changed</i>	
17a non-custodial measure/ release?	Tick the box if "Yes"	
17b house arrest?	Tick the box if "Yes"	
17c arrest applied / upheld	Tick the box if "Yes"	
JUSTIFIABILITY / GROUNDS FOR DETENTION (Article 5 § 3) Failure to give relevant and sufficient reasons when ordering / extending pre-trial detention and/or refusing habeas corpus requests (Becciev, Sarban, Castravet, Boicenco, Istrati and others, Modarca, Stici, Turcan and Turcan, Popovici, Ursu, Malai, Straisteanu and others, Oprea, Ignatenco, Feraru).		
<p><i>In comparison with the previous Section, the task is to assess the practice concerning the GROUNDS for detention. According to Articles 176 and 185 CPC, both the parties and judges are obliged to elaborate and reason on the grounds, as provided by Article 5§ 3. Judicial reasoning must be concrete, clearly articulated and based on an analysis of evidence and particular circumstances of the given case. Stereotypic and general references, such as simple quotations of the ECtHR judgments are unacceptable. Fill below if such a reasoning is observed in decisions ordering and/or extending detention. The general test is summarized in the Buzadji case as follows (§§ 87 and 88): " According to the Court's established case-law under Article 5 § 3, the persistence of a reasonable suspicion is a condition sine qua non for the validity of the continued detention, but, after a certain lapse of time, it no longer suffices: the court must then establish (1) whether other grounds cited by the judicial authorities continue to justify the deprivation of liberty and (2), where such grounds were "relevant" and "sufficient", whether the national authorities displayed "special diligence" in the conduct of the proceedings ... Justifications which have been considered "relevant" and "sufficient" reasons (in addition to the existence of reasonable suspicion) in the Court's case-law, have included such grounds as the danger of absconding, the risk of pressure being brought to bear on witnesses or of evidence being tampered with, the risk of collusion, the risk of reoffending, the risk of causing public disorder and the need to protect the detainee."</i></p>		

18	Did PARTIES in their judicial pleadings/written motions/appeals refer to GROUND s FOR DETENTION?	Tick the box if "Yes" Distinguish between the evidence substantiating / disproving reasonable suspicion and that referring to the grounds for detention , such as risk to of flight, obstruction, re-offend, public disturbances, etc. See for references the Buzadji case and Articles 176 (3) and 185 (2) CPC .	
19	PROSECUTION provided evidence/specific argument(s) substantiating grounds for continuous detention	Tick the box if "Yes" Refer here only to evidence proposed by the prosecution substantiating grounds for detention (in particular the risk of flight, obstruction, re-offending, public disturbances). Distinguish these arguments from those concerning a "reasonable suspicion". Not all four grounds must be cumulatively substantiated; it is sufficient that just one ground is e properly substantiated in order to mark this obligation as fulfilled (see Article 308 (1) and (6) CPC).	
PROSECUTION mostly, relied on the following ACCEPTABLE grounds asking to ORDER/ EXTEND detention?		Could be ticked solely or cumulatively.	
20a	Risk of flight	Tick the box if "Yes"	
20b	Obstruction	Tick the box if "Yes"	
20c	Re-offending	Tick the box if "Yes"	
20d	Causing public disorder	Tick the box if "Yes"	
20e	Protection of detainee	Tick the box if "Yes"	
20f	Other (please specify, briefly) Including relevant to those listed in s/paras 2-7 of para. 3 of Article 176 of the CPC	Tick the box if "Yes" Specify briefly below. Not more than 500 symbols	

		<p>Tick the box if "Yes"</p>
21	<p>DEFENCE provided evidence/specific argument(s) to the contrary</p>	<p>Could be ticked solely or cumulatively.</p>
22	<p>DEFENCE mostly contested that the following grounds were NOT present:</p>	
22a	Risk of flight	<p>Tick the box if "Yes"</p>
22b	Obstruction	<p>Tick the box if "Yes"</p>
22c	Re-offending	<p>Tick the box if "Yes"</p>
22d	Causing public disorder	<p>Tick the box if "Yes"</p>
22e	Protection of detainee	<p>Tick the box if "Yes"</p>
22f	<p>Other (please specify, briefly) Including relevant to those listed in s/paras 2-7 of para. 3 of Article 176 of the CPC</p>	<p>Tick the box if "Yes" Specify briefly below. Not more than 500 symbols</p>
23	<p>DEFENCE addressed/rebutted ALL/KEY evidence/specific argument(s) substantiating the grounds put forward by the prosecution.</p>	<p>Tick the box if "Yes" <i>(if they did not address/rebut the key ones at least, consider it as 'No').</i></p>
24	<p>Did the Court/Judge(s) refer in their judicial DECISIONS to a at least ONE of the acceptable grounds for detention?</p>	<p>Observe accurately, whether the judges separated their assessment of a reasonable suspicion from the grounds for detention. The persistence is to be assessed in continuous detention (its extension). Tick the box if "Yes" (i.e. court/judge(s) substantiated the decision by the ground(s)-related considerations).</p>

ACCEPTABLE grounds / reasons for continuous detention / provided by the Court/Judge(s)	
The Court/Judge(s) mostly referred to the following ACCEPTABLE grounds, while ORDERING/EXTENDING detention:	<i>Could be solely or cumulatively ticked. Leave all the boxes blank if released.</i>
24a Risk of flight	<i>Tick the box if "Yes"</i>
24b Obstruction	<i>Tick the box if "Yes"</i>
24c Re-offending	<i>Tick the box if "Yes"</i>
24d Causing public disorder	<i>Tick the box if "Yes"</i>
24e Protection of detainee	<i>Tick the box if "Yes"</i>
24f Other (please specify, briefly) Including relevant to those listed in s/paras 2-7 of para. 3 of Article 176 of the CPC	<i>Tick the box if "Yes" Specify briefly below. Not more than 500 symbols</i>
UNACCEPTABLE grounds / reasons for continuous detention	
25 The Court/Judge(s) did strongly substantiate the ADVERSE decision by UNACCEPTABLE grounds/ reasoning (exceeding those listed under the preceding question):	<i>Could be solely or cumulatively check-in. This criterion must characterize the remand proceedings taken as a whole. Tick the box(es) below if "Yes" Leave all the boxes blank if released.</i>

25a	Gravity of crime	e.g. "crime of which the accused is being charged is punishable by more than one year's/two years' imprisonment"
25b	Special status of the accused	e.g. a police officer, a judge, a politician, a public figure.
25c	Criminal records	Repeat offender, hypothetical possibility to commit new crimes, repeated crimes, previous criminal records or anything to that effect; e.g. "this is the second crime of the accused" or "the accused is a recidivist".
25d	Transnistrian region	See for specific reliance on the possibility to flee by the Transnistrian "uncontrolled" region. Any mention of "Transnistria" would suffice.
25e	Visa-free regime	See for reliance on fleeing in general given the open borders and free-visa regime. Any mention of Europe and visa free travel would be sufficient.
25f	Stereotypic expressions	See for general and abstract references to template-like reasons, stereotypical expressions, well established by the judicial practice copied from other judgments. They would prevail rather than a description of the facts of a given case; e.g. - "the materials of the case file provide sufficient grounds that the accused might abscond," or "the law says that the arrest is applied in the following circumstances"
25g	Prevailing Law quotations	Copy-paste phenomena of the legal texts, including but not limited to expressions such as "law provides" or "according to the law", etc. They would prevail over the particular circumstances of the case.
25h	Reliance on prosecution	Copy-paste phenomena from the texts of the prosecutors' motions, without paraphrasing and/or reproducing word for word his texts. It reveals an exclusive reliance on the motion of the prosecutor at the expense of the defense lawyer's opinion.
25i	Failure to comment on parties' arguments	particular, the failure to comment on the defense lawyer's arguments. Merely mentioning the lawyers' positions, without developing their arguments in detail; e.g. "the defense disagreed with the prosecution motion" or "the defense objections are manifestly ill-founded".


25j	Deterrent effect of detention	In some cases the text of decision refer to the detention as educative and/or preventive, including as an appropriate punishment; e.g. the recent Sireno case, § 31 "... in its decision ordering the applicant's detention on remand, the Court of Appeal stated that pre-trial detention was necessary to punish and discourage anti-social behaviour and that unjustified manifestations of clemency could encourage anti-social behaviour of the sort and could affect the peoples' trust in the law enforcement organs...."
25k	Other grounds (please specify)	Specify briefly only UNACCEPTABLE grounds Not more than 500 symbols
26. OTHER practices related to the failure to provide sufficient reasons for detention <i>Leave all the boxes blank if released.</i>		
26a	"Copy-paste"	The judge(s), in particular while EXTENDING detention, relied mostly on the same grounds of detention, repeating them without reviewing them in substance. All SUBSEQUENT DECISIONS were a copy or mostly similar to the first and/or previous orders for detention.
26b	Travel documents as a guarantee	The defense proposed as a guarantee that the authorities seize the accused's travel documents, but this argument has been refused or ignored by the judges.
26c	Formal review (habeas corpus)	Under Article 195 CPC, the judge(s) reiterated their previous decisions and refused to review new circumstances indicated in the DEFENCE MOTIONS to review.
26d	House arrest treated as an alternative measure	The Judge(s) acknowledged that there are no or less sufficient grounds to keep the accused in detention and, thus, applied house arrest as an alternative to the remand. See such practice in the Buzadji case.
26e	Other practices (please specify)	Specify briefly only UNACCEPTABLE practices Not more than 500 symbols
27	Failure to consider alternative measures and justify their insufficiency. Did Parties / Courts consider/address this issue	Failure to justify why any other alternative or non-custodial measure is inapplicable. (Articles 185 and 308 (8) CPC)

30	Did PROSECUTION provide evidence/specific argument(s) substantiating insufficiency of alternatives?	Tick the box if "Yes"	
31	Did DEFENCE provide evidence/specific argument(s) to the contrary?	Tick the box if "Yes"	
32	Did JUDGE(S) in their judicial DECISIONS refer to insufficiency of alternatives?	Observe accurately, whether the judges separated their assessment of insufficiency from the alternatives. Tick the box if "Yes"	
33	How you would qualify JUDICIAL reasoning on GROUND(S) FOR DETENTION?	See below the explanation of the criteria applicable to your assessment. Applicable also to the decisions refusing or discontinuing detention. Tick the relevant box below.	
33a	Very poor	No clear legal terminology applicable to the case; quotes of legal authorities manifestly irrelevant for the case; copy-paste phenomena; many errors and even grammatical inconsistencies; a reader is unable to understand the text and to follow the reasoning; very formal attitude and authoritative language giving an impression of an arbitrary decision; no clear coherence and clarity of arguments etc..	
33b	Poor	Incoherent argumentation; mainly consisting of quotations of the relevant legal provisions, without attempting to apply them in casu; a judge was unable to adapt his reasoning to the context of the legal reasoning and arguments of the parties; no explanations of meaning and application of legal authorities; quotes of legal authorities do not bring any added value to the judicial reasoning and it could be easily ignored as if it does not exist.	
33c	Average	Provided reasons reveal an average and general knowledge about the employed terminology and legal standards; however, the judge confuses legal standards and human rights issues (e.g. he links his reasoning on reasonable suspicion with grounds for continued detention (e.g. risk of flight, obstruction etc.)), or employs other irrelevant standards (e.g. such as presumption of innocence confusing it with presumption of liberty, etc.).	

33d	Good	Reasons show good knowledge of the case-law and legal provisions; judge mainly elaborates on his own assessment and applies this reasoning in casu, but he remains silent on the parties' arguments, imposing his authoritative opinion.
33e	Excellent	Judge elaborates on each parties' arguments (prosecution and defence) and adds his own argumentation applied in casu.
OTHER VIOLATIONS		
FAIRNESS, other types of violations (Article 5 § 3 and 5 § 4)		
34. Length of the remand proceedings		Mostly refer to the breaches of statutory time-limits.
The appeal/review proceedings exceeded the three-day statutory time-limit. (Article 312 (2) CPC)		
34a	Justifiably	Like in the Haritonov case §§ 45-49, when the judges decided on motions to recuse and secured the presence of the accused, who refused to appear in court. Tick the box if "Yes"
34b	Unjustifiably	No clear reasons why. Tick the box if "Yes"
35	The judicial review under Articles 190-195, and 308, 309 CPC exceeded the requirement of "promptness" within the meaning of Article 5 § 3 (see Buzadji, § 100-102)	
35a	Justifiably	Like in the Haritonov case §§ 45-49, when the judges decided on motions to recuse and secured the presence of the accused, who refused to appear in court. Tick the box if "Yes"
35b	Unjustifiably	No clear reasons why. Tick the box if "Yes"

Access to the case-files	
36	<p>Whether the judge(s) granted the defense request for access to the main criminal casefile submitted by the prosecutor in substantiating his motion?</p> <p>In some cases, prosecutors could present the judges with a full case-file which is still being kept confidential at the pre-trial stage. The defense could ask for the full disclosure, which may be refused (see the case of Iurcovschii and others, §§ 45-50). Look in the case file for the defense pleadings in this sense, including audio records of hearings. Tick the box if "The defense asked but was not granted access"</p>
Direct examination of evidences	
37	<p>Refusal to hear witnesses or examine other direct evidence as requested by the defense</p> <p>Until July 2016, before the amendments, the CPC did not allow for direct hearing of witnesses or direct examination of evidence as requested by the defense (see Sarban, Boicenco cases). Observe whether the judge(s) expressly refused or just ignored such requests. Tick the box if "The defense asked, but the request was not granted without properly addressing the issue"</p>
Publicity of hearings	
38	<p>Refusal to hold public hearings</p> <p>The remand proceedings are held in camera by default, unless the detainee requests otherwise, Article 308 (5) and Article 312 the new version of the CPC after July 2016. Tick the box if "Yes"</p>
39	<p>Whether the defense requested a public hearing, if so, how the defense motion was dismissed (solely on the ground that the legislation does not allow it)?</p> <p>Tick the box if "The defense asked, but refused"</p>
40	<p>Other violations (Please specify)</p> <p>Tick the box if "Yes" Specify briefly below. Not more than 500 symbols.</p>

Annex 3. Check-list No. 2 OVERALL FILE ACCUSED-RELATED

Comments, explanations and reference to national legislation		Check-in
<p>INSTRUCTIONS. The present Check-List is to be considered as a separate file generated in the system (by means of the gadget). Use it for one accused (if several under the same procedures – use just one for a case). Fill in and generate a separate file for each Check-List. Introduce only verified data, in the format required by the cell. For other questions and inquiries contact the Project Team. Do not copy the decisions or documents from the files examined. Do not engage the court staff in review or give them any tasks except providing the files.</p>		
OVERALL CASE-FILE DATA General information about the CASE and the REMAND proceedings		
1	Check List No.	... N2 - ...
1a	IDENTIFICATION DETAILS OF THE ACCUSED	DO NOT confuse with the domestic case-file number. The number should comprise your initials and successive number. Insert name and surname of the accused concerned by the decision examined. Will be used solely for the search purposes in the Research data.
1b	Reference to Check-list(s) 1 or 3	Indicate the Check list N1 or 3 (known/identified) if a decision concerning the accused was examined under the relevant limbs of the Research ... N1 - N3 - ...
CASE(PROCEDURE)-SPECIFIC DATA		
2	INVESTIGATION (Date of initiation)	When did the official investigation start? (To be distinguished from the initiation of criminal proceedings against the accused) .../.../.....
3	INVESTIGATION (CASE) N	Assigned by the prosecution N

4	Date of accusation	When was the accused notified of the official charges against him?	.../.../...
5	ACCUSATION (qualification)	Under what article of the Criminal Code has the accusation been qualified? To be clearly distinguished from the initial qualification at the date of the investigation and request for applying detention (to be indicated above), because it could change in the meantime. Please write down all articles of the Criminal Code with which the accused has been charged, if more than one.	
6	GRAVITY (accusation)	Select one classification under Article 16 Criminal Code . If there are many, choose the most serious one. This concerns only the accusation at the time of arrest and detention.	
7	MERITS (final decision determining guilt)	Specify whether the accused was acquitted or sentenced, at least at the first instance court or by the appellate court, if there had not yet been a final decision. It does not matter on what counts of the charges. If the accused was partially acquitted on some counts of charges and on other sentenced, then he is considered as partially sentenced. This data is needed for the purposes of the Research, to assess the prospects of the application of Law no. 1545/1998. The finality of the decision on the merits means at least a decision of an appellate court, even if the appeal on points of law is pending before the Supreme Court.	
8	Punishment imposed	If Imprisonment (actual) indicate in the box, the length as in the final sentence.	...years ... months ... days
		If non-custodial (including suspended imprisonment), indicate the punishment in the box.	
Detention proceedings			
9	DETENTION (overall length)	Both Articles 185 and 188 CPC . Overall length of detention including periods under house arrest , if any. It is deducted from the data below (dies a quo & dies ad quem) and is calculated by itself.	... years ... months ... days

10	<p>Dies a quo (taken in custody, house arrest, apprehension)</p>	<p>Date of arrest under Article 60 p.40); Art. 164 (2) p. 1), 2) CPC and or effective apprehension when the detention order has been issued in absentia. This also includes the date of house arrest or direct detention order if applied without a three-day apprehension.</p>
11	<p>Dies ad quem (final release)</p>	<p>Date of final release (including following non-extension) or a sentence rendered by the first instance court. This date includes also the imposition of a final non-custodial measure, such as obligation not to leave the locality or country, including alternative measures such as release on bail, on recognizance, under judicial control, etc. Be aware that changing detention into a house arrest does not qualify as a release and the period spent in house arrest should be included in the overall detention period.</p>
12	<p>Interruption (temporary release)</p>	<p>In some cases, the overall length of detention could be interrupted by a short release followed by a return to custody. For example, when an accused has been released by the investigating judge and then arrested again by an appellate court or arrested again by the prosecution on other grounds. The days spent in freedom must be deducted from the overall detention period. For these purposes, please introduce a number in this cell and it will be deducted by the table.</p>
13	<p>HOUSE ARREST (total length in days)</p>	<p>Article 188 CPC. Calculate the total days spent under house arrest. This includes house arrest if applied more than twice during the overall detention period. Be aware that the start and the end dates of house arrest should be included within the overall detention period specified above (not later and not before). This data is needed only for the purposes of the Research. If house arrest has been not ordered, then leave the cell blank. If only house arrest has been ordered, then duplicate the overall number of days of detention as calculated above.</p> <p>... years ... months ... days</p>
14	<p>EXTENSIONS (total)</p>	<p>Calculate how many extensions of detention were granted by the courts (under Articles 186 (4) et seq. CPC for whatever period). Do not confuse this with extensions requested by the prosecution but not upheld by the courts. Only those effectively upheld by the courts are relevant.</p>

15	APPEALS (total)	Article 311 CPC. Overall number of appeals lodged with an appellate court. Do not insert any data in this cell.
15a	PROSECUTION appeals	Specify the total number of appeals by the prosecution against decision(s) of the investigating judge in accordance with Article 311 CPC. This data includes any appeals against any decision, release or otherwise (for example, prosecution may request by appeal an extension of the detention, if the judge issued a detention order only partially, for less than the statutory 30 days).
15b	DEFENCE appeals	Calculate how many appeals have been filed by the defense in accordance with Article 311 CPC, on whatever grounds and against whatever decisions of the investigating judge. Do not confuse this with the defense's requests to the investigating judge to review or to order non-custodial measures.
16	MOTIONS TO REVIEW (total) (Articles 190-195 CPC)	Overall number of motions to review other than appeals lodged with an investigating judge. Do not insert any data in this cell.
16a	PROSECUTION motions to review	How many motions for a judicial review or any other alternative measure, including non-custodial measures, have been submitted by the prosecution (including notifications after 29 July 2016) in accordance with Articles 190-195 CPC ? Do not confuse with appeals.
16b	DEFENCE motions to review	How many motions for judicial review or any other alternative measure, including non-custodial, have been submitted by the defense (including by the detainee) in accordance with Articles 190-195 CPC ? Do not confuse with appeals.
16c	JUDICIAL REVIEW(S) (total)	Whether there have been any judicial review(s) after or during detention. Do not confuse with an extension(s) requested by the prosecution whether granted or dismissed by the judge. This cell only concerns reviews requested outside the so-called "ordinary extensions" and "initial order". Usually these are defense motions (in accordance with Articles 190-195 CPC), but after 29 July 2016 it could be also the prosecution that would review the detention (see Article 195 (3) CPC in its new version after amendments by Law no. 100 of 26 May 2016). Moreover, the release following a non-extension differs from that after the review.

17	Release on bail	Article 192 CPC. Specify a number only if granted. If none, leave the box blank.
18	Release under judicial control	Article 191 CPC. Specify a number only if granted. If none, leave the box blank.
19	Release on recognizance	Articles 179-180 CPC. Specify a number only if granted. If none, leave the box blank.
20	Revocation	Article 195 CPC. Specify a number only if granted. If none, leave the box blank.
21	Prosecutorial review (only after 29 July 2016)	Article 195 (4) CPC. Specify a number only if granted. If none, leave the box blank.
22	Other non-custodial measure	Article 178 CPC. For example, "obligation not to leave the locality or country. Specify only if any are granted. This includes a simple release without any measure, as decided by the judge. The consequential application of a measure by the prosecution does not count.

Annex 4. Check-list No. 3 JUDICIAL REMEDY

CRITERIA	Comments, explanations and reference to national legislation	Check-in
INSTRUCTIONS. The present Check-List is to be considered as a separate file generated in the system (by means of the gadget). Use it for one (each) civil claim. Fill in and generate a separate file for each Check-List. Insert only verified data, in the format required by the cell. For other questions and inquiries contact the Project Team. Do not copy the decisions or documents from the files examined. Do not engage the court staff in review or give them any tasks except providing the files.		↓
RESEARCH DATA General data for research purposes		
1	Check List No.	... N3 - ...
1a	IDENTIFICATION DETAILS OF THE ACCUSED	DO NOT confuse with the domestic case-file/judicial number. The number should comprise your initials and successive number. Insert name and surname of the accused concerned by the decision examined. Will be used solely for the purpose of the search in the Research data only.
1b	Reference to Check-list(s) 1 or 2	Indicate the Check list No 1 or No 2 (known/identified) if a decision concerning the accused was examined under the relevant limbs of the research ... N1 - N2 - ...
CASE-FILE DATA General information about the CIVIL CASE and the REMEDY proceedings about the CIVIL Case		
2	CIVIL PROCEEDINGS (overall length)	Overall length of civil proceedings in all three instances of the courts ... years ... months ... days

3	Dies a quo	Date of civil action lodged in the first instance court	.../.../20...
4	Dies ad quem	Date of final judgment, including third instance court (Supreme Court), if any	.../.../20...
THEMATIC SURVEY / SUBSTANTIVE ISSUES			
Claims (Claimant)			
Which JUDGE(S) and/or PROSECUTION BRANCH(S) does the claimant allege is responsible for the violation of his right to liberty?			
5	APPELLATE COURT (appellate jurisdiction)	Indicate the area, according to the appellate court jurisdiction, which is responsible for the violation, according to the claimant. The respondent is the MoJ, but the violation(s) are related to judges/court(s) that issued the detention order, extended it.	
6	COURT (investigating judge)	Select the relevant court from the list, which is responsible for the violation, according to the claimant. (See above)	
7	PROSECUTION (office branch)	Which Prosecution branch is responsible for the remand proceedings seeking an extension of the detention? Do not confuse it with the branch that initiated the investigations or initiated remand proceedings but recently transmitted the case to another prosecution branch. If there are more than one prosecution branches involved, then select the last one which sought the extension of the detention.	
8	TIME and/or PERIOD?	WHEN did the alleged violation take place? Indicate the time or period. For the purpose of the Research it is enough to indicate a year, if no more data from the case-file could be obtained.	01/01/1900
		Could be checked-in either separately or cumulatively	01/01/1900
CLAIMS on the MERITS?			
9	Unlawful deprivation of liberty	Could be a variety of situations, mostly revealing serious breaches of procedure and the CPC; e.g. detained outside the time-limit or recently released; arrested without any judicial order; arrested twice by two separate orders; arrested due to another accusation after having been released; detained after being discharged; etc. Tick the box if "Yes"	

10	Lack of reasonable suspicion	Could be based on the investigating judge's decision to release the accused due to the lack of a reasonable suspicion, or on the appellate court's decision. However, not necessarily, it could be an opinion of the plaintiff and if so, it must be recorded. Tick the box if "Yes"	
11	No Grounds for detention	The claimant alleges that there have not been any grounds for continuous detention. Please choose one or more of the detention grounds which the claimant refers to as lacking, in his case.	
<i>11a</i>	Risk of flight	Tick the box if "Yes"	
<i>11b</i>	Obstruction	Tick the box if "Yes"	
<i>11c</i>	Re-offending	Tick the box if "Yes"	
<i>11d</i>	Causing public disorder	Tick the box if "Yes"	
<i>11e</i>	Protection of detainee	Tick the box if "Yes"	
<i>11f</i>	Detained in inhuman conditions	Not related to detention as such, but for the purpose of the Research it should be recorded.	
<i>11g</i>	Unlawful ADMINISTRATIVE arrest	Not related to the detention in criminal proceedings, but for the purposes of the research it should be recorded, once the ECtHR might consider the administrative case as criminal within the meaning of the Convention (see recently the case of Gorea Mihail on insufficient compensation for unlawful administrative arrest).	
<i>11h</i>	Other claims (please specify)	Tick the box if "Yes". Specify briefly, by key-words below. Not more than 500 symbols.	
12	CLAIMED as COMPENSATION (total amount)	The claimant asks for payments as compensation. To distinguish between the amounts for unlawful detention and inhuman conditions of detention, if possible according to the claimant's civil action. However, if the claimant does not distinguish this, record the sums as a whole. Be aware, these are the CLAIMED SUMS , in contrast to the awarded compensation, which will be registered below. Total amount will be calculated by the table; no need to fill in this cell.	MDL ...

12a	Pecuniary	Preferably to be converted into MDL.	MDL ...
12b	Non-pecuniary	Preferably to be converted into MDL.	MDL ...
12c	Costs and expenses	Preferably to be converted into MDL.	MDL ...
12d	A LUMP sum (only if not divided)	To fill in only if the claimant did not divide the compensation into one or all of the above types	MDL ...
Objections (Respondent)			
RESPONDENT'S OBJECTIONS		Specify briefly, by key-words. Summarize all the respondents' objections if the plaintiff has more than one representative. There could be situations in which together with the representative of the Ministry of Justice, other representative of law-enforcement bodies, prosecution office, Ministry of Finance, etc. appear in the hearings. Usually they all concur. Mark only concurred positions and check-in only one from the list below.	
13	ALL manifestly ill-founded	According to the representative of the Ministry of Justice the civil action must be dismissed in full; e.g. unsubstantiated by the evidence; the claimant's rights had not been breached on the merits (detention was lawful, etc.) Tick the box if "Yes"	
14	PARTIALLY admissible but excessive concerning the amounts	The representative agreed in principle with the merits but not regarding the claimed amounts; the claims for compensation are excessive in his opinion and the following sums could be reasonable. Tick the box if "Yes"	
15a	Pecuniary	If possible, indicate which sum the representative of Ministry of Justice agreed to for compensation.	MDL ...
15b	Non-pecuniary	If possible, indicate which sum the representative of Ministry of Justice agreed to for compensation.	MDL ...
15c	Costs and expenses	If possible, indicate which sum the representative of Ministry of Justice agreed to for compensation.	MDL ...
15d	Compensation left at the court's discretion	This is usually the case, when the respondent leaves the question of the amounts at the judge's discretion, and is unable to set out his own position. Tick the box if "Yes"	
16	FULLY admissible	Both the merits and the sums claimed for compensation are accepted in full. Tick the box if "Yes"	

Final Decision	
17	FINAL DECISION on the MERITS
To record only the final form and irrevocable judgments	
17a	UPHELD in full
All claims, both on the merits and for compensation are accepted unconditionally. Tick the box if "Yes"	
17b	PARTIALLY upheld
Civil action allowed only in part, could be both on the merits and in part regarding compensation. Tick the box if "Yes"	
18	INADMISSIBLE, including because
The civil action is dismissed. Tick the box if "Yes" (as well as relevant boxes below).	
18a	no acquittal
See Article 6 p. a) Law no. 1545/1998, requiring an acquittal to claim compensation.	
18b	no prosecution decision to discharge the accused
See Article 6 p. b) Law no. 1545/1998, requiring a criminal discharge to claim compensation.	
18c	no decision on unlawful administrative arrest
See Article 6 p. c) Law no. 1545/1998, requiring a judicial decision releasing the arrested person in administrative proceedings.	
18d	the detention was lawful on the merits and justified
The judges looked into the merits of the detention and found that there had been no violations.	
18e	Other grounds for inadmissibility (please specify)
Tick the box if "Yes": Specify briefly, by key-words below. Not more than 500 symbols.	
SUBSTANTIVE violations found by courts	
Pick-up according to the list.	
19	Unlawful deprivation of liberty
Could be a variety of situations, mostly revealing serious breaches of procedure and the CPC; e.g. detained outside the time-limit or released late; arrested without any judicial order; arrested twice by two separate orders; arrested on account of another accusation after having been released; detained after being discharged etc.	

20	Lack of reasonable suspicion	Could be based on the investigating judge's decision to release the accused due to the lack of a reasonable suspicion, or on the appellate court's decision. However, not necessarily, it could be an opinion of the plaintiff and if so, it must be recorded.
21	No Grounds for detention	The claimant alleges that there are not any grounds for continuous detention. Please choose one or more of the detention grounds to which the claimant refers as lacking, in his case.
<i>21a</i>	Risk of flight	Tick the box if "Yes"
<i>21b</i>	Obstruction	Tick the box if "Yes"
<i>21c</i>	Re-offending	Tick the box if "Yes"
<i>21d</i>	Causing public disorder	Tick the box if "Yes"
<i>21e</i>	Protection of detainee	Tick the box if "Yes"
<i>21f</i>	Detained in inhuman conditions	Not related to detention as such, but for the purpose of the Research it should be recorded. Tick the box if "Yes"
<i>21g</i>	Unlawful ADMINISTRATIVE arrest	Not related to the detention in criminal proceedings, but for the purpose of the Research it should be recorded, once the ECtHR might consider the administrative case as criminal within the meaning of the Convention (see recently the case of Gorea Mihail on insufficient compensation for unlawful administrative arrest). Tick the box if "Yes"
<i>21h</i>	Other violations (please specify)	Tick the box if "Yes". Specify briefly, by key-words below. Not more than 500 symbols.
22	COMPENSATION awarded (total amount)	Final compensation awarded by the courts.
<i>22a</i>	Pecuniary	Preferably to be converted into MDL. If dismissed leave the cell blank.
<i>22b</i>	Non-pecuniary	Preferably to be converted into MDL. If dismissed leave the cell blank.
		MDL ...
		MDL ...
		MDL ...

22c	Costs and expenses	Preferably to be converted in MDL. If dismissed leave the cell unfilled.	MDL ...
22d	A LUMP sum (only if not divided)	To fill only in case when the courts did not divide compensation into one or all of the above types	MDL ...
Courts' Reasons (non-exhaustive and deducted from practice; could be a variety of other)			
23	Whether there is a reference to the ECHR amounts given in similar cases	The references must be relevant and clearly illustrate the ECtHR as the relevant authority for determining the amount of compensation; e.g. "in the case of Ganea the European Court awarded the following amount of money for three days of unlawful detention", etc. Otherwise, the reference is irrelevant. Tick the box if "Yes" .	
24	Whether the Length of detention has been calculated	The length of detention is the first criterion to evaluate the amount of non-pecuniary damages, in cases of unlawfulness and unjustified detentions. Tick the box if "Yes" .	
25	SPECIAL reasons for compensation	These reasons could appear in the courts' decisions as justification for a particular amount of compensation awarded.	
25a	Unlawfulness due to acquittal	This could be a specific reason employed by the courts. Be aware that an acquittal in itself is not a sufficient ground for compensation for the unlawful detention. However, if the domestic courts based their reasons on this element. Tick the box if "Yes" .	
25b	Lack of reasonable suspicion	ibid.	
25c	Unlawfulness due to other procedural shortcomings	e.g. exceeding the time or prerequisite detention, more than the time set by the arrest decision Tick the box if "Yes" .	
25d	Lack of one or more of four acceptable grounds for detention	e.g. risk of flight, obstruction, re-offending, public disturbance. Tick the box if "Yes" .	

26	Other non-pecuniary justifications	A variety of other reasons that might be employed by the domestic courts and concerning the personality of the claimant.
26a	Humiliation	e.g. "degrading treatment or psychological suffering", etc. Tick the box if "Yes" .
26b	Presumption of innocence	e.g. "the claimant suffered from being subjected to a criminal charge", etc. Tick the box if "Yes" .
26c	Loss of reputation	ibid.
26d	Detention in inhuman conditions	could be an alternative ground justifying compensation (see the <i>Ciorap</i> (2) case) Tick the box if "Yes" .
26e	Health problems	could be an alternative ground justifying compensation (see the <i>Sarban, Becciev</i> cases) Tick the box if "Yes" .
26f	Labour rights	Forcible absence from employment or dismissal of the defendant by his employer. Law no. 1545, in articles 7 and 12 refers to these situations. Tick the box if "Yes" .
26g	Other reasons (please specify)	TICK THE BOX IF "YES" . SPECIFY BRIEFLY, BY THE KEY-WORDS BELOW.

Annex 5. Mapping of the research

Sampling universe: number of preventive detention request accepted by the courts and appeal courts, per years and court.

Statistics source: Statistical reports on arrest warrants admitted for each instance and year (2013-2017) provided by the Superior Council of Magistracy.

Sample type: stratified, probabilistic.

Stratification criteria: court type, region

Sample size:

- 400 decisions for preventive detention<
- 200 judicial cases with preventive detention ordered .

Selection procedure:

- Random selection from the list of courts from each pre-defined sub-group after stratification- region.
- Random selection of cases.

Admitted arrest warrants distribution:

	Zone	2013	2014	2015	2016	2017
COURTS	Chisinau	1554	2850	1821	2375	2023
	Balti	126	262	139	165	200
	North	296	784	391	410	377
	South	204	511	217	264	335
	Center	475	1176	596	640	656
	Comrat	77	249	127	100	75
	Total	2733	5832	3291	3954	3666
						19476
APEAL	Chisinau	175	175	164	197	164
	Balti	30	30	28	33	28
	Cahul	5	5	4	7	4
	Comrat	4	4	3	5	3
	Total	214	214	200	241	200

Distribution of the examination of decisions and cases:

Type	Region	Court	DECISIONS						CASES					
			2013	2014	2015	2016	2017	TOTAL	2013	2014	2015	2016	2017	TOTAL
COURTS	Chisinau	Sect. Botanica	5	13	7	7	6	38	1	3	2	2	2	10
	Chisinau	Sect. Buiucani	8	10	8	14	9	48	2	2	2	4	2	12
	Chisinau	Sect. Centru	11	18	12	16	16	74	3	5	3	4	4	19
	Chisinau	Sect. Ciocana	2	4	2	3	3	14		1		1	1	3
	Chisinau	Sect. Rîșcani	4	10	7	6	5	32	1	3	2	1	1	8
	Balti	Balti	2	5	3	3	4	17	1	1	1	1	1	4
	North	Dondușeni	2	2		3	4	11		1		1	1	3
	North	Fălești	2	2	3	2	2	11	1		1	1		3
	North	Ocnîța	1	6	2	1	1	11		1	1		1	3
	North	Soroca	1	5	2	1	2	11		1		1		2
	Center	Anenii Noi	1	4	2	1	2	10		1				1
	Center	Criuleni	1	4	2	1	2	10		1	1			2
	Center	Hîncești	1	3	1	2	2	10		1			1	2
	Center	Nisporeni	1	3	1	3	2	10	1	1		1	1	4
	Center	Rezina	1	3	2	2	2	10	1	1	1			3
	Center	Șoldănești	1	4	1	2	2	10		1			1	2
	Center	Ungheni	2	2	2	2	2	10	1	1		1		3
	South	Cahul	2	2	1	2	3	10		1		1	1	3
	South	Cimișlia	1	4	3	1	1	10		1	1			2
	South	Taraclia	1	6		2	1	10		1		1		2
UTAG	Ceadr-Lunga	2	4	3	2	1	12		1	1	1		3	
APEAL	Chisinau		4	4	3	4	3	18	1	1	1	1	1	5
	Balti		1	1		1	1	4				1		1
	Cahul							0						0
	Comrat							0						0

Annex 6. Questionnaire

This QUESTIONNAIRE is intended to assess the application of **pre-trial detention in the Republic of Moldova**. The information that you provide will be treated confidentially and used only for **research purposes**. Your data will be **anonymous**, meaning that neither your name will be collected, nor will it be linked to the data. Please tick only the check-boxes that are **relevant to you**.

General information

Your speciality or occupation:

- | | |
|--|--------------------------|
| Judge/court personnel | <input type="checkbox"/> |
| Prosecutor | <input type="checkbox"/> |
| Lawyer | <input type="checkbox"/> |
| Investigator | <input type="checkbox"/> |
| Civil activist/HR defender | <input type="checkbox"/> |
| Legal scholar/academician | <input type="checkbox"/> |
| Other (<i>please, explain below</i>) | <input type="checkbox"/> |
-

How many years of experience do you have in your profession?

- | | |
|--------------------|--------------------------|
| 0-2 year(s) | <input type="checkbox"/> |
| 2-5 years | <input type="checkbox"/> |
| more than 5 years | <input type="checkbox"/> |
| more than 10 years | <input type="checkbox"/> |

How often you deal with pre-trial detention cases (if applicable):

- | | |
|-----------|--------------------------|
| Never | <input type="checkbox"/> |
| Rarely | <input type="checkbox"/> |
| Often | <input type="checkbox"/> |
| Regularly | <input type="checkbox"/> |

Please specify two areas in the application of pre-trial detention in which you see a big inconsistency between national law and practice.

- | | |
|---|--------------------------|
| Lawfulness of detention. Law applies incoherently | <input type="checkbox"/> |
| Judicial practice | <input type="checkbox"/> |
| Prosecutorial practice | <input type="checkbox"/> |
| Other (<i>please, explain below</i>) | <input type="checkbox"/> |
-

How would you rate the compliance of the application of pre-trial detention with national laws in Moldova? (within a range from 1 (negative) to 10 (positive)).

<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
1	2	3	4	5	6	7	8	9	10
Negative					Positive				

At what stage of the deprivation of liberty are the requirements of national law most frequently violated?

- Arrest
- Initial detention
- Extension of detention at the pre-trial stage
- Extension of detention at the trial stage
- None of them

Thematic multiple-choice questions

Systemic problem

Whether there is a problem of excessive use of arrest in Moldova as it is claimed to be

- Yes, it is a problem and a serious one.
- No, it is not a problem at all
- Yes, there is a problem but mostly in some isolated cases. It is not a big problem.

Whether the application of arrest is a systemic problem

(requiring considerable legislative, institutional and capacity-building interventions)

- No, because it relates to some isolated cases, but I do not see an overall misuse of arrest
- Yes, it is systemic problem because of its excessive use
- I am not able to assess whether the problem is a systemic one.

What are the major difficulties in the arrest proceedings you have encountered?

- Primarily, legal, since the legislation is still imperfect.
- Primarily, concerning the practical application, since the legal traditions and habits are outdated in the contrary to a very perspective legislation

Specific issues

Do you have difficulty in understanding the meaning of “reasonable suspicion”?

- Yes
- No

What are the shortcomings of applying the legal construction of reasonable suspicion? (Several answers could be ticked cumulatively)

- The Prosecution does not (appropriately) refer in their judicial pleadings/ written motions/appeals to a reasonable suspicion/its persistence.
- The defence does not (appropriately) address them either.
- There is no clear judicial practice in this regard.
- Other (please indicate briefly below)

What are the difficulties regarding the justification of arrest?

- The Prosecution does not (appropriately) refer in their judicial pleadings/ written motions/appeals to the ground / persistence.
- The defence does not (appropriately) address them either.
- Gathering evidence/circumstances supporting the hypothetical allegations of the grounds of arrest
- Describing in detail the grounds of arrest in the decision/motion given the lack of time and workload
- There is no clear judicial practice in this regard.
- Other (please explain briefly below)

Should a person held in unlawful detention be entitled to monetary compensation?

- No, until he or she is finally acquitted
- Yes, despite the decision on the merits of his or her criminal charges
- Yes, only if the criminal charges are not serious
- No, if the person is released immediately once his or her detention has been acknowledged as unlawful.

What is the regime and the relationship between pre-trial detention and house arrest?

- They are different preventive measures depriving an individual of his/her liberty, but they have similar requirements of motivation and grounds for justification.

- House arrest is a less serious preventive measure and should be treated as an alternative non-custodial measure compared to pre-trial detention.
- They are not distinguishable and are equal preventive custodial measures.

Context-specific questions

Should detention be used in order to investigate a serious crime, if a person does not reveal information about a grave attack which is being prepared or which is about to be committed?

- Yes, under any circumstances because the interest of justice/investigation prevails
- Yes, but only in the event of a serious crime (e.g. murder, fraud, international crimes, etc.).
- No, because “not cooperating with the investigation authorities” cannot be a motive justifying his arrest (partially true)
- No, because that person appears rather as a witness and he is not accused of a crime of which he has knowledge, and there is no “reasonable suspicion” that would serve as a legal ground for his arrest (true).

Should arrest be used if the accused has acknowledged his guilt?

- Yes, but only if another non-custodial alternative measure is applied.
- Yes, under any circumstances because the acknowledgement of guilt would be a mitigating factor for arrest
- No, because the acknowledgment of guilt is not related to the grounds of arrest
- No, because the grounds of arrest remain valid and the acknowledgment of guilt proves the validity of these grounds of arrest.

Is house arrest applicable if the arrested person asks for such a measure instead of his detention in a penitentiary institution, provided that he has already booked a flight ticket, but proposes that his passport be seized as a guarantee?

- No, because there are still reasonable grounds to consider that the accused presents a risk of flight. The passport could not be lawfully seized by the prosecution.
- Yes, because the ticket has not yet been bought (only booked) and the accused can be supervised during his house arrest.
- Yes, because, house arrest is a less serious deprivation of liberty in comparison to detention pending trial, although they share a similar legal regime under the Criminal Procedure Code

- No, because the legal regime of house arrest and detention pending trial is similar and, thus, it matters not what measure is applicable. It is better to prevent the accused from fleeing.

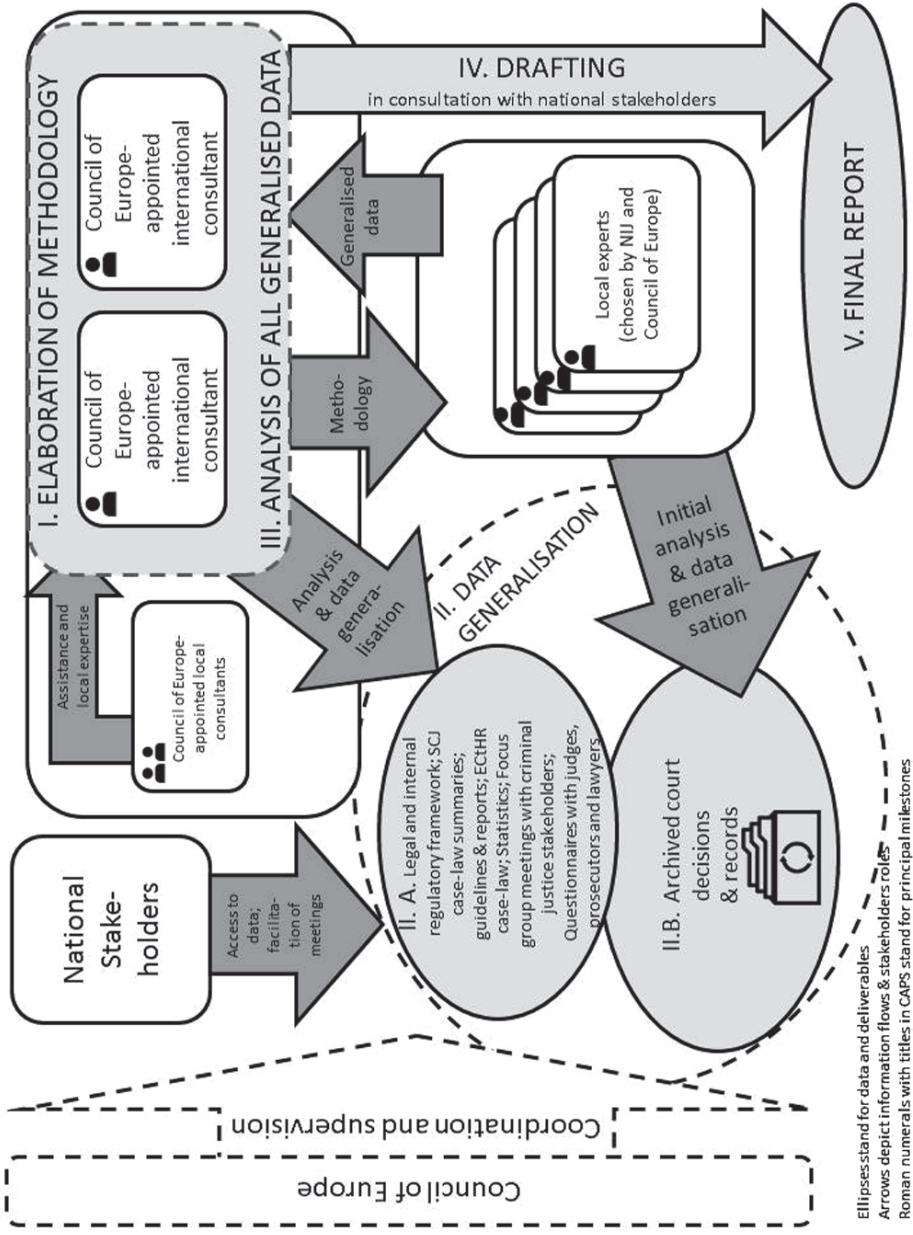
If there is a lack of reasonable suspicion, should an investigating judge refuse detention, but apply another preventive measure?

- No, since it is a general requirement for the application of all such measures
- Yes, provided that the person is accused of a particularly grave crime

Should a person be entitled to monetary compensation for unlawful detention, if he was initially accused of committing a serious crime, for which he had been arrested, was finally requalified by the court to a minor offence?

- No, because he has been eventually found guilty and the arrest was a justifiable means to achieve the outcome, sentencing the guilty person.
- Yes, because regardless of his guilt of committing a minor offence, the initial accusations of committing a serious offence were finally dismissed and did not serve as grounds for his arrest.
- No, he is not entitled to monetary compensation because even if his arrest had been unjustified, only the acknowledgement of a violation, without monetary compensation, would be sufficient.
- Yes, but only a small amount of money, because he has been found guilty of the crime that he has committed and that he has been arrested in lack of any grounds it a form of punishment in itself, thus alleviating the financial burden.

Annex 7. Flow-chart: Information flows and stakeholders' roles in conducting the Research on the application of pre-trial detention



Annex 8. Research Stages and Schedule

N	Component/Stage	Dec-18		Jan-19		Feb		Mar		Apr		May		June		July		Aug		Sep		
		I	II	I	II	I	II	I	II	I	II	I	II	I	II	I	II	I	II	I	II	
1.	Development of Methodology																					
2.1	Analysis of legal and intra-institutional regulatory frameworks																					
2.2	Analysis of the statistical data generated by domestic stakeholders																					
2.3	Examination and analysis of decisions and case-files																					
2.4	Examination and analysis of files on compensation for illegal arrests																					
2.5	Survey (by means of questionnaires) among judges, prosecutors and lawyers																					
2.6	Panels, consultations with stakeholders																					
2.7	Consolidation of data and findings and development of comprehensive Report																					
3.	Consultations with the authorities and Conference																					

Annex No 2

Analysis of Legal and Intra-Institutional Regulatory Framework

Introduction

A thorough analysis of legislation is not the primary aim of the Research. Still, it should not be disregarded, since this assessment is the first step in evaluating the implementation of legislation by the domestic courts and prosecution authorities. The Republic of Moldova's legislation regulating pre-trial detention has been generally regarded as compatible with the Convention and other international standards. However, the domestic authorities acknowledged and international monitoring institutions agreed that the excessive use of pre-trial detention in the Republic of Moldova is not a problem of compatibility of the domestic legislation but rather it is a question of its appropriate and coherent application.

1. Scope

The Analysis of the legislative and internal institutional regulatory framework (Analysis of Legislation) scrutinises the current normative framework applicable to preventive detention in criminal proceedings, as well as the available remedies providing compensation for unlawful and/or unjustified deprivation of liberty pending criminal investigations and trials. Given the main rationale of the Research, which is to evaluate application of relevant legislation rather than its quality, this component of the Research does not assess or describe in detail the legal texts and other pieces of legislation. However, it is undisputed that certain legislative amendments may have had affected judicial and prosecutorial practices during the period covered by the Research. The aim of this component is **therefore** limited to these effects. Moreover, the Analysis of Legislation is to be seen as introductory; it guides the follow-up examination of judicial and prosecutorial practices in the substance, which is the task of other part of the Research, according the Methodology.

As required by the Methodology, the Research covers the period between **1 January 2013** and **31 December 2018**. This period refers mainly to the assessment of practices but not changes in the domestic legislation. Certain amendments of procedural or material criminal legislation may have affected the practices during this period even if they were introduced in the past, before the starting point of the Research period. Other amendments enacted during the relevant period are capable of changing future practices. Therefore, the Analysis of Legislation will consider them all, even if they were introduced outside of the above time-frames.

The Analysis of Legislation has opted to study amendments to **primary** and **secondary domestic legislation**, as **principal sources of law** for judicial and prosecutorial practices.

Furthermore, the Republic of Moldova directly applies the ECtHR's case-law and the Committee of Ministers' practice on the supervision of the execution of judgments. Therefore, they are a part of its legal system. However, for the purposes of the Research, these international sources of law will be regarded as leading authorities to which the Analysis of Legislation will refer in evaluation of the relevant legislative changes.

The Research has not identified any new legislative initiatives. Moreover, the Research address neither draft amendments nor legislative initiatives which have not yet entered into force. The last minor legislative initiative amending the Criminal Procedure Code of the Republic of Moldova entered into force on 1 January 2019 and thus could be taken into consideration but to the lesser extent. However, the last substantive and relevant amendments of the remand proceedings were introduced in December 2018¹, which are more useful for the purposes of the Research. Accordingly, in assessing legislative amendments the factor of relevance prevails over the time criterion of changing legislation.

An assessment from **comparative** perspective, i.e. the legal systems of the Council of Europe Member-States, offers valuable insights about the quality of the Republic of Moldova's legislation. Whilst being a part of the Analysis of Legislation, the comparative analysis is, however, secondary to the analysis of the domestic and international sources of law. According to the Methodology, it has to be undertaken in a separate sub-component and for another purpose. Its scope is to give some clues concerning the quality and features of the Moldovan system as part of the Convention *espace juridique*. It does not seek to compare in depth the Moldovan legislation with the normative frameworks of other states.

Finally, it should be recalled that the Research as a whole has been conventionally divided in two parts. The First part studies the practices of using detention on remand in criminal proceedings. The Second part concerns the effectiveness of remedies awarding compensation for the breaches of the right to liberty. Accordingly, the Analysis of Legislation separates the **normative framework in two parts** concerning "remand detention" and "remedy", but employs the same methods of analysis as described below, in the next chapter.

2. Methods

The methods used by the Analysis of Legislation should not be confused with the Methodology tools designed for concocting the Research. The Analysis of Legislation checks the domestic legislation by reviewing its compatibility with the Convention's requirements. It mainly uses two methods:

- **Dynamic overview** of all relevant amendments to the principal legal sources;
- **Legal proofreading** of written texts from the *accessibility, clarity and foreseeability* criteria.

1. E.g. as to some additional reasons justifying the application of pre-trial detention plus eliminating the „plea bargaining condition“ following the Constitutional Court's decision of 30 November 2018

Assessment of legislation in abstracto is avoided to elude conclusions of *lex ferenda* type. The Research outlines only the impact of new legislation on practices assuming that the current law does not raise serious questions of compatibility. The Analysis of Legislation only observes the legislation from *lex lata* perspective. It will not speculate on how a particular piece of legislation should be or have been. While hypotheses cannot be fully escaped in assessment of legislation, in particular when the normative foreseeability is being questioned, the Research deliberately avoids using suppositions of such type. The quality of legislation is mainly observed by its consequences, i.e. whether and how the legislative changes affected the practices.

Comparative method of assessment collates the domestic legislation only with the standards of the ECtHR's case-law. In this sense, the cases against Moldova remain the principal source. It should not be confused with the comparative study of the Moldovan legislation with other European legal systems regulating remand proceedings. The present assessment seeks to compare key-elements of the ECtHR's case-law with the domestic legislation subjected to review. In this respect, every amendment to legislation will be briefly compared with the Convention standards in the interpretation of the ECtHR and the practice of the Committee of Ministers concerning supervision of execution of the ECtHR judgments.

I. GENERAL ASSESSMENT

The Moldovan remand proceedings, as well as its criminal procedure system taken as a whole, have certain particularities. Accordingly, some preliminary clarifications about the classification of legal sources are needed.

The Republic of Moldova's remand proceedings were inspired mostly by European systems. They, however, needed time to fit into the particular domestic context in transitional period, when certain post-soviet practices still persisted. New remand proceedings and regulations were "well drafted on paper" and "good in theory" but it transpired that they became inapplicable. This could be due to the fact that a number of legal traditions continued after the legislative reforms in criminal system with new legislation after 2002². Many old habits are still ingrained in the domestic practices, mentality and legal culture.

The Moldovan legal system, from comparative perspective, resembles the legal traditions of codified and written law as the primary and the only source for judicial practice. Neither judicial nor other type of interpretation is officially recognised as a source of law. In other words, a judge or a prosecutor only applies the law but does not make it. Moreover, the law may lead to patterns of violations if it is incompatible with the Convention. Such a piece of legislation would continue producing its effects and it is highly that judges or prosecutors would dismiss the application of such legal provisions only because they are incompatible. This legal provision could create a range of deficient administrative or judicial practices at scale of becoming a systemic problem due to the 'malfunctioning of legislation'³. In this case, the assessment of systemic violations usually starts by analysis of the legislation quality, as it was done in the Moldova's problem on overuse of detention in criminal proceedings⁴. Once the test of quality is passed, then the systemic patterns should be sought at the level of institutional, administrative or judicial practices leading to the repetitive failure to apply legislation.

The constitutionality of the domestic laws checked by the Constitutional Court of the Republic of Moldova ("the Constitutional Court") produces valid interpretation in terms of human rights compatibility. The case-law of the Supreme Court of Justice may also have similar effects. The judgments of these judicial bodies can, in principle, influence the practice of the domestic courts. Although, the Supreme Court could issue instructions or guiding directions by its explanatory decisions and the Constitutional Court provides with valuable interpretations in its case-law, legal practitioners still retain discretion to decide whether to apply or dismiss these legal sources. In general, investigating judges, prosecutors and appeal judges do not accept judicial precedent as a formal source of law and they are not required to quote previous judicial reasons when deciding their own cases.

-
2. After the initial abolishment in 2002 of many of the aspects of the old criminal procedure of 1961 were recently reintroduced by amendments in 2006 into the new Criminal Procedure Code, revealing that the practices were incapable of adapting (e.g. "suspension of criminal investigation", "prosecutorial hierarchical control", etc.).
 3. See *mutatis mutandis Broniowski v. Poland [GC] (2004) § 189; Hutten-Czapska v. Poland [GC] (2006) § 235 et seq.*
 4. See *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 (2018) § 44 et seq.*

The judicial reasoning usually identifies written rules and then checks their applicability in particular circumstances of a given case. This means that if a specific right is not written in law or procedural rules it could not be granted. In Moldova, like in any continental system of law, judicial or prosecutorial practice cannot rewrite the law.

Moreover, the Moldovan legal system follows a strictest hierarchy of legal texts and sources of written law. Accordingly, along with the first condition of clarity and foreseeability of legislation, the second premise for establishing good practices is the coherence between **primary** and **secondary sources of law**. In Moldova, from the first category are the “organic laws” or “ordinary laws”, while the second is often named in general terms “internal institutional regulations”, which include acts, decisions, orders, guides and other instructions. The Constitution and international treaties, including the Convention, are considered to be primary sources of law and placed above all others, i.e. at the top of the domestic legislative pyramid.

It is to be noted, that sources of written law do not have a similar legally binding force. Primary legislation has far superior mandatory rules compared to the secondary sources of law. However, the secondary sources often determine institutional and administrative practices. They interpret and develop laws in more detailed fashion. In comparison with the Constitution and organic laws, which both are couched in general terms, the secondary legislation may describe in further detail the proceedings and provide instructions. However, these secondary legal sources should be viewed with some degree of caution owing to their subordinate position, i.e. below organic laws and the Constitution. The secondary legislation will be inevitably invalidated, sometimes in its entirety, if its superior primary legal source has been changed.

The Needs Assessment Report analysed and summarised in details primary legal sources of remand proceedings and remedies. It identified the key-elements that raised concerns. The Report concluded that ‘the legislative framework regulating detention on remand, in general, complies with the requirements of Article 5 [of the Convention]⁵. For that reason, the Research should not double the previous analysis of primary and secondary legislation. However, the present assessment will inquire whether the continuous process of legislative improvements determined the ‘legal uncertainty’ of judicial and prosecutorial practices in detention proceedings.

5. *Ibid*, § 43.

II. LEGAL FRAMEWORK CONCERNING DETENTION

2. The Convention

This sub-component summarises relevant legal issues from the Convention perspective. The ECtHR's case-law exerts great authority on both legislative drafting and judicial practices in the Republic of Moldova. The Constitutional Court recognises its direct application in the domestic legal order, thus it could be equated with primary sources of law. A variety of the Supreme Court's Explanatory Decisions, internal regulations of the General Prosecutor's Office and other institutional instructions acknowledge the same effects. The ECtHR's case-law became almost mandatory for judges and prosecutors to be applied in their practice. However, in this sub-component it will not be treated as a separate source of law but used as a reference for assessing the compatibility of primary legislation, again in view of its continuing change.

The analysis will be conducted in view of the issues raised by the judgments of the ECtHR delivered against Moldova. Only questions of legislative compatibility and/or incoherent application of the law will be extracted from this case-law. The practice of the Committee of Ministers for the supervision of execution of judgments in these cases will be also considered in this sense. It also provides valuable insights about the quality of legislation and compatibility of the domestic practices.

2.1.1. The overview of the ECtHR's judgments

The Research brings up mainly two patterns of violations often occurring in detention proceedings. The first is repetitive breach of the reasonable suspicion requirement for lawfulness of detention and the second is consistent practice to detain accused persons without sufficient grounds (Article 5 §1 (c) and Article 5 §3, respectively)⁶. Other violations, mostly concerning general fairness of the detention proceedings (Article 5 §4)⁷, were regarded as accessory because they hardly reveal continuous or repetitive patterns in the judicial and prosecutorial practices. Indeed, they were included in the Research but as secondary to the principal two patterns.

The third pattern of violations is the consistent practice to grant insufficient compensation for unlawful detentions or to refuse it because the detainee was not eventually acquitted or discharged. This practice undermines the effectiveness of the domestic remedies and leave victims of unlawful detentions without relief, in breach of the right to compensation guaranteed by Article 5 § 5. It has effects only in connection Article 5 § 1 (c) and Article 5 § 3, complementing these substantive provisions. But this right should be enforceable and it has *lex specialis* status in relation to general remedies (Article 13). In Moldova it is provided by special law and subjected to separate civil proceedings. That is why this pattern of violations was detached from those occurring pending detention proceedings. It was analysed in the separated sub-component below.

6. Unless specified, references to all its Articles will be used without mentioning "the Convention".

7. Such as those provided by Article 5 § 4, *habeas corpus*, the right to defence, access to the prosecution materials substantiating motions to remand, etc.

This below overview summarises relevant judgments and decisions of the ECtHR in cases against Moldova raising the above-mentioned patterns of violations. The main rationale of the present Analysis of Legislation is to extract only those key-elements of the case-law that illustrate whether the quality of the legislation was questioned by the ECtHR or the violations occurred mostly because of inconsistent practices and deficient implementation of the law. Accordingly, the overview will describe a number of judgments either questioning the legislation or revealing certain patterns of violations concerning its application.

However, the present assessment is also undertaken from temporal perspective. It is necessary to ascertain whether the ECtHR examined the on-going practices and the legislative compatibility after new amendments to the domestic legislation or most of its judgments are already outdated. This temporal assessment could conversely reveal whether the legislative changes have modified the judicial or prosecutorial practices.

1) The Time-related overview

From temporal perspective, the ECtHR constantly drew attention on deficient judicial and prosecutorial practice ordering and extending detention in criminal proceedings. In most of the judgments against Moldova, it noted existence of an ostensibly compatible legislation but problematic practical implementation of written law. The ECtHR's judgments questioning legislation were the exception rather than the rule.⁸ A great number of judgments finding violations on account of deficient practices were delivered before 2012.⁹ Similar problems the ECtHR underlined in its judgments after 2012¹⁰ and after 2016¹¹ proving recurring patterns of deficient practices.

The ECtHR's decisions also adjudicate on the questions relevant for the purposes of the Research. They end by either a friendly settlement or a unilateral declaration where the authorities acknowledge a breach of the Convention. Only those decisions are relevant that pertain to detention in the context of criminal proceedings. All these decisions¹² were issued from 2006 onwards. The number of such decisions slightly increased in 2009 and 2010. In 2011 the decisions reached the highest numbers and then kept constant trend in 2013 and 2014. In 2017 and 2018 the numbers of decisions again jumped high.

Apart from these cases about detention in the context of criminal proceedings, the ECtHR has decided on deprivations of liberty in other contexts. For example, the cases of *David* and *Gorobeț* concerned the unlawful orders of medical constraining measures

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8. See for ex. *Boicenco* ; unless necessary only short titles of the Moldova's cases will be used in the Research
 9. *Becciev, Șarban, Holomiov, Castraveț, Istratii and Others, Modârca, Gorea, Stici, Țurcan and Țurcan, Stepuleac, Mușuc, Cebotari, Țurcan, Popovici, Ursu, Malai, Paladi, Străisteanu and others, Leva, Oprea, Lipencov, Ignatenco.*
 10. *Levința (2), Feraru, Tripaduș, Ninescu, Buzadj, Rimschi, Sara, Balakin, Caracet, Savca.*
 11. *Vasiliciuc, Gumeniuc, Grecu, Braga, Ialamov, Pașa, Goremişin , Ceaicovschi, Cucu and Others, Mătăsar and Savițchi, Iurcovschi and Others, Miron, Secrieru , Coteț.*
 12. See *Țvetcov, Volghin, Samotiuc, Lipcan Lilia, Trohin, Netanyahu, Stati and Marinescu, Munteanu, Popovschi, Berber, Lupacescu, Stefoglio, Enachi, Neicovcen and Moscoglo, Marținiuc, Abu Aziz, Moroazan, Godniuc, Hodoroagea, Pinzari, Tudorachi, Mocanu, Popa Radu, Gheorghita , Ghetan, Grintevici, Paduret, Cicala, Carpala, Gospodinov, Nedelcu, Dimitrov Andrei, Cristea, Gorgan, Stepuleac, Neamtu, Niholat, Rotaru, Matasar, Madan and Musaji, Filimonova, Stepuleac Gheorghe and Anatol, Poia, Gabura, Ionel, Pasat, Gutu, Ciornea, Buzu, Malancea, Efros cases.*

applied without criminal charges. After 2014, the case of *Dogotar* revealed a recurring problem of forced medical isolation pending criminal proceedings. Other cases concerned violations of Article 5 occurred within the framework of contraventional arrests following the suppression of peaceful protests by law-enforcement authorities¹³. These arrests were classified by the ECtHR as situations involving criminal charges (Article 5 § 1(c)) but according to the Moldova's legislation they are non-criminal and fall outside of criminal detention. The last notable case¹⁴ referred to extra-legal transfer of foreigners, again without any criminal charges. Accordingly, all these cases related to deprivations of liberty in situations other than detention based on criminal charges. They are less relevant for the purposes of the present assessment.

The so-called 'Transnistrian cases' constitute a separate category. In these cases, violations of Article 5 have been found in relation to deprivations of liberty carried out by separatist entities¹⁵, outside of the Republic of Moldova's effective control. These detentions have never been ordered under its legislation and accordingly they are excluded from the Research.

Pending applications also could be helpful for the Research. To date, almost 161 applications pending before the ECtHR raise at least one question under Article 5 about the lawfulness of detention in the context of criminal proceedings. Most of them (132) are the follow-up cases of the so-called "*Mozer precedent*"¹⁶ regarding detentions in the Transnistrian region. The Research does not study this type of cases for same reasons explained above. The remaining applications raise a variety of issues under Article 5 and hardly reveal repetitive patterns. For example, the applicants complain about imprisonment for unpaid debts¹⁷ or non-imputation of arrest into the final sentence¹⁸, etc. These aspects of the detention in the context of criminal proceedings are outside the scope of the Research. However, around 20 pending applications¹⁹ could be classified as relevant for the present analysis but without any speculation about future outcomes of the case before the ECtHR.

All the above-mentioned figures are reflected in the

Chart No 1 below. It shows the trends of the Moldova's cases relating to detention in the context of criminal proceedings in violation of Article 5.

13. *Hyde Park and Others (4), Brega, Brega and Others*

14. *Ozdil and Others v. the Republic of Moldova* (2019).

15. E.g. *Ilaşcu and Others, Ivanțoc and Others, Mozer, Țurțurica and Casian, Padureț, Eriomenco, Vardanean, Șoyma, Apcov, Draci, Braga, Pocasovschi and Mihaila, Mangîr and others, Colobișco (Kolobychko), Stomati, Sobco and Ghent, Canțer and Magaleaș*,

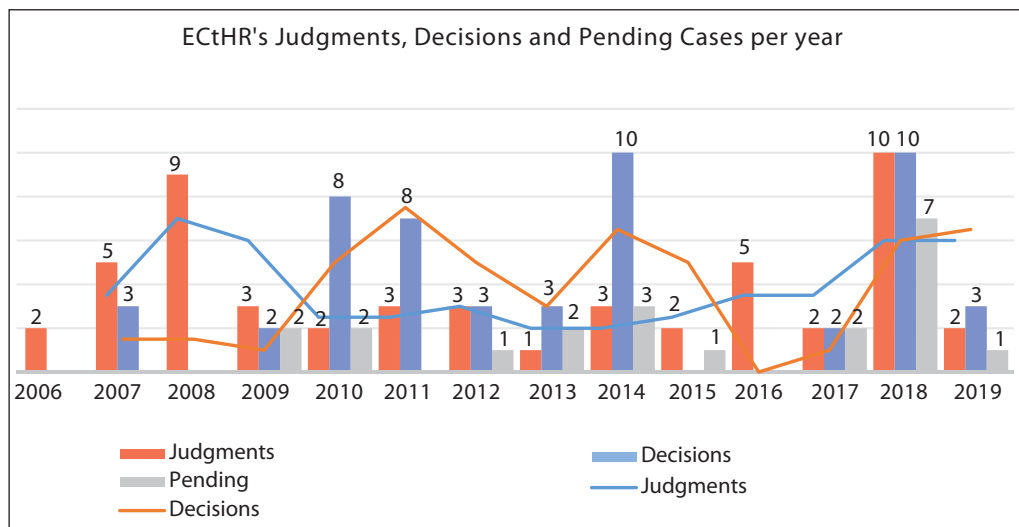
16. *Mozer v. the Republic of Moldova and Russia*, concerning unlawful detention ordered by "courts" of separatist region of the Republic of Moldova.

17. See *Belobrov (communicated)* (2018)

18. See *Chiosa (communicated)* (2014)

19. *Mătășaru (II), Mătășaru (IV), D. And N., Ionel, Gilanov, Moscalciuc, Navrotki, Eșanu, Grecu, Cașu, Moldovanu, Navroțki, Canuda, Platon, Muradu, Cosovan, Baraboi and Gabura, Burlacu, Valentin Rimschi and Balachin.*

Chart No 1



It could be observed that the number of judgments finding violations has been shifting. It increased in 2011 and decreased in 2012 and then suddenly grows again in 2018 after its lowest level in 2016. The trend regarding the ECtHR's decisions, on the other hand, shows that from 2009, the authorities were likely to acknowledge violations and to settle the cases. While the number of judgments decreased between 2009 and 2015, the number of decisions grew respectively. The figures of 2018, however, raise concerns. In that year both judgments and decisions rose almost to the level of 2008, when the ECtHR observed for the first-time patterns of repetitive violations. The year of 2018 is also questionable since the number of communicated cases raising issues under Article 5 jumped to the highest levels ever.

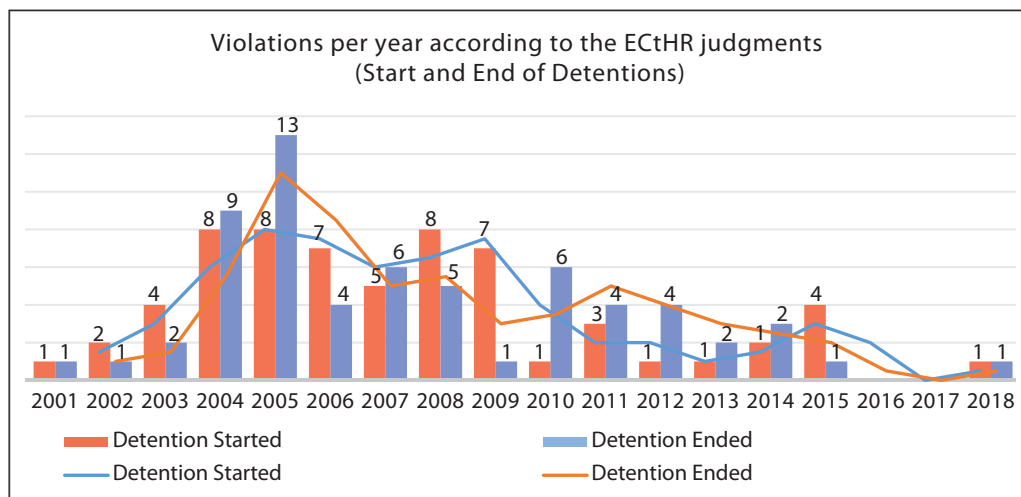
In summary, the figures show that the overall trend was relatively stable for almost eight years after 2008.

It suddenly increased in 2018 when the legislation had been already changed to bring practices in line with the Convention requirements.

These figures refer to the date of the ECtHR's judgments and decisions plus the dates when an application was given notice to the Moldovan authorities. It suggests the time-frames of continuous patterns of violations but not the time when they have actually occurred. In other words, the ECtHR decided on these cases with certain lapse of time, after the violations had already taken place. From this point of view, the violations would appear from other perspective and the time of patterns could be different. Here a careful reading of each judgment and decision is needed in order to determine when detentions have started and ended.

The below **Chart No 2** illustrates violations with time of their occurrence, as reflected in the judgments. It cuts out the periods of the ECtHR's proceedings.

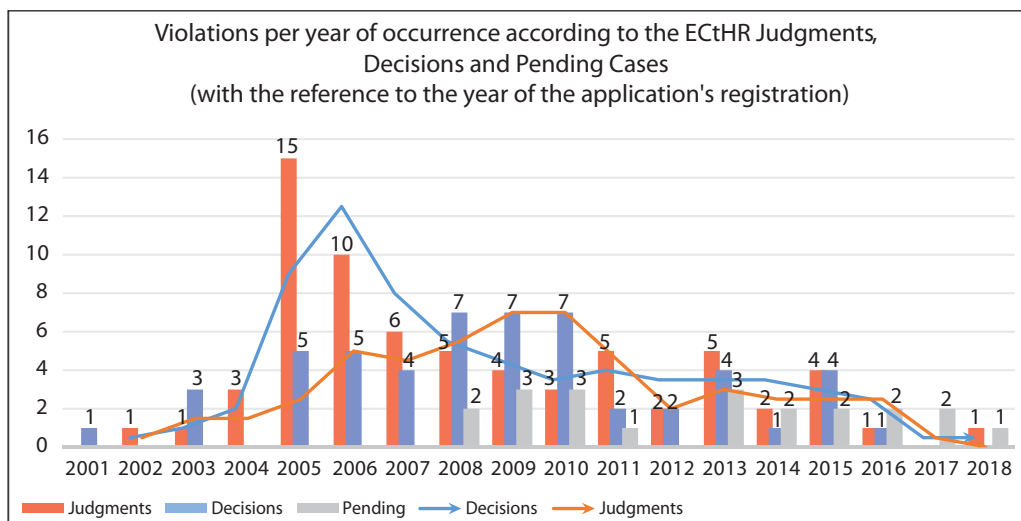
Chart No 2



With the reference to end of detentions (i.e. when the violation ended), the trend repeats the patterns showed in the above **Chart No 1**. Almost all violations occurred before 2013, including those found by the judgments delivered by the ECtHR in 2015 and 2018. In other words, even the recent ECtHR judgments still rule on detentions that took place between 2004 and 2008. Small number of judgments refer to detentions for the period from 2009 to 2012. There has been a slight increase of violations starting from 2013 with a noticeable raise in 2015. No violations were observed in 2016 and 2017. In 2018 the figures jumped significantly showing that the ECtHR has decided on some recent detention cases of 2018. The increasing trend of violations after 2018 is worrying.

However, the above figures should be connected with the below **Chart No 3** that reflects the trends of violations following the decisions and pending cases. The only difficulty with this data the determination of the end-days of detentions. The ECtHR's decisions on friendly settlements or unilateral declarations rarely mention the periods of detentions. The same situation is with the cases pending before the ECtHR where both the facts and the legal evaluation remain arguable. Accordingly, in these cases the only reasonable reference remains the year when the application was registered with the ECtHR Registry, assuming roughly that year as a decisive date when the violation has ended.

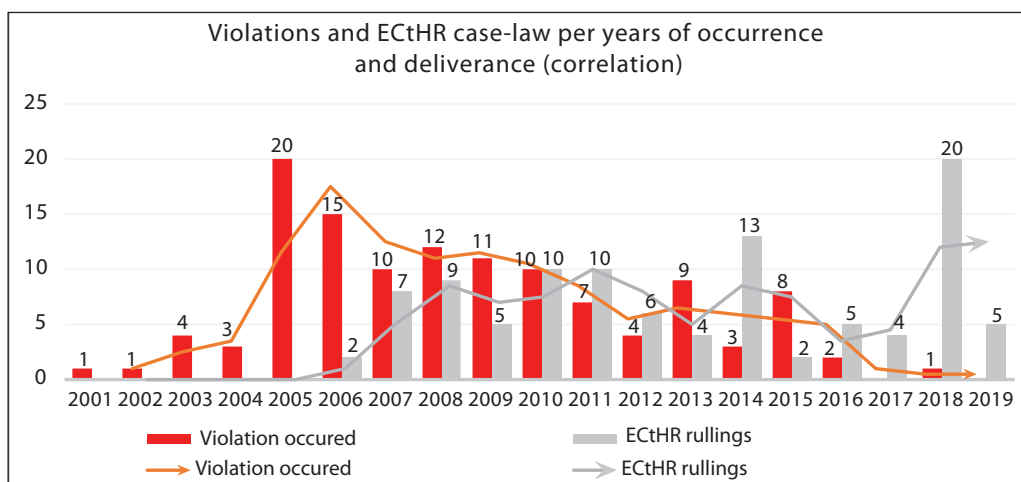
Chart No 3



The trend is the same as in the cases decided by the ECtHR judgments. According to the judgments, most of the violations occurred in the period from 2005 to 2011. The analysis of the decisions revealed continuous trend of violations starting in 2005 up to 2010. Both trends fell in 2012 and then rose in 2013 and 2015, respectively.

The final **Chart No 4** compares the data from all above charts. It corroborates all methods of assessment in determining the trends of violations and patterns. There are two types of data available: years when the violations occurred and years when the ECtHR decided on them by judgment or decision. In other words, the below compiles the years of occurrence with the years of rulings. Pending cases were excluded from this analysis to avoid any speculation about the outcomes of a case.

Chart No 4



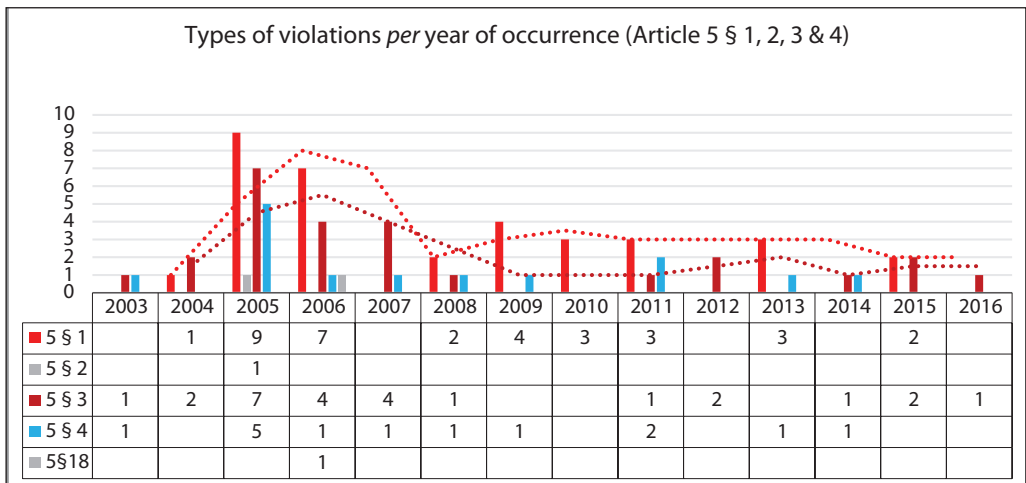
Therefore, according to this data, the greatest number of violations found by the ECtHR occurred in 2005 and 2006. The trend of violations continued between 2007 and 2010, albeit less intensive. In 2011 and 2012 the number of violations decreased significantly only to rise again in 2013. Then it declined significantly in 2014, but suddenly increased in 2015 and reached the level of 2011. In 2016 the number decreased again.

Turning on the types of violations under Article 5, the below Chart shows the dynamics of the principal violations per year of their occurrence, as described by the ECtHR judgments. It also classifies the violations by types, according to Article 5 paragraphs.

It should be borne in mind that each violation of Article 5 and its paragraphs is different in substance. For example, a detention is unlawful because it was regarded as arbitrary²⁰. In other situations, the unlawfulness of detention stems from unreasonable suspicions²¹ or absence of judicial review²². Nevertheless, all these violations fall within the ambit of the paragraph 1 of Article 5. Sometimes, when the domestic courts continue to issue unreasoned detention orders, violations could be classified either under paragraph 3 or paragraph 1 of Article 5 but to remain essentially the same²³.

Accordingly, the below Chart classifies the violations only according to the paragraphs of Article 5. Some cases were excluded from this assessment because they concerned to deprivations of liberty outside of the criminal proceedings framework²⁴. The violations concerning insufficient compensations under paragraph 5 of Article 5 will be analysed separately and reflected below in a separate Chart.

Chart No 5



20. E.g. *Cebotari v. Moldova* (2007).

21. E.g. *Stepuleac, Muşuc* cases.

22. *Levinta v. Moldova (no. 2)* (2012).

23. E.g. "... the courts envisage [no] possibility of applying alternative measures ... This, in addition to the lack of reasons for ... detention [under Article 5 § 3], could cast doubt on the lawfulness of his detention as a whole as required by Article 5 § 1 of the Convention", *Turcan* §52; "... it does not exclude that similar cases could also raise an issue under Article 5 § 1 of the Convention where the initial reasons for detention are insufficient and no new reasons are given for a continuation of detention" *Oprea*, § 45

24. E.g. *Guţu* or *Gumeniuc* concerning the deprivation of liberty in administrative proceedings.

The **Chart No 5** illustrates that Article 5 §1 and Article 5 §3 are the most frequently violated provisions during the whole period of reference. According to the trends, the violations were intensive in years of 2005 and 2006 and then they decreased. However, after 2009 the trend of these types of violations increased and became stable till 2015. During this period, the number of Article 5 § 3 violations is higher in comparison with violations of Article 5 §1. These data duplicate **Chart No 4** showing similar trends.

All data analysed above allow concluding that most of the violations occurred before 2013, i.e. in 2005 and 2006. Since then, the number of violations gradually decreased until 2013 when the trend started to rise again and became stable until 2015. However, after 2015 the trend slightly increased in intensity and seemingly continuous to grow.

The trend for the period between 2016 and 2019 could be changed because the ECtHR might deliver judgments concerning violations happened during these years. This assumption follows from **Chart No 4** showing the correlation between the dates when violation had occurred and the ECtHR's feedback. It takes four years in average for the ECtHR to rule on violations, provided that its proceedings are not delayed on other grounds. Accordingly, the data are insufficient to draw reliable conclusions on the scale of violations for the period between 2015 and 2018, because the ECtHR is still dealing with pending cases.

However, even with insufficient data, the scale of the violations for the period after 2015 is worrying. According to Charts nos. 2, 3 and 4, the violations reached the highest point in the middle of the period between 2000 and 2010. The decrease thereafter was significant, but the number of violations rose again in the middle of 2010ies and remained constant after 2015. The trend of violations has potential to rise after 2016 onwards, according to the data available today for the number of violations happened in 2017 and 2018. But for these last years after 2016 the conclusions are highly hypothetical and depend on future developments of the proceedings before the ECtHR.

2) Overview of the quality of legislation

The legality principle under Article 5 requires that any deprivation of liberty must have a legal basis and be properly regulated by domestic law. However, the lawfulness of any deprivation of liberty under the domestic law does not necessarily mean that it would be compatible with the Convention. The domestic authorities could not bend the law to fit other purposes, otherwise the deprivation of liberty would become arbitrary. The quality of law is a prerequisite in this sense. The domestic law should fulfil the requirements of accessibility, clarity and foreseeability to be classified as compatible with the Convention. However, the same principle of legality compels the domestic authorities and, in particular, the domestic courts to give consistent interpretation to the law and to do this in good faith.

In addition, one needs to consider the principle of legal certainty, which is implied in this context. This is the principle underpinning the whole Convention and, respectively, it guides application of Article 5. Its purpose is to ensure that the law benefits from sufficient confidence and stability of interpretation, so all persons subjected to its regulation foresee their behaviour and, thus, are able to comply.

In summary, these two principles of legality and legal certainty essentially mean that a person may be deprived of his or her liberty pending criminal proceedings. However, the deprivation of liberty should be done on basis of legal provisions and proceedings compatible with the Convention. The law in itself must be qualitative and applied proportionately without arbitrariness. Implementation of the law should be sufficiently predictable and stable, to leave no doubts about the implied behaviour of parties in the proceedings.

These principles become exceedingly relevant in view of the principal scope of the Analysis of Legislation. To recap, the analysis of the legislative framework aims to observe whether

- ▶ the continuous unpredictability of legislation due to frequent amendments would affect practices and its implementation;
- ▶ the judges and prosecutors are capable of predicting their procedural behaviour and to organise the proceedings in compliance with the law.

It is the long-established practice of the ECtHR to assess domestic legislation, mainly, by three criteria – accessibility, clarity and foreseeability. In particular, this is true for legislation regulating aspects of deprivation of liberty, under Article 5. The ECtHR noted in this sense, that ‘Article 5 § 1 ... does not merely refer back to domestic law, it also relates to the “**quality of the law**” which implies that where a national law authorises deprivation of liberty it must be sufficiently **accessible**, **precise** and **foreseeable** in its application.’ (emphasis added)²⁵.

In addition to the checking of quality, the ECtHR may wonder whether the domestic authorities maintain consistent administrative practice or judicial interpretation of legislation. However, the ECtHR case-law is brief when assessing incoherent and confusing interpretation of the domestic law. In a small number of cases, the ECtHR has emphasised that ‘provisions which are **interpreted in an inconsistent and mutually exclusive manner** by the domestic authorities will, too, fall short of the “quality of law” standard required under the Convention’ (emphasis added).²⁶ For example, inconsistent interpretation of provisions applicable to detainees awaiting extradition was regarded as the law lacking the required quality.²⁷ In other case, a refusal to review administrative detention of foreigner despite clear domestic judicial practice in this sense was regarded as incompatible with the Convention.²⁸ Change of judicial practice or inconsistent case-law may also lead to unlawful detention when release is expected.²⁹

Turning to the case-law in respect of the Republic of Moldova, it could be said that the ECtHR has rarely questioned the quality of domestic law under the requirements of legality and legal certainty within the meaning of Article 5. However, some cases could be identified.

25. ECtHR, *Guide on Article 5 of the Convention – Right to liberty and security*, updated to 30 April 2019 ed. (2019) §§ 32–33.

26. *Jėčius v. Lithuania*, §§ 53–59

27. *Nasrullojev v. Russia*, § 77

28. E.g. *Abdi v. United Kingdom*, concerning incompatible administrative practice to refuse periodic review of detention orders issued in respect of deportees.

29. E.g. *Del Rio Prada v. Spain*, concerning postponement of release following change in case-law after sentencing

The quality of legislation was firstly observed in 2006. Back then, the ECtHR held as unlawful the practice of keeping accused persons in detention pending trials without clear time-limits. The domestic Moldovan legislation at that time provided neither an obligation nor proceedings to review detention pending trial. On the contrary, the law required periodic extension of length of pre-trial detention, at least once in 30 days pending investigation stage. Nevertheless, after the cases were sent to trial, any detention was extended by the effects of law until sentencing or acquittal.

The ECtHR did not criticise the quality of the domestic law but noted with concern that the CPC at the relevant time lacked clear provisions authorising detention pending trial. It noted that CPC was compatible with Article 25 of the Constitution. The Constitution requires a court order and judicial review after criminal cases have reached the trial stage of criminal proceedings.³⁰ However, in the absence of legal provisions in the CPC no judge has ever reviewed the detention pending trial. Lately, the ECtHR repeated these findings in other judgments, whilst still not questioning the quality of the domestic law³¹ but rather its application.

The law at the time was controversial. If the ECtHR required judicial review of detention pending trial, the special provisions of the CPC (Article 186 CPC) were silent in this respect. They merely provided for judicial review pending the investigation and the prosecution stages of criminal proceedings. The CPC provide nothing about the duty to review detention pending trial. It could have been extensively interpreted in view of the constitutional provisions but this task was beyond the judges' strength. The CPC provisions were amended eventually, but at the relevant time they represented a noticeable example of post-soviet legal tradition inherited by new legislation after 2003.

The previous Criminal Procedure Code of 1961 ("the former CPC") contained no system for judicial review of detention pending trial. Nor it has ever accepted such an obligation. This perspective shaped the legal mentality of several generations of legal practitioners, including experienced judges and prosecutors. Moreover, after the adoption of new criminal procedure legislation in 2003 this tradition remained institutionalised. The new CPC repeated the older provisions of the former CPC providing for no review of detention pending trial. Accordingly, judges and prosecutors still perceived preventive detention as a measure connected only with the pre-trial stages of criminal proceedings.

The Constitutional Court demonstrated this attitude back in 1999. When asked to decide on constitutionality of the former CPC, the constitutional judges held that Article 25 of the Constitution provides for an overall 12-month detention time-limit applicable only during the investigation stage of criminal proceedings [sic].³² In their opinion, once an accused had been committed to trial, his or her detention was no longer subject to review

30. *Boicenco*, § 152.

31. *Holomiov, Modârca, Gorea, Paladi, Stici, Țurcan, Ursu, Străisteanu and others*

32. '... The meaning of „reasonable time“ pertains to the examination of a criminal case and not to the length of detention. Or, the provisions of art. 25 paragraph (4) of the Constitution refers to the pre-trial investigation stage and not to the proceedings pending trial. Thus, the legal text of procedure, provided in par. 6 art. 79 CPC, according to which, after a criminal case has been sent to a court for trial on the merits, the defendant can be held under arrest until that case is finished within a reasonable time, does not contravene the Constitution. ... „ Constitutional Court of the Republic of Moldova, Judgment no. 72 of 23.12.1999 on the control of constitutionality of art. 79 paragraph 1, 2, 5 and 6 and art. 79/1 § 1 and 2 Code of Criminal Procedure of the Republic of Moldova (1999) § 6.

until sentencing; it does not have to comply with the requirement of reasonability. As it will be observed below, this constitutional rationale has been lately overruled by another Constitutional Court judgment (in 2016). However, this interpretation illustrates how past experiences continue to influence judicial interpretation and practices.

Other doubts concerning the quality of legislation could be observed in the case of *Boicenco*, where the ECtHR directly highlighted certain legislative incompatibilities. It questioned the quality of the CPC which banned the release on bail because of the gravity of criminal accusations (Article 191 (1) CPC). The ECtHR stated that ‘the right to release pending trial cannot, in principle, be excluded in advance by the legislature’.³³ Thus, this was the first Moldovan case when the quality of legislation was questioned. This judgment eventually led the authorities to repeal these legislative prohibitions in 2006. However, certain issues remained unresolved. The Needs Assessment Report scrutinised these provisions in detail and noted that imposing fixed requirements, such as the pre-condition to repair damages in order to benefit from bail, is incompatible with Convention provisions.³⁴

The important concerns on the quality of the domestic legislation could be drawn from the *Savca* judgment³⁵. This case was about detention on remand having been extended beyond the constitutional 12-month period (Article 25 of the Constitution). The extension of detention was based on Article 186 CPC allowing it in exceptional situations and in cases of particularly grave crimes. The CPC distinguished two types of detention, one pending investigation and other pending trials. Following this distinction, it calculated the 12-month length separately for each pre-trial and pending trial detentions. Accordingly, it actually allowed the detention to reach 24 months in length until the final determination of criminal charges.

The ECtHR seriously questioned these provisions emphasising their manifest incompatibility in comparison with clear constitutional provisions. It recognised that they were ‘not sufficiently clear and foreseeable in [their] application and thus [they] did not meet the requirement of „lawfulness“’. Furthermore, Article 186 CPC was found controversial between its different sections.³⁶ A number of follow-up cases underlined similar problems of the quality of law.³⁷ Similar issues were raised by the notorious Constitutional judgments nos. 3 and 9 in 2016 concerning the length of detention on remand. These judgments will be explained below.

In another notable case, *Leviņa no. 2*, the Supreme Court reopened criminal proceedings and ordered detention pending extraordinary review. However, it provided neither reasons nor the time-frames for detention and briefly referred this task to the lower-instance courts.³⁸ The ECtHR dismissed this practice stating that ‘a court which has the power to order a person’s detention must also have the power to justify such a detention,

33. *Boicenco*, §§ 134-136

34. *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*, § 59.

35. *Savca* (2016).

36. *Savca*, §§ 51, 52.

37. Judgments in cases of *Goremichin* and *Miron* plus Decisions in the cases of *Enachi*, *Neicovcen* and *Moscoglo*, *Marținiuc*, *Morozan*, *Godniuc*, *Hodorogea*, *Pinzari*.

38. *Leviņa 2*, § 32.

no matter how extraordinary the circumstances.³⁹ From legal perspective, this case raised a number of concerns about compatibility of procedural legislation governing remand proceedings pending the appeal stages and/or extraordinary revisions before the second- and third-tier courts.

The last situation where the ECtHR tested the quality of domestic legislation was the *Litschauer* case. It could be argued that this particular case concerns other requirements of foreseeability. It rather disputed the material criminal legislation regulating the basis for criminal responsibility; not the legislation regulating proceedings of remand detention. The ECtHR concluded that ‘the relevant legal rules [of the Criminal Code of the Republic of Moldova] did not provide sufficient guidance and were not formulated with the degree of precision required by the Convention so as to satisfy the requirement of “lawfulness” set out by the Convention’⁴⁰. In this sense, there was no “reasonable suspicion of having been a criminal offence committed” as required by Article 5 § 1 (c). The ECtHR went to decide that the whole detention was unlawful because the crimes were not clearly defined by the Criminal Code.

In this case the ECtHR questioned the quality of material criminal legislation, not procedural. In the opinions of dissenting judges this interpretation went far outside of regular interpretation of Article 5⁴¹. On the contrary, the Research mostly focuses on the compatibility of procedural framework, i.e. the rules governing application of detention and not those establishing criminal liability. Accordingly, this particular judgment and its legal reasons were excluded from the current Analysis of Legislation.

In other cases, the ECtHR did not find incompatibilities in the domestic legislation on remand detention, with notable exception of the law on compensations for unlawful detention. The later aspect will be dealt with in separate sub-component below.

3) Overview of the issues on implementation of legislation

This sub-component seeks to establish the ECtHR found repetitive patterns or systemic dysfunctions in the judicial and prosecutorial practices ordering and extending detention. It will not describe almost 20-year long case-law of the ECtHR in this sense. Only selected cases will be highlighted disclosing some general problems of the implementation of the legislation.

The *Şarban* and the *Becciev* cases are the landmark judgments concerning practical application of criminal procedural legislation to detention. In these cases, the ECtHR criticised the domestic courts’ failures to give sufficient and relevant reasons for continuous remand detention. Notably, these cases pointed to the formal approach of the domestic courts that preferred using standardised quotations of law and copying the texts of their own earlier decisions. The decisions on remand detention were viewed as abstract and stereotyped. The domestic judges often transcribed the grounds for detention from written

39. *Levința 2*, § 33.

40. *Litschauer*, § 35.

41. ‘...The fact that domestic legislation did not contain a definition ... is not in itself decisive. ...the majority [of judges] do not pay sufficient attention to the wording of Article 5 § 1 (c) of the Convention, which requires only a “reasonable suspicion”, not a sufficient basis for a conviction, and it is first and foremost for the domestic courts to interpret and apply domestic law...’ *Litschauer*, §§ 9 and 14 Dissenting opinion of judges Spano and Kjølbros.

law' without any attempt to show how they applied [these grounds] to the [case at hand]'⁴². The cases that followed the precedents of *Şarban* and *Becciev*, found no improvements in the domestic courts' practice. The majority of the judgments finding violations concern these practices incompatible with the Convention.⁴³

The formal approach to the law by the domestic courts and prosecution authorities is the most pressing issue. Both earlier and recent cases reveal certain patterns of this formal approach. Moreover, this formalism is so imbedded in daily routine that even in meritorious cases it raises serious questions of quality of judicial reasoning. For example, in the *Haritonov* judgment the absence of proper judicial reasoning was highlighted as questionable even in case when the detention was eventually justified under Article 5 § 3. The ECtHR noted that 'the domestic courts, when ordering the applicant's detention ... as in the cases of *Şarban* and *Castraveţ*, the reasons relied upon by the domestic courts to detain him in custody appear to be very brief'.

The ECtHR continued to underline these failures in its next judgments. The domestic courts kept failing to give reasons for their decisions ordering and extending detention. It was suggested that the scales of these failures could declare the whole detention as unlawful. For example, the failure to consider alternative measures⁴⁴ or to give new reasons for continuation of detention⁴⁵ could be classified as unlawful within the meaning of Article 5 § 1, not only as the violation failing the requirements of Article 5 § 3. These reasons reveal repetitive patterns due to the domestic courts' continuous failure to justify the detention orders.

This formal approach in application of law could be observed in the case of *Vasiliciuc*⁴⁶, where the prosecution authorities requested and the courts ordered detention *in absentio*. It was alleged that the applicant had intentionally fled prosecution and, thus, no notification about criminal charges or hearings in her presence is possible. The ECtHR underlined a formalistic approach on part of the prosecutors and judges. It held that 'the prosecutors had made no attempt to follow up information that she was in Greece and had made no reasonable attempts to inform her of the criminal proceedings and the necessity to appear before them' while the domestic courts refused 'to check the applicant's submissions about the improper summoning and to give her a chance to appear before the authorities'⁴⁷.

Other violations found by the ECtHR under Article 5 reveals no repetitive patterns or systemic dysfunctions. Some of the cases, however, cast doubts on the compatibility of judicial or prosecutorial practices.

For example, the *Cebotari* case revealed an arbitrary use of the law to secure detention. The ECtHR found that despite of the apparent compliance with procedural rules, the

42. *Şarban*, § 100.

43. See among many others the cases of *Castraveţ*, *Boicenco*, *Istrati and others*, *Modârca*, *Stici*, *Țurcan and Țurcan*, *Popovici*, *Ursu*, *Malai*, *Străisteanu and others*, *Oprea*, *Ignatenco*, *Feraru*, *Ninescu*, *Rimschi*, *Balakin*, *Caracet*, *Buzadji*, *Ceaicovschi*, *Coteţ*, *Secieru*, *Sirencu*.

44. *Țurcan* (2007) § 50.

45. *Oprea* (2010) § 45.

46. *Vasiliciuc* (2017).

47. *Vasiliciuc*, § 40.

detention pursued other aims than those provided by the legislation⁴⁸. The case illustrates that the domestic courts, even occasionally, allow themselves to bend the law in detention proceedings. There have been no similar cases since then and it is classified as an isolated incident.

Another isolated example is the *Leva* case. It concerns the prosecutorial practice to disjoin criminal cases and to ask separate detention orders based on different criminal charges. The Constitutional Court already found these practices incompatible with Convention provisions.

The *Străisteanu* case illustrated other incompatible practices, by which prosecutors sought detention in courts with different territorial jurisdictions, in order to circumvent earlier refusals to grant prosecutorial motions to remand. This practice was prohibited by amendments to the law thereby solving jurisdictional disputes between different courts.

A number of cases, such as *Muşuc*, *Stepuleac* and *Cebotari*, concerned the detention with no reasonable suspicions. In the most of these cases, the prosecutors arbitrarily initiated criminal cases and asked for detention. On the other hand, the judges, when ordering detention, failed to provide reasons in this regard, despite of being asked to do so. These cases apparently might have become repetitive, but the legislative amendments of 2006⁴⁹ quickly confined the problem. They judicial and prosecution practices were guided in the right direction, still some isolated incidents continue to occur.

In conclusion, with the exception of the cases finding violations of Article 5 § 3 for failures to provide reasons on grounds of detention, no other cases could be classified as repetitive. Violations of Article 5 § 1 (c) on account of detention based on unreasonable suspicions featured some repetitive patterns but not at the scale of the previously mentioned cases. Other cases are mostly isolated violations and would not reveal persistent practices raising serious systemic concerns. Accordingly, another view is needed that could observe these systemic or repetitive patterns. This systemic view is provided by the Committee of Ministers in its practice on the supervision of the execution of judgments.

2.1.2. The Committee of Ministers' supervision of execution

The practice of the Committee of Ministers offers valuable insights into the domestic problems. It observes the ECtHR cases from systemic perspective distinguishing between individual and general measures of implementation of judgments⁵⁰. Individual measures concern applicants, whereas general measures require changes of domestic laws and/or practices. Accordingly, the way in which the Committee of Ministers has analysed the Moldovan cases under Article 5 will be helpful for the purposes of the Research.

The Committee of Ministers assembles the judgments in groups if they reveal repetitive patterns. Within such a group it distinguishes leading judgments that had first identified the problem and repetitive cases revealing similar patterns of violations. Systemic problems

48. *Cebotari*, §§ 52–53.

49. See below the Law no. 264/28.07.2006 for amending and completing the Criminal Procedure Code of the Republic of Moldova.

50. See for details Department for the Execution of Judgments of the European Court of Human Rights, 'The supervision process at <https://www.coe.int/en/web/execution/the-supervision-process>'.

and structural dysfunctions should be distinguished from groups of cases with repetitive patterns. The former cases, nowadays, are being examined in separate pilot or quasi-pilot proceedings. The Republic of Moldova has no such cases under Article 5⁵¹.

All Moldovan cases revealing violations in the context of criminal detentions have been classified by the Committee of Ministers as repetitive and subjected to either enhanced or standard supervision procedure. According to the Committee of Ministers' definition, the enhanced procedures are designed to the judgments disclosing major structural and/or complex problems⁵². The other supervision procedure is followed in the remaining cases, which are either isolated or non-repetitive in character.

Using these working methods, the Committee of Ministers distinguished the Moldovan cases concerning the detention on remand in two main groups, i.e. the *Șarban*⁵³ and *Mușuc*⁵⁴. Both raised problems of excessive use and repetitive violations. The *Savca* group resembled some repetitive patterns but the supervision by the Committee of Ministers was speedily closed after the amendments to the domestic law⁵⁵. The *Brega* group⁵⁶, though disclosing repetitive violations of Article 5 in the administrative detentions, is irrelevant for the Research. The rest of the cases were regarded by the Committee of Ministers as isolated and thus without patterns of repetition⁵⁷.

Most of the relevant cases⁵⁸, including the first group of *Mușuc* involving complex problem on detaining applicants without reasonable suspicion, were closed by the Committee of Ministers⁵⁹. In the former group, the Committee of Ministers agreed with the legislative improvements but expressed reservations concerning the implementation of law by 'inadequate reasoning of detention orders'. However, in the absence of new repetitive cases on detention 'without reasonable suspicion', the Committee considered it appropriate to close the supervision. It decided to continue examination of the issues pertaining to the quality of judicial reasoning, as well as to the efficiency of remedies, within the context of the *Șarban* group⁶⁰ only.

The *Boicenco* case regarding the legislative uncertainty prohibiting provisional or bail release, was closed after the legislative changes.⁶¹

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51. Pilot proceedings were initiated by the case of *Olaru et al.* concerning non-enforcement or delayed execution of domestic courts' decisions of and the quasi-pilot judgment in case of *Shishanov* concerns inhuman conditions of detention.
 52. Committee of Ministers, 'Guide Procedures and working methods' (2018) chap. 19.
 53. See the description and the list of cases at <http://hudoc.exec.coe.int/eng?i=004-6712>
 54. See at <http://hudoc.exec.coe.int/eng?i=004-6966>
 55. Committee of Ministers, Resolution CM/ResDH (2017) 124 closing supervision, the 1284th meeting (DH) April 2017 [Savca case].
 56. See at <http://hudoc.exec.coe.int/eng?i=004-6938>
 57. See for example the cases of *Litschauer, Vasilciuc, Gumeniuc, Straisteanu and Others, Levița (no. 2), Boicenco, Sara and Savca*.
 58. Committee of Ministers, Resolution CM/ResDH (2018) 296 closing supervision, the 1322nd meeting (DH) September 2018, [Sara case].
 59. Committee of Ministers, Resolution CM/ResDH (2018) 227 closing supervision, the 1318th meeting (DH) June 2018, [Mușuc, Stepuleac, Leva, Brega, Brega and Others cases].
 60. Committee of Ministers, CM's Resolution Mușuc et al.
 61. Committee of Ministers, Decision CM/Del/Dec(2017)1294/H46-18, the 1294th meeting (DH) September 2017 [Șarban group]' (2017) § 3; Committee of Ministers, 'Resolution CM/ResDH(2016)146 closing supervision, the 1259th meeting (DH) June 2016, [Boicenco group].

The repetitive cases following from the *Șarban* group were closed without prejudice to certain remaining issues 'required in response to the shortcomings' that continued to be examined within the framework of that group.⁶²

Therefore, at the present time, the *Șarban* group of cases is the only relevant that remains under the supervision of the Committee of Ministers. The violations there that represent keep the Committee interested, mostly concern the 'lack or insufficient reasons to order and extend detention on remand' by the domestic courts and prosecution authorities. It would seem that a number of legislative improvements, whilst highly appreciated, do not suffice unless good practices are established. This element of legislative implementation was emphasised by the Committee in September 2009⁶³, repeated in November 2009⁶⁴ and appeared in all its subsequent decisions delivered in the *Șarban* group.⁶⁵

The Committee of Ministers cannot go beyond the findings of the ECtHR and recognise the new problems. It did not question the quality of the legislation in Moldova but rather the practice of its implementation. The Committee of Ministers recognised that some outstanding legislative issues have been resolved and the new improvements aimed at establishing good practices. Nevertheless, the question of developing judicial practices in the Republic of Moldova, in particular, after the 2016 legislative amendments, and the issues of remedies still remain pending⁶⁶. In its last reassessment, the Committee of Ministers repeated these concerns⁶⁷ and added that the authorities had to deal with some new elements, in particular, concerning the:

- access to the detention case files;
- exercise of defence rights;
- proper rules of evidence;
- length of *habeas corpus* proceedings; and
- improvement of the Law no. 1545/1998 on remedies.⁶⁸

62. Committee of Ministers, Resolution CM/ResDH(2019)144 closing supervision, the 1348th meeting (DH) June 2019, [23 cases: Balakin, Buzadji, Castravet, Coteț, Cucu and others, Feraru, Guțu, Ignatenco, Iurcovschi and others, Levința no. 2, Mătăsaru and Savițchi, Modârca, Ninescu, Pașa, Rimschi, Secrieru, Sirencu, Stici, Straisteanu and others, Tripăduș, Țurcan and Țurcan, Veretco, Ursu].

63. Department for the execution of judgments of the ECHR, Memorandum CM/Inf/DH(2009)4 (First Part); Measures required to comply with the judgments concerning detention on remand in Moldova [*Șarban* group] § 15 et seq.

64. Department for the execution of judgments of the ECHR, Memorandum CM/Inf/DH(2009)4-rev (Second Part); Measures required to comply with the judgments concerning detention on remand in Moldova [*Șarban* group] §§ 17 and 27 et seq.

65. Committee of Ministers, Decision CM/Del/Del(2014)1214/13, the 1214th meeting (DH) December 2014 [*Șarban* group]; Committee of Ministers, 2nd CM's Decision *Șarban* (2017); Committee of Ministers, 'Decision CM/Del/Dec(2019)1348/H46-17, the 1348th meeting (DH) June 2019 [*Șarban* group].

66. Committee of Ministers, 2nd CM's Decision *Șarban* (2017); Notes and Status of Execution CM/Notes/1294/H46-18, the 1294th meeting (DH) September 2017 [*Șarban* group].

67. Committee of Ministers, 3rd CM's Decision *Șarban* (2019), § 3; Committee of Ministers, Notes and Status of Execution CM/Notes/1348/H46-17, the 1348th meeting (DH) June 2019 [*Șarban* group].

68. Committee of Ministers, 3rd CM's Decision *Șarban* (2019), § 7.

2.1.3. Conclusion

The above analysis identified a number of patterns of violations relevant for the Research, all pertain to the use of detention in the criminal proceedings. This is the overview from both perspectives of the ECtHR judgments against Moldova and the Committee of Ministers' practice on supervision of execution. The patterns of violations were classified under the relevant paragraphs of Article 5, and those resolved were marked as such. Violations involving deprivations of liberty outside of the domestic criminal proceedings were excluded from the Research. As noted above, the Research concerning the effectiveness of remedies for unlawful detentions will continue in the separated sub-component below.

Accordingly, these patterns of violations include the following:

1) *Lawfulness of detention (Article 5 § 1):*

- ▶ Detention pending trial in the absence of a court order⁶⁹. This issue was **resolved** and no longer raises concerns⁷⁰;
- ▶ Detention ordered by superior courts in brief sentence in operative part of judgments without giving any reasons for that detention, while sending criminal cases for rehearing⁷¹. This issue was **resolved** and no longer raises concerns⁷²;
- ▶ Conflict of detention orders following prosecutorial circumvention of jurisdictional rules seeking new detention after another court refused to grant it⁷³. This issue was **resolved** and no longer raise concerns⁷⁴;
- ▶ Overall detention period exceeded the statutory time-limit of 12 months set by the Constitution⁷⁵. This issue was **resolved** and no longer raises concerns.⁷⁶

2) *Reasonable suspicion (Article 5 § 1 (c)):*

- ▶ Refusal or silence of the investigating/appellate judges to examine the applicants' arguments about the lack of reasonable suspicions.⁷⁷ This issue was **resolved** and no longer raise concerns⁷⁸;
- ▶ Detention based on a criminal accusation with reference to unclear criminal provisions⁷⁹. Since this issue implies assessment of criminal legislation rather than procedural rules, it was **excluded** from the Research.⁸⁰

69. *Boicenco, Holomiov, Modarca, Gorea, Paladi, Stici, Turcan, Ursu, Straisteanu and others*

70. Committee of Ministers, 1st CM's Decision Şarban (2014).

71. *Levinta no. 2 and Danalachi*

72. Committee of Ministers, 2nd CM's Decision Şarban (2017); Committee of Ministers, Resolution CM/ResDH(2017)290 closing supervision, the 1294th meeting (DH) September 2017, [Danalachi]; Committee of Ministers, CM's Resolution 23 cases.

73. *Straisteanu and others*

74. Committee of Ministers, 2nd CM's Decision Şarban (2017); 3rd CM's Decision Şarban (2019); CM's Resolution 23 cases.

75. *Savca, Goremichin, Miron.*

76. Committee of Ministers, CM's Resolution Savca.

77. *Musuc, Cebotari, Stepuleac*

78. Committee of Ministers, Decision CM/Del/Dec(2016)1259/H46-19, the 1259th meeting (DH) June 2016 [Muşuc group, Guţu case and Brega group]; Decision CM/Del/Dec(2018)1318/H46-15, the 1318th meeting (DH) June 2018 [Muşuc group, Guţu case, Brega group]; CM's Resolution Muşuc et al.

79. *Litschauer*

80. Committee of Ministers, Decision CM/Del/Dec(2019)1348/B1-add1 Classification of new judgments under standard procedure the 1348th meeting (DH) June 2019 (i.a. Litschauer).

3) *Reasons for detention (Article 5 § 3):*

- a) Failure to give relevant and sufficient reasons for ordering and extending detention on part of investigating judges and/or appellate judges⁸¹. This problem seems to be **repetitive** and still raises concerns⁸². It emerges as a **systemic** deficiency and, thus, regarded as the principal aim of the Research⁸³;
- b) Incompatibility of Article 191 CPC with the requirements of the Convention banning bail and other alternative measures for certain category of accused persons⁸⁴. This issue was **resolved** and no longer raise concerns.⁸⁵

4) *Fairness of the remand proceedings (Article 5 § 4):*

- a) Violation of lawyer-client confidentiality because of the glass partition in the remand centre of the former Centre for Fighting Economic Crimes and Corruption⁸⁶. This issue was **resolved** and no longer raise concerns⁸⁷;
- b) Non-disclosure of the case-file submitted by prosecution before judges to substantiate grounds for detention⁸⁸; Refusal to hear witnesses pending the remand hearings⁸⁹. The issues remain recurrent and, thus subjected to further implementation⁹⁰;
- c) Non-Speedily examination of the *habeas corpus* requests and/or appeals against detention orders⁹¹. The issue remains recurrent and subjected to further implementation. It concerns the application of the statutory procedural time-limits by the courts in their current practices.⁹²

The above patterns of violations were specified in the Check-Lists aiming at evaluating the domestic practices.

In summary, both the ECtHR and the Committee of Ministers remain concerned about the proper implementation of legislation. It could be argued that both institutions observe no issues concerning the quality of the domestic legislation in the Republic of Moldova. Apart from the effectiveness of the remedies, the Moldovan criminal procedural law needs no further improvement in respect of the remand proceedings. However, there is a room for improvement on the practical level; the implementation of the law in remand detention proceedings still require further attention.

81. *Becciev, Șarban, Castraveț, Boicenco, Istrati and others, Modârca, Stici, Țurcan and Țurcan, Popovici, Ursu, Malai, Străisteanu and others, Oprea, Ignatenco, Feraru, Ninescu, Rimschi, Balakin, Caracet, Buzadji, Ceaicovschi, Coteș, Secrieru, Sirencu.*

82. Committee of Ministers, 1st CM's Decision Șarban (2014); Committee of Ministers, 2nd CM's Decision Șarban (2017); Committee of Ministers, 3rd CM's Decision Șarban (2019).

83. See the CM Decision in the *Șarban* group of cases [CM/Del/Dec\(2017\)1294/H46-18 of 21 September 2017](#)

84. *Boicenco*

85. Committee of Ministers, 2nd CM's Decision Șarban (2017).

86. *Castraveț, Istrati and others, Modârca, Leva*

87. Committee of Ministers, 1st CM's Decision Șarban (2014).

88. *Țurcan and Țurcan*

89. *Becciev, Țurcan and Țurcan, Feraru*

90. Committee of Ministers, 2nd CM's Decision Șarban (2017); Committee of Ministers, 3rd CM's Decision Șarban (2019).

91. *Șarban*

92. Committee of Ministers, 2nd CM's Decision Șarban (2017); Committee of Ministers, 3rd CM's Decision Șarban (2019).

2. Primary legislation

2.2.1. Preliminary findings

A preliminary analysis of the Moldovan primary legislation regulating pre-trial detention was carried out by the Needs Assessment Report in 2018⁹³. The Analysis of Legislation draws necessary inferences from it. Accordingly, an overview of its findings is relevant for the purposes of the present assessment.

The Needs Assessment Report has identified some aspects of the domestic legislation raising concerns. Its first observation is about the use of an incongruous legislative technique in the CPC, seemingly mixing up preventive measures. According to this observation the remand detention and house arrest, are regulated first in comparison with alternative non-custodial measures, such as bail, conditional release or release on recognisance, under judicial control etc.⁹⁴ The Report, thus, recommended redrafting the CPC to follow the order of priority from less to more serious preventive measure.

The CPC was amended in this sense, but the authorities chose another legislative technique. Article 185 §§ (3) and (3¹) CPC were redrafted in August 2018 compelling judges to consider first alternative measures before ordering remand detention or house arrest⁹⁵. Thus, the law establishes the required priority order.

The second observation of the Needs Assessment Report underlined that the detention could be widely used in the cases involving less serious or even minor criminal accusations in crimes punishable by more than 2 years imprisonment⁹⁶. It was, thus, recommended to reduce the range of criminal accusations when the detention could be used.

This recommendation was implemented by legislative amendments to the CPC of August 2018⁹⁷. Currently, detention and house arrest are applicable only if the person is charged with a crime punishable by more than 3 years imprisonment. It could be argued that this statutory limitation could have been increased even more, in view of the Report's recommendations.⁹⁸

The third observation of the Needs Assessment Report wonders about the compatibility of provisions allowing detentions in cases when the accused refuses to specify or has no registered and/or *de facto* place of residence⁹⁹. Although the Report did not recommend anything in this respect, it is clear from its wording that this provision might be questionable both in practice and in terms of compatibility with the Convention.

93. *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.*

94. *ibid*, § 39.

95. Parliament of the Republic of Moldova, Law no. 179/26.07.2018 amending some legislative acts (effective from 17.08.2018).

96. *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*, § 40.

97. Parliament of the Republic of Moldova, Law no. 179/26.07.2018 amending some legislative acts (effective from 17.08.2018), of (*major changes in arrest proceedings*).

98. The Report proposed a variety of options from a comparative legal perspective, e.g. "four years" in Italy, "five years" in Romania or "a mixed approach" in Ukraine.

99. *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*, § 41.

This condition, is an additional ground for detention set out in Article 185 (2) p.1) and (2¹) CPC, has not been yet amended or repealed. Whilst questionable in theory by the ECtHR¹⁰⁰, this condition is rarely applicable. However, this particular provision is capable of leading to arbitrary detention. It opens the door to abuse, supposing that the prosecution is determined to substantiate its motion to remand on the grounds of unclear residence or refusal to declare it. Moreover, the refusal to declare *de facto* place of residence could be covered by the right to remain silent, which the defendant could choose to hide for whatever purposes. In this situation, a detention based solely on these grounds would be punitive in character and could be used as a method of persuasion to confess. Accordingly, this provision remains controversial.

The last observation of the Needs Assessment Report continues the same line of argument. It is highly problematic to corroborate the reasoning on detention with the obligation to examine the reasonability of suspicions without reaching conclusions on the merits of criminal charges. According to Article 176 (3) p. 1 CPC, a judge is bound to consider the reasonableness of suspicion, the seriousness of the crime and its consequences. But the judge should escape making any assumptions about the guilt of the accused. In the opinion of the authors this is almost impossible to achieve in practice without prejudice to the presumption of innocence and the principle of impartiality¹⁰¹. The Report, thus, recommended changing this provision.

It appears that this recommendation has not been yet followed by the authorities.

The Needs Assessment Report has already described the relevant domestic provisions and identified pressing issues in general terms. The Analysis of Legislation upholds its findings and intends to broaden its assessment by examination of the legislation and the amendments thereto. It evaluates only fundamental amendments to the domestic criminal procedure legislation. Technical adjustments or minor clarifications introduced in the legal texts were omitted as irrelevant. However, to choose some legislative changes over others appears to be problematic. The leading criterion is whether an amendment to law might influence or has already influenced the domestic practices. Thus, the amendments that do not change the semantic meaning of procedural rules were disregarded.

100. ‘...as the danger of absconding, the risk of pressure being brought to bear on witnesses or of evidence being tampered with, the risk of collusion, the risk of reoffending, the risk of causing public disorder and the need to protect the detainee...’ see *Buzadji v. the Republic of Moldova* [GC] (2016) §§ 87–88.

101. *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*, § 43.

2.2.2. Constitutional provisions and practice

The relevant constitutional provision is Article 25 of the Constitution, which reads as follows (emphasis added):

Article 25. Individual Freedom and Security of Person

(1) Individual freedom and security of person are inviolable.

*(2) Searching, detaining in custody or arresting a person shall be permitted only in cases and pursuant to the **procedure established by the law**.*

*(3) The period of detention in custody **may not exceed 72 hours**.*

*(4) The arrest shall be carried out under a **warrant** issued by a **judge for a period of 30 days at the most**. An **appeal may be lodged against the validity of the warrant**, under the law, at the hierarchically superior court of law. The term of the arrest may only be **prolonged by the judge or by the court of law**, under of the law, to a period not exceeding 12 months.*

*(5) The person detained in custody or under arrest shall be **immediately informed on the reasons** of his/her detention or arrest, and shall be **notified of the charges** brought against him/her as soon as possible; the notification of the charges shall only be made in the presence of a lawyer, either chosen or appointed ex officio.*

(6) If the reasons for detention in custody or arrest have ceased to exist, the release of the person concerned must follow without delay.

The provisions establishes the main principles: the presumption of liberty (§ 1), legality (§ 2) and the right to judicial review (§ 4). A specific period is provided for short term arrest (§ 3), not exceeding 72-hours. This constitutional provision was amended in 2001, which extended the original '24-hours' arrest' originally provided by the Constitution since its adoption in 1994.¹⁰²

The Constitution limits the overall length of detention to 12 months (§ 4), while neither the Convention nor any other international treaty requires the States to do so. This provision was subjected to controversial interpretations since its amendments in 2001.

Originally, the Constitution provided that detention must not exceed six months but it could be exceptionally extended by the authorisation of the Parliament for no longer than 12 months. In 2001, the Parliamentary authorisation was lifted and Article 25 of the Constitution remained with two conditions that the maximum length of detention should not exceed 12 months and it must be subjected to periodic judicial review at thirty-day intervals¹⁰³. Since then, disputes have continued on the correct interpretation of these provisions. The controversy lays in the question how to regard the overall 12-month time-limit; either as applicable to the pre-trial detention only or to overall time detention until sentencing.

The Constitutional Court's Judgment of 2016 on the maximum length of preventive detention¹⁰⁴ solved all controversies. It has changed both legislation and practice, ruling

102. Parliament of the Republic of Moldova, *Law no. 351/12.07.2001 for amending and complementing the Constitution of the Republic of Moldova (in force since and of 02.08.2001)*.

103. Parliament of the Republic of Moldova, *Law no. 351/ of 12.07.2001 for amending and complementing the Constitution of the Republic of Moldova (in force since 02.08.2001)*.

104. *Constitutional Court of the Republic of Moldova, Judgment no. 3 of 23.02.2016 regarding the exception of unconstitutionality of paragraphs (3), (5), (8) and (9) of article 186 of the Criminal Procedure Code.*

that the 12-month time-limit should no longer be regarded in connection with the stages of criminal proceedings. Since then, the relevant period to be considered as starting from the date of arrest and ending by the date of final determination of criminal accusations, i.e. sentencing, acquittal or dismissal of charges. The Constitutional Court also ruled on the times-frames set up by the CPC for judicial review. The CPC provided 30 days and 90 days intervals for review depending on the stages of criminal proceedings, which were found to be incompatible with the Constitution. Article 25 of the Constitution provides only for 30 days of judicial review and, thus, the CPC could not override this constitutional time-limits.

As a result, Article 186 CPC has been completely reworded¹⁰⁵. Practices on using preventive detention have changed according to this new interpretation. In other non-criminal proceedings, the courts started to apply a similar rationale to custodial measures of deprivation of liberty. For example, the Supreme Court has extended the Constitutional judgment's reasoning to the detention of foreigners under Law no. 200 of 2010 on the Status of Aliens¹⁰⁶. The courts were recommended to ignore the unclear provisions in Article 64 (2) of the Law, which should be construed that no detention order can exceed a 30-day time-limit. The detention of an alien could be extended but no longer than six months or 12 months where required by the law.¹⁰⁷

The Constitutional Court has complemented its judgment with explanation on how detention should be applied in situation of consecutive accusations. Provided that an accused has been released and then committed *de novo* a crime or a new unknown crime has been discovered pending the investigation or trial, the 12-month time-limit starts anew for these crimes. Otherwise, this time-limit is applicable to detention on the basis of all charges brought before the arrest, regardless of their legal classification or re-qualifications, suspicions and the number of the initiated criminal cases.¹⁰⁸

In 2016, the Constitutional Court gave an interpretation to the time-limits of alternative measures to detention. It declared that provisional release and, respectively, any other alternative non-custodial measure must have a time-limit and be reviewed periodically¹⁰⁹. In 2018, it applied a similar rationale to the time-limits of non-custodial measures limiting freedom of movement and leaving the country applicable in the context of criminal proceedings.¹¹⁰

In 2017, the Constitutional Court ruled on the consequences of breaching the procedural time-limits in remand proceedings. The CPC requires the prosecution to fill its motion for extension of detention in advance, at least five days before the end the previous detention

105. Parliament of the Republic of Moldova, *Law no. 100/26.05.2016 for amending and completing the Criminal Procedure Code of the Republic of Moldova no. 122-XV of March 14, 2003 (in effect from July 29, 2016)*.

106. Parliament of the Republic of Moldova, *Law no. 200/16.07.2010 regarding the regime of foreigners in the Republic of Moldova*.

107. Supreme Court of Justice of the Republic of Moldova, *Advisory opinion no.102/2018 concerning the length of custody of foreigners*.

108. Constitutional Court of the Republic of Moldova, *Judgment no. 9 of 29.04.2016 on execution of its Judgment no.3 of 23.02.2016 regarding the exception of unconstitutionality of paragraphs (3), (5), (8) and (9) of article 186 of Criminal Procedure Code (preventive detention length)*.

109. Constitutional Court of the Republic of Moldova, *Judgment no. 17 of 19.05.2016 regarding the exception of unconstitutionality of article 191 of Criminal Procedure Code (release on bail)*.

110. Constitutional Court of the Republic of Moldova, *Judgment no. 19 of 03.07.2018 regarding the exception of unconstitutionality of article 178§ 5 (3) of Criminal Procedure Code (Duty not to leave country)*.

order (Article 308 (2) CPC). The dispute was how to qualify this time-limit, as mandatory or optional, given that any breach of a procedural time-limits would declare the protracted motion void. Still it could remain legal because the extension would be requested before the detention expired. Moreover, it was unclear how to calculate this time; when this 5-days exclusion period starts to run, either from the prosecutorial own records or from the registry of the court. In the judgment of 2017¹¹¹, the Constitutional Court noted that the CPC provided for a five-day statutory time limit to lodge a prosecutorial motion seeking an extension of detention. As this is a peremptory rule of criminal procedure and *lex specialis* in relation to the general calculation of procedural time-limits in accordance with Article 232 (2) CPC, its breach results in the loss of the prosecution's prerogative to request the extension of detention. Thus, the controversy was settled without the need to amend the CPC.

Another major development, implying the interpretation of the CPC in view of Article 25 of the Constitution, was the checking compatibility of certain amendments introduced by Law no. 179 of 2018¹¹². The Constitutional Court invalidated these amendments on account that they did not distinguish the grounds for pre-trial detention from the criminal charges. In short, Article 185 (1) CPC was supplemented in August 2018 with yet another possibility for detention in criminal proceedings. It allowed almost "blanket" detention when the accused has not yet confessed, as well as in the cases of joint criminal enterprise and/or serious crimes causing damages.¹¹³

The wording of these new grounds was so ambiguous that they would have allowed the prosecution to threaten the accused with detention and thus legally extract a confession. By its Judgment of October 2018, the Constitutional Court declared the amendments unconstitutional as they violate the principle of the presumption of innocence and the right to silence¹¹⁴. After a very short period of being in force, these provisions were repealed in November 2018. They could have barely been implemented. Thus, these amendments will be disregarded in the Research.

The Constitutional Court has dealt with other petitions seeking to review the constitutional compatibility of criminal procedure legislation. Mostly, between 2016 and 2018, it rejected almost 17 constitutional applications, implying, that the procedural law governing remand proceedings is compatible with the Constitution.¹¹⁵

111. Constitutional Court of the Republic of Moldova, *Judgment no. 40 of 21.12.2017 regarding the exception of unconstitutionality of articles 232§ § (2) and 308§ § (4) of Criminal Procedure Code of the Republic of Moldova (time-limit for motion to extent detention)*.

112. Parliament of the Republic of Moldova, *Law no. 179/26.07.2018 amending some legislative acts (major changes in the arrest procedures)*.

113. Parliament of the Republic of Moldova, *Law no. 179/26.07.2018 amending some legislative acts (major changes in the arrest procedures)*.

114. Constitutional Court of the Republic of Moldova, *Judgment no. 27 of 30.10.2018 regarding constitutional control of regarding constitutional control of article 185 of Criminal Procedure Code (pre-trial detention if a person did not confess)*.

115. *Decision no. 6 of 26.02.2016 of inadmissibility of petition no. 5a/2016 regarding constitutional control of article 186 § (3), (8), (9) of Criminal Procedure Code of the Republic of Moldova nr. 122-XV of 14.03.2003; Decision no. 16 of 23.03.2016 of inadmissibility of petition no. 23g/2016 regarding the exception of unconstitutionality of article 329 § (1) of Criminal Procedure Code of the Republic of Moldova; Decision no. 27 of 29.04.2016 of inadmissibility of petition no. 45g/2016 regarding the exception of unconstitutionality of some provisions of Criminal Procedure Code of the Republic of Moldova (requirements on application of detention); Decision no. 35 of 14.06.2016 of inadmissibility of petition no. 59g/2016 regarding the exception*

2.2.3. The Criminal Procedure Code

The Criminal Procedure Code of the Republic of Moldova (“the CPC”) is the primary source of law for remand proceedings. Its basic principle is the legality (Article 2 CPC) recognising that only international standards and the Constitution prevail over the provisions of the CPC (Article 2 §§ (1), (2) and (3) CPC). Other legal sources have no value for criminal proceedings if they are not included or referred to by the CPC (Article 2 § (4) CPC). As a result, remand detention proceedings are governed only by the CPC, international treaties and the Constitution (Article 7 § (1) CPC).

International and constitutional standards prevail over the conflicting texts of the CPC (Article 7 § (2) and (3) CPC). The CPC texts, conflicting with Constitution and international treaties, should be applied by the courts only after constitutional request or referral to the Supreme Court seeking to verify the compatibility. The criminal proceedings should be stayed pending constitutionality checks (Article 7 § (3) CPC). This suspension of criminal proceedings appears to be problematic because it would virtually extend the length of detention if the alleged normative conflict pertains to procedural rules on remand detention. But this is hypothetical because no such situations in practice were observed.

of unconstitutionality of some provisions of article 329 § (2) of Criminal Procedure Code of the Republic of Moldova (appeal of preventive measures); Decision no. 66 of 12.10.2016 of inadmissibility of petition no. 120g/2016 regarding the exception of unconstitutionality of article 191 § (3) pct. 3) of Criminal Procedure Code of the Republic of Moldova (release under judicial control); Decision no. 72 of 27.07.2017 of inadmissibility of petition no. 94g/2017 regarding the exception of unconstitutionality of article 395 § (1) p. 5) of Criminal Procedure Code (use of preventive detention while convicting); Decision no. 107 of 07.11.2017 of inadmissibility of petition no. 135g/2017 regarding the exception of unconstitutionality of some provisions of article 68§ § (1) and (2) and article 293 § (1) of Criminal Procedure Code (access to criminal case-files of pre-trial investigation); Decision no. 20 of 09.03.2017 of inadmissibility of petition no. 19g/2017 regarding the exception of unconstitutionality of article 308 § (2), (4) and (6) of Criminal Procedure Code of the Republic of Moldova (examination of motion to remand in detention); Decision no. 22 of 10.03.2017 of inadmissibility of petition no. 23g/2017 regarding the exception of unconstitutionality of article 308 § (2), (4) and (6) of Criminal Procedure Code of the Republic of Moldova (examination of motion to extend detention on remand); Decision no. 1 of 19.01.2017 of inadmissibility of petition no. 2g/2017 regarding the exception of unconstitutionality of article 308 § (1) and § (2) of Criminal Procedure Code (application of detention on remand); Decision no. 15 of 9.02.2018 of inadmissibility of petition no. 11g/2018 regarding the exception of unconstitutionality of art.195 § (5) pct. 3) and article 395 § (1) pct. 5) of Criminal Procedure Code (application of remand detention after conviction and ceasing of remand detention by force of law); Decision no. 20 of 06.03.2018 of inadmissibility of petition no. 26g/2018 regarding the exception of unconstitutionality of articles 275 pct. 7) and 285 § (2) of Criminal Procedure Code (rehabilitation of person in case of criminal case closure); Decision no. 106 of 06.09.2018 of inadmissibility of petition no. 125g/2018 regarding the exception of unconstitutionality of some provisions of article 191 § (32) of Criminal Procedure Code; Decision no. 108 of 25.09.2018 of inadmissibility of petition no. 127g/2018 regarding the exception of unconstitutionality of some provisions of Law no. 1545 of 25.02.1998 regarding reparation of damage caused by unlawful actions of criminal investigation bodies, prosecutors and courts; Decision no. 115 of 11.10.2018 of inadmissibility of petition no. 138b/2018 regarding interpretation of article 25 § (4) of Constitution of the Republic of Moldova (length of detention); Decision no. 122 of 30.10.2018 of inadmissibility of petition no. 147g/2018 regarding the exception of unconstitutionality of some provisions from article 186 § (101) pct. 2) of Criminal Procedure Code (accepting prosecution motion to keep under house arrest); Decision no. 124 of 30.10.2018 of inadmissibility of petition no. 149g/2018 regarding the exception of unconstitutionality of article 321 § (2) pct. 2) of Criminal procedure Code, adopted by Law no. 122 of 14.03.2002.

If a secondary source of law conflicts with the CPC, and it cannot be subject to constitutional check of compatibility, the courts are required to apply the CPC without hesitation (Article 7 § (4) CPC). It is worth mentioning that Article 7 § (4) CPC requires the courts to apply international human rights standards, without initiation of constitutional proceedings provided that they notify the authority that enacted the law and the Supreme Court. The ECtHR's judgments have special status in criminal proceedings with a direct application and unconditional execution (Article 7 § (8) CPC).

In principle, retro-active application of procedural law is banned, but older provisions can exceptionally outstay new provisions provided that the law clearly specifies in which situations (Article 3 § (2) CPC). But this is rarely to be the case; older provisions almost never are applicable onwards once new laws lift them.

Article 11 § 1 CPC declares personal inviolability and right to liberty and security. It paraphrases Article 25 of the Constitution, but does not refer to the time-limits for detention, except for short-term arrest (Article 11 § (4) CPC). In its § 2, it unequivocally states that the procedure for detention is regulated only by the CPC and no other legal provisions. Other guarantees, such as notification of charges, rights of the detainee and the conditions of release are expressly provided by §§ 5 and 6, respectively.

These are general provisions applicable overall. In terms of the structure, the CPC has a number of special provisions governing substantive rights and guarantees pending detention. Substantive provisions relevant for detention can be found in Chapter II "Preventive measures", in particular Articles 175, 176, 177 providing for general and special grounds for detention.

Articles 185 and 186 CPC are *lex specialis* regulating detention orders and extension thereof. Article 187 describes the rights of detainee and the obligations of prison administration. Article 189 CPC provides for special protection measures for all persons deprived of their liberty within the context of criminal proceedings. Article 188 CPC establishes legal regime for house arrest.

In addition, Articles 190-195 CPC, could be considered as *corpus juris* for alternative measures, such as bail, provisional release, on recognisance, conditions for review, revision of any preventive measures, including detention. Article 195 CPC could be regarded as the principal provision for *habeas corpus*, in comparison with Article 196 CPC which grants the general right to appeal against any preventive measure.

The procedure for remand detention is thoroughly regulated by Articles 308 CPC. It refers to proceedings before the investigating judges, who would order and extend detention, but it is applied by analogy by trial judges as well. Articles 309 and 310 CPC govern proceedings before the investigating judge on *habeas corpus* applications, motions to review. These proceedings should be distinguished from appeal proceedings governed by Articles 311 and 312 CPC, applicable before appellate courts.

Short-term arrest, i.e. for 72 hours, is regulated in detail by several provisions from Articles 165 to 174 in Chapter I „Arrest“ of the CPC. Every situation and ground for short-time arrest are thoroughly described.

In the CPC house arrest remains to be classified as alternative measure to detention (Article 177 § (2) CPC), though Article 5 of the Convention almost equates them in status and requirements¹¹⁶. It could be argued that this provision brings confusion concerning the relation between house arrest and detention. Now, turning to the implementation of the CPC, the Moldovan remand procedures appears to be quite complex. A variety of decisions and proceedings could finally lead to remand detention. In this sense, the Research evaluates prosecutorial and judicial practices by assessing, among other things, the decisions on remand detention. In the following paragraphs the remand proceedings will be briefly described in view of the CPC provisions, i.e. how and what types of decisions resulting in deprivation of liberty are being taken. The attention is paid to the decision-making process resulting in remand detention but house arrest decisions are also mentioned in comparison.

The detention is being decided in two-tier instances, i.e. by investigating or trial judges acting as *judex a quo* and appellate courts acting as *judex ad quem*. In criminal proceedings, they exercise different procedural jurisdiction; the investigating judge carries out only judicial control over the pre-trial stage, whereas trial judges, as well as appellate judges, can decide on the merits of accusations. Still, only the trial judges, who can order or extend detention pending trial, are not prohibited to decide on the merits of the same case. Neither the investigating judge nor the appeal judges are allowed to sit trials if they decided earlier on detention.

All judges could deliver at least four types of decisions ordering, extending, revoking and changing preventive measures that could result in remand detention or house arrest. Appeal jurisdictions could overrule any of these decisions or amend them by increasing or decreasing the periods of detention. All these decisions are listed below and classified by three jurisdictions that issue them.

1) Investigating judge's remand proceedings

These judges can decide on the detention by the following decisions:

1. Ordering initial detention. These decisions include ordering initial detention after an accused was brought before the judge with or without being previously arrested. Some of the situations of under Article 165 § (2) p.p. 3), 4), and 7) CPC are excluded from the scope of the Research (i.e. «sentenced» and «extradition»). These situations do not constitute detention „on the basis of reasonable suspicion” within the meaning of Article 5 § (1) (c) of the Convention. Accordingly, a detention could be ordered following:

- a) arrest as a suspect (Articles 165 § (2) p.1) and 166 CPC)
- b) arrest as a result of a breach of a non-custodial preventive measure (Article 165 § (2) p.2) and 170 CPC)
- c) arrest following non-compliance with a domestic violence protection order (Articles 165 § (2) p.2) and 170 CPC)
- d) arrest for indictment (Articles 165 § (2) p.6) and 169 CPC)

116. Buzadji, §§ 113 and 114

- e) arrest ordered by a trial judge for the so-called "crimes committed pending judicial hearings" (Articles 165 § (2) p. 5) and 171 CPC)
- f) a direct motion of prosecutor, without arrest. Before the amendments of July 2016, the suspects could have been detained for 10 days without indictments (Article 64 § (2) p.p. 2) and 3) CPC), but this provision was lately abolished. Nowadays, the situation is relevant only in respect of the accused.
- g) *in absentia* pending a criminal investigation. These situations have not yet been clearly regulated by the CPC. However, in practice, they could be considered as a pattern of violations found in the *Vasiliciuc* case. They, however, must not be confused with the situations of arrest in the execution of a criminal conviction issued *in absentia* (Article 165 § (2) p.4 and p. 5 CPC). These are situations in which a person was accused pending criminal investigations but fled and his whereabouts are unknown.

2. Extension of detention for no longer than 30 days but not exceeding 12 months overall (Article 186 CPC). These decisions include any investigating/trial judge decision extending an earlier detention ordered in accordance with Article 308 § (7) CPC.

3. Judicial review resulting in detention. Here the word "review" is used *lato sensu*. It refers to any decision of the investigating judge to change a non-custodial measure into detention following the prosecution motion to review. It also includes decisions to refuse the defence motion to review detention under one of the provisions set out in Articles 190-195 CPC. They must not be confused with prosecutorial refusals to review under Article 195 § (3) CPC as amended by Law no. 100 of 2016, whereby the investigating judge is informed. These prosecution reviews result in release rather than in remand detention.

4. Dismissing motions for provisional release. This type of decisions includes dismissal of any defence/prosecution motion for provisional release and alternative non-custodial measures, such as:

- a) release on bail (Article 192 CPC);
- b) release under judicial control (Article 191 CPC);
- c) release on recognizance (Articles 179-180 CPC); or
- d) obligations not to leave country and area of residence (Article 178 CPC)

In all these situations, the investigating judge can

- a) declare the motion(s) inadmissible, without a hearing
- b) consider them unsubstantiated following a hearing and keep detention or house arrest unchanged

5. Revocation from provisional release. This type of decisions refers to both situations provided by Article 193 § (1) CPC (release on bail and judicial control), and could amount to

- a) house arrest (Articles 193 § (2) + 188 CPC)
- b) remand detention (Articles 193 § (2) + 185 CPC)

6. Change into detention. Under Articles 195 CPC + 185 and/or 188 CPC these decisions of the investigating/trial judges could be issued only in cases seeking to review a

detention from/into remand detention or house arrest. It includes situations in which the judge changed the detention following an ordinary prosecution request for an extension. Although the ECtHR and CPC both regard remand detention and house arrest as equal in status, for the purposes of the Research the decisions interchanging these types will be regarded as separate entities. This type includes the following decisions to change the preventive measure:

- a) *from remand detention into house arrest.* Under Articles 188 and 195 § (1) CPC, it is a decision when the investigating judge changes remand detention into house arrest, thereby refusing to extend the first. However, whilst, in the CPC this appears as a decision to order house arrest, in the Research it will be regarded as an extension with an attenuating change. Another decision of this type is adopted under Article 195 CPC alone by a motion of the parties (usually the defence) to change remand detention into another less serious measure.
- b) *from house arrest into remand detention.* Under Articles 185 and 195 § (1) CPC, it is the opposite situation in which house arrest is changed into remand detention following a motion to review, usually sought by the prosecution. This scenario is not applicable in situations of prosecution requests for extension of house arrest, since the judge cannot rule *ultra vires*. It is, however, applicable to situations in which house arrest is changed following the prosecutorial motion to remand.
- c) *from a non-custodial measure into remand detention.* Under Articles 178-180, 185, and 195 § (1) CPC, these are situations in which the accused is subjected to alternative non-custodial measure (duty not to leave, release on recognizance, etc.) and the judge orders his detention anew or by changing a previous measure.
- d) *from a non-custodial measure into house arrest.* These are similar situations to those described above.

2) Trial judges' remand proceedings

The trial judge rarely orders initial detention pending the trial, unless the prosecution seeks *detention in absentia*, i.e. when the defendant has fled in advance of the trial or has *failed to comply with a non-custodial preventive measure*. The articles relevant for an investigating judge are applicable *mutatis mutandis* in these situations. Trial judges conduct remand proceedings under Article 329 § (1) CPC. Appeals against trial judges' decision to remand could be lodged under § (2) of the same Article. Trial judges usually extend detention or examine motions to review, *habeas corpus*, etc. using the same procedure as the investigating judges.

3) Appeal judges' remand proceedings

Appellate judges are *judex ad quem* and issue their decisions under the procedures provided by Articles 308-310 CPC. They review all decisions concerning pre-trial and pending trial detentions, issuing the following decisions:

1. Upholding the decisions ordering detention. Under Article 312 § (5) p. 2) CPC, the appellate judges uphold without changes the initial detention orders, extension and/or judicial review decisions of the investigating/trial judge(s), thereby dismissing either

one or both, the prosecution and the defence appeals. They could uphold the following decisions:

- a) ordering remand detention;
- b) ordering house arrest;
- c) extension of remand detention;
- d) extension of house arrest;
- e) dismissal of provisional release;
- f) revocation of provisional release and ordering remand detention;
- g) revocation of provisional release and ordering house arrest;
- h) changing house arrest into remand detention;
- i) changing remand detention into house arrest
- j) changing a non-custodial measure into remand detention;
- k) changing a non-custodial measure into house arrest;

2. Overruling the decision not to order detention. Under Article 312 § (5) p. 1) lit. b) CPC, these decisions overrule in full the initial refusals of investigating/trial judges to either order or extend detention. If the appellate judges change the remand detention, previously ordered by an investigating/trial judge into house arrest or otherwise, this is not qualified as an “overruling decision” but rather as a changing-type. Appellate judges can issue the following decisions:

- a) *ordering initial remand detention.* By this decision, the appellate judges grant the prosecution appeal and annul the investigating/trial judge’s refusal to order the initial remand detention;
- b) *ordering initial house arrest.* Appellate judges grant the prosecution appeal and annul the investigating/trial judge’s refusal to order house arrest;
- c) *extending remand detention.* By this decision, the appellate judges grant the prosecution appeal and annul the investigating/trial judge’s refusal to extend detention.
- d) *extending house arrest.* Similar to the above but concerning the investigating/trial judge’s refusal to extend house arrest;
- e) *dismissing an appeal on provisional release.* Appellate judges overrule provisional release measures, such as release on bail (Article 192 CPC), release under judicial control (Article 191 CPC) as earlier decided by the investigating/trial judges. The appellate judges, thus, maintain remand detention or house arrest ordered before the review;
- f) *dismissing an appeal to change into a non-custodial measure.* The appellate judges overrule alternative non-custodial measures, such as release on recognizance (Articles 179-180 CPC), or obligations not to leave country or locality (Article 178 CPC), as decided by the investigating/trial judges. The appellate judges thus maintain the previous detention or house arrest.

3. Changing the decision of the investigating/trial judges regarding the type of detention. Under Article 312 § (5) p. 1) lit. b) CPC, these decisions overrule in part the decisions of the investigating/trial judges. These decisions should be regarded as changing type and are divided into four types:

- a) changing house arrest into remand detention;
- b) changing remand detention into house arrest;
- c) increasing the period of detention;
- d) decreasing the period of detention.

As it can be seen from above, the proceedings deciding on remand detention under the current CPC are quite versatile. They are complicated by appellate proceedings and extraordinary reviews. This is also an element contributing to difficult implementation of the law and incoherent practices. Indeed, there are many options for an accused to review or revisit detention orders and be released. However, there is as many as this number of ways for prosecutors to circumvent legal rules and finally get the accused detained. It is, thus, unsurprising that the prosecutors, sometimes, are tempted to twist the procedural rules pursuing their interests in investigation. The judges, on the other hand, may bend the rules in view of lowering their judicial workload. These complex procedural rules are difficult to comprehend and even harder to apply. Whilst the written law is clear, its unwieldy codification only contributes to its problematic implementation.

4) Amendments to the Criminal Procedure Code

This sub-component considers whether the amendments to these already complex rules of criminal procedure have affected practices and thus lead to legal uncertainty. The amendments covering the Research period from 2013 to the end of 2018 will be examined. The legislative changes before 2013 will be described briefly.

Since its entering into force in 2003, the CPC was subjected to legislative amendments on almost 60 occasions before it was fully republished in 2013. After that it has been amended 40 times further. Thus, 100 Amendment laws have changed the CPC operating either fundamental changes or just paraphrasing some provisions. Many legislative changes have been technical in character. They stem from other legislative reforms, such as those concerning to secret surveillance, legal aid system, investigative bodies, judicial reforms etc. However, the other part of the amendments may have changed substantially some of the basic procedural mechanisms and rules.

Since 2005, the CPC has been subject to constitutionality checks by 11 judgments of the Constitutional Court, which found significant incompatibilities of procedural rules, thus leading to amendments. Other legislative initiatives to amend the CPC were usually lobbied by prosecutors or judiciary, but in the biggest part amendments were initiated by the Ministry of Justice in view of the on-going reforms of the judicial and prosecutorial systems.

It could be argued that the CPC has actually regressed to its older version of 1961, in particular concerning the rules of criminal investigation and pre-trial stage of criminal proceedings. These proceedings resemble very much the older practices of investigation

and prosecution, with some notable exceptions. In general, the current CPC is no longer recognisable from its original version in 2003.

The rules governing remand detention have been amended five times since 2006 and five more times since 2013. All relevant laws amending remand proceedings are listed as follows:

Before 2013:

1. *Law no. 264/28.07.2006 amending and complementing the Code of Criminal Procedure of the Republic of Moldova (in force since 03.11.2006);*
2. *Law no. 410/21.12.2006 amending the Criminal Procedure Code of the Republic of Moldova (in force since 31.12.2006);*
3. *Law no. 89/24.04.2008 amending and complementing some legislative acts (in force since 01.07.2008);*
4. *Law no. 167/09.07.2010 amending and complementing some legislative acts (in force from 03.09.2010);*
5. *Law no. 66/05.04.2012 for amending and complementing Criminal Procedure Code of the Republic of Moldova no. 122-XV of 14 March 2003 (in force from 27.07.2012).*

After 2013:

1. *Law no. 100/26.05.2016 amending and complementing Criminal Procedure Code of the Republic of Moldova no. 122-XV of March 14, 2003 (in force from 29.07.2016);*
2. *Law no. 122/02.06.2016 amending and complementing some legislative acts (in force from 05.08.2016);*
3. *Law no. 58/29.03.2018 amending and complementing Criminal Procedure Code of the Republic of Moldova no. 122/2003 (in force from 27.04.2018);*
4. *Law no. 179/26.07.2018 amending of some legislative acts (in force from 17.08.2018);*
5. *Law no. 213/25.10.2018 amending Criminal Procedure Code of the Republic of Moldova (in force as of 16.11/2018).*

5) General legislative dynamics

A number of laws adopted before 2013 introduced fundamental changes of remand proceedings and thus should be mentioned. Firstly, this is the Law no. 264 of 2006, commonly referred to as “the first comprehensive procedural reform of the criminal procedure after 2003”. It introduced the concept of ‘a reasonable suspicion’ needed for official opening of criminal proceedings. This concept has been connected with arrest and continuous detention on remand. The Law introduced periodic judicial review of detention pending trial in 90-day intervals. These amendments implemented the *Muşuc* and the *Boicenco* judgments. The Law also established tight time-limits (three days) for lodging appeals against remand detention orders. At the relevant time, the Law, taken as a whole, appeared to be the most significant development of remand procedures.

The Law no. 410 of 2006 amended the rules on provisional release. It was the outcome of the *Boicenco* case, where Article 191 CPC was subject to review by the ECtHR and declared incompatible with the Convention. This Amendment Law lifted legislative ban for certain

categories of the accused persons to apply for provisional release, yet another limitation remained. Provisional release remained conditioned by restitution of damages on part of the accused. This later limitation was repealed only in 2016.

Between 2008 and 2012, the remand proceedings were amended twice. On each occasion the amendments were minor. The Law no. 89 in 2008 introduced rules on legal aid in the remand proceedings. In 2010, the Law no. 167, sought to fight with domestic violence and, thus, introduced additional grounds for detention in such cases.

The Law no. 66 of 2012 changed the principle of proportionality inserted in Article 176 (2) CPP. It excluded application of remand detention to persons charged with minor and less serious crimes. In brief, the amendment lifted the reference to minimum time of imprisonment as the criterion for application of detention. It made detention applicable only in relation with crimes qualified by the Criminal Code as at least a serious offence.

However, in 2016, this limitation was fundamentally changed by introducing the reference to punishment with at least one-year imprisonment. The range of crimes serving as basis for detention was widened. It became even larger than originally established in 2003. In the end, the Law no. 176 of 2018 narrowed the range of crimes by increasing the reference to three years of imprisonment. Nevertheless, it still remains questionable in the view of the recommendations from the Needs Assessment Report (see above).

The Law no. 66 of 2012 also introduced a rather questionable additional ground for detention in Article 185 § (2¹). This is the ‘refusal of the accused to inform about his permanent residence’.

After 2013, the most significant amendments to detention proceedings were introduced by Law no. 100 of 2016. These were major and fundamental developments, following substantial *travaux préparatoires* of April 2014¹¹⁷ and international expertise in October 2014¹¹⁸. The Law addressed the most pressing issues raised by the ECtHR case-law under Article 5 and was welcomed by the Committee of Ministers as ‘ensuring compliance with Article 5 requirements’¹¹⁹. New amendments served to reinforce limitations in using remand detention, compelling judges to consider alternative measures. It also strengthened the rights of the defence in remand proceedings and hearings, including appeals against the legality detention orders remand. The Law introduced the principle of judicial discretion in application of detention based on proportionality and individual examination on a case-by-case basis. It enhanced the duty to give reasoned decisions based on specific grounds for detention. The law increased the rules of evidence and disclosure, as well as allowed cross-examination in remand judicial hearings.

117. Ministry of Justice of the Republic of Moldova, *Compatibility Study of the Criminal procedure code provisions in relation to Article 5 of the European Convention on Human Rights and the relevant European Court’s case-law* (2014).

118. L. Bachmeier-Winter and M. J. McBride, *Expertise analysis of the draft amendments to the Criminal Procedure Code of the Republic of Moldova* (2014); prepared under the framework of the Project ‘Support to a coherent national implementation of the European Convention on Human Rights (ECHR) in the Republic of Moldova’.

119. Committee of Ministers, *CM’s Notes Execution Şarban* (2017).

The provision that survived from the earlier CPC of 1961, the ten-day detention of suspects, was excluded.¹²⁰ It was redundant in practice. Certain provisions on arrest in view of extradition were clarified. The law strengthened the rights to appeal against unjustified arrests by the police, criminal investigating bodies and prosecutorial procedural abuses. In general, according to the opinion of the Council of Europe Directorate General Human Rights and Rule of Law: “overall the amendments embody a considerable advance on the protection of liberty in criminal process in accordance with the European standards and, in particular the Convention”¹²¹. The impact of these amendments is to be studied by the Research and it is expected by the Committee of Ministers, according to its last two decisions of 2017 and 2019.

The Law no. 122 of 2016 is less relevant since it was technical in nature. It clarified a bit the obligation to reason judicial remand decisions. The same could be said in respect of the Law no. 58 of 2018, which introduced clear proceedings and time-limits for release under judicial control and provisional release, following the Constitutional Court judgment of 2016¹²².

The Law no. 179 of October 2018 is controversial since it had introduced some provisions that lately were declared unconstitutional. Article 185 § (1) CPC in its reading was repealed by Law no. 213 of November 2018 as a result of the Constitutional Court judgment of November 2018. However, the Law no. 179 of October 2018 also brought relevant amendments. It changed the legal regime of non-custodial measures in line with the Constitutional Court judgment of July 2018¹²³. The Law also slightly amended some provisions by enhancing judicial duties to reason remand decisions and re-consider the priority of alternative measures (currently Article 185 §§ (3) and (3¹) CPC). Moreover, it has re-enforced the hierarchical prosecutorial control over the extension of remand detention. Currently, Article 186 § (10¹) CPC compels prosecutors seeking extension of detention beyond three and six months, to have their motions authorised by the chief-prosecutor or the General Prosecutor, respectively. As noted above, the Law no. 179 of 2018 limited the applicability of detention based on criminal charges in crimes punished no less than three-year imprisonment.

The present analysis seeks to establish whether the frequent amendments to legislation have affected the practices. Most of the amendments were positive normative developments, with minor exceptions when the Constitutional Court intervened and checked their compatibility. Some of the amendments were technical changes to legal texts; such amendments have been a lot. Other changes made the remand proceedings too formal. For example, the reintroduction of hierarchical prosecutorial control over the motions to extend remand detention. These legislative changes restored the old system

120. See for details the *Sara* case

121. Committee of Ministers, CM’s Notes Execution Şarban (2017); Bachmeier-Winter and McBride, *Expert opinion on draft Law*.

122. Constitutional Court, *Decision no. 17 of May 19, 2016 regarding the exception of unconstitutionality of article 191 of the Code of criminal procedure (provisional release under judicial control)* (Notification no. 33g / 2016).

123. *Constitutional Court of the Republic of Moldova, Judgment no. 19 of 03.07.2018 regarding the exception of unconstitutionality of article 178 § (3) of Criminal Procedure Code (duty not to leave country)*.

of prosecutorial hierarchic supervision as in the CPC of 1961, but they formalised the already persistent practices to coordinate the motions to remand or extend detention. Accordingly, some amendments were useful whilst other were not; some legislative changes stemmed from practical needs, whereas other aimed to formalise prosecutorial and judicial habits.

It is difficult to classify the amendments to evaluate what are their effects on practices. The forms of legislative amendments vary from one legal system to another. For example, the European Union legislative technique provides that there are two forms of amendments, technical adjustments and substantive changes¹²⁴. They may both result in a replacement, insertion, addition, or deletion of legal texts¹²⁵. On the other hand, the Moldovan law on normative acts¹²⁶ employs a number of legislative techniques. It says that any legal text or an act may be repealed entirely, it may be rectified, changed or adjusted. Legislative texts may be edited or substituted in substance by new provisions; new texts could be inserted or some older provisions could be reintroduced. Drawing inspiration from these techniques, it could be reasonably inferred that only substantive amendments could have the practices changed or affected. Adjustments, that technical in nature would not do the task. So, it remains to classify all above amendments of the CPC in the following categories and to observe their impact on practices in time:

- j) “Changes” reflects substantive changes of particular legal provision and thus capable to influence the practices.
- k) “Editing” refers to formal adjustments of text rather technical in nature, such as minor deletions, re-wordings, etc. They would not influence practice but adapt legislation to the current situation.
- l) “Repealing” refers to deletions of incompatible or outdated provisions, no longer valid in practice.

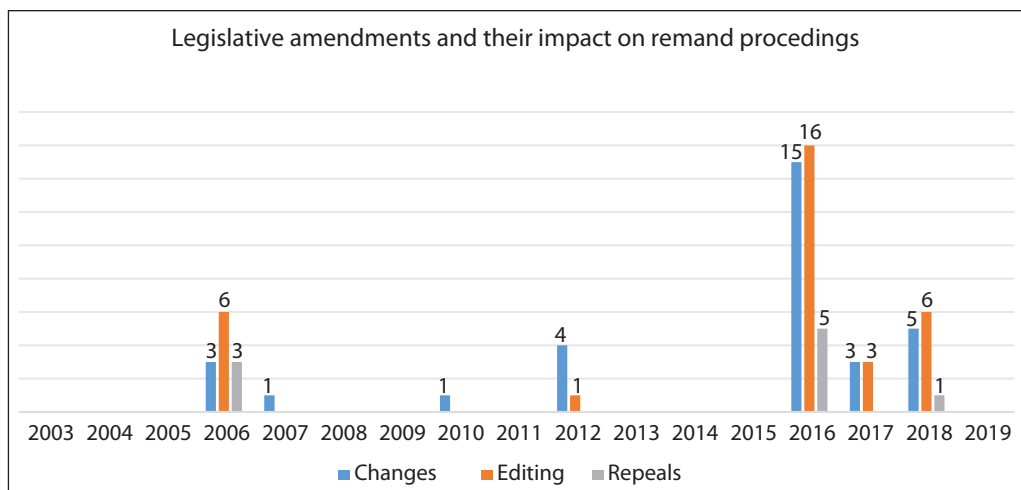
The chart below sets out how many amendments of these types were made since 2003, including the relevant research period since 2013. Obviously, the Chart replicates only amending laws regarding the rules of remand detention and use of alternative measures.

124. n.b. the first is called “formal amendment”, while the second is “substantive”, save that it is not an “autonomous amendment” that is not allowed in amendment laws. See Legal Service European Commission, *Joint practical guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union legislation* (Publications Office, 2015) §§ 18.1 and 18.14, 18.3 and 18.4.

125. *Joint practical guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union legislation* (Publications Office, 2015), § 18.13.5.

126. Parliament of the Republic of Moldova, *Law no. 100 / 22.12.2017 regarding the normative acts (in force since 12.01.2018)*.

Chart No 6



As expected, the Chart shows that the most significant changes in remand procedures were introduced in 2016, mostly by the Law no. 100. In its 36 articles, the Law introduced, edited, and repealed many relevant legal texts regarding detention. The Law no. 179 of 2018 mostly edited certain texts, but also inserted new substantive provisions.

In this sense, the period of time between these significant legislative changes of 2016 and of 2018 is too short for practices to be set up. New amendments need time to be implemented. It happened with the amendments in 2006, in particular, with regard to the introduction of the concepts on reasonable suspicion and judicial review of detention pending trial. There was a passage of time when practices became settled. Amendments between 2006 and 2016, were not substantial and did not affect practices. On the contrary, the legislative interventions from 2017 and 2018 might have had different effects. They were made after the substantial legislative reform of 2016, in the period of time when new practices have not yet been settled. Accordingly, the last legislative interventions of 2017 and 2018 were less utile; they could have destabilised the implementation of the amendments since 2016.

The above-described general dynamics of amendments to detention proceedings allow concluding that judicial and prosecutorial practices were uncertain during the whole period relevant for the Research. But they became less stable after 2016 when frequent legislative to the CPC shifted the establishment of new practices. Some specific legislative dynamics could be also analysed in this respect, to see whether they have had the same impact.

6) Specific legislative dynamics

The Research aims to find the causes of certain patterns of violations under Article 5 in judicial and prosecutorial practices. These patterns of violations were identified mostly in judicial failures to give reasons for reasonable suspicion and the grounds for continuous

detention. These two principal patterns may have evolved into a constant repetitive practice and they formed the key-elements for the assessment by both the Check-lists and the Questionnaires. Accordingly, some specific legislative amendments need special attention in this regard. Therefore, the present sub-component focuses on brief description of the legislative dynamics concerning the introduction of “reasonable suspicion” and “grounds for continuous detention” in the CPC.

The concept of “reasonable suspicion” was introduced in the CPP for the first time in 2006 by the Law no. 264. To satisfy the concerns of the domestic legal community on compliance with the Convention, the amendments were inserted into the criminal procedural legislation even before the relevant *Muşuc*, *Stepuleac* and *Cebotari* cases, which found violations of Article 5 § 1 on account of detention without “reasonable suspicion” only later in 2007.

However, as it is clear from the amendments introduced by the Law no. 264 of 2006, the concept of “reasonable suspicion” was new for the domestic criminal procedure. It was misread by the domestic legislator, as well as the prosecutors and judges. Pursuant to Article 5 § 1 (c) of the Convention, the ECtHR sees the concept of “a reasonable suspicion” connected with remand proceedings. It is the requirement of lawfulness of detention in criminal proceedings only¹²⁷. It does not need to be elevated to the level of actual criminal charges, nor does it need to be downgraded to the requirement to open a criminal investigation¹²⁸. A suspicion of having committed an offence needs to be only “reasonable”, i.e. to satisfy the “objective observer” test¹²⁹. Nevertheless, the amendments in 2006 have virtually extended the applicability of such suspicions. They required reasonable suspicions for lawful opening of investigation, even in cases where the detention would not be applicable. In other words, the legislation elevated the requirement of having “a reasonable suspicion” beyond the scope of detention, so no criminal investigation could be commenced in its absence. This seems to run contrary to the original meaning of reasonable suspicion given by the ECtHR in the cases of *Muşuc*, *Stepuleac* and *Cebotari*.

Moreover, whilst introducing the concept of “reasonable suspicion”, the 2006 amendments did not explain its meaning. They left this to be explained by courts and prosecution. As a result, the practice on the reasoning about reasonable suspicions shifted in wrong direction. For prosecutors, the fact that a criminal case has been officially initiated, already proves the existence of reasonable suspicions. They easily requested detention solely on that basis. For judges, an official decision to initiate criminal investigation also became sufficient. They treated it as an evidence of “a reasonable suspicion”. Almost all investigation judges, after the amendments of 2006, requested prosecutors to attach copies of decisions to open criminal investigation. This practice of attaching these decisions to the prosecution remand motions was officialised. According to § 105 of the General Instructions on registration of judicial case-files, issued by the Superior Council of Magistrates, “an investigating judge will examine the prosecutorial motions only after the official initiation of a criminal case under Article 274 of the CPC”¹³⁰.

127. See *Ječius v. Lithuania*, §§ 50, 51.

128. See *Brogan and Others v. the United Kingdom*, § 53.

129. See *Fox, Campbell and Hartley v. the United Kingdom*, §§ 32 and 35

130. Instructions on recording and procedural documentation in the courts and courts of appeal, adopted by the Decision of the Superior Council of Magistracy no. 142/4 of 04.02.2014 (Official Monitor no. 127-133 of 23.05.2014), modified by the Decision of the Superior Council of Magistracy no. 368/19 of 31.07.2018 (2014).

As a result, both the prosecutors and the judges barely relied on facts proving or disproving reasonable suspicion. They would rather prefer to reason that a criminal case has been lawfully and officially initiated, in their opinion, this was enough to prove that “a reasonable suspicion” exists by relying on Article 274 CPC that requires it for opening of criminal investigation. Moreover, apart from being the procedural basis for detention on remand and opening of criminal case, reasonable suspicion is prerequisite for requesting authorisation of other investigative measures, such as home searches, seizing correspondence and undercover operations (Articles 125 § (1), 133 § (1), 135 § (1) in the new version of the CPC brought in by Law no. 264 of 2006). This status of reasonable suspicion as basis for the whole investigation caused confusion and distorted its original meaning as the sole requirement for detention.

It is argued in the Research that this confusion may have affected the judicial and prosecutorial practices on remand detention. The judges and prosecutors became less inclined to give reasons based on the facts. They rather preferred to rely on the legality of the criminal investigation as a whole. In other words, the mere fact that a criminal investigation was lawfully initiated is sufficient to prove the existence of reasonable suspicion and, thus, the basis for detention.

The amendments of 2016, by Law no. 100, changed this practice. The amendments inserted definition of “a reasonable suspicion” in Article 6 pct. 4³). Currently, it literally replicates the ECtHR’s test of “objective observer” thereby requiring judges and prosecutors to rely on facts to reason about the reasonability of suspicion (Article 176 § (3) p. 1) in its reading by the Law no. 100 of 2016).

In addition, the 2016 amendments compelled the prosecutors to enclose evidence and references to the facts in their motions to remand. They now should substantiate the existence of reasonable suspicion (Article 308 § (1) in its reading by the Law no. 100 of 2016). According to the same provision, judges should insert express references in their decisions and give specific reasons about the existence of reasonable suspicion. These reasons should be provided along with reasons on the grounds for detention.

Other serious pattern of repetitive violations concerns the failure of judges to provide reasons on the grounds of detention, within the meaning of Article 5 § 3 of the Convention. In this sense, the legislative dynamics are as follows.

In the original reading of 2003, Article 176 § (1) CPC provided the following permissible grounds for continuous detention based on the risks to flee, to obstruct justice or investigation and to re-offend. Other specific ground was the need to secure the execution criminal punishments. Articles governing the proceedings on remand (Articles 308 -312 CPC) expressly required a reasoned judicial decision with reference to these grounds. The CPC compelled all judges to issue a reasoned decision on remand but left its drafting to be settled by practice. None of the amendments to the CPC until the Law no. 100 of 2016 have actually reviewed these grounds and obligation to issue a reasoned decision.

These legislative provisions appear to have caused judicial practice of copy-pasting the grounds from the written law, without serious attempt to refer to the facts and particular circumstances of the case. The content, templates, language and other elements of judicial

decisions were left at the discretion of judges, which is not incompatible within the meaning of the Convention. Even if the legislation required, in general terms, to provide reasons for detention, the judges remained unconvinced as to the need to develop their practices on judicial reasoning. This repetitive failure to develop judicial reasoning could have been caused by this legislation, which was couched in very narrow terms.

The amendments of 2016 by Law no. 100 moved the situation forwards. The law provided clear and detailed instructions about how a decision ordering detention should look like. The grounds of detention were revisited and redrafted in full. Specific conditions for both the prosecutors' motions and the judges' decisions on detention were described. Amendments introduced mandatory elements of any decisions and motions (Articles 176 and 308 CPC). Currently, Articles of CPC seem to resemble a compilation of the ECtHR's case-law. Moreover, the Amendment Law introduced further permissible grounds for detention, such as the risk of causing public disorder or the need to protect the detainee from retaliation (Article 176 § (1) CPC in the reading of the Law no. 100 of 2016).

In theory, even if a judge or a prosecutor has less experience in drafting remand decisions or motions, the CPC now contains detailed and carefully codified instructions in this regard. A simple reading would help to draw qualitative decisions or motions. All narrow legislative provisions were reshaped and now they explain in detail the content and the meaning of the grounds for detention, as well as the content of decisions and motions.

These relatively new amendments introduced in 2016 need time to be put into practice. It is expected that the judicial and prosecutorial practices will change. Previous stereotypical-type decisions and motions might be changed into more factual-oriented assessment of the grounds for continuous detention. Indeed, this was one of the main scopes of the Law no. 100 of 2016, according to its explanatory note.

2.2.4. The Criminal Code of the Republic of Moldova

The Criminal code of the Republic of Moldova ("the CC"), is partially relevant to remand proceedings. The most important provision of the CC relevant for detention proceedings is Article 16. It sets out the criteria for classification of criminal offences. As mentioned above, the CPC in its original reading of 2003 (Article 176 (2)) limited the applicability of detention to crimes punishable by at least two years of imprisonment. Thus, the detention could have been used at large, in relation to the criminal accusations of minor and less serious offences.

In 2012, the Law no. 66, changed this approach. It introduced the reference to the classification of crimes provided by Article 16 CC. Accordingly, the CC provisions become relevant for the scope of remand detention. However, in 2016, the principle of mixed proportionality was introduced. This reference to the CC was abandoned. The CPC has now its own criterion by which the detention is limited to crimes punishable by one year of imprisonment. In 2018, Law no. 179 increased this limitation up to three years of imprisonment. Therefore, the CC provisions on classification of crimes have become irrelevant for the purposes of remand detention.

2.2.5. Other relevant legislation

Other pieces of primary legislation proved to be irrelevant for the remand proceedings. According to the principle of legality (Articles 2 and 7 of the CPC), none of the provisions of other laws are applicable in criminal proceedings, unless the CPC includes them or makes direct references to such provisions. In other words, other laws are hardly applied in remand proceedings. The CPC retains exclusivity and autonomy of regulations on detention on remand.

For example, the Contraventional Code of the Republic of Moldova (“the Cv.C”) has a number of procedural rules and provisions regulating administrative arrests, either with preventive or punitive purposes. However, its Article 374 (3) refers to the CPC as the general framework for the contraventional proceedings. The Cv.C makes such references least 30 times.¹³¹ Accordingly, the Cv.C does not regulate expressly the detention in criminal proceedings, according to the classification of such offences in the Moldovan legal system. The classification of offences as falling under the criminal limb of Article 6 of the Convention, is irrelevant for the purposes of the Research. Accordingly, the Cv.C provisions regulating deprivations of liberty by contraventional detentions fall outside of the Analysis of Legislation.

Another piece of legislation, relevant for detention proceedings is the Law on Identity Documents¹³². In a number of cases, the ECtHR drew interferences about violations of Article 5 because the domestic courts refused to retain identity documents in the alternative to detention.¹³³ The Law allows the authorities to seize travel documents only in cases of forgery or frauds in using personal data. It prohibits any seizure of identity documents to guarantee fulfilment of a legal duty (Article 9, lit. m) of the Law nr. 273 of 1994). In other words, prosecutors and judges cannot retain travel documents, even if they have been voluntarily offered by the accused. Consequently, the offer of travel documents to secure release pending criminal proceedings is hardly applicable.

Other relevant laws do not provide any assistance the purposes of Analysis of Legislation. These laws establish the status, rights and duties of the investigators, prosecutors, judges or defence lawyers. Brief screening of these revealed that none of them refers to the relevant aspects of remand detention.

2.3. Secondary sources of law

The Secondary sources of law could be relevant providing that the CPC makes direct reference to them. As noted above, the CPC retains autonomy in regulation of all aspects concerning remand detention. Consequently, even if the secondary legislation is being used in practice it is not the principal source of law for detention. However, for the purposes of an objective legal analysis they should be briefly overviewed. They may have little or no value at all for the establishment of practices. Still, practices could be influenced by the secondary legislation and probably their role should be enhanced.

131. See for example, Articles 378 (4), 382 (5,6), 383 (1) of the CAO.

132. Parliament of the Republic of Moldova, *Law no. 273 / 09.11.1994 regarding the identity documents of the national passport system.*

133. See *Becciev* para 60, *Şarban* para 100, *Stici* para 40, *Ţurcan and Ţurcan* para 14, *Ceaicovschi* para 12, etc.

The Secondary legislation includes internal institutional instructions, the Prosecutor Office's bylaws, the Supreme Court's explanatory decisions, etc. The Constitutional Court's judgments constitute primary sources of law, along with the CPC and thus should not be confused with the secondary sources of law. This so, because of the legality principle enshrined in Articles 2 and 7 of the CPC.

The Defence Lawyers also have their own legal intra-institutional framework. It covers only the administrative aspects and deontology of lawyers. They contain neither the instructions nor the tutoring how to conduct criminal proceedings and defend detainees. None of them interpret the CPC. Accordingly, the Defence Lawyers' internal regulations were found to be irrelevant for the purposes of the Research.

The decisions and instructions of the Superior Council of Magistrates („the SCM") have also little or no relevance. Mostly they regulate institutional function of the judiciary, deontology and the principles of the proper administration of justice. For example, the code of judicial ethics recognizes the principles of independence, impartiality, integrity of judges, as well as the direct application of the ECtHR's case-law¹³⁴. Regulations concerning certain aspects of conducting hearings could be relevant to remand proceedings albeit remotely. They regulate audio-visual recording of hearings¹³⁵, access to courts and registry¹³⁶, good practices in administration of justice¹³⁷, procedural behaviour in courts¹³⁸ etc. This is the general framework for the judges but they mostly rely on the primary procedural framework. They almost never, with few exceptions, describe procedural rules relevant to remand proceedings. For example, according to these regulations the "publicity rule" of hearings is inapplicable to remand proceedings, though Article 308 (5) of the CPC is clearer in this regard.

2.3.1. The Supreme Court's explanatory decisions and recommendations

Firstly, it should be recalled that the legal force of these decisions was questioned by the Constitutional Court in 2016¹³⁹. By the way of *obiter dictum*, it emphasized that the Supreme Court's explanatory decisions must not serve as the basis for decisions in individual cases. This kind of practice to issue 'recommendations/explanations' for the benefit of the inferior courts on matters of the law enforcement, was referred by the Constitutional Court as outdated 'post-soviet [sic.]' inheritance. In its view it runs contrary to the principle of judicial independence. The Constitutional court, thus, ruled that 'such "recommendations/

134. Code of judicial ethics and professional conduct (Approved by Decision of the General Assembly of Judges no. 8 of 11 September 2015).

135. Regulation regarding the digital audio recording of the court hearings, approved by the Decision of the Superior Council of Magistracy no. 338/13 of 12.04.2013, amended by the Decision of the Superior Council of Magistrates no. 488/20 of 05.07.2016 (Official Gazette no.87-91 / 461 of 11.04.2014).

136. Instructions regarding the activity of records and procedural documentation in the courts and courts of appeal, approved by the Decision of the Superior Council of Magistracy no. 142/4 of 04.02.2014 (, the Official Monitor no. 127-133 of 23.05.2014), modified by, HCSM no. 368/19 of 31.07.2018 (Official Gazette no. 321-332 of 21.08.2018)

137. Guide on the implementation of good practices of excellence in the courts of the Republic of Moldova, approved by the Decision of the Superior Council of Magistracy no. 978-39 as of 15.12.2015.

138. Rules of conduct of the justices and other persons during trials, approved by the Decision of the Superior Council of Magistracy no. 504/17 of 03.06.2014, Official Gazette no. 249-255 / 1241 of 22.08.2014

139. *Constitutional Court of the Republic of Moldova, Judgment no. 21 of 22.07.2016 regarding the exception of unconstitutionality of article 125 lit. b) of Criminal Code, articles 7§ (7), 39 pct. 5), 313§ (6) of Criminal Procedure Code and a some provisions of articles 2 lit. d) and 16 lit. c) of Law on Supreme Court .*

explanations” cannot form the basis of a judgment [in individual cases]’ and the judicial decision should ‘be based solely on legal provisions’.

This Constitutional Court’s judgment undermined the already fragile legal force of the Supreme Court’s explanatory decisions and recommendations. In the context of the CPC (Articles 7 (7) and 39 (5)), and the Law on the Supreme Court (Article 16 (c)), these sources of law have been already regarded as non-binding. Their legal value has diminished in comparison with the exclusionary rule of the CPC as the primary and sole source of law for criminal proceedings, including remand detention.

Accordingly, the Explanatory Decisions of the Supreme Court must be regarded with caution, even if they have been quoted in a number of the Committee of Ministers Decisions¹⁴⁰ or in the ECtHR’s judgments¹⁴¹. Their legal force could be questioned after new amendments to the CPC, which is amended faster than the Supreme Court is able to issue explanatory decisions. However, even in this context, the two explanatory decisions of the Supreme Court concerning remand proceedings merit particular attention.

The first was issued in 2005 and amended twice. This decision was referred to by the Committee of Ministers in 2009¹⁴² as the source of law expected to guide the development of judicial practices. The second explanatory decision was issued in 2013¹⁴³ repealing previous decision of 2005. The 2013 decision was at the relevant time highly appreciated. The Committee of Ministers made a number of references to it in its decisions and notes hoping that it may guide the practice in good direction.¹⁴⁴ Indeed, the explanatory decision has thoroughly addressed the most pressing practical issues of remand proceedings and how the judges and the prosecutors must apply the legislation amended in 2012. It stressed the importance of reasoned decisions concerning detention on remand and to what extent the *Şarban* group of cases should be implemented.

The Supreme Court has explained in detail the grounds and reasons that should be given by the courts when ordering and extending detention. It has compelled judges to refer in their decisions to the ECtHR’s case-law. It has explained the principle of equality of arms, access to the case-file materials and the time-limits for hearings and appeals in remand proceedings.

Some other explanatory decisions and brief recommendations are worth mentioning. Two explanatory decisions of 2013¹⁴⁵ and 2014¹⁴⁶, established the mandatory principle of direct

140. Department for the execution of judgments of the ECHR, Memorandum *Şarban* (part I); Department for the execution of judgments of the ECHR, Memorandum *Şarban* (part II); Committee of Ministers, 2nd CM’s Decision *Şarban* (2017).

141. See, for example, the case of *Dan* § 20, in which the ECtHR has expressly referred to the Supreme Court’s explanatory decision as a relevant source of law for examining criminal cases in appellate courts.

142. Department for the execution of judgments of the ECHR, Memorandum *Şarban* (part II), § 18 et seq.

143. The Supreme Court of Justice of the Republic of Moldova, Explanatory decision of the Plenum of the Supreme Court of Justice no. 1/2013 concerning to application by courts of some provisions of criminal procedure legislation on preventive detention and house arrest.

144. Committee of Ministers, 2nd CM’s Decision *Şarban* (2017); Committee of Ministers, CM’s Notes Execution *Şarban* (2017).

145. The Supreme Court of Justice of the Republic of Moldova, Explanatory decision of the Plenum of the Supreme Court of Justice no. 2/2013 regarding the practice of applying by courts of provisions of Constitution of the Republic of Moldova, with the amendments introduced by the Plenum Decisions no. 38 of 20 December 1999 and no. 26 of 22 October 2018.

146. The Supreme Court of Justice of the Republic of Moldova, Explanatory decision of the Plenum of the Supreme Court of Justice no. 3/2014 regarding the application by the courts of some provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

application of constitutional provisions and the Convention. Two other recommendations dealt with exceptional situations in cases of the extension of detention and the places of detention of sentenced persons¹⁴⁷, and certain aspects of appeal proceedings.¹⁴⁸

2.3.2. General Prosecutor's Office internal regulations

These secondary sources of law are problematic only in one respect; they are unpublished and inaccessible and are intended for prosecutors only. All Prosecutor General's Orders, Instructions and Guides were issued for internal prosecutorial use and remain publicly unavailable. They fall short the principal requirement of the quality of law, i.e. the accessibility. Some studies and reports¹⁴⁹ are available on the page web of the General Prosecutor Office but they are outdated. Almost all of them refer to the practices and legislation before the amendments by Law no. 100 of 2016¹⁵⁰. The regulation on the internal normative framework of the General Office of Prosecutors¹⁵¹ is also outdated, in view of new Law on the Prosecution Service of 2016.¹⁵²

It becomes difficult to assess these secondary sources of law because they are not accessible for large public. Moreover, once the CPC is amended these internal instructions could become outdated. Accordingly, this normative framework will be disregarded in the Research, without prejudice to its quality or compatibility with the primary sources of law. In any case, even if the prosecutors make use of their internal regulations in remand proceedings, the CPC still does not allow them to be the source of law. In other words, even if this legal framework regulates certain practices (for example by templates of motions to remand, minutes of arrest, appeals) they remain irrelevant once the CPC completely overrules them out.

147. The Supreme Court of Justice of the Republic of Moldova, 'Recommendation no. 73/2015 regarding the application or extension of the preventive measure in the form of an arrest in respect of the convict, to be transferred or, as the case may be, left in the prison for further criminal investigation.'

148. The Supreme Court of Justice of the Republic of Moldova, 'Recommendation no. 53/2013 regarding the procedure of appeal according to the amendments and changes in Criminal Procedure Code, introduced by Law no.66 of 05.04.2012, OG 155-159 / 27.07.2012, in force 27.10.2012.'

149. V. Poalelungi, 'Recommendations regarding the control over the observance of the law when executing criminal penalties in penitentiary institutions' (2005) Newsletter of the Prosecutor's Office of the Republic of Moldova 17-18; I. Vacari, 'The role of the Prosecutor's Office in the defence of the constitutional rights and interests of the convicts' (2005) Newsletter of the Prosecutor's Office of the Republic of Moldova 22-23; V. Batir, 'Detention of the Suspected, the Defendant' (2006) Newsletter of the Prosecutor's Office of the Republic of Moldova 7-22; M. Gornea, 'Compliance with the law on the detention, arrest and detention of minors' (2006) Newsletter of the Prosecutor's Office of the Republic of Moldova 23-29; V. Burlacu, 'The grounds for applying preventive measures' (2009) Newsletter of the Prosecutor's Office of the Republic of Moldova 33-35; General Prosecutor's Office of the Republic of Moldova, 'Study of the legislation and the practice of applying preventive measures and other procedural measures of restraint, with emphasis on preventive arrest, house arrest and bail release' (2012)..

150. See for example: General Prosecutors Office Instructions no.11 / 7154 of 19.09.2006, no.11-2.2d / 06-7154 of 23.03.2006, no.11-2.2d / 07-3000 of 23.03.2009, no.11-2.2d / 08-9054 of 03.11.2008, no. 11-2.2d / 08-9150 of 12.11.2008, 30.12.2003 and 30.09.2007.

151. General Prosecutor's Office of the Republic of Moldova, 'Regulation regarding normative acts of the Prosecutor's Office, (approved by the Order of the General Prosecutor no. 200/22 of September 23, 2004).'

152. Parliament of the Republic of Moldova, *Law no. 3/25.02.2016 regarding the Prosecutor's Office.*

III. LEGAL FRAMEWORK CONCERNING REMEDIES

One main point should be emphasized in respect of remedies available in the domestic legal order of the Republic of Moldova. In general, the system provides for two types of remedies available in criminal proceedings by means of appeals against detention orders and civil actions claiming monetary compensation for unlawful detention.

Concerning criminal procedure remedies, the legal system of the Republic of Moldova provides for the right to appeal against detention orders or its extension, although Article 5 does not require this¹⁵³. In addition, a number of procedures for review of the remand detention, generically called *habeas corpus* rights are available (Articles 190 and 191 CPC)¹⁵⁴. These remedies are being classified by the ECtHR as falling within the limbs of Article 5 §§ 3 or 4, depending on the particular circumstances of the case¹⁵⁵. None of these remedies allow to award monetary compensation for the alleged breaches; they all are destined to seek release from detention. These remedies not part of the present assessment in this sub-component of the Analysis of Legislation. They are part of the above assessment.

In this sub-component only those relevant legal sources providing the right to compensation, within the meaning of Article 5 § 5 of the Convention, will be addressed. These are the civil remedies in the Republic of Moldova. They are regulated by the general civil procedure framework. Primarily they are governed by *lex specialis* legal provisions. Due to its exclusive role, the CPC has delegated (Articles 524, 525 CPC) the issue of compensation to the special Law no. 1545 of 1998, in force since 1998.¹⁵⁶ The complaints made on basis of this law initiates civil actions and are being examined under the rules of civil procedure by the civil courts. The analysis regards only this legal framework.

3.1. The Convention

The Convention and the ECtHR case-law occupies the same place in the legal hierarchy of sources for compensation proceedings, as explained in the sub-component above. It is directly applicable and has legal force as a primary source of law.

3.1.1. The overview of the ECtHR judgments

In general, the ECtHR cases have emphasized two principal problems concerning civil remedies seeking compensations for unlawful detention. The first problem was about the quality of the legislation, in particular Law no. 1545 of 1998 which has a limited scope of application. The second problem mainly concerns practices and relates to insufficient compensation awarded by the courts for unlawful detentions.

153. E.g. In the *Mociu* case, the applicant complained about the delay of examining his appeal against pre-trial detention, but his complaint was declared inadmissible since ‘...Article 5 § 4 guarantees no right, as such, to appeal against decisions ordering or extending detention as the above provision refers to “proceedings” and not to appeals’ (see *Ječius v. Lithuania* § 100, and *Malai*, § 29).

154. See for habeas corpus procedures the cases of *Boicenco*; *Șarban*

155. The illustrative in this sense is the case of *Haritonov v. Moldova* explaining specific aspects of appeals in remand proceedings.

156. Parliament of the Republic of Moldova, *Law no. 1545/25.02.1998 on how to repair the damage caused by the illicit actions of the criminal investigation bodies, the Prosecutor’s Office and the courts (in force since 04.06.1998)*.

In summary, the right to compensation for any breach under Article 5 of the Convention is guaranteed by § 5 of this article. It is *lex specialis* in comparison with the general right to just satisfaction under Article 41 of the Convention. Article 5 § 5 creates ‘a direct and enforceable right to compensation before the national courts’ provided that ‘a violation of one of [its] paragraphs have been established, by a domestic authority’. This provision of the Convention is complied with where it is possible to apply for compensation and the effective enjoyment with this right must be ensured with a sufficient degree of certainty. It relates, primarily, to financial compensation both pecuniary and non-pecuniary. There is no entitlement to a particular amount of compensation, but it should not be wholly negligible and disproportionate. An award cannot be considerably lower than that awarded by the ECtHR in similar cases¹⁵⁷. These are the basic principles provided by the ECtHR in its cases against Moldova.

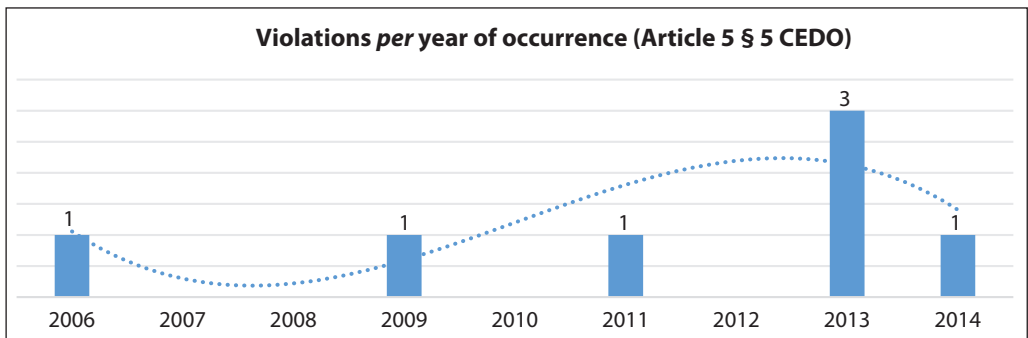
The cases of *Ganea* and *Cristina Boicenco* highlighted for the first time the deficiencies in awarding insufficient compensation for unlawful detention. The violations in these cases occurred before 2012. The last case of *Gavrilița* reiterated the problem of the unavailability of remedies for unlawful deprivations of liberty in the context of criminal proceedings. The *Veretco* case emphasized the blanket limitation set by the Law no. 1545 of 1998 preventing applicants from seeking such compensation before the domestic courts.

The ECtHR emphasised that ‘it does not appear from the [Law no. 1545 of 1998] that the applicant would have a remedy available to him to this effect, ... as long as a domestic court does not finally acquit him of all charges.’ Accordingly, the legislative blanket restriction to claim compensation for unlawful detention, seems to be incompatible with the Convention.

Previously, in the *Arabadji* and *Țopa* decisions, as well as in the *Mătășaru and Savițchi* (no. 1) judgment, the ECtHR dismissed claims that the Law no. 1545 of 1998 is ineffective. It noted that the applicants are still required to exhaust this remedy and they simply cannot argue that it is inefficient in theory. As a result, in the *Mătășaru and Savițchi* (no. 2) case, the applicants applied for compensation but received low amounts of compensation and the ECtHR found a violation of Article 5 § 5.

Based on the above methods, the assessment of the ECtHR’s cases-law needs to ascertain when the violations occurred and whether they relate to the period relevant to the Research.

Chart No 7



157. ECtHR, *Guide on Article 5 of the Convention – Right to liberty and security*, § 270 et seq.

The above Chart illustrates that violations of Article 5 § 5, increased in 2013 and continued to grow in 2014. The situation is considerably different in comparison to other violations of Article 5.

The efficiency of Law no. 1545 of 1998 became questionable from the perspective of the so-called “rehabilitation criterion”. The Law provides that only persons acquitted or discharged by final decision can claim compensation¹⁵⁸. Otherwise, even if criminal investigations were closed on other grounds (e.g. due to an amnesty law or statute of limitations), the person claiming to be victim of a breach pending criminal proceedings has no legal standing to bring a civil action. This limitation is subject to the ECtHR’s review in other aspects of criminal proceedings, not only concerning the detention on remand.

For example, the recently communicated case of *Balacci* concern the courts’ refusal to order restitution of the applicant’s possessions seized pending criminal investigation initiated against him. That investigation was closed because the proceedings were vitiated¹⁵⁹. However, the applicant in that case is still unable to claim restitution and compensation of damages because he was not acquitted or discharged.

From the perspective of the right to liberty this “rehabilitation criterion” seriously restricts the prospects of seeking compensation under Article 5 § 5. It again links the right to compensation with the merits of the criminal charges and the outcomes of the criminal case. The approach is incompatible with the Convention and thus the ECtHR cast serious doubts concerning the quality of the law.

Another most pressing problem continues to be the practice of the civil courts awarding insufficient compensation, if the person succeeds to initiate civil action for damages. These violations tend to increase during the relevant period of the Research.

3.1.2. The Committee of Ministers’ supervision of execution

The Committee of Ministers has examined the problems of insufficient awards for compensation and the quality of the remedy in separate groups of cases (the *Muşuc* group and the *Şarban* group). Lately, these problems were left to be examined in the context of the *Şarban* group only¹⁶⁰. The cases on the insufficient amount of compensation were closed in 2016¹⁶¹. In its last decision of 2019, the Committee of Ministers had considered that the general measures appear capable of preventing similar violations of Article 5 § 1 due to insufficient compensation awarded by the domestic courts¹⁶². However, the problem of the availability of remedies under Article 5 § 5 is still being examined and the amendments to the Law no. 1545 of 1998 are expected¹⁶³.

158. See Article 6 p.p. b) and c) of *Law no. 1545/25.02.1998 on how to repair the damage caused by the illicit actions of the criminal investigation bodies, the Prosecutor’s Office and the courts*.

159. *Balacci v. the Republic of Moldova (pending)* (2019).

160. Committee of Ministers, 2nd CM’s Decision *Şarban* (2017); Committee of Ministers, 3rd CM’s Decision *Şarban* (2019).

161. Committee of Ministers, Resolution CM/ResDH(2016)147 closing supervision, the 1259th meeting (DH) June 2016, [Cebotari, Ganea, Cristina Boicenco].

162. Committee of Ministers, 3rd CM’s Decision *Şarban* (2019), § 8; Committee of Ministers, ‘CM’s Notes Execution *Şarban* (2019); Committee of Ministers, CM’s Resolution 23 cases.

163. Committee of Ministers, 3rd CM’s Decision *Şarban* (2019), § 7.

3.1.3. Conclusion

Only two patterns of violations were identified following the analysis of the ECtHR case-law and the practice of the Committee of Ministers. They concern low compensations and the quality of remedies, both classified under the limb of Article 5 § 5, as follows:

Remedy (Article 5 § 5)

- a) Insufficient compensation for unlawful detention awarded by the domestic courts.¹⁶⁴ The matter was **closed** in 2019.
- b) Unavailability of the compensation due to the legislative restrictions¹⁶⁵. This problem is being supervised and amendments to the law are expected.¹⁶⁶

3.2. Primary legislation

Article 25 of the Constitution, does not provide for the right to compensation, within its meaning under Article 5 § 5 of the Convention. It could be argued that Article 53 of the Constitution could grant such a right, as this provision states as follows (emphasis added):

Article 53. Right of the Person Prejudiced by a Public Authority

(1) Any person prejudiced in any of his/her rights by a public authority by way of an administrative act or failure to solve a complaint within the legal term, is entitled to obtain acknowledgement of the declared right, cancellation of the act and payment of damages.

*(2) The State shall be under patrimonial liability as provided by the law for any prejudice caused by way of errors committed in criminal lawsuits by the investigation bodies and courts of law.*¹⁶⁷

In one case, the Constitutional Court did not find that the Law no. 1545 of 1998 incompatible with the Constitution. It explained that the Law is in compliance with the Constitution because only certain violations give rise to the right to compensation. As the constitutional complaint concerned the domestic courts' refusal to award compensation under Law no. 1545 of 1998 for refusing to start a criminal investigation, the Constitutional Court dismissed it as *actio popularis*. It noted that the Parliament, under Article 53 of the Constitution, is allowed to distinguish between certain violations suitable for compensation, and, as a result, the Law can be limited in scope¹⁶⁸.

Law no. 1545 of 1998, in its relevant part, provides that 'a person shall be entitled to compensation only in cases of (i) acquittal in criminal proceedings, (ii) dropping charges or discontinuation of an investigation on the grounds of rehabilitation, or (iii) following a decision by which an contraventional arrest is cancelled on the grounds of rehabilitation (Article 46).

164. *Ganea, Cristina Boicenco, Cucu and Others, Mătăsar and Savițchi, Coteț.*

165. *Veretco*

166 See the CM Decision in the *Șarban* group of cases [CM/Del/Dec\(2017\)1294/H46-18 of 21 September 2017](#)

167. Constitutional Court of the Republic of Moldova, *Decision no.10 of 19.01.2017 of inadmissibility of petition no. 3g/2017 regarding the exception of unconstitutionality of some provisions of Law no. 1545-XIII of 25.02.1998.*

168. Constitutional Court of the Republic of Moldova, *Decision no.10 of 19.01.2017 of inadmissibility of the notification no. 3g / 2017 regarding the exception of unconstitutionality of some provisions of Law no. 1545-XIII of February 25, 1998 on how to repair the damage caused by the illicit actions of the criminal investigation bodies, the Prosecutor's Office and the courts.*

The first condition has been provided by law since its adoption in 1998 and has remained unchanged. The second condition was slightly amended in 2003 by the “rehabilitation criterion”, explained above. The Law has been amended on a number of occasions, but the above provisions remained intact. They represent the most controversial conditions limiting the scope of the applicability of the law. Its other provisions fall outside of the scope of the Research.

Other primary legislation sources do not raise concerns. The procedure seeking compensations under Law no. 1545 of 1998 is regulated by the Civil Procedure Code of the Republic of Moldova. There is no need to review it from the perspective of criteria concerning the quality of legislation.

3.3. Secondary sources of law

In this sub-component, the only relevant sources appear to be the Supreme Court’s instructions and explanatory decisions in civil matters. Recalling their recommendatory role, these sources of law were capable of guiding the practice of the civil courts in the right direction.

The relevant explanatory decision of the Supreme Court was issued in 2012¹⁶⁹. It explains the applicable law and procedure by which a person could claim compensation for the alleged breach of Article 5 of the Convention. It refers to the relevant case law of the ECtHR in cases against Moldova. It also covers, among other things, issues on the authorities’ failures to comply with the law while ordering and extending detention on remand. In 2017, this explanatory decision was amended in line with new developments of the ECtHR’s case-law.¹⁷⁰

The Supreme Court’s recommendation concerning the amounts of just satisfaction issued in 2012¹⁷¹, acknowledged the direct application of the Convention and the ECtHR’s case law. It gives guidance to the domestic courts how to award just satisfaction in comparable amounts with the ECtHR practice in similar cases. The recommendation lists the average sums applicable for breaches.

The Supreme Court also has directed all domestic courts to apply the Convention and the ECtHR’s case-law in their judgments¹⁷².

169. The Supreme Court of Justice of the Republic of Moldova, ‘Decision of the Plenum of the Supreme Court of Justice no. 17/2017 amending and complementing the SCJ Plenum Decision no. 8 of 24.12.2012 Regarding the examination of the litigations regarding the repair of the moral and material damage caused to the persons detained by the violation of art. 3, 5, 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

170. The Supreme Court of Justice of the Republic of Moldova, ‘Decision of the Plenum of the Supreme Court of Justice no. 17/2017 amending and complementing the SCJ Plenum Decision no. 8 of 24.12.2012 Regarding the examination of the litigations regarding the repair of the moral and material damage caused to the persons detained by the violation of art. 3, 5, 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms

171. The Supreme Court of Justice of the Republic of Moldova, *Recommendation no. 6/2012 regarding fair satisfaction*.

172. The Supreme Court of Justice, *Plenum Decision no. 3 of June 9, 2014 regarding the application by the courts of the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms*.

CONCLUSIONS

Certain patterns of violations were identified following the Analysis of Legislation. From the perspective of the Convention, the situation with overuse of detention could be hardly characterised as a systemic problem since it has no obvious root causes in legislation. However, the scale of the abusive application of remand detention is continuously growing, mainly because of the repetitive practices in courts and prosecution incompatible with Convention provisions and case law of the ECtHR.

Some issues under Article 5 of the Convention have been resolved by the Moldovan authorities and need no further measures. Other issues remain unresolved and require further measures, in particular, regarding the improvement of judicial and prosecutorial practice ordering and extending detention on remand. The Legislation is of a good quality but its implementation is formalistic and uncertain. From the perspective of the ECtHR and the Committee of Ministers, it could be argued that the judicial and prosecuting authorities still continue to approach the problem of detention in a stereotyped way. Often, they lack the required diligence and good faith in applying the legislation. Accordingly, the flow of Article 5 violations continues. They violations reveal indications of excessive use of detention and the abuse of procedural rules, which are often twisted to fit old practices. These practices could not be changed solely by legislative amendments, if there is neither willingness, nor commitment, to change the attitude.

In this context, the frequent legislative changes are of no assistance to practitioners. They only contribute to the uncertainty of legal practices and could question the authority of the law. The CPC is easily changed either by the will of practitioners or politicians to fit their well-settled practices or other interests. They would rather change the law but not their practices and attitudes. For example, after the welcomed reforms of remand procedures carried out in 2016, the amendments introduced in 2017 and 2018 to the CPC were mostly redundant. They brought no added value to the already compatible legal framework and did not express the practical needs. This is proven by hasty legislative amendments, declared incompatible by Constitutional Court and then speedily repealed. Accordingly, the practices become less responsive to so frequent amendments of law, and this could be the principal root-cause of their incompatibility. They need time to be settled. Moreover, the law should be interpreted in good faith, which appears to be problematic when so many changes are so easily introduced.

However, this seemingly easier process to amend laws does not work for issues that need real reaction of the authorities. For example, the remedy Law no. 1545 of 1998 has not been amended for more than 20 years and is outdated. The perspectives of a new draft are illusory. However, even in this situation, the reaction of the judiciary has helped to guide practices in the right direction. This proves that practices, could be changed by the practitioners and not necessarily by redrafting laws.

Annex No 3

Comparative Study
on Pre-trial Detention.
The Practice of some Member States
of the Council of Europe

Introduction

1. Background and aim of the study

This study is developed within the **Council of Europe Programme “Promoting a human rights compliant criminal justice system in the Republic of Moldova” funded by the Government of Norway.**

The study seeks to provide information, insights and an overview of some CoE member states to support the on-going reform of the criminal justice system in the Republic of Moldova.

The author was requested to carry out a study among at least five Council of Europe member states taking into consideration the jurisprudence of the ECtHR on Article 5 of the ECHR and specifically focusing on:

- a) grounds for pre-trial detention;
- b) term of pre-trial detention, reasons and procedure for extension or renewal of pre-trial detention;
- c) rules applicable to the change of charges during pre-trial detention; and
- d) compensatory remedies in the event of unlawful pre-trial detention.

2. Country selection

The comparative study focuses on Armenia, Estonia, Georgia, Germany and Romania.¹ These states have been selected pursuant to the following criteria:

- a) *Membership in the CoE*, implying the obligation to comply with the human rights standards developed in the ECtHR case-law on Article 5 ECHR;
- b) *The state of execution of the ECtHR judgments*, in particular, the complete general measures implemented;
- c) *Recent improvements of legislation*, due to previous adverse judgments of the ECtHR on pre-trial detention [for example, the adjustment of the Romanian criminal legislation – Criminal code, Criminal Procedure Code and Execution of Penalties Law – is quite recent (2014), and these laws were drafted so as to comply with the ECHR standards]; and
- d) *Geographical coverage* of Western, Central and Eastern Europe.

1. Note: Armenia ratified the European Convention on Human Rights in 2002; Estonia in 1996; Georgia in 1999; Germany in 1952; Romania in 1994.

The study examines the legislation in force on pre-trial detention in the selected states, its recent development, where necessary, domestic jurisprudence, and judgments of the ECtHR concerning the compliance of national legislation and jurisprudence with Article 5 of the ECHR.

3. Terminology

The study uses mainly “pre-trial detention” to define the majority of measures of severe restraint by which a person accused of committing a crime is held in the custody of the state, deprived of his or her liberty in the relevant facilities, based on a court order, either in the pre-trial stage or the trial stage of the criminal proceedings.

Depending on the documents and materials used in the study, other synonyms of this term are present throughout the study: “remand detention”, “arrest”, “taking into custody” etc.

4. Methodology and structure

The present study was conducted as legal desk research, taking into account the ECtHR jurisprudence on Article 5 of the ECHR, related to the cases already decided by the ECtHR in connection with the Republic of Moldova, thus, covering the typical problems of the states analysed in the study.

The jurisprudence of the ECtHR was examined to identify the judgments delivered regarding the countries in question and involving pre-trial detention under Article 5 (1) (c).

Moreover, other relevant sources were taken into consideration – documents, recommendations of the Council of Europe, reports of the CPT, SPACE I and World Prison Brief statistics.

The study comprises individual chapters on each country follow the same structure:

- 1) Legal framework. Statistics;
- 2) Grounds for pre-trial detention;
- 3) Term of pre-trial detention, reasons and procedure for extending or renewing pre-trial detention;
- 4) Rules applicable to the change of the charges during pre-trial detention;
- 5) Compensatory remedies in the event of unlawful pre-trial detention.

I. Armenia

1.1. Legal framework. Statistics

Legal framework

Relevant legal provisions are set out in the:

- ▶ **Constitution of the Republic of Armenia**² (*Armenian Constitution*) - the right to liberty and security of person (article 27), access to courts (article 69) and the principle of proportionality (article 78).
- ▶ **Code of Criminal Procedure of the Republic of Armenia** (*Armenian CPC*)³ - article 7 (Legitimacy), article 9 (Respect for the Rights, Freedoms and Dignity of an Individual) and Chapter 18. Preventive measures to secure the appearance (articles 134 – 151).

Statistics

According to the **SPACE I Statistics** (2018), with a population of 2,972,732, Armenia had a total number of inmates of 3,536 (of which, 2,239 are sentenced prisoners and 1,297 untried detainees, amounting to 36.7% of the prison population), resulting in a prison population rate of 118.9 (in 2008, the prison population rate was 118.4).⁴

According to the **World Prison Brief statistics**⁵, as of 1 January 2018, the prison population in Armenia was 3,536 inmates, with a prison population rate of 119 (in 2000: a total number of 7,281 inmates, with a prison population rate of 236) of which 1,313, meaning 37.44%, are pre-trial detainees, amounting to a pre-trial population rate of 44 (per 100,000 of the national population).

In comparison, in 2001 the total prison population (including pre-trial detainees) was 48,267, of which 762, meaning 18.1%, were pre-trial detainees, amounting to a pre-trial population rate of 25 (per 100,000 of national population).

2. Available at: <https://www.president.am/en/constitution-2015/>, accessed 11th of May 2019.

3. Available at: <http://www.parliament.am/legislation.php?sel=show&ID=1450&lang=eng>, accessed 11th of May 2019.

4. Aebi, M. F., & Tiago, M. M. (2018). SPACE I - 2018 – Council of Europe Annual Penal Statistics: Prison populations. Strasbourg: Council of Europe, p. 28, 29, 43, available at: http://wp.unil.ch/space/files/2019/04/FinalReportSPACEI2018_190402.pdf, accessed 11th of May 2019.

5. Available at: <http://www.prisonstudies.org/country/armenia>, accessed 29th of June 2019.

From 2000 to the present day, the prison population has constantly decreased, as was the case of persons in pre-trial detention, whether the evaluation was

- in terms of the total number of pre-trial detainees or
- as a percentage of the total prison population, or
- as a percentage of the prison population rate.

No statistics were communicated by Armenia (*as is the case of Georgia and Germany*) regarding the total number of days spent in penal institutions by non-sentenced offenders, the average number of detainees in pre-trial detention or the average length of pre-trial imprisonment, in months (based on the total number of days spent in penal institutions).

1.2. Grounds for pre-trial detention

Guarantees for the personal liberty

Guarantees for the personal liberty are provided at a constitutional level: Everyone shall have the right to personal liberty. A person can be deprived of personal liberty only in specific cases and as prescribed by law, including for the purpose of bringing a person before a competent authority where there exists a reasonable suspicion that the person has committed a criminal offence, or a justified need to prevent the person from committing a criminal offence fleeing after having done so [*Article 27 (1) no.4), (2) Armenian Constitution*].

Some additional constitutional provisions add further guarantees to ensure personal liberty, requiring a clear and certain legal framework. There are express provisions stating that when restricting basic rights and freedoms, the laws must define the grounds and extent of restrictions, be sufficiently certain to enable the holders and addressees of these rights and freedoms to adopt appropriate conduct [*Articles 75, 79 Armenian Constitution*].

As a matter of principle, the *Armenian CPC* expressly states that the authorities are obliged to obey the law, thus respecting the right to personal liberty: Respect for the rights, freedoms, and dignity of a person is mandatory for all bodies and persons participating in criminal proceedings. The court can impose a temporary limitation on the rights and freedoms of individuals as well as measures of procedural compulsion only in cases, where the necessity is supported by appropriate legal grounds [*Article 9 (1)-(2) Armenian CPC*].

Preventive measures are measures of coercion taken in relation to the suspect or the accused to prevent their inappropriate behavior during the criminal proceedings and to ensure the execution of the sentence and such measures shall not be executed in combination with each other: arrest (only for accused persons); bail (only for accused persons); a written obligation not to leave a place; a personal guarantee; an organization guarantee; placing under supervision, for under-age persons only; placing under supervision of commanding officer [*Article 134 (1)-(4) Armenian CPC*].

The basis for the execution of preventive measures is provided in *Article 135 (1) Armenian CPC*: Preventive measure shall be ordered by the court, prosecutor, investigator and inquiry body only when the material obtained for the criminal case **provides sufficient reason to assume that the suspect or the accused may:**

- a) hide from the body which is conducting the criminal proceedings;
- b) inhibit the pre-trial process of the investigation or court proceedings in any way, particularly by means of illegal influence over the persons involved in the proceedings, concealment and falsification of the materials relevant to the case, failing to comply with the subpoena without any reasonable explanation;
- c) commit an action forbidden by the Criminal law;
- d) avoid responsibility and the imposed punishment;
- e) oppose the execution of the verdict.

The basic requirement provided by the law therefore consists of an assessment of the grounds/sufficient reasons that have to be present in order to adopt a preventive measure.

Pre-trial detention/Arrest

(1) To arrest a person means to detain a person under arrest in the places and under conditions prescribed by law [Article 137 (1) Armenian CPC].

In connection with a criminal case, no person may be, among others, detained or arrested than on the grounds and by the procedure prescribed by law [Article 7 (2) Armenian CPC].

Regarding the initial deprivation of liberty, the Court of Cassation (Decision of 18 December 2009, in the case no. EADD/0085/06/09) firstly pointed out that there were two procedures for depriving a person of his liberty on suspicion of having committed an offence, namely "arrest" (articles 128-133 Armenian CPC) and "detention" (articles 137-142 Armenian CPC).

The Court of Cassation concluded that the procedures for depriving a person of liberty on suspicion of having committed an offence were not limited to "arrest" and "detention" but also included the procedure for taking into custody and bringing the person before the relevant authority. Consequently, a person deprived of his liberty, along with the status of an "arrestee" and a "detainee", could also have an initial legal status which could be conditionally called the status of a "brought-in person". The fact that "bringing-in" was given, by the legislature, relative independence as a procedure was evidenced by article 180 (2) Armenian CPC which included the possibility "to bring persons in on a suspicion of having committed an offence".

The Court of Cassation ruled that persons in such situations should enjoy the rights guaranteed by the Constitution and the Convention, including knowing the reasons for their deprivation of liberty, having access to a lawyer and exercising the right to silence⁶.

Some specific criminal and judiciary enforcement measures are carried out only by court decree; including detention, in cases regarding the execution of a preventive measure [Article 280 Armenian CPC].

Arrest and the alternative preventive measures shall be applied in respect of the accused only if he has committed a crime punishable by more than one year's imprisonment; or there are sufficient grounds to believe that the suspect or the accused can commit some of the following specific actions (the same for all the preventive measures):

6. ECtHR, *Mushegh Saghatelian v. Armenia*, application no. 23086/08, 20.09.2018, final on 20.12.2018, para. 123.

- a) hiding from the body which conducts the criminal proceedings;
- b) inhibiting the pre-trial process of investigation or court proceedings in any way, particularly by illegally influencing the persons involved in the proceedings, concealment and falsification of the materials relevant to the case, failing to comply with the subpoena without any reasonable explanation;
- c) committing an action prohibited by Criminal law;
- d) avoiding the responsibility and the imposed punishment;
- e) opposing the execution of the verdict.

(2) **The draft of the new Armenian CPC** [article 116 (2)] provides for concise reasons determining the measures of restraint. A restraint measure may be applied if it is necessary to:

- a) prevent the accused from escaping; or
- b) prevent the accused from committing a crime; or
- c) ensure that the accused fulfils the obligations imposed on him by law or by a court decision.

While considering the issue of necessity and kind of the preventive measure the following shall be taken into account: the nature and the degree of danger of the criminal offence; the personality of the suspect or the accused; the age and the health condition of the suspect or the accused; sex; the occupation of the suspect or the accused; their marital status and availability of dependents; their property/assets situation; availability of a permanent residence; other relevant circumstances [Article 135 (3) Armenian CPC].

(3) *Particular situations.* An **under-aged** suspect or accused may only be arrested when he or she is accused of committing a medium, severe and especially severe crime [Article 442 Armenian CPC].

Proportionality

(1) In accordance with the ECtHR case-law, the Armenian Legislation contains an explicit provision relating to the **principle of proportionality**: The means chosen for restricting basic rights and freedoms must be suitable and necessary for achieving the objective prescribed by the Constitution and commensurate to the significance of the basic right or freedom being restricted [Article 78 Armenian Constitution].

(2) In terms of proportionality, mention should be made that both the legislation in force and the draft of the new *Armenian CPC* provide for non-custodial preventive measures, specifying the situations where they can be applied instead of pre-trial arrest.

The following non-custodial measures are expressly provided for in the *Am.CPC*:

- a) bail (only for accused persons), which shall be considered an alternative measure to arrest and shall only be granted with a decision of the court about the arrest of the accused. [Article 134 (4) Armenian CPC] Bail may consist of money, securities and other valuables posted by one or several persons to the deposit of the court for the release from detention of someone accused of committing a crime classified as minor or of medium gravity. With the permission of the court, real estate may be posted as an alternative measure to bail [article 143 (1) Armenian CPC];

- b) an obligation not to leave a place, consisting of a written promise of the suspect or the accused not to move to a new place without permission, or change the place of residence, but to appear in court upon receiving a subpoena from the inquiry body, investigator, prosecutor and the court, and to inform them of a change of his or her place of residence [*article 144 (1) Armenian CPC*];
- c) a personal guarantee, which shall be given in the form of a written undertaking by trustworthy persons who upon their word and bail posted by them can guarantee the appropriate behavior of the suspect or the accused, his appearance in court upon receiving a subpoena of the body which conducts the criminal proceeding as well as his fulfillment of other court proceeding responsibilities [*article 145 (1) Armenian CPC*];
- d) an organization guarantee, which shall be given in the form of written undertaking by a trustworthy legal entity which based on its reputation and bail posted can guarantee the appropriate behavior of the suspect or the accused, his or her appearance in court upon receiving a subpoena of the body which conducts the criminal proceeding as well as his fulfillment of other court proceeding responsibilities [*article 146 (1) Armenian CPC*];
- e) placing under supervision, for under-age persons only;
- f) placing under supervision of commanding officer [*article 134 (1)-(4) Armenian CPC*];
- g) temporary suspension from work of the accused who is a state employee, if there is sufficient reason to assume that he or she may hinder the process of the case investigation, of the compensation of damage caused by the crime or may continue to be involved in criminal activities while in that post [*Article 152 (1) Armenian CPC*].

Upon delivering an order for arrest, the court shall also decide on the admissibility of the release of the accused on bail; if the court determines pre-trial release is permissible, it shall determine the amount of the bail. Later, upon a petition being presented by the defense, the court may reconsider its decision concerning the inadmissibility and the amount of bail [*Article 137 (4) Armenian CPC*].

On determining the extension of the period of detention the court shall have the right to release the accused on bail and determine the amount of the bail [*Article 139 (2) Armenian CPC*].

(3) **Draft of the new Armenian CPC.** The alternative restraint measures provided by the Draft of the Code are:

- a) house arrest;
- b) administrative control;
- c) bail;
- d) suspension of the term in office;
- e) prohibition of absence / absence ban;
- f) guarantee;
- g) educational supervision;
- h) military supervision [*Article 115 (3)-(4) Draft. Armenian CPC*].

1.3. Term of pre-trial detention, reasons and procedure for extension or renewal of pre-trial detention

Term of pre-trial detention

(1) Detention during the pre-trial criminal proceeding shall not last longer than two months except for the cases prescribed by the law. The term of the detention of the accused may be extended up to one year, in exclusive cases due to the complexity of the case. The term of the detention of the accused at the time of a pre-trial criminal case and the hearing of the case shall not last longer than: a) one year; b) the maximum time period of the imprisonment prescribed by Criminal law for the crime of which the accused is suspected where the maximum term is less than one year. [Article 138 (3)-(5) Armenian CPC]

There is no maximum period of arrest during the criminal proceeding in the **trial stage** [Article 138 (6) Armenian CPC].

(2) In *Mushegh Saghatelyan v. Armenia*⁷, regarding the time spent under arrest, the ECtHR found a violation of article 5 (1), as the arrest had not been formally acknowledged for the first 16 hours and had exceeded the time-limit under domestic law (72 hours) for bringing a suspect before a judge by 12 hours.

The ECtHR took the same approach in *Ayvazyan v. Armenia*⁸, in which it also found that the detention of the applicant was unlawful between 1 and 13 May 2008 as it had not been authorised by a court as required by law, amounting in a violation of Article 5 (1).⁹

(3) **Draft of the new Armenian CPC** provides for additional guarantees, especially by regulating new maximum terms for detention/pre-trial arrest. Thus, according to *article 119 (1)-(4) Draft. Armenian CPC*, a person may be held in detention so long as it is necessary to secure the normal course of the proceedings, but in any event such term shall not exceed the maximum periods of detention, as prescribed by the law.

In pre-trial proceedings, detention may be ordered or the term of detention may be extended for not longer than two months each time, provided that the following maximum periods during the pre-trial stage are complied with:

- a) two months - a crime which is not serious
- b) four months - a crime of medium-gravity;
- c) ten months – a grave crime; and
- d) 12 months - a particularly grave crime.

In any case, the total duration of detention may not exceed the maximum term of the imprisonment provided for the alleged crime.

7. ECtHR, *Mushegh Saghatelyan v. Armenia*, application no. 23086/08, 20.09.2018, final on 20.12.2018.

8. ECtHR, *Ayvazyan v. Armenia*, application no. 46245/08, 18.10.2018.

9. No action plan was forwarded by Armenia, so individual, but most important, general measures are awaited. See, also, ECtHR, *Asatryan v. Armenia*, application no. 24173/06, 09.02.2010, final on 09.05.2010, where the Court concluded that between 5.50 p.m. on 23 November 2005 and the time when the Court of Appeal decided on 24 November 2005 to prolong her detention the applicant continued to be deprived of her liberty, despite the fact that there was no court decision authorising her detention for that period as required by law.

Reasons and procedure for extension or renewal of pre-trial detention

(1) Some basic principles regarding the pre-trial detention and the termination or extension of the measure are present at the constitutional level.

According to the Constitution, everyone deprived of personal liberty shall have the right to challenge the lawfulness of depriving him/her of liberty, where upon the court shall render a decision within a short time period and shall order his/her release if the deprivation of liberty is unlawful [*Article 27 (5) Armenian Constitution*].

The order of the court for the execution of the arrest as a preventive measure may be appealed against to the court of a higher instance [*Article 137 (5), 150 (2) Armenian CPC*].

If the investigator and the inquiry body find it necessary to extend the term of the detention of the accused, they shall submit a reasonable, substantiated explanation for such a decision to the prosecutor no later than ten days before the expiration of the detention period.

If the court agrees with this decision to extend the detention period, an appropriate decision will be made no later than five days before the expiration of the period prescribed by the court. While delivering a judgment about the extension of the detention period the court shall determine the term of the further detention within the time limits prescribed by the law; the duration of each extension period shall not exceed two months [*Article 139 (1), (3) Armenian CPC*].

If necessary, the preventive measure can be substituted by the body which conducts the criminal proceeding. The preventive measure shall be annulled when it is no longer necessary [*Article 151 (1)-(2) Armenian CPC*].

The accused shall be released immediately based on a decision of the corresponding body which conducts out the criminal proceeding when:

- a) the criminal proceedings have been suspended, or the criminal prosecution is terminated;
- b) the court has imposed a punishment on the accused other than imprisonment, detention in a disciplinary battalion or arrest;
- c) the body which conducts the criminal proceeding does not find it necessary to detain a person longer;
- d) the deadline for the arrest has expired and has not been extended;
- e) the maximum term of the detention prescribed by the Code has expired;
- f) bail for the release of the accused has been posted [*Article 142 (1) Armenian CPC*].

(2) Regarding the extension or renewal of pre-trial detention, the ECtHR has found the use of stereotype formulae when imposing and extending detention to be a recurring problem in Armenia. Such complaints concerned a repetitive situation, which has already been examined in several cases against Armenia (e.g. *Sefilyan v. Armenia*¹⁰ and *Malkhasyan v. Armenia*¹¹), in which a violation of Article 5 (3) of the Convention was found.¹²

10. ECtHR, *Sefilyan v. Armenia*, no. 22491/08, 02.10.2012, final on: 02.01.2013.

11. ECtHR, *Malkhasyan v. Armenia*, no. 6729/07, 26.06.2012, final on: 26.09.2012.

12. Regarding the lack of relevant and sufficient reasoning provided by national courts when ordering and extending detention on remand, see, also, ECtHR, *Arzumanyan v. Armenia*, application no. 25935/08, 11.01.2018, final on: 11.04.2018; ECtHR, *Ara Harutyunyan v. Armenia*, application no. 629/11, 20.10.2016, final on: 20.01.2017; ECtHR, *Badalyan v. Armenia*, application no. 44286/12, 20.07.2017; ECtHR, *Hovhannisyan v. Armenia*, application no. 50520/08, 20.07.2017.

This was also the situation in the *Mushegh Saghatelyan* group of cases¹³, as the domestic courts had failed to provide relevant and sufficient reasons for the applicant's subsequent detention, amounting to a violations of Article 5 (3).

(3) *The Draft of the new Armenian CPC* contains provisions covering changing, annulling or extending a restraint measure, expressly provided in *articles 117 (1), (4), 118 (5)*: If the conditions of lawfulness of a restraint measure have ceased during its effective term, the Body Conducting the Criminal Proceedings shall, within the limits of its authority, take a decision on changing or annulling the restraint measure.

If the restraint measure applied has been annulled as a result of reviewing an appeal, then that restraint measure or a more stringent restraint measure may be applied only if there is a new circumstance in the same proceedings. When extending the detention the due diligence exercised by the Body Conducting the Criminal Proceedings in order to discover significant circumstances for the proceedings, as well as the need to continue the criminal prosecution of the accused must be justified before the court.

1.4. Rules applicable to the change of charges during pre-trial detention

The Code contains only some general provisions regarding the possibility to change the charges during the criminal process: If during the preliminary investigation it becomes necessary to change or add to the criminal charge(s) brought, the investigator must bring a new charge in accordance with the requirements regarding the grounds and procedure of impleading as the accused or the procedure of bringing an accusation [*Article 204 Armenian CPC*].

The prosecutor must return the case to the investigator to bring additional charges or change the charges, when there are grounds to complete the charges or there are grounds for replacing the charge(s) with more a severe charge or an essentially different one in relation to the facts of the previous charges [*Article 274 (2) Armenian CPC*].

There are no specific provisions on pre-trial detention in the event of a change of charges. The general rules on pre-trial detention shall apply, as they are sufficiently flexible to allow the reassessment of the pre-trial detention based on the new charges.

13. See, ECtHR, *Ayvazyan v. Armenia*, application no. 46245/08, 10.08.2018; ECtHR, *Voskerchyan v. Armenia*, application no. 28739/09, 18.10.2018. In both cases, the Court found that domestic courts similarly justified the applicant's continued detention with a mere citation of the relevant domestic legal principles and a reference to the gravity of the offence without addressing the specific facts of his case or providing any details as to why the risks of absconding, obstructing justice or reoffending were justified.

In *Gaspari v. Armenia*, application no. 44769/08, 20.09.2018, final on: 20.12.2018, the ECtHR stressed out that there is nothing to suggest that the ground for detention was the subject of examination before the Court of Appeal and it appears that the court reached the relevant finding on the basis of the case file. By doing so, the Court of Appeal denied the applicant the possibility of objecting to that ground for detention, including by submitting the arguments which he raised before this Court.

1.5. Compensatory remedies in the event of unlawful pre-trial detention

(1) The acquitted is entitled to demand full compensation in respect of the lost opportunities as a result of the arrest, impleading as the accused, and conviction [Article 66 (3) *Armenian CPC*].

(2) The ECtHR has constantly ruled against Armenia regarding its violation of Article 5 (5) ECHR.

In *Khachatryan and others v. Armenia*¹⁴ the Court observed that the Armenian law at the material time did not provide for a right to claim compensation for any non-pecuniary damage suffered, including as a result of a breach of any of the first four paragraphs of Article 5 of the Convention. In particular, Article 66 of the *Am. CPC* entitled an acquitted person to claim compensation only for pecuniary damage. Similarly, while Article 1064 of the Civil Code provided for a possibility to claim compensation as a result of unlawful detention, Article 17 of the Civil Code limited such compensation only to pecuniary damage, such as any expenses incurred or lost income. It followed that the applicants did not enjoy in law or in practice an enforceable right to compensation within the meaning of Article 5 (5).

(3) At present¹⁵, according to Article 162.1 § 2 of the Civil Code, if as a result of a decision, action or omission of a state or a local self-government body or their official there is a violation of a person's rights guaranteed by the Constitution and Convention, including the right to liberty and security, the person has the right to claim compensation for non-pecuniary damage caused to him. In addition, the right to compensation is available for a person who has been acquitted based on the conditions set out in Article 3 of Protocol No. 7 to the Convention (Article 162.1 § 3).

Furthermore, the person is entitled to claim compensation not only in those cases, when the domestic court found a violation, but also when the violation was established by the investigating authority. The latter entitles the person to directly claim before the court compensation for the non-pecuniary damage caused. The purpose of this amendment to the law was to ensure an effective mechanism for compensation and exclude the practice of double judicial proceedings (Article 162.1 § 2).

14. ECtHR, *Khachatryan and others v. Armenia*, application no. 23978/06, 27.11.2012. See, also, ECtHR, *Sahakyan v. Armenia*, application no. 66256/11, 10.11.2015, final on: 06.09.2016.

15. Following a Law on „Making changes and additions to the Civil Code of the Republic of Armenia“ that entered into force on 1 November 2014 and another Law on „Making changes and additions to the Civil Code of the Republic of Armenia“ that entered into force on 1 January 2016. See, *in extenso*, Communication from Armenia concerning the cases of *Poghosyan and Baghdasaryan, Khachatryan and Others and Sahakyan against Armenia* (Applications No. 22999/06, 23978/06, 66256/11), Action report (23/03/2016) for the 1259 meeting (7-9 June 2016) (DH), 31/03/2016, no. DH-DD(2016)382.

II. Estonia

2.1. Legal framework. Statistics

Legal framework

The relevant legal provisions are contained in the:

- ▶ **Constitution of the Republic of Estonia** (*Ee. Constitution*)¹⁶ - the principles relating to access to court (articles § 15, 24) and the right to liberty and security of the person (articles § 20, 21, 24);
- ▶ **Code of Criminal Procedure of the Republic of Estonia** (*Ee. CPC*)¹⁷ - article § 9 (Safeguarding personal liberty and respect for human dignity), Chapter 4. Securing criminal proceedings, Division 1. Preventive Measure (articles § 127 – 137²) and Division 2. Other Means of Securing Criminal Proceedings (articles § 138 – 143¹) and Chapter 15. Proceedings for adjudication of appeals against court rulings (articles § 383 – 392).

Statistics

According to the **SPACE I Statistics** (2018), Estonia, with a population of 1,319,133, had a total number of inmates of 2525 (of which, 2134 were sentenced prisoners and 391 untried detainees, amounting to 15.5% of the prison population), resulting in a prison population rate of 191.4 (in 2008 the prison population rate was 273.2).¹⁸

According to the **World Prison Brief statistics**¹⁹, in 2018, the prison population in Estonia was 2525 inmates, with a prison population rate of 191 (in 2000: a total number of 4712 inmates, with a prison population rate of 343).

As of 27 May 2019, the total prison population is 2480, of which 507, meaning 20.4% of the total prison population are pre-trial detainees, amounting to a pre-trial population rate (per 100,000 of national population) of 38. In comparison, in 2000 the total prison population was 4712, of which 1639, meaning 35.5%, were pre-trial detainees, amounting to a pre-trial population rate of 119 (per 100,000 of national population).

16. Available at: <https://www.riigiteataja.ee/en/eli/530102013003/consolide#>, accessed on 11th May 2019..
17. Available at: <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/508042019008/consolide>, accessed 11th of May 2019.
18. Aebi, M. F., & Tiago, M. M. (2018). SPACE I - 2018 – Council of Europe Annual Penal Statistics, p. 28, 29, 42.
19. Available at: <http://www.prisonstudies.org/country/estonia>, accessed 9th of June 2019.

From 2000 to the present, the prison population has constantly decreased as was the case of persons in pre-trial detention, whether the evaluation was in terms of the:

- ▶ total number of pre-trial detainees; or
- ▶ percentage of the total prison population; or
- ▶ percentage of the prison population rate.

Also, during 2017, in Estonia, the total number of days spent in penal institutions by non-sentenced offenders was 146,933, with an average number of detainees in pre-trial detention of 402.6. Finally, the indicator of the average length of pre-trial imprisonment, in months (based on the total number of days spent in penal institutions) was 4.3 months.²⁰ This figure is, in the author's opinion, still high, as in other CoE member states, the duration of pre-trial imprisonment is significantly lower (e.g., in Romania and Ireland it is 2.0 months and in Austria 2.6 months).

2.2. Grounds for pre-trial detention

Pre-trial detention/Arrest

In accordance with **the Constitution (article § 20)**, **the Ee. CPC contains express provisions on the cases and reasons for which a person can be deprived** of his/her liberty. According to the law, **when deciding on a preventive measure (including pre-trial detention), the choice of the judicial authorities shall be based on the following circumstances:**

- a) the probability of absconding from criminal proceedings or the execution of a court judgment;
- b) continuing to commit criminal offences;
- c) destruction, alteration or falsification of evidence;
- d) the amount of the punishment;
- e) the personality of the suspect²¹, accused²² or convicted offender²³;
- f) his/her state of health and marital status; and
- g) other circumstances relevant to the application of the preventive measures [Article § 127 (1) Ee. CPC].

Pre-trial detention/Arrest is a preventive measure which is applied with regard to a suspect, an accused or a convicted offender and which means deprivation of the liberty of the person on the basis of a court ruling. [article § 130 (1) Ee. CPC] The measure **can be decided in the following cases:**

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20. Aebi, M. F., & Tiago, M. M. (2018). SPACE I - 2018 – Council of Europe Annual Penal Statistics, p. 107.
 21. A suspect is a person who has been detained on suspicion of a criminal offence, or a person whom there is sufficient basis to suspect of the commission of a criminal offence and who is subject to a procedural act. [article § 33 (1) Est.CPC]
 22. The accused is a person with regard to whom a prosecutor's office has prepared a statement of charges in accordance with the legal provisions in force or a person against whom a statement of charges has been brought pursuant to expedited procedure or a person with whom an agreement has been entered into in settlement proceedings. [article § 35 (1) Est.CPC]
 23. The accused with regard to whom a judgment of conviction has entered into force is a convicted offender. [article § 35 (3) Est.CPC]

- a) the suspect/accused is likely to abscond from the criminal proceedings and taking into custody is inevitable;
- b) the suspect/accused is likely to continue to commit criminal offences and taking into custody is inevitable;
- c) an accused who has been prosecuted and is at large, if he/she has failed to appear when summoned by a court and may continue to abscond from the court proceeding;
- d) an accused is at large, in order to ensure the execution of imprisonment;
- e) a suspect is a member of the Defence Forces not situated in the territory of the Republic of Estonia, in order to bring him/her back to the Republic of Estonia;
- f) detention for up to five days (alternatively with a fine) of a person who failed to appear when summoned by the body conducting the proceedings. [Article § 130 (2)-(6), article § 138 (1) Ee. CPC].

Proportionality

(1) The Estonian Constitution does not contain an explicit **principle of proportionality**, otherwise well established by the ECtHR, but it has been developed by the Supreme Court in its case-law based on *article § 11 Ee. Constitution*, which provides: “Rights and freedoms may be restricted only in accordance with the Constitution. Such restrictions must be necessary in a democratic society and shall not distort the nature of the rights and freedoms restricted.”²⁴

(2) Some non-custodial measures are provided for in the *Ee. CPC*, the grounds and proportionality for choosing a certain preventive measure being provided by the law [article § 127 (1) *Ee. CPC*; see above, no.2.1]:

- a) prohibition on leaving the residence [article § 128 (1) *Ee. CPC*];
- b) the supervision of the commanders of his or her military unit on the basis of an order or ruling [article § 129 *Ee. CPC*];
- c) bail [article § 135 (1)-(2) *Ee. CPC*];
- d) electronic surveillance [article § 137¹ (1) *Ee. CPC*]; At the request of a suspect, accused or prosecutor, a preliminary investigating judge or court, with the consent of the person held in custody, may commute being held in custody to the obligation to submit to electronic surveillance. The time of electronic surveillance shall not be considered to be custody pending trial or detention and it is not included in the term of the punishment. Electronic surveillance is applied by a court ruling [article § 137¹ (1), (4) *Ee. CPC*];
- e) release from custody [Article § 137² (1) *Ee. CPC*].

24. C. Morgenstern, *Pre-trial Detention in the European Union, An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU, Chapter 8 Estonia*, A.M. van Kalmthout, M.M. Knapen, C. Morgenstern (eds.), WLP 2009, p. 290.

2.3. Term of pre-trial detention, reasons and procedure for extension or renewal of pre-trial detention

Term of pre-trial detention

(1) The time limits for pre-trial detention/arrest are set out in *article § 131¹ Ee. CPC*:

a) **in pre-trial proceedings** [*para.(1)*]

- ▶ a person suspected/accused of a criminal offence in the first degree may not be held in custody *for more than six months*;
- ▶ a person suspected/accused of a criminal offence in the second degree may not be held *for more than four months*;
- ▶ a suspect/accused *who is a minor* may not be held in custody in pre-trial proceedings *for more than two months*.

b) **in a particularly complex case or due to the extent of a criminal matter or in exceptional cases arising from international cooperation in criminal proceedings**, a preliminary investigating judge *may extend the time limit for holding a person in custody as specified above (with no mandatory time limit, just like all the other cases during the pre-trial proceedings), at the request of the Prosecutor General* [*para.(2)*];

c) no legal provisions set out a time limit **for custody in the trial phase**.

(2) The **procedure for taking a person into custody is** set out in *article § 131¹ (4) Ee. CPC*:

- a) upon taking a person into custody, a preliminary investigating judge shall issue an authorisation to hold the suspect or the accused in custody *for up to two months*.
- b) the preliminary investigating judge may extend the specified time limit based on a reasoned request of the prosecutor's office *by up to two months at a time*, taking into consideration the restrictions provided in paragraphs a and b above.

Reasons and procedure for extension or renewal of pre-trial detention.

(1) In the **pre-trial proceedings**, upon the completion of this phase, when preparing the statement of charges and sending the statement of charges to court, if the prosecutor considers it necessary to continue the application of the preventive measure, the prosecutor's office shall perform the acts specified by the law no later than 15 days before the end of the term provided in the law [*See above, no. 3.1. a.), b.)*] [*Article § 226 (6) Ee. CPC*].

(2) During the securing of the **criminal proceedings** stage, the prosecutor's office, a person held in custody or his/her counsel may file an appeal pursuant to the procedure set out in *Chapter 15 Ee.CPC* [*Proceedings for adjudication of appeals against court rulings*] against a court ruling according to which custody was imposed or refused, and regarding the extension of the term of custody or refusal to extend the term of custody [*article § 136 Ee. CPC*].

(3) In the **court hearing of a criminal matter**, by making a ruling, the court has the right to choose, a preventive measure or alter or annul the previously chosen preventive measures. If the accused is held in custody in the proceedings conducted by a county court, the court

shall verify the reasons for custody on its own initiative *at least once within six months* and prepare a written ruling on it [article § 275 (1)-(2) Ee. CPC].

(4) **Appeals** shall be filed (within ten days from the date on which the person became or should have become aware of the contested court ruling), among others, against the court rulings on:

- ▶ taking a person into custody;
- ▶ refusing to take a person into custody;
- ▶ extension of the term for holding a person in custody;
- ▶ refusal to extend the term for holding a person in custody and provisional custody
 - with a circuit court through the county court which made the contested court ruling, if the contested court ruling was made by a county court;
 - with the Supreme Court, if the contested court ruling was made by a circuit court [Articles § 385 5), 387 (2) Ee. CPC].

(5) In the *Sulaoja v. Estonia* and *Pihlak v. Estonia* cases²⁵, the ECtHR found that the grounds for detaining the applicants – a brief standard formula justifying the detention on the ground of the applicants’ previous convictions – were not sufficient throughout the period of detention. The Court also found that the authorities had not considered any alternative means of ensuring the applicants’ appearance at trial and had not displayed “special diligence” in the conduct of the proceedings.

The problems identified in the *Sulaoja v. Estonia* and *Pihlak v. Estonia* cases were resolved by adopting general measures in accordance with the Estonian Code of Criminal Procedure (which entered into force mainly in 2004 and 2005), according to which, in the absence of exceptional reasons, a person may not be kept in pre-trial detention for more than six months. After the initial arrest warrant, a detainee may, within two months, ask the preliminary investigating judge or a court to verify the reasons for the detention. A new request may be submitted two months after the previous one. The preliminary investigating judge must decide on such requests within five days of receipt.

If the term of the pre-trial detention has been extended for more than six months, the preliminary investigating judge must verify the reasons for the detention at least once a month regardless of whether this has been requested.²⁶

25. ECtHR, *Sulaoja v. Estonia*, application no. 55939/00, 15.02.2005, final on 15.05.2005; ECtHR, *Pihlak v. Estonia*, application no. 73270/01, 21.06.2005, final on 21.09.2005. These cases concern the unmotivated extension of the applicants’ detention on remand which in the *Sulaoja* case lasted for a year and a half and in the *Pihlak* case for two years and 22 days, amounting in violations of Article 5 (3).

See, also, ECtHR, *Malkov v. Estonia*, application no. 31407/07, 04.02.2010, final on 04.05.2010, dealing with the excessive length of the applicant’s detention on remand (more than four years and nine months), thus, amounting in a violation of Article 5 (3).

Moreover, in the *Sulaoja v. Estonia* case, the Supreme Court failed to promptly examine the applicant’s request for release; it took nearly three months to give a decision, amounting in a violation of Article 5 (4).

26. See, Resolution CM/ResDH(2007)33 on 20 April 2007 at the 992nd meeting of the Ministers’ Deputies, on the Execution of the judgments of the European Court of Human Rights *Sulaoja against Estonia*, *Pihlak against Estonia*. Supervision of the execution of the European Court’s judgments.

2.4. Rules applicable to the change of charges during pre-trial detention

If the degree of a criminal offence of which the person held in custody is suspected or accused is changed during the term of the custody, the relevant legal provisions [see above, no. 3.1. a.), b.)] apply according to the new legal assessment of the criminal offence as of the time when the basis for suspecting or accusing the person according to the new degree of criminal offence becomes evident. [article § 131¹ (5) Ee. CPC]

2.5. Compensatory remedies in the event of unlawful pre-trial detention

(1) As a matter of principle, article § 15 Ee. Constitution provides that “Everyone whose rights and freedoms have been violated has the right of recourse to the courts.”

In the specific case regarding the right to liberty and security of person, article § 25 of **the Constitution** provides that “Everyone is entitled to compensation for intangible as well as tangible harm that he or she has suffered because of the unlawful actions of any person.”

(2) In the cases of *Harkmann v. Estonia* and *Bergmann v. Estonia* ²⁷, the ECtHR found that the periods within which the applicants were brought before a judge after their arrest were incompatible with the requirement of “promptness” under Article 5 (3) of the Convention, amounting to a violation of Article 5 (3). In *Harkmann v. Estonia*, the European Court concluded that a claim for compensation made by the applicant under any of the relevant provisions of the Compensation for Damage Caused by State to Person by Unjust Deprivation of Liberty Act (The Compensation Act) or the State Liability Act would not have had any reasonable prospect of success. The Court also pointed out that Estonian law did not provide for a distinct right to compensation for detention in violation of Article 5 of the Convention, resulting in a violation of Article 5 (5) of the Convention.

(3) The problems identified in these two cases were resolved by adopting general measures, following **amendments to the State Liability Act of 2006**, which provided for a right to compensation for unlawful activities of a public authority if the ECtHR found a violation. As observed below, persons detained unlawfully may receive compensation based on this law or in accordance with the provisions of the **Compensation for Damage Caused by State to Person by Unjust Deprivation of Liberty Act (The Compensation Act)**²⁸.

The State Liability Act²⁹ provides that a person may claim compensation for damage caused by acts or omissions of a public authority if the ECtHR has satisfied the person’s individual petition due to a violation of the ECHR or any of its protocols by the relevant public authority, the person’s rights were violated to a significant extent and the person has no other means to restore his or her rights. Compensation for damage may also be claimed by a person who has filed an individual petition with the ECtHR in a similar matter and on the same legal basis or who has the right to file such a petition in a similar matter and on the same legal basis [article § 7 (2’)].

27. ECtHR, *Harkmann v. Estonia*, application no. 2192/03, 11.07.2006, final on 11.10.2006; ECtHR, *Bergmann v. Estonia*, application no. 38241/04, 29.05.2008, final on 29.08.2008.

28. Replies of the Republic of Estonia to the list of issues prior to the submission of the fifth periodic report on implementation of the International Convention Against Torture, available at: https://vm.ee/sites/default/files/content-editors/CAT_Replies_of_Estonia.pdf, accessed 11th of May 2019.

29. Available at: <https://www.riigiteataja.ee/en/eli/515112013007/consolide>, accessed 12th of June 2019.

The Compensation for Damage Caused by the State to a Person by Unjust Deprivation of Liberty Act³⁰ provides for the right to receive compensation. Pursuant to the procedure provided for in the Act, a person shall be compensated for damage caused by an unjust deprivation of liberty if, among others:

- ▶ persons who were held in custody with the permission of a court and criminal proceedings were terminated at the stage of pre-trial investigation or in a preliminary hearing or persons with regard to whom a judgment of acquittal has entered into force³¹;
- ▶ persons who were detained on suspicion of committing a criminal offence or released when the suspicion ceased to exist;
- ▶ persons who were held in prison and whose conviction has been quashed and criminal proceedings were terminated and persons with regard to whom a judgment of acquittal has been made;
- ▶ persons whose period of imprisonment has exceeded the term of the punishment which was imposed on the person;
- ▶ persons who have served detention provided that the judgment ordering detention has been annulled;
- ▶ persons who were unjustly deprived of liberty by a decision of an official authorised to deprive liberty or without conducting disciplinary proceedings, misdemeanour proceedings or criminal proceedings if such proceedings were compulsory.

The state shall compensate the damage caused by an unjust deprivation of liberty to persons specified above, regardless of the guilt of an official.

30. Available at: <https://www.riigiteataja.ee/en/eli/530102013021/consolide>, accessed 11th of May 2019.

31. Judgment of Constitutional Review Chamber of Supreme Court of 02.06.2011 declares subsection 1 (1) of the Compensation for Damage Caused by State to Person by Unjust Deprivation of Liberty Act to be in conflict with the Constitution in the part where it precludes compensation for damage if criminal proceedings have been terminated on the bases of clause 199 (1) 2) of the Ee.CPC during the court hearing.

III. Georgia

3.1. Legal framework

3.1.1. Legal framework

The relevant legal provisions are contained in the:

- ▶ **Constitution of Georgia** (*Ge. Constitution*)³² - the principles concerning human liberty and the right to liberty and security of the person (article 13), procedural rights, including access to court (article 31);
- ▶ **Code of Criminal Procedure of Georgia** (*Ge. CPC*)³³ - the principles (article 6 - Inadmissibility of any unlawful restriction of a person's constitutional rights and liberties, article 8 - Fair trial and expediency of justice) and the general framework (Section V. Initiating Criminal Prosecution, Selecting Measures of Restraint, Plea Bargaining and Chapter XX - Initial Appearance of the Accused in Court; Measures of Restraint).

3.1.2. Statistics

According to the SPACE I Statistics (2018), a population of 3,729,633, Georgia had a total number of inmates of 9,407 (of whom 8,016 were sentenced prisoners and 1391 were untried detainees, amounting to 14.8 % of the prison population), resulting in a prison population rate of 252.2 (in 2008 the prison population rate was 445.2).³⁴

According to the **World Prison Brief statistics**³⁵, **as of 30 April 2019**, the prison population in Georgia was 9,882 inmates, with a prison population rate of 265, of which 1992 were pre-trial detainees (20.2% of the total prison population), amounting to a pre-trial population rate of 53 (per 100,000 of the national population).

In comparison, in 2000, the total prison population was 8,349, of whom 2,511, (30.1%, were pre-trial detainees), amounting to a pre-trial population rate of 57 (per 100,000 of the national population).

In 2010 the total prison population (including pre-trial detainees) was 23,684, of whom 2745, (11.6%, were pre-trial detainees), amounting to a pre-trial population rate of 61 (per 100,000 of national population).

32. Available at: <https://matsne.gov.ge/en/document/view/30346?publication=35>, accessed 18th of May 2019.

33. Available at: <https://matsne.gov.ge/en/document/view/90034?publication=103>; <https://matsne.gov.ge/en/document/download/90034/103/en/pdf>, accessed 18th of May 2019.

34. Aebi, M. F., & Tiago, M. M. (2018). SPACE I - 2018 – Council of Europe Annual Penal Statistics, p. 28, 29, 42.

35. Available at: <http://www.prisonstudies.org/country/georgia>, accessed 9th of June 2019.

The current prison population is comparable to that in 2000, but it has constantly decreased since 2010, when it was at its peak in terms of the total prison population.

In any case, according to the statistics, Georgia has the lowest pre-trial detention rate in the region, as reflected in the 2017 Annual Report of the Council of Europe's Anti-Torture Committee. Georgia registered better results than most European states, but the report shows that, on average, remand prisoners amount to one in every four inmates held in European penal institutions. The report also showed that the prison administrations with the highest proportion of remand prisoners are Albania (49.2 %), the Netherlands (43.4 %), Moldova (41.8 %) and Switzerland (39.6 %). The prison administrations with the lowest proportion of remand prisoners are Romania (8.4 %), Bulgaria (8.6 %), the Czech Republic (9.4 %) and Bosnia and Herzegovina (9.9 %).³⁶

No statistics were communicated by Georgia (*as it is the case with Armenia and Germany*) regarding the total number of days spent in penal institutions by non-sentenced offenders, the average number of detainees in pre-trial detention or the average length of pre-trial imprisonment, in months (based on the total number of days spent in penal institutions).

3.2. Grounds for pre-trial detention

3.2.1. Pre-trial detention/Remand detention

The Georgian legislation contains **specific provisions** stating that a measure of restraint shall be applied to:

- a) ensure that the accused appears in court,
- b) prevent his/her further criminal activities, and
- c) ensure the execution of the judgement [*Article 198 (1) Ge. CPC*].

In other words, the grounds for applying a measure of restraint shall be the **reasonable assumption** that the accused will flee or will not appear in court, will destroy evidence, or will commit a new crime [*Article 198 (2) Ge. CPC*].

When deciding to apply a measure of restraint and its specific type, the court shall take into consideration the personality, occupation, age, health status, marital and material status of the accused, restitution made by the accused for damaged property, violation of any of the previously applied measures of restraint, and other circumstances [*Article 198 (5) Ge. CPC*].

Imprisonment as a measure of restraint shall be imposed on the accused when there exists a risk that he/she will abscond, continue criminal activities, exert pressure on witnesses, destroy evidence, or there is a risk of non-enforcement of the judgment [*Article 38 (12) Ge. CPC*].

Remand detention/Pre-trial detention is considered as a measure of restraint which shall be **applied only if it is the only means to prevent the accused from:**

- a) hiding;
- b) interfering with the rendering of justice;
- c) interfering with the collection of evidence;
- d) committing a new crime [*Article 205 (1) Ge. CPC*].

36. Available at: <http://agenda.ge/en/news/2017/752>, accessed 14th of June 2019.

There is an obvious change in terms of applying the preventive measures, in the sense that, although the law does not provide many real alternatives to pre-trial detention, non-custodial restraint measures are, nevertheless, increasingly used, averaging from approximately 51% in 2001 to approximately 67% in 2017 from the total preventive measures (the rest amounting to pre-trial detention).

In 2015, the Parliamentary Assembly of the Council of Europe (PACE) adopted a resolution criticizing Georgia, along with Turkey and Russia, for their “abuse of pretrial detention”, stating, among others, that such countries have adopted legal reforms accompanied by practical measures which have led to a clear reduction in the number of pretrial detainees and considerable improvements in the treatment of the majority of detainees, even though abuses of pretrial detention, as mentioned above, continue to occur.³⁷

3.2.2. Proportionality

(1) In accordance with the ECtHR case-law, the Georgian legislation contains an explicit paragraph relating to the **principle of proportionality**: Remand detention or any other measure of restraint may not be applied against the accused if the purpose set out in the law can be achieved by another less severe measure of restraint [*Article 198 (1) Ge. CPC*].

This principle is a consequence of the principles contained in the *Ge. Constitution*, which state that human liberty shall be protected, and the deprivation or other restrictions of liberty shall only be permitted on the basis of a court decision [*articles 6 (3), 18 (1)-(2)*] and in the *Ge. CPC*, according to which preference shall always be given to **the most lenient form** of restriction of the rights and liberties [*article 6 (3)*].

(2) In order to give substance to the provision that according to which preference shall always be given to the most lenient form of restriction of rights and liberties, the following non-custodial measures are provided for in the *Ge. CPC*:

- a) bail;
- b) an agreement not to leave home and to behave properly (only for criminal offences punishable by more than one year’s imprisonment);
- c) personal surety;
- d) supervision by the command of the behaviour of a military service member [*Articles 199 (1), 201, 202 Ge. CPC*].

The progress regarding pre-trial detentions is reflected in the following statistical information.³⁸ The national courts often apply alternative non-custodial restraint measures.

37. Parliamentary Assembly of Council of Europe (PACE), Resolution 2077 (2015) - Abuse of pretrial detention in States Parties to the European Convention on Human Rights, *adopted by the Assembly on 1 October 2015 (34th Sitting)*, available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=22206&lang=en>, accessed 14th of June 2019.

38. Secretariat of the Committee of Ministers, DH-DD(2017)1184, 1302nd meeting (December 2017) (DH) Item reference: Action report (13/10/2017) Communication from Georgia concerning the case of *Giorgi Nikolaishvili v. Georgia* application no. 37048/04, 13.01.2009, final on 13.04.2009, 18/10/2017, available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=090000168075f507, accessed 12th of June 2019.

Year	Percentage of cases in which detention on remand was used
2011	49.3%
2012	41.9%
2013	26.8%
2014	32%
2015	29.6%
2016	29.1%
2017 (first seven months)	32.6%

3.3. Term of pre-trial detention, reasons and procedure for extension or renewal of pre-trial detention

3.3.1. Term of pre-trial detention

(1) The national standard in this field, as prescribed at the constitutional level, is that the human liberty shall be protected [Article 13 (1) Ge. Constitution].

The maximum duration of remand detention of the accused is *nine months*³⁹. After that period expires, the accused must be released from remand detention. [Article 205 (2) Ge. CPC]. The term of the remand detention of the accused before a preliminary hearing shall not exceed 60 days after he/she has been arrested. After the expiry of that term, the accused shall be released from detention, except when

- a) a party has filed a reasoned motion with the court requesting the extension or reduction of the above period by a reasonable period; and
- b) the court has ruled accordingly [Article 205 (3) Ge. CPC].

(2) In *Merabishvili v. Georgia* case⁴⁰, the ECtHR found, among others, a violation of Article 5 (3) suffered by the applicant during his pre-trial detention (the applicant was arrested and placed in pre-trial detention on 21 May 2013, where he remained until he was convicted at first instance on 17 February 2014 and sentenced to five years' imprisonment). The reason for the violation of Article 5 (3) was that although the Kutaisi City Court gave relevant and sufficient reasons when the applicant was first placed in pre-trial detention, when he applied for release on 25 September 2013 and 7 October 2013, it did not give sufficient reasons for his continued detention.

(3) In respect of the violation of Article 5 (3), the authorities reported that amendments to the Code of Criminal Procedure were adopted by Parliament on 8 July 2015 [see above, article 205 (3) Ge. CPC], measures welcomed by the CoE⁴¹. This amendment to the Code of Criminal Procedure provided for an automatic review of pre-trial detention at intervals of

39. The legal provision is identical, in substance, with the constitutional provisions, according to which, the detention period for an accused person shall not exceed 9 months. [article 13 (5) Ge. Constitution]

40. ECtHR, *Merabishvili v. Georgia*, application no. 72508/13, 28.11.2017, final on 28.11.2017.

41. See, Ministers' Deputies, 1331st meeting, 4-6 December 2018 (DH), Decision CM/Del/Dec(2018)1331/H46-10, *Merabishvili v. Georgia* (Application No. 72508/13). Supervision of the execution of the European Court's judgments, available at: [https://hudoc.exec.coe.int/eng#%7B%22EXEIdentifier%22:%7B%22CM/Del/Dec\(2018\)1331/H46-10E%22%7D%7D](https://hudoc.exec.coe.int/eng#%7B%22EXEIdentifier%22:%7B%22CM/Del/Dec(2018)1331/H46-10E%22%7D%7D), accessed 12th of June 2019.

at least every two months (the maximum period for which a person can be detained pre-trial is nine months) At each review, the judge must:

- (a) determine whether there are compelling reasons to detain the accused;
- (b) give a reasoned ruling specifying the evidence upon which the order is based; and
- (c) order release or a less coercive measure of control if there are no such compelling reasons.

According to the Constitutional Court of Georgia, the rule of thumb is that **the total length of pre-trial detention should not exceed 9 months.**⁴²

3.3.2. Reasons and procedure for extension or renewal of pre-trial detention

(1) According to the constitutional provisions, deprivation or other restrictions of liberty shall only be permitted if **based on a court decision** [Article 13 (2) Ge. Constitution].

A measure of restraint shall be applied, **changed and annulled according to the jurisdiction** provided for by the law, the rule being that a criminal case shall be heard by a district (city) court at first instance. The question regarding the ordering of a measure of restraint may also be reviewed at a **preliminary hearing and during the main hearing**, in the manner prescribed by the law [Article 206 (1), 20 (2) Ge. CPC].

A party may file a motion with a magistrate judge requesting a change to or annulment of a measure of restraint imposed on the accused as follows:

- ▶ Within 24 hours after a motion is filed, the judge shall, without an oral hearing, decide the admissibility of the motion;
- ▶ In particular, the judge shall decide what new, essential issues have been raised that may indicate the possibility of changing or annulling the measure of restraint applied;
- ▶ The judge shall rule on the admissibility of a motion;
- ▶ If a motion is found to be admissible, the court shall hold an oral hearing within the time limits and in accordance with the standards established by the Code [Article 206 (8) Ge. CPC].

At the **preliminary hearing the judge** shall, among others, review motions for the application, change or annulment of a **measure of restraint** in accordance with the rules and standards established by the law [see above, article 206 (8) Ge. CPC]. If an accused person has been sentenced to remand detention, the judge shall, on his/her own initiative, review, **at the first preliminary hearing**, the need to maintain the remand detention, regardless of whether the party has filed a motion for change or annulment of the remand detention.

42. The Constitutional Court of Georgia in the case of *Citizen of Georgia Giorgi Ugulava v. The Parliament of Georgia*, 15th of September 2015, case no. 3/2/646, available at: <http://www.constcourt.ge/en/legal-acts/judgments/citizen-of-georgia-giorgi-ugulava-v-the-parliament-of-georgia1.page>, accessed 29th of August 2019.

The court shall, then on its own initiative, review, *at least once every two months*, the need to maintain the remand detention. [Article 219 (4) b) Ge. CPC]

During the main hearing, if the accused has been remanded in custody, before delivering the judgment, periodically, *at least once every two months*, the presiding judge shall, on his/her own initiative, review the need to continue to hold the accused in custody [Article 230¹ (2) Ge. CPC].

After verifying the reasonableness of the motion and the formal (procedural) and factual grounds for applying a measure of restraint, the judge shall give a reasoned ruling. When **reviewing a motion** for the application of a measure of restraint, the judge may, by providing relevant reasons:

- a) reject a measure of restraint indicated in the motion;
- b) select another, less severe measure of restraint; or
- c) not use any measure of restraint [Article 206 (5) Ge. CPC].

A ruling on the application, **change or annulment** of a measure of restraint may, within 48 hours after it has been made, be **appealed only once** to the investigative board of the court of appeals by:

- a) the prosecutor; or
- b) the accused and/or his/her defense lawyer.

The appeal (which shall not suspend the execution of the ruling subject to the appeal) shall be filed with the court delivering the ruling and must indicate the essential issues and evidence that were not examined or assessed by the court of the first instance, which could have affected the lawfulness of applying the measure of restraint against the person concerned [Article 207 (1)-(2) Ge. CPC].

The judge of an investigative board of the court of appeals, after notifying the parties, shall review an appeal sitting alone, *not later than 72 hours* after it has been filed, in the manner prescribed by law [see above, article 206 (3) Ge. CPC]. The judge shall, without an oral hearing, **decide the admissibility** of an appeal against a measure of restraint and shall give a reasoned ruling on the admissibility of the appeal [Article 207 (3)-(4) Ge. CPC].

If an appeal is found to be admissible, the judge shall hold an **oral hearing** within the period and in the manner established by the law. A ruling given in accordance with this article **shall be final** and it may not be appealed [Article 207 (5), (7) Ge. CPC].

(2) In *Patsuria v. Georgia* case⁴³ the Court held that there had been a violation of the applicant's right to liberty and security due to his being detained on remand on grounds which cannot be regarded as "relevant" or "sufficient". The European Court held that, because they relied essentially on the seriousness of the charges against the applicant, the

43. ECtHR, *Patsuria v. Georgia* case, application no. 30779/04, 06.11.2007, final on 06.02.2008.

See, also, *Lasha Tchitchinadze v. Georgia*, application no. 35195/05, 07.06.2016, final on 07.06.2016, which sanctioned the failure of domestic authorities to address the specific facts of the case and to consider alternative non-custodial pre-trial measures using stereotyped formulas, paraphrasing the terms of the Ge.CPC - violation of Article 5 (3) and *Mindadze and Nemsitsveridze v. Georgia*, application no. 21571/05, 01.06.2017, final on 01.09.2017.

Georgian courts had failed to address the specific circumstances of his case or to consider alternative pre-trial measures. The Court also stressed that the fact that the last decision extending the applicant's detention on remand was a standard template text with pre-printed reasoning was particularly worrying, amounting in a violation of Article 5 (3).

(3) As the Georgian government took some efficient general measures, the monitoring of this case was closed: **As a result of the** judgments of the ECtHR, in a judgment of 16 December 2003, the Constitutional Court declared article 406 §4 (*former*) *Ge. CPC* unconstitutional and incompatible with Article 5 (1) ECHR. Subsequently, a new *Ge. CPC* was adopted, which came into force on 1 October 2010, and which, among others, definitively repealed the provision at issue. Thus, there are no longer two periods of detention on remand.⁴⁴

3.4. Rules applicable to the change of charges during pre-trial detention

The *Ge. CPC* contains only some general provisions regarding the possibility to change the charges during the criminal process.

In this sense, the prosecution may, with the consent of a superior prosecutor, withdraw charges or part of the charges, or replace the existing charges with more lenient charges, in which case the court shall rule on whether to terminate the criminal prosecution with respect to the withdrawn charges or part of the charges. [*Article 250 (1) Ge. CPC*]

There are, however, no specific provisions on pre-trial detention in the event of an amendment to charges. The general rules on pre-trial detention shall apply, as they are sufficiently flexible to allow the reassessment of the pre-trial detention based on the new charges.

3.5. Compensatory remedies in the event of unlawful pre-trial detention

The Constitution of Georgia states that **any violation of the human liberty principle** shall be punished by law. A person whose liberty has been unlawfully restricted shall have the **right to compensation** [*Article 13 (6) Ge. Constitution*].

The accused has the right, by way of civil/administrative proceedings, to request and obtain compensation for the damage caused as a result of the unlawful procedural action [*Article 38 (11) Ge. CPC*].

Regardless of whether the arrested person is convicted, he/she shall be fully reimbursed from the state budget for the damage suffered as a result of an unlawful and unjustified arrest [*Article 176 (5) Ge. CPC*].

44. See, Resolution CM/ResDH(2011)105, Adopted by the Committee of Ministers on 14 September 2011 at the 1120th Meeting of the Ministers' Deputies, on the Execution of the judgments of the European Court of Human Rights *Patsuria, Gigolashvili, Ramishvili and Kokhreidze against Georgia*. Supervision of the execution of the European Court's judgments, available at: https://hudoc.exec.coe.int/eng#%7B%22EXE_CIdentifier%22:%5B%22001-106884%22%5D%7D}, accessed 12th of June 2019.

Such a provision is similar to the one in Romania, as the acquittal, by itself, cannot constitute a basis for establishing the unlawfulness of the deprivation of liberty. No specific provisions are in place in the case of Germany.

Article 276 (e) *Ge. CPC* also provides that the decision on an acquittal shall indicate the right of the acquitted person to be reimbursed for any damage suffered. According to art. 92 *Ge. CPC*, “Everyone has a right to request and receive compensation for damage suffered due to illegal procedural actions and illegal decisions, by means of civil/administrative proceedings. The person may also request compensation for damage, via civil claim procedure.”⁴⁵

As regards the rules of civil litigation, according to art. 1005 § 3 *Ge.CC*, rehabilitated person shall be compensated by the State regardless of:

- ▶ the fault of the officials of investigative or prosecution bodies and court for unlawful conviction;
- ▶ unlawful prosecution;
- ▶ unlawful use of detention as the restraint measure; and
- ▶ the improper imposition of administrative detention or correctional labor in the form of the administrative penalty.

According to art. 1008 *Ge. Civil Code*, the statute of limitation for claiming compensation regarding the damage sustained as a result of the delinquency is three years from the moment when the victim has been informed about the damage or in respect of the person responsible for the damage. The same approach also exists in Estonia⁴⁶.

45. See, the updated action report (15/02/2016). Communication from Georgia concerning the case of *Jgarkava against Georgia* (Application No. 7932/03) adopted by the Committee of Ministers on 8-10 March 2016 at the 1250th Meeting of the Ministers’ Deputies, available at: [https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%5B%22DH-DD\(2016\)195E%22%5D%7D](https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%5B%22DH-DD(2016)195E%22%5D%7D)], accessed 29th of August 2019.

46. See, the updated action report (15/02/2016). Communication from Georgia concerning the case of *Jgarkava against Georgia* (Application No. 7932/03).

IV. Germany

4.1. Legal framework. Statistics

Legal framework

The relevant legal provisions are contained in the:

- ▶ **Constitution of the Federal Republic of Germany** (*De. Constitution*)⁴⁷ – article 2 [Personal freedoms], article 19 [Restriction of basic rights – Legal remedies], article 103 [Fair trial], article 104 [Deprivation of liberty];
- ▶ **The German Code of Criminal Procedure - StPO** (*De. CPC*)⁴⁸ – Chapter IX - Arrest and provisional apprehension (art. 112 - 130) and Chapter IXa - Further measures to secure criminal prosecution and execution of sentence (art. 131 – 132).

Statistics

According to the **SPACE I Statistics** (2018), with a population of 82,850,000, Germany had a total number of inmates of 64,193 (of whom, 50,328 were sentenced prisoners and 13,865 untried detainees, amounting to 21.6% of the prison population), resulting in a prison population rate of 77.5 (in 2008 the prison population rate was 90.9).⁴⁹

According to the **World Prison Brief statistics**⁵⁰, **on 30 November 2018**, the prison population in Germany was 63,643, with a prison population rate of 77 (in 2000: the total number of inmates was 70,252, with a prison population rate of 85), of whom 13,956, meaning 21.9%, are pre-trial detainees, amounting to a pre-trial population rate (per 100,000 of national population) of 17.

In comparison, in 2000, the total prison population (including pre-trial detainees) was 70,252, of whom 18,201, meaning 22.9%, were pre-trial detainees, amounting to a pre-trial population rate of 22 (per 100,000 of national population).

From 2000 to the present time, the prison population has slightly decreased (approximately 10%), as was the case of persons in pre-trial detention (except that the decrease was approximately 23%).

47. Available at: <https://www.btg-bestellservice.de/pdf/80201000.pdf>, accessed 14th of June 2019.

48. Available at: https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html, accessed 14th of June 2019.

49. Aebi, M. F., & Tiago, M. M. (2018). SPACE I - 2018 – Council of Europe Annual Penal Statistics, p. 28, 29, 30, 42.

50. Available at: <http://www.prisonstudies.org/country/germany>, accessed 9th of June 2019.

No statistics were communicated by Germany (as is the case with Armenia and Georgia) regarding the total number of days spent in penal institutions by non-sentenced offenders, the average number of detainees in pre-trial detention or the average length of pre-trial imprisonment, in months (based on the total number of days spent penal institutions).

4.2. Grounds for pre-trial detention

Preventive measures

Concerning the preventive measures (namely, arrest and pre-trial detention), *articles 2 (2) and 11 (2) De. Constitution* provide for the following principles: the freedom of the person and the freedom of movement; Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law.

Regarding the *deprivation of liberty*, the Constitution clearly states that the liberty of the person may be restricted only pursuant to a formal law and only in compliance with the procedures prescribed therein [*Article 104 (1) De. Constitution*].

Pre-trial detention/Remand detention

(1) *Untersuchungshaft* (literally: “investigatory detention”) in German law is the deprivation of liberty of a person who has not yet been tried and convicted, and the legal basis for which is the *De. Constitution* and the *De. CPC*.⁵¹

More detailed provisions in relation to pre-trial detention are set out in sections 112-130 *De. CPC*. Both the provisions of the *De. Constitution* and those of the *De. CPC*, however, required additional interpretation by the Federal Constitutional Court (FCC), whose jurisprudence has always had a huge impact on the legal and practical situation of pre-trial detention in Germany⁵².

(2) Remand detention may be ordered against the accused in respect of whom there are strong suspicions that he has committed a criminal offence and if there is a ground for his arrest. **A ground for arrest** shall exist if, based on certain facts:

- a) it is established that the accused has fled or is in hiding;
- b) considering the circumstances of the individual case, there is a risk that the accused will evade the criminal proceedings (risk of flight); or
- c) the accused’s conduct gives rise to a strong suspicion that he will: destroy, alter, remove, suppress, or falsify evidence; improperly influence the co-accused, witnesses, or experts; or cause others to do so and therefore, the danger exists that it will be more difficult to establish the truth will be made more difficult (risk of tampering with evidence) [*Section 112 (1)-(2) De. CPC*].

51. C. Morgenstern, H. Kromrey, DETOUR – Towards Pre-trial Detention as Ultima Ratio, 1st National Report on Germany Greifswald, October 2016, p. 2, available at: <https://www.irks.at/detour/DE%201st%20National%20report%20031116.pdf>, accessed 14th of June 2019.

52. C. Morgenstern, H. Kromrey, DETOUR – Towards Pre-trial Detention as Ultima Ratio, 1st National Report, p. 6.

The *risk of absconding* is by far the common ground for ordering remand detention, accounting for 86% of all cases of pre-trial detention in 2014.⁵³ Such approach is still present, as it was stressed out that the risk of flight (by definition of the current jurisprudence being understood as a higher probability of the suspect staying away from the criminal procedure than of taking part in it.) is the ground for detention the most often applied by far.⁵⁴

In order to comply with the strict requirements of the German Constitution, monitored by the very influential Federal Constitutional Court, it is, however, still necessary for a court, even when dealing with crimes against life, to argue that the above-mentioned aims of pre-trial detention actually would be at risk unless the defendant is detained.⁵⁵ Thus, *Section 112 (3) De. CPC* which sets out some exceptions based on the gravity of the criminal offence (e.g., in case of severe terrorist offences, causing very severe bodily harm and all capital offences) is rarely used, as it is considered to be redundant.

It was stressed⁵⁶ that the provision is almost unanimously criticised by scholars for systematic reasons: If there is no risk for the proper conduct of the criminal proceedings, there will be no need to detain the accused. The mere seriousness of the offence itself does not impede the proceedings nor does it justify detention for preventive reasons. According to the FCC, the provision only meets the constitutional requirements when one of the other grounds justifying remand is at least plausible.

(3) **Further grounds for arrest** are provided in *Section 112a (1) De. CPC*, which covers the risk of repeating or continuing an offence (the offences are expressly provided in the text – e. g. sex offences or stalking, terrorist offence, a violent assault, aggravated theft, fraud, robbery or other serious economic crimes, arson or a serious drug offence), but it also provides further legal restrictions in order to allow remand arrest in such cases provided that there is an imminent risk of re-offending. In such cases, detention may not exceed one year.

(4) In the **case of less serious crimes**, restrictions apply in relation to the grounds for imposing remand detention:

If the offence is only punishable by up to six months' imprisonment, or by a fine up to one hundred and eighty daily units, remand detention may not be ordered on the ground of a risk of evidence being tampered with, but it can be imposed on the ground of a risk of flight in particular cases, if the accused [*Section 113 (1)-(2) De. CPC*]:

- ▶ has previously evaded the proceedings against him or has made preparations for flight;
- ▶ has no permanent domicile or place of residence within the territorial scope of this statute; or
- ▶ cannot establish his identity.

53. C. Morgenstern, H. Kromrey, DETOUR – Towards Pre-trial Detention as Ultima Ratio, 1st National Report, p. 8.

54. C. Morgenstern, assisted by E. Tanz, DETOUR – Towards Pre-trial Detention as Ultima Ratio, 2nd German National Report on Expert Interviews, November 2017, p. 22, 23, available at: <https://www.irks.at/detour/Uploads/Germany%202nd%20report%20Final%20Version.pdf>, accessed 30th of June 2019.

55. Federal Constitutional Court (FCC), 15 December 1965, official collection: BVerfGE 19, 342 (350), apud C. Morgenstern, H. Kromrey, DETOUR – Towards Pre-trial Detention as Ultima Ratio, p. 2.

56. C. Morgenstern, H. Kromrey, DETOUR – Towards Pre-trial Detention as Ultima Ratio, p. 11.

(5) Prior to the bringing criminal charges, the judge at the Local Court within whose district venue is vested, or where the accused is residing, shall issue the arrest warrant upon application of the public prosecutor's office or if a public prosecutor cannot be reached, or in urgent circumstances, *ex officio*.

The arrest warrant shall be issued by the court seized of the case and, if an appeal on law has been filed, by the court whose judgment is being contested. In urgent cases the presiding judge may also issue the arrest warrant [Section 125 (1)-(2) De. CPC].

Proportionality

(1) It is (at least theoretically) clear that detention should be ordered as a last resort, that means it must not be ordered unless it is absolutely necessary in accordance with the **principle of proportionality**.⁵⁷ In accordance with the ECtHR case-law, German law provides for the principle of proportionality when applying remand detention: Remand detention may not be ordered if it is disproportionate to the significance of the case or to the penalty or measure of reform and prevention likely to be imposed [Section 112 (1) De. CPC].

The principle of proportionality is further elaborated by leading decisions of the higher courts in the principle of expediency: The longer the duration of the remand of the individual, the more urgent the official investigations into the case become. At the same time, the requirements for the extension of detention become stricter. This is not expressly stated in the *De. CPC*, but is derived from several provisions such as Art. 5 (3), Art. 6 (1) ECHR or the rule of law embodied in Art. 20 (3) of the *De. Constitution*.

For this reason, if the use of a coercive measure is inappropriately long, the measure needs to be annulled, which accounts especially for pre-trial detention.⁵⁸

(2) **Alternatives** to pre-trial detention **play a comparatively minor role** in Germany. This is partly due to the systematic concept of supervision in the community: The judge always has to comply with the requirements for pre-trial detention and issue an arrest warrant. Only if these prerequisites are met, can s/he – and because of the **principle of proportionality**, in principle, must s/he- choose less restrictive means to secure the proceedings; that is, **release the suspect or accused under certain conditions** (suspend the arrest warrant, *Section 116 De. CPC*).⁵⁹

Unlike in other countries, German law does not provide for a range of different measures to secure the criminal proceedings, one of which is being detention. However, it is possible to use the arrest warrant as a means of securing the proceedings without actually detaining the suspect (or by releasing him later) according to *Section 116 De. CPC*, which states: "The judge shall suspend execution of an arrest warrant which is justified merely by the risk of

57. C. Morgenstern, *Pre-trial Detention in the European Union, An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU, Chapter 11 Germany*, A.M. van Kalmthout, M.M. Knapen, C. Morgenstern (eds.), WLP 2009, p. 420.

58. C. Morgenstern, H. Kromrey, *DETOUR – Towards Pre-trial Detention as Ultima Ratio*, 1st National Report, p. 7.

59. C. Morgenstern, assisted by E. Tanz, *DETOUR – Towards Pre-trial Detention as Ultima Ratio*, 2nd German National Report on Expert Interviews, p. 55.

flight if the expectation is sufficiently substantiated that the purpose of remand detention may also be achieved by less severe measures.”⁶⁰

The declining number of prisoners could also be due to an increased use of alternative measures. German judges cannot choose from a variety of different custodial and non-custodial pre-trial measures. When they consider that it is too risky to allow the suspect to remain at large, they need to issue an arrest warrant and later can decide to suspend its execution under certain conditions. There are no official statistics on the number of suspended arrest warrants in Germany. With all due caution it can be said that in Germany the execution of an arrest warrant is rarely suspended immediately. If it is suspended, this usually happens after some weeks.⁶¹

Based on *Sections 116 (1)-(2), 116a De. CPC*, the judge shall suspend execution of an arrest warrant which is justified merely by a risk of flight if the expectation is sufficiently substantiated that the purpose of remand detention may also be achieved by less severe measures such as:

- ▶ regular reporting;
- ▶ the obligation to stay within the place of residence or leaving it only with the permission of the judge;
- ▶ prohibition of contacting co-accused, witnesses, or experts; and
- ▶ bail.

The possibility of **bail** is disputed with regard to equality before the law and, in fact, is mostly applied to wealthy suspects. It has to be acknowledged, however, that this measure does not seem to be very popular in Germany, although no reliable data exists in this regard.⁶² **Bail is used rarely** in the practice of our interview partners, sometimes in economic offences/white-collar-crimes. In some courthouses it is not used either because there is simply no facility to pay the money.⁶³

Whilst **electronic monitoring** does not play a significant role in Germany, the possibility to substitute pre-trial detention by electronically monitored house arrest is currently under discussion – influenced also by the development in other European countries.⁶⁴

Because there is still much scepticism amongst scholars and practitioners with regard to this far-reaching measure (which also affects the suspect’s family), it is currently only used in the state of Hessen (since 2000 – first as a pilot project but subsequently in the whole German Federal State).⁶⁵

60. C. Morgenstern, *Pre-trial Detention in the European Union*, A.M. van Kalmthout, M.M. Knapen, C. Morgenstern (eds.), p. 420.

61. C. Morgenstern, H. Kromrey, DETOUR – Towards Pre-trial Detention as Ultima Ratio, p. 23.

62. C. Morgenstern, *Pre-trial Detention in the European Union*, A.M. van Kalmthout, M.M. Knapen, C. Morgenstern (eds.), p. 420.

63. C. Morgenstern, assisted by E. Tanz, DETOUR – Towards Pre-trial Detention as Ultima Ratio, 2nd German National Report on Expert Interviews, November 2017, p. 50.

64. C. Morgenstern, H. Kromrey, DETOUR – Towards Pre-trial Detention as Ultima Ratio, p. 41, 42.

65. C. Morgenstern, *Pre-trial Detention in the European Union*, A.M. van Kalmthout, M.M. Knapen, C. Morgenstern (eds.), p. 420.

4.3. Term of pre-trial detention, reasons and procedure for extension or renewal of pre-trial detention

Term of pre-trial detention

(1) Any person provisionally detained on suspicion of having committed a criminal offence shall be brought before a judge no later than the day following that of his arrest; the judge shall inform him of the reasons for the arrest, examine him and give him an opportunity to raise objections. The judge shall, without delay, either issue a written arrest warrant setting out the reasons therefor or order his release [Article 104 (2)-(3) De. Constitution].

(2) German law does not provide for an absolute limitation on the length of pre-trial detention, but as a matter of principle, remand detention must not exceed six months (the warrant of arrest shall be revoked upon the expiry of this period), but some exceptions apply. Remand detention for a single offence, which exceeds six months shall be executed only if the particular difficulty or the unusual extent of the investigation or some other important reason do not yet admit pronouncement of judgment and justify the continued remand detention. In such cases, the decision to extend remand detention can be taken by: (a) a judge or, (b) the Higher Regional Court/ the Federal Court of Justice. This review must be repeated at intervals of no more than *three months* [Sections 121 (1)-(2), (4), 122 (1), (4) De. CPC].

The lack of an absolute time-limit can be considered as problematic, as statistics show that at the time of their conviction, approximately a quarter of all remand detainees have been held in pre-trial detention for more than six months.⁶⁶

Moreover, it was said that sometimes, the prosecution does not use all allegations in their files to substantiate the application for an arrest warrant but holds back some to have a basis beyond “the single offence” to issue consecutive arrest warrants.⁶⁷

(3) Due to the strong support of the individual criminal procedural rights by the constitution and the jurisprudence of the FCC, the case-law of the ECtHR is perceived as being less important. Nevertheless, in several judgments in recent years, the ECtHR has ruled that Germany has breached the Convention because of the German law and practice with regard to pre-trial detention. The judgments related to the length of pre-trial detention and to the right to inspect files in order to ensure fairness in the review proceedings.⁶⁸

In three judgments against Germany (*Erdem v. Germany*, *Čevizović v. Germany*, *Batuzov v. Germany*) regarding the **excessive duration of the pre-trial detention**, the ECtHR did not consider that the excessive length of detention was justified by the complexity of the case or the duration of the investigation⁶⁹, or criticised a lack of **adequate promotion**

66. C. Morgenstern, H. Kromrey, DETOUR – Towards Pre-trial Detention as Ultima Ratio, 1st National Report, p. 13.

67. Fahl 2004, 202 et seq. on this matter, apud C. Morgenstern, H. Kromrey, DETOUR – Towards Pre-trial Detention as Ultima Ratio, 1st National Report, p. 13.

68. C. Morgenstern, H. Kromrey, DETOUR – Towards Pre-trial Detention as Ultima Ratio, 1st National Report, p. 44.

69. ECtHR, *Erdem v. Germany*, application no. 38321/97, 05.07.2001, final on 05.10.2001, § 45 et seq., with 5 years and 11 months of pre-trial detention preceding.

of the proceedings by the judiciary⁷⁰, thereby finding a violation of art. 5 (3) ECHR in each of the three cases. However, in more recent cases the ECtHR did not rule that the German proceedings (especially with terrorist backgrounds) to be an infringement of the convention and upheld the now more thoughtful approaches of the German law enforcement agencies and the reasoning of the courts given in their decision on the extension of the pre-trial detention.⁷¹ That is to say, the earlier ECtHR-jurisprudence tightened up the jurisprudence of the higher regional courts.⁷²

Also, in another case⁷³, the ECtHR held that there had been **no violation** of Art. 5 (3) ECHR, although the applicant had been held in pre-trial detention for more than five years and six months. The Court argued that the case involved a particularly complex investigation and trial concerning serious offences of international terrorism which caused the death of three victims and serious suffering to more than a hundred. In such exceptional circumstances, the Court concluded that the length of the applicant's detention can still be regarded as reasonable. There was accordingly no violation of Article 5 (3) ECHR.

However, exceptions already appeared regarding the tightening up of the jurisprudence of the courts. In a rather recent judgment - *Patalakh v. Germany*⁷⁴ the ECtHR held that the competent Higher Regional Court had failed to comply with the requirement arising from Article 5 (4) of the Convention to speedily conduct a detention review because almost four months had passed between the second motion for challenge being filed on 22 January 2015 and the decision ordering the continuation of detention being served on 15 May 2015. In this case (*considered to be specific and not representative for the judicial system by the German government*), the domestic courts assessed this question differently than the ECtHR, without the provisions of the *De. CPC* providing any concrete time limit. It thus amounts to an interpretative decision in a single case, where the requirements arising from the Convention were not sufficiently considered.

70. ECtHR, *Čevizović v. Germany*, application no. 49746/99, 29.10.2004, final on 29.07.2004, § 52 et seq., with 4 years and 9 months of pre-trial detention preceding. But, although (like in *Dzelili v. Germany* case) the Court found that “the competent court should have fixed a tighter hearing schedule in order to speed up the proceedings”, this violation did not amount to a structural problem, but rather an isolated one. See also, ECtHR, *Dzelili v. Germany*, application no. 65745/01, 10.11.2005, final on 10.11.2005, § 78 et seq., with 4 years and 8 months, ruling that the judicial authorities had failed to act with the necessary diligence in the conduct of proceedings.

See also, ECtHR, *El Khoury v. Germany*, application no. 8824/09, 09.07.2015, final on 09.10.2015, in which case the ECtHR came to the conclusion that the length of the detention on remand (three years and nine days) had violated the Applicant's Convention right to prompt judicial review, as the court of first instance failed to act with diligence when scheduling the hearings.

71. ECtHR, *Batuzov v. Germany*, application no. 17603/07, 22.05.2012, with almost 6 years of pre-trial detention preceding.

See also, ECtHR, *Ereren v. Germany*, application no. 67522/09, 06.11.2004, final on 06.02.2015, § 62, 65, with 5 years and 8 months of pre-trial detention preceding. In this case, having regard to the circumstances of the case, the Court was satisfied that the reduction of the sentence was measurable and had a decisive impact on the applicant's actual sentence. Accordingly, the Court considered that the domestic courts have acknowledged the breach of the Convention and awarded sufficient redress to the applicant. Consequently, the Court found that the applicant has ceased to be a victim within the meaning of Article 34 of the Convention.

72. C. Morgenstern, H. Kromrey, *DETOUR – Towards Pre-trial Detention as Ultima Ratio*, 1st National Report, p. 4.

73. ECtHR, *Chraidi v. Germany*, application no. 65655/01, 26.10.2006, final on 26.01.2007, § 46 et seq.,

74. ECtHR, *Patalakh v. Germany*, application no. 22692/15, 08.06.2018, final on 08.06.2018.

Reasons and procedure for extension or renewal of pre-trial detention

(1) The most frequently used is **the review** (*“Haftprüfung”*) that in principle can be lodged at any time by the defendant (some time restrictions apply when repeated). The review is decided upon by the detention judge.

The so-called **detention appeal** (*“Haftbeschwerde”*) is decided upon by the regional court. **An ex officio judicial review** of the imposition and prolongation of remand detention exists after six months.

These decisions by the high court may, in the long run, have contributed to change in the detention culture and to speed up the process.⁷⁵ If remand detention is continued, the accused shall be informed of the right of complaint as well as of other appellate remedies [Section 115 (4) De. CPC].

The national law provides for the review of detention and for the **complaint** against remand decision.

(2) The accused may apply at any time (but *no more than every two months*) for a **review of the decision to order** remand detention and to propose alternatives to detention⁷⁶: Where following an oral hearing at which remand detention has been maintained, the accused shall have a right to further oral hearing only if remand detention has continued for *at least three months* and at least two months of remand detention have elapsed since the last oral hearing [Section 118 (3) De. CPC].

(3) For the duration of his remand detention, the accused may, at any time, apply for a court hearing to be held as to whether the arrest warrant is to be **revoked** or its execution suspended. A complaint shall be inadmissible where an application has been made for a review of detention. The right to challenge the decision following the application shall remain unaffected [Section 117 (1)-(2) De. CPC].

The arrest warrant shall be revoked:

- ▶ as soon as the conditions for remand detention no longer exist; or
- ▶ if the continued remand detention is disproportionate to the importance of the case or to the anticipated penalty or measure of reform and prevention.

In particular, it shall be revoked if:

- ▶ the accused is acquitted; or
- ▶ if the opening of the main proceedings is refused; or
- ▶ if the proceedings are terminated other than provisionally [Section 118 (3) De. CPC].

(4) Decisions concerning arrest of the adjudicating courts prior to judgment shall be subject to **complaint** [Per a contrario, see Section 305 De. CPC].

75. C. Morgenstern, assisted by E. Tanz, DETOUR – Towards Pre-trial Detention as Ultima Ratio, 2nd German National Report, p. 94.

76. Criminal proceedings and defence rights in Germany, Fair Trials International – February 2013, p. 19, available at: <https://www.fairtrials.org/wp-content/uploads/Germany-advice-note.pdf>, accessed 26th of June 2019.

Complaints shall be admissible against orders and directions given by the Higher Regional Courts (in cases they have jurisdiction at first instance) concerning, among others, arrest. A complaint against the directions of the investigating judge at the Federal Court of Justice/Higher Regional Court shall be admissible only if it concerns, among others, arrest. [Section 304 (4)-(5) De. CPC]

Specific situations

If restoration of the *status quo ante*⁷⁷ annuls the legal effect of a court decision, then arrest warrants which were in force at the time the court decision took effect, shall become effective again. In the case of an arrest warrant, the court granting restoration of the *status quo ante* shall make an order revoking such an arrest warrant or **placement order** if it is evident that the requirements therefor are no longer met. If this is not the case, the competent court shall review the detention without delay [Section 47 (3) De. CPC].

4.4. Rules applicable to change of charges during pre-trial detention

There are no specific provisions governing pre-trial detention in the event of a change of the charges. The general rules on pre-trial detention shall apply, as they are sufficiently flexible to allow the reassessment of the pre-trial detention based on the new charges.

4.5. Compensatory remedies in the event of unlawful pre-trial detention

Compensation for unjustified detention can be awarded by the criminal court, pursuant to the **Compensation in Criminal Proceedings Act** ("*Gesetz über die Entschädigung für Strafverfolgungsmaßnahmen*", StrEG⁷⁸) of 1971 in its 2001 version if:

- ▶ the detained person is acquitted after the main proceedings;
- ▶ the proceedings are discontinued by a decision of the state prosecutor's office; or
- ▶ the opening of the main proceedings is refused.

The full pecuniary damage suffered as a result of the criminal prosecution measure is compensated (e.g. loss of earnings due to loss of employment); the damage must be described in detail by the person entitled to the compensation. The accommodation and subsistence costs during the period of detention might be deducted from the amount awarded. Secondly, a fixed rate of 11 euros [A/N: now 25 euros/day, see article 7] for each day of the deprivation of liberty is awarded as compensation for non-pecuniary damages.⁷⁹

77. If a person was prevented from observing a time limit through no fault of his own, he shall be granted restoration of the *status quo ante* upon application.

78. Available at: <https://www.gesetze-im-internet.de/streg/BJNR001570971.html>, accessed 24th of June 2019.

79. C. Morgenstern, *Pre-trial Detention in the European Union*, A.M. van Kalmthout, M.M. Knapen, C. Morgenstern (eds.), p. 419-420.

V. Romania

5.1. Legal framework. Statistics

Legal framework

The relevant legal provisions are contained in the:

- ▶ **Constitution of the Romania** (*Ro. Constitution*)⁸⁰ – article 22 (right to life, to physical and mental integrity) and article 23 (individual freedom);
- ▶ **The Romanian Code of Criminal Procedure** (*Ro. CPC*)⁸¹ –article 9 (right to freedom and safety) and Title V. Preventive measures and other process measures, Chapter I. Preventive measures (articles 202 – 244).

Statistics

According to the **SPACE I Statistics** (2018), Romania, with a population of 19,523,621, had a total number of inmates of 23,050 (of whom, 21,172 were sentenced prisoners and 1978 were untried detainees, amounting to 8.6% of the prison population), resulting in a prison population rate of 118.1 (in 2008 the prison population rate was 132.1).⁸²

According to the **World Prison Brief statistics**⁸³, the prison population in Romania was, on 31 May 2009 20,528 with a prison population rate of 106, of whom 1887, meaning 9.1%, are pre-trial detainees, amounting to a pre-trial population rate of ten (per 100,000 of national population). In comparison, in 2000 the total prison population was 48,267, of whom 10,792, (22.4%), were pre-trial detainees, amounting to a pre-trial population rate of 48 (per 100,000 of national population).

From 2000 to the present day, the prison population constantly decreased, as was the case of persons in pre-trial detention, whether the evaluation is:

- ▶ in terms of the total numbers of the pre-trial detainees; or
- ▶ as a percentage of the total prison population; or
- ▶ as a percentage of the prison population rate [at 8.6%, along with the Czech Republic (8.2%) and North Macedonia (8.4%) **the lowest percentage of pre-trial remand prisoners from the total prison population among members of the Council of Europe**].

80. Available at: <https://www.presidency.ro/en/the-constitution-of-romania>, accessed 24th of June 2019.

81. Available at: <http://legislatie.just.ro/Public/DetaliiDocumentAfis/210277>, accessed 24th of June 2019.

82. Aebi, M. F., & Tiago, M. M. (2018). SPACE I - 2018 – Council of Europe Annual Penal Statistics, p. 28, 30, 43.

83. Available at: <http://www.prisonstudies.org/country/romania>, accessed 29th of June 2019.

Data gathered from the National Police Agency (April 2014) indicates that people who were held in pre-trial detention facilities in police lockups (excluding those held in prisons) spent on average 42 days in police lockups. This average applies for persons under investigation (before a final conviction is reached).⁸⁴

Also, during 2017, in Romania, the total number of days spent in penal institutions by non-sentenced offenders was 308,726, with an average number of detainees in pre-trial detention of 345.8. Finally, the indicator of the average length of pre-trial imprisonment, in months (based on the total number of days spent in penal institutions) was 2.0 months.⁸⁵ This figure is along with Ireland (2.0 months) and Austria (2.6 months) **the lowest average length of pre-trial imprisonment among members of the Council of Europe**].

5.2. Grounds for pre-trial detention

The principle of inviolability of individual freedom and security of the person is provided at a constitutional level. By way of exception, the arrest of a person shall be permitted only in the cases and in accordance with the procedure provided by the law [Article 23 (1)-(2) Ro. Constitution; see also, Article 9 (1)-(2) Ro. CPC].

The principle of the freedom of the person is, therefore, imposed for the entire duration of the criminal proceedings, applying a preventive or restrictive measure affecting the liberty of the person having the character of an exceptional measure.⁸⁶

Pre-trial detention/Pre-trial Arrest

(1) Preventive custody shall be ordered by a judge and only in the course of the criminal proceedings [Article 23 (4) Ro. Constitution].

The preventive measure consisting of pre-trial arrest can be taken against a defendant by the Judge for Rights and Liberties, during the criminal investigation/**pre-trial stage** (at the request of the prosecutor), by the Preliminary Chamber Judge, in **preliminary chamber proceedings**, and by the court during the **trial phase** [Article 203 (3), 223 (1), 224 Ro. CPC].

Preventive measures may be ordered if there is evidence or probable cause leading to a reasonable suspicion that a person has committed a criminal offense and if such measures are necessary in order to:

- a) ensure the proper conduct of the criminal proceedings;
- b) prevent the suspect or defendant from avoiding the criminal investigation or trial; or
- c) prevent the commission of another criminal offense [Article 202 (1) Ro. CPC].

(2) Pre-trial arrest is not mandatory and may be ordered only if the evidence generates a reasonable suspicion that the defendant has committed an offense and if one of the following situations exists:

84. Association for the Defence of Human Rights in Romania, the Helsinki Committee (APADOR-CH), Is pre-trial detention used as last resort measure in Romania? Research Report, p. 41.

85. Aebi, M. F., & Tiago, M. M. (2018). SPACE I - 2018 – Council of Europe Annual Penal Statistics, p. 108.

86. A. Barbu, G. Tudor, A.M. Şinc, Codul de procedură penală adnotat cu jurisprudență națională și europeană, Ed. Hamangiu, Bucharest, 2016, p. 63.

- a) the defendant has fled or went into hiding in order to avoid the criminal investigation or trial, or has made preparations of any nature whatsoever for such acts;
- b) a defendant tries to influence another participant to commit the offense, or a witnesses or an expert to destroy, alter or conceal or to steal physical evidence or to make a different person to adopt such behavior;
- c) a defendant exerts pressures on the victim or tries to reach a fraudulent agreement with him/her;
- d) there is reasonable suspicion that, after the initiation of the criminal proceedings, the defendant has intentionally committed a new offense or is preparing to commit a new offense [Article 223 (1) Ro. CPC].

By way of exception, the pre-trial arrest of the defendant can also be ordered if the evidence generates reasonable suspicion that the defendant has committed a certain offense (e.g. with specific intent against life, an offense against national security, an offense of drug trafficking, a violation of the regime of weapons, ammunition, nuclear materials or explosives, trafficking and exploitation of vulnerable persons, acts of terrorism, money laundering, tax evasion, corruption etc.) or another offense punishable by at least five years' and, based on an assessment of the seriousness of facts, of the manner and circumstances under which it was committed, or the persons associated with the defendant and the environment from which the defendant comes, of their criminal history and other circumstances regarding their person, it is decided that their deprivation of freedom is necessary in order to eliminate a threat to public order [Article 223 (1) Ro. CPC].

(3) During a review of the judicial practice in this field, it was stated that, it is generally perceived that judges and prosecutors consider pre-trial detention practice to be balanced nowadays.⁸⁷

In practice, in most cases, the judges stressed that the decision on pre-trial arrest is based on a 'whole picture' or a multi-factorial analysis where many factors play a role.⁸⁸ Moreover, all judges and prosecutors considered that they have sufficient resources including time and information to make a decision on preventive measures⁸⁹

(4) Particular situations.

(a) The national law provides for a situation in which the person detained in provided with medical treatment under constant guard.

- a) it is considered that a defendant placed in pre-trial arrest suffers from a disease that cannot be treated in the medical facilities of the National Administration of Penitentiaries;
- b) the management of the detention facility orders that such a defendant be treated in the medical facilities of the Ministry of Health under constant guard.

87. G. Oancea, I. Durnescu, DETOUR – Towards Pre-trial Detention as Ultima Ratio, 2nd Romanian National Report on Expert Interviews, November 2017, Bucharest, p. 7, available at: <https://www.irks.at/detour/Uploads/2nd%20Nat%20Report%20RO%20for%20Web.pdf>, accessed 30th of June 2019.

88. G. Oancea, I. Durnescu, DETOUR – Towards Pre-trial Detention as Ultima Ratio, 2nd Romanian National Report, p. 16.

89. G. Oancea, I. Durnescu, DETOUR – Towards Pre-trial Detention as Ultima Ratio, 2nd Romanian National Report, p. 17.

The period of time while the defendant is kept under constant guard is included in the pre-trial arrest term [Article 240 Ro. CPC].

(b) Taking a person into custody and pre-trial arrest may be ordered exceptionally against **a minor defendant**, only if the effects of their deprivation of liberty on their personality and development are not disproportionate to the objective pursued by such measures. In determining the duration of a pre-trial arrest, the defendant's age at the date of ordering, extending or maintaining such measure shall be considered [Article 243 (2)-(3) Ro. CPC].

(5) In recent years, several problems have been identified by the ECtHR in cases against Romania, dealing with different issues related to pre-trial detention:

- ▶ In the case of *Pantea v. Romania*⁹⁰, the ECtHR ruled that the detention in question was unlawful. Moreover, the Court pointed out that since prosecutors in Romania act as members of the Department of the Prosecutor-General, they do not satisfy the requirement of independence from the executive. In this case, the Court repeated what it had said before in this respect in the case of *Vasilescu v. Romania*⁹¹. The total length of detention before the suspects were brought before a judge or another officer in the sense of Art. 5 (3) of the ECHR was more than four months. The Court concluded that the length of this detention was too long.⁹²
- ▶ In *Creangă v. Romania*⁹³, the case concerned the remand in pre-trial detention following the Prosecutor General's application to quash the final decision ordering the defendant's release, in 2003 (violations of Article 5§1).

As a result of this case, the articles of the (former) *Ro. CPC* governing applications to have final judicial decisions quashed were repealed by Law No. 576 of 14 December 2004. A new Code of Criminal Procedure has been in force since 2014.⁹⁴

Proportionality

(1) No preventive measure may be ordered, confirmed, extended or **maintained if there is a cause that prevents the beginning or the exercise of the criminal action**. Any preventive measure has to be **proportionate** to the seriousness of the charges brought against the person in respect of whom such a measure is, and necessary for reaching the purpose sought when it was ordered [Article 202 (2)-(3) Ro. CPC].

(2) During Communism, the **criminal procedure** and the substantive criminal law were enforced formally. There was a big reform in 2003, which led, among other things, to

- a) a reduction in the prison population (including remand prisoners);
- b) the introduction of alternative measures; and
- c) a change in the mentality of judges.

90. ECtHR, *Pantea v. Romania*, application no. 33343/96, 03.06.2003.

91. ECtHR, *Vasilescu v. Romania*, application no. 27053/95, 22.05.1998.

92. M.M. Knapen, *Pre-trial Detention in the European Union, An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU, Chapter 23 Romania*, A.M. van Kalmthout, M.M. Knapen, C. Morgenstern (eds.), WLP 2009, p. 807.

93. ECtHR, *Ciobanu v. Romania*, application no. 29226/03, 23.02.2012, final on: 09.10.2013.

94. See Resolution CM/ResDH(2013)220, *Creangă against Romania*, Execution of the judgment of the European Court of Human Rights, adopted by the Committee of Ministers on 6 November 2013 at the 1183rd meeting of the Ministers' Deputies.

In 2003, the Constitution of Romania was revised by, among other things, improving article 23, which is of great importance for criminal proceedings. Due to the amendments to the CPC, the prison population – especially the number of pre-trial detainees – has declined enormously.⁹⁵

Most judges see pre-trial detention practice as an evolution product: the first change took place when the measure was introduced to be decided by the judge (in 2003); the second change took place with the EtCHR jurisprudence. In 2014 a new Criminal Procedure Code entered into force and introduced a new alternative to pre-trial detention – house arrest. It seems that this new alternative encouraged some judges to use house arrest as an alternative to pre-trial detention.⁹⁶

This change in mentality seems to be influenced by factors such as: ECHR jurisprudence, changes in the National Institute of Magistracy curricula (more focused on the ECHR), a long process of adjusting between prosecution and the courts, the new generation of magistrates that entered the system in the recent years.⁹⁷

A person in preventive custody shall have the right to apply for provisional release, under judicial control or on bail [*Article 23 (10) Ro. Constitution*].

When refusing an application to extend pre-trial arrest or upon the expiry of the maximum duration of the defendant's pre-trial arrest, the court may order other preventive measures, according to the law [*Articles 227 (2), 237 (2), 239 (3) Ro. CPC*].

According to *article 202 (4) Ro. CPC*, the preventive measures serving as an alternative to pre-trial arrest are:

- a) judicial control [*Article 211 - 215¹ Ro. CPC*]; The prosecutor, during the criminal investigation, the Preliminary Chamber Judge, in preliminary chamber proceedings, or the court, during the trial, may order a judicial control measure against a defendant (requiring the defendant to comply with some specific obligations), if such a preventive measure is necessary to reach the purpose set out in the law [*articles 211 (1)-(2), 215 (1) Ro. CPC*];
- b) judicial control on bail; [*article 216 - 217 Ro. CPC*]. The prosecutor, during the criminal investigation, the Preliminary Chamber Judge, in preliminary chamber proceedings, or the court, during the trial, may order judicial control on bail against the defendant (requiring the defendant to comply with some specific obligations) if the requirements set out for pre-trial arrest are met, if taking such a measure is sufficient to reach the purpose set by the law, and if the defendant deposits bail, the value of which is established by the judicial bodies [*Article 216 Ro. CPC*].

95. M.M. Knapen, *Pre-trial Detention in the European Union, An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU, Chapter 23 Romania*, A.M. van Kalmthout, M.M. Knapen, C. Morgenstern (eds.), WLP 2009, p. 789-790.

96. G. Oancea, I. Durnescu, DETOUR – Towards Pre-trial Detention as Ultima Ratio, 2nd Romanian National Report, p. 10.

97. G. Oancea, I. Durnescu, DETOUR – Towards Pre-trial Detention as Ultima Ratio, 2nd Romanian National Report, p. 11.

The value of bail is of at least RON 1,000 (200 Euro) and is determined based on the seriousness of the charge brought against the defendant, their material situation and their legal obligations;⁹⁸

- c) house arrest [*Article 218 - 222 Ro. CPC*]. House arrest (with the obligation to comply with some specific obligations) is ordered by the Judge for Rights and Liberties, by the Preliminary Chamber Judge or by the court, if the requirements set out for pre-trial arrest are met and if such measure is necessary and sufficient for reaching one of the purposes set by the law [*Article 218 (1) Ro. CPC*].

The fulfillment of the legal conditions is assessed by considering the level of the threat posed by the offense, the purpose of such a measure, the health condition, age, family status and other circumstances related to the person against whom such a measure is taken. Such a measure may not be ordered against a defendant in whose respect there is a reasonable suspicion that he committed an offense against a family member and in relation to whom the defendant previously received a final conviction for prison break. A person against whom a house arrest measure is ordered shall be informed of the following rights:

- ▶ to access emergency medical assistance;
- ▶ to challenge such a measure; and
- ▶ to request the revocation or replacement of this measure by another preventive measure [*Article 218 (2)-(4) Ro. CPC*].

They have been found to contribute **to the good progress of the trial**. Judicial control is by far the most popular preventive measure. The main arguments in favour of this measure are:

- ▶ It contains many measures and obligations that can be used by the magistrates to ensure the defendant's presence in trial and avoid the risks of absconding or tampering with evidence;
- ▶ It allows defendants to continue their professional and social life;
- ▶ It really protects the presumption of innocence until proved guilty etc.

However, as mentioned by some lawyers, there is a significant risk for this measure to be used too widely and create the **so-called net-widening**.⁹⁹

98 G. Oancea, I. Durnescu, DETOUR – Towards Pre-trial Detention as Ultima Ratio, 2nd Romanian National Report, p. 30.

99 G. Oancea, I. Durnescu, DETOUR – Towards Pre-trial Detention as Ultima Ratio, 2nd Romanian National Report, p. 35.

5.3. Term of pre-trial detention, reasons and procedure for extension or renewal of pre-trial detention

Term of pre-trial detention

(1) According to the Association for the Defence of Human Rights in Romania, the Helsinki Committee (APADOR-CH), before 1998, detainees would stay in police custody until the prosecutor finalised the indictment. The time spent in police custody could be months or even years. From 1998 onwards, after a decision of the Constitutional Court, the courts steadily began reviewing the grounds for detention on a monthly basis. However, it was not until 2003 that this practice acquired a foundation in the law.¹⁰⁰

(2) In accordance with the constitutional provisions [*article 23 (5) Ro. Constitution*], the *Ro. CPC* provides specific rules whereby the pre-trial arrest of a defendant may be extended during the criminal investigation/**pre-trial stage** if:

- a) the grounds which gave rise to the initial arrest require the further detention of the defendant; or
- b) there are new grounds justifying the extension of such measure.

This measure can only be taken by the Judge for Rights and Liberties [*Article 234 (1)-(3) Ro. CPC*].

A proposal to extend pre-trial arrest shall be submitted along with the case file to the Judge for Rights and Liberties, at least five days before the pre-trial arrest term expires. The Judge for Rights and Liberties shall rule upon an application for extending the term of pre-trial arrest before the expiry of such a term [*Article 235 (1)-(2), (6) Ro. CPC*].

These provisions were analysed and interpreted by the *Constitutional Court* (Decision no. 336/2015), which ruled that the provisions of *Article 235 (1) Ro. CPC* are constitutional insofar as the non-observance of the term “at least five days before the expiry of the preventive arrest” has the effect of *Article 268 (1) Ro. CPC* (meaning that the failure to comply with that time frame shall entail the loss of that right and nullification of the act that was performed beyond that time frame).

The extension of the term of the defendant’s pre-trial arrest may be ordered for a maximum period of *30 days*. During the criminal investigation, the Judge for Rights and Liberties may also award, further extensions; however, each such extension shall not exceed 30 days. The total duration of the defendant’s pre-trial arrest during the criminal investigation cannot exceed a reasonable term and can be *no longer than 180 days* [*Article 236 (2)-(4) Ro. CPC*].

(3) A defendant’s pre-trial arrest may be ordered during the **preliminary chamber proceedings** by the Preliminary Chamber Judge, *ex officio* or based on a reasoned application by the prosecutor, for a term not exceeding *30 days*, for the same grounds and under the same terms as the pre-trial arrest ordered during the criminal investigation/pre-trial stage [*Article 238 (1), (3) Ro. CPC*].

100. M.M. Knapen, *Pre-trial Detention in the European Union, An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU, Chapter 23 Romania*, A.M. van Kalmthout, M.M. Knapen, C. Morgenstern (eds.), WLP 2009, p. 806.

(4) In accordance with the constitutional provisions [article 23 (6) Ro. Constitution], the Ro. CPC provides specific rules on the term of pre-trial arrest in the **trial stage**. The court shall establish *ex officio* if the grounds having determined the taking, extension or maintaining of a preventive measure subsist, prior to the expiry of its term, and summon the defendant. Throughout the trial, the court, *ex officio*, through a court resolution, shall regularly check, but **no later than 60 days**, whether the grounds that gave rise to the maintaining a pre-trial arrest measure and of a house arrest measure ordered against the defendant are still in place [Article 208 (2)-(3) Ro. CPC].

During the **trial** at first instance, the total duration of a defendant's pre-trial arrest may not exceed a *reasonable period of time* and cannot exceed half of the *special maximum limit* provided by law for the offense with which the court was seized. In all cases, the duration of pre-trial arrest at first instance may *not exceed five years* [Article 239 (1) Ro. CPC].

Reasons and procedure for extension or renewal of pre-trial detention

(1) The decisions by a court of law on preventive custody may be subject to the legal proceedings provided by the law. [Article 23 (7) Ro. Constitution]

During the criminal investigation/pre-trial stage and preliminary chamber proceedings, any applications, proposals, complaints and challenges regarding pre-trial arrest are ruled on in chambers, by a reasoned court resolution. During the trial, the court decides upon preventive measures through a reasoned court **resolution** [Article 203 (5)-(6) Ro. CPC].

(2) During the **pre-trial stage, against court resolutions** by which the Judge for Rights and Liberties orders preventive measures, the defendant and the prosecutor may file a challenge, within 48 hours from the time the court issued the resolution or, as applicable, from the communication of the resolution. A challenge filed against such a court resolution by which it ordered the taking or extension of a preventive measure or it found the expiry by law of the preventive measure shall not suspend enforcement¹⁰¹ [Article 204 (1), (3) Ro. CPC].

(3) During the **preliminary chamber stage**, the procedure is the same as that with regard to the pre-trial stage, except the judgment is of the Preliminary Chamber Judge of the hierarchically superior court [Article 205 (1), (3)-(5) Ro. CPC].

Throughout the proceedings of the preliminary chamber, the Preliminary Chamber Judge, *ex officio*, shall check regularly, but **no later than 30 days**, whether the grounds which gave rise to taking a pre-trial arrest measure and of a house arrest measure subsist or if new grounds have arisen justifying the maintenance of these measures [Article 207 (6), 348 Ro. CPC].

(4) During the **trial stage**, the procedure is the same as that with regard to the pre-trial stage and the preliminary chamber stage, except that the hierarchically superior court is competent to rule on the pre-trial detention.

101. *Per a contrario*, in all the other situations (e.g., when replacing the house arrest with pre-trial detention) the challenge against the preventive measures shall not suspend the enforcement. See, C. Jderu, in M. Udriou (coord.), Codul de procedură penală. Comentariu pe articole, art. 1-603, 2nd edition, Ed. C.H. Beck, Bucharest, 2017, p. 1003, no. 7.

Throughout the trial, the court, *ex officio*, through a court resolution, shall regularly check regularly, but **no later than 60 days**, whether the grounds that gave rise to maintaining a pre-trial arrest measure and of a house arrest measure ordered against the defendant are still in place [Article 208 (1)-(2), (4), 362 Ro. CPC].

When the ruling (of the first instance) is reversed, the appellate court may maintain the pre-trial detention arrest measure [Article 423 (3) Ro. CPC].

(5) *Revocation. Replacement.* A preventive measure is **revoked** *ex officio* or upon request, if the reasons that gave rise to ceased or new circumstances confirming the unlawfulness of such measure occurred. In such cases, the release of the suspect or the defendant is being ordered, unless arrested in another case.

A preventive measure is **replaced**, *ex officio* or upon request, by a less harsh preventive measure, if the requirements provided by law for its ordering are met and, after an assessment of the case's specific circumstances and the defendant's conduct in the process, it is considered that the less harsh preventive measure is sufficient to achieve the objective laid down in the law [Article 242 (1)-(2) Ro. CPC].

(6) In relation to the extension of preventive arrest without a proper analysis of the legal criteria, the **ECtHR** has stressed that extending the pre-trial detention must be examined in connection with the individual circumstances of the suspect/defendant. In such circumstances the domestic authorities are obliged to examine the applicant's personal situation in greater detail and to give specific reasons for holding him/her in custody. However, even the existence of a reasonable suspicion that suspect/defendant has committed a serious offence is not enough to justify a repeated extension of pre-trial detention.¹⁰²

In recent years, in numerous cases against Romania, ECtHR has found violations of different aspects of article 5 ECHR. The most important problems were found in the following cases:

- ▶ In *Calmanovici v. Romania group*¹⁰³, the cases mainly concerned irregularities of detention, such as: an unjustified extension of the detention on remand; the an

102. G. Oancea, I. Durnescu, DETOUR – Towards Pre-trial Detention as Ultima Ratio, 1st Romanian National Report, October 2016, Bucharest, p. 36-38, available at: <https://www.irks.at/detour/Uploads/2nd%20Nat%20Report%20RO%20for%20Web.pdf>, accessed 30th of June 2019.

103. ECtHR, *Calmanovici v. Romania*, application no. 42250/02, 01.07.2008, final on: 01.10.2008; ECtHR, *Lazăr v. Romania*, application no. 23395/05, 31.05.2012; ECtHR, *Mihuță v. Romania*, application no. 13275/03, 31.03.2009, final on: 14.09.2009; ECtHR, *Răducu v. Romania*, application no. 70787/01, 21.04.2009, final on: 24.07.2009; ECtHR, *Scundeanu v. Romania*, application no. 10193/02, 02.02.2010, final on: 02.05.2010; ECtHR, *Stoican v. Romania*, application no. 3097/02, 06.10.2009, final on: 06.01.2010; ECtHR, *Tarău v. Romania*, application no. 3584/02, 24.02.2009, final on: 24.05.2009; ECtHR, *Tiron v. Romania*, application no. 17689/03, 07.04.2009, final on: 07.07.2009.

See also, ECtHR, *Ionuț-Laurențiu Tudor v. Romania*, application no. 34013/05, 24.06.2014, final on: 24.09.2014, regarding, *inter alia*, excessive length of pre-trial detention due to lack of reasoning of extension; lack of impartiality of judges examining the merits of the criminal case having previously ordered the extension of the applicant's pre-trial detention; ECtHR, *Hamvas v. Romania*, application no. 6025/05, 09.07.2013, final on: 09.10.2013, regarding unlawful detention on remand: failure of the domestic courts to justify continued pre-trial detention and length of review proceedings; ECtHR, *Irinel Popa v. Romania*, application no. 6289/03, 01.12.2009, final on: 01.03.2010, regarding the unlawful detention on remand; lack of effective access to the criminal investigation file and lack of adversarial proceedings during the judicial review concerning the prolongation of detention on remand; breach of the right to be brought promptly before the judge; ECtHR, *Begu v. Romania*, application no. 20448/02, 15.03.2011, final on: 15.06.2011, regarding the lack of sufficient justification for continued detention on remand (Articles 5 §3)

lack of immediate appeal against court decisions extending detention on remand; **the failure of the defendant to attend the hearing**, the outcome of which would determine whether the detention will be maintained and lack of a speedy determination of the request for release; **belated presentation before a judge**; unfair criminal proceedings.

The *Calmanovici* case concerns the unlawfulness of the applicant's detention on remand, for various periods in 2002. In this respect, the ECtHR noted that the public prosecutor's order, which was the basis for the detention between 2 and 31 August 2002, did not give concrete reasons for the arrest, as required by the relevant provisions.

Further, the detention of the applicant between 21 September 2002 and 19 November 2002 was based on the decisions of a military court which was not competent to consider the applicant's case [violations of Article 5 (1)].

In the *Calmanovici, Lazăr, Mihuță, Stoican, Scundeanu, Tarău and Tiron* cases, the ECtHR also noted that, between 2001 and 2005, the authorities provided no "pertinent and sufficient" reasons to justify extending the applicants' detention [violations of Article 5 (3)].

The *Mihuță* case also concerns the lack of an immediate appeal against court decisions extending detention on remand [violation of Article 5 (4)].

In addition, in the *Răducu* case, the competent court took 30 days to rule on the applicant's request to be freed from detention on remand [violation of Article 5 (4)].

In relation to the execution of the judgments of the ECtHR in those cases, the Romanian authorities stated that, following the 2003 amendments of the (*former*) *Ro. CPC*, the prosecutor is no longer competent to order the place the defendant in detention on remand. Currently, the domestic courts' practice of ordering detention on remand gives direct effect to the European Court's case-law and complies with the requirements of the Convention. In addition, a court decision placing a person in detention on remand may be challenged before the higher court within 24 hours from its delivery or from its notification to the person concerned. The new *Ro. CPC*, in force since February 2014, includes all the above-mentioned provisions.¹⁰⁴

- ▶ *Konolos v. Romania* case¹⁰⁵ dealt with the protection of rights in detention: The extension of the applicant's detention on remand without specifying its duration, contrary to Article 149 of the (*former*) *Ro. CPC*, as interpreted by the Constitutional Court. [violation of Article 5 (1)].

The Romanian authorities took some general measures to respond to the problems in the case; as a result, Law No. 281/2003 amending the (*former*) *Ro. CPC* has expressly obliged the domestic courts to regularly verify the legality and the appropriateness of continuing the detention on remand.¹⁰⁶

104. See Resolution CM/ResDH(2014)13, Execution of the judgments of the European Court of Human Rights in eight cases against Romania, adopted by the Committee of Ministers on 5 February 2014 at the 1190th meeting of the Ministers' Deputies.

105. ECtHR, *Konolos v. Romania*, application no. 26600/02, 07.02.2008, final on: 07.05.2008.

106. See Resolution CM/ResDH(2011)22, Execution of the judgment of the European Court of Human Rights, *Konolos* against Romania, Adopted by the Committee of Ministers on 10 March 2011 at the 1108th Meeting of the Ministers' Deputies.

- ▶ The *Năstase-Silvestru v. Romania* case¹⁰⁷ concerned, mainly, the fact that the applicant, whose detention was ordered by a prosecutor on 24 November 2000, was not brought promptly before a judge but only after 18 days [violation of Article 5 (3)].
Consequently, the (former) *Ro. CPC* was amended in 2003. Currently, the judge has exclusive competence to order detention on remand.¹⁰⁸

5.4. Rules applicable to the change of charges during pre-trial detention

(1) During the **pre-trial stage**, after the criminal investigation has started, if the criminal investigation body finds new facts, concerning the involvement of other individuals or circumstances that can lead to amending the charges for the offense, that body shall order **the scope** of the criminal investigation to be expanded or the **amendment – to the charges** [article 311 (1) *Ro. CPC*], with the obligation to inform the suspect/defendant about the new facts that justified the widening of the scope/the amendment to the charges.¹⁰⁹

(2) When during the **trial stage**/court proceedings, it considers that the legal charges for the crime in the bill of indictment are about to be changed, the court is obliged to discuss the new legal charges and to draw the defendant's attention to his right to ask for the case to be adjourned to a later date during the same court session or to be postponed, so that he can prepare his defense¹¹⁰ [Article 386 (1) *Ro. CPC*]. The same approach applies in relation to guilty plea cases [Article 377 (4) *Ro. CPC*].

(3) There are no specific provisions on pre-trial detention in the event of amendments to the charges. The general rules on pre-trial detention shall apply, as they are sufficiently flexible to allow the reassessment of the pre-trial detention based on the new charges.

5.5. Compensatory remedies in the event of unlawful pre-trial detention

When it is found that a custodial or measure **restricting freedom** of the accused was ordered unlawfully, the competent authorities are obliged to order that the measure is void and, as the case may be, the detained or arrested individual shall be released. Any person against whom a custodial or measure restricting freedom has been ordered unlawfully during the criminal proceedings is entitled to compensation for their losses, in accordance with the law [Article 9 (4)-(5) *Ro. CPC*].

107. ECtHR, *Năstase-Silvestru*, application no. 74785/01, 04.10.2007, final on: 04.01.2008.

108. See Resolution CM/ResDH(2011)149, Execution of the judgment of the European Court of Human Rights, *Năstase-Silvestru* against Romania, adopted by the Committee of Ministers on 14 September 2011 at the 1120th Meeting of the Ministers' Deputies.

109. Based on the *Constitutional Court* Decision no. 90/2017, which found that the legislative solution excluding the obligation to inform the suspect / defendant about the change of legal classification is unconstitutional.

110. Based on the *Constitutional Court* Decision no. 250/2019, this provision can be applied only in the cases in which the court decides on the change of legal classification given to the act by means of a notice of appeal by a judgment which does not solve the merits of the case.

The right to receive compensation in the event of an illegal deprivation of liberty is expressly regulated in the national legislation. **Anyone who is unlawfully deprived of his liberty during criminal proceedings is** entitled to compensation. There must be a finding of an unlawful deprivation of freedom, as the case may be, by a prosecutorial order, final judgment by the Judge for Rights and Liberties or the Preliminary Chamber Judge, or by final judgment or sentence by the court that tries the case [Article 539 Ro. CPC].

The *High Court of Cassation and Justice* (decision no. 15/2017, appeal in the interest of the law procedure) ruled that in interpreting and applying the provisions of art. 539 (2) Ro. CPC, the judicial acts provided for in the article (namely, a prosecutorial order, A final judgment by the Judge for Rights and Liberties or the Preliminary Chamber Judge, or A final judgment or sentence by the court that tries the case) must contain the unlawful nature of the preventive measures depriving them of liberty. It also ruled that the judgment of acquittal, by itself, cannot constitute a basis for establishing the unlawfulness of the deprivation of liberty.

An action for compensation can be filed by the person entitled to it and after their death, it can be taken up or filed by their dependents at the date of their death. An action for compensation can be filed within six months of the date on which either the court judgment remained final, or the orders and decisions of the judicial bodies became final, if by such a judgment/order/decision was established a judicial error or the unlawful deprivation of freedom.

The person can file a claim for compensation with the Tribunal in whose territorial jurisdiction they live, by legal action against the government, which shall be summoned through the Ministry of Public Finance [Article 541 (3) Ro. CPC]. By civil judgment no. 56/16.09.2014, the Mehedinți County Tribunal admitted the action brought by the claimant V. A. C. and ordered the Romanian State to pay the amount of 20,000 lei moral damages, based on art. 539 Ro. CPC, noting that the claimant was detained for 24 hours by the prosecutor, having been suspected of the crime of setting up an organised criminal group, computer crime, possession of equipment for falsifying electronic payment instruments and fraudulently carrying out financial operations, money laundering and the use of counterfeit transport documents, crimes for which he was not convicted, on the grounds that “the deed does not exist”.¹¹¹

111. L. Barac, *Câteva considerații cu privire la procedura reparării pagubei materiale sau a daunei morale în caz de eroare judiciară sau în caz de privare nelegală de libertate ori în alte cazuri*, 25.06.2015, available at: <https://www.juridice.ro/382615/cateva-consideratii-cu-privire-la-procedura-repararii-pagubei-materiale-sau-a-daunei-morale-in-caz-de-eroare-judiciara-sau-in-caz-de-privare-nelegala-de-libertate-ori-in-alte-cazuri.html>, accessed 30th of August 2019.

CONCLUSIONS

Each of the five states (Armenia, Estonia, Georgia, Germany and Romania) was under the supervision of the Committee of Ministers to implement relevant judgments of the ECtHR in this field.

Regarding the prison population and the pre-trial detention measures, as a general rule, **the prison population was constantly on the decrease in the recent years, as was the case of persons in pre-trial detention** in terms of the total number of pre-trial detainees and the percentage of pre-trial detainees in prison population.

Among the states studied, Romania has the lowest rate of pre-trial detention percentage of pre-trial remand prisoners from the total prison population [8.6%, which, along with the Czech Republic (8.2%) and North Macedonia (8.4%) constitutes the lowest percentage of pre-trial remand prisoners in the total prison population within the Council of Europe].

All of the states analysed in this study have alternatives to pre-trial detention: in Romania and Estonia, these are considered to be valid and real alternatives, in contrast to Germany, which has rather limited options that in practice cannot replace pre-trial detention, except in some particular cases (where bail, for example, can be imposed).

In terms of the common approaches regarding pre-trial detention and the compliance with Article 5 of the ECHR, the national legislation provides, as a basic rule, the **principle of personal liberty** and the **principle of proportionality**. It should be stressed that pre-trial detention must constitute an exceptional measure and, as with all preventive measures, has to be proportionate to the seriousness of the charges brought against the person against whom such a measure is taken, and necessary to attain the purpose sought when ordering it.

The principle is that in connection with a criminal case, no person may be placed in pre-trial detention except on **the grounds and in accordance with the procedure prescribed by law**.

As a general rule, all preventive measures (including pre-trial detention), must be applied only when there are **sufficient reasons** to assume that the suspect or the accused may, in the absence of such measures: abscond from the criminal proceedings or the execution of a court judgment; impede the pre-trial process of investigation or court proceeding in any way; destroy, alter or falsify the evidence; commit an action forbidden by criminal law; **will avoid the responsibility for his/her crime and the imposition of a punishment**.

In other words, the grounds for applying a measure of restraint shall be a **reasonable assumption** that the accused will flee or will not appear in court, will destroy the evidence that is importance to the case, or will commit a new crime. In particular, **pre-trial detention must not be mandatory** and shall be applied only if it is the only means to prevent such cases and if the other preventive measures are not considered to be sufficient (preference shall always be given to **the most lenient form** of restriction of rights and liberties).

Express legal provisions are needed with regard to the **length of the pre-trial detention**, meaning that the law must specify the length of the measure (e.g. 30 days in Romania, two months in Armenia and Estonia) and, in particular, the maximum length of the measure

(although German law *does not provide for the maximum length of pre-trial detention*, it is a matter of principle that the remand detention *must not exceed six months*, subject to certain exceptions).

Also, the national legislation must provide **real alternative measures to pre-trial detention** (non-custodial measures), such as: house arrest; administrative control; judicial control; judicial control on bail/bail; electronic surveillance. Such alternatives must be effective, convincing the magistrates and the courts that applying such measures:

- ▶ contribute to the good progress of the trial;
- ▶ ensure the defendant's presence in trial and avoid the risks of absconding or tampering with evidence;
- ▶ allow the defendants to continue their professional and social life.

Finally, clear legal procedures must be in place to allow **effective compensatory remedies in the event of unlawful pre-trial detention**, either in the form as a special law (in Estonia, Germany) or the general legal provisions (the Civil Code or the Criminal Procedure Code in Romania and Georgia).

Annex No 4

Analysis of the Questionnaires among Judges, Prosecutors, and Lawyers

I. Scopes and methods

The analysis of the questionnaires disseminated among judges, prosecutors and lawyers (hereinafter referred to as Survey) is a component of the Research and describes the Survey conducted among relevant domestic actors, who either play a primary role in remand detention proceedings or appear as interested third-parties. It was intended to be carried out among legal professionals (judges, prosecutors and defence lawyers), a group defined by the Methodology as “immediately engaged in pre-trial detention proceedings”. However, the template of the Questionnaire was drafted in more accessible, quasi-legal language, that could be used for a survey of opinions expressed by other interested parties, not necessarily legal specialists (i.e. human rights defenders, academicians, civic activists, etc.). Nevertheless, its main objective was to gather the necessary data from professionals and to collect their views needed for the purposes of the Research. One of these purposes is to evaluate the collective views and overall attitudes towards the problem of the alleged excessive use of pre-trial detention in the Republic of Moldova.

The critical aim pursued by the Questionnaire was to assess whether the groups of professionals participating in remand detention proceedings perceive that the problem is systemic. Furthermore, the survey aims to clarify some specific key-issues relating to legal practice (judicial, prosecutorial and/or criminal defence) from the perspective of the identified patterns of violations during the Research. To recall, the Research revealed the following three basic patterns relating to the alleged overuse of detention:

- (i) a breach of the reasonable suspicion requirement; and
- (ii) inadequate reasoning on grounds for continued detention; and
- (iii) awarding insufficient monetary compensation for unlawful or unjustified detention.

The remaining questions regarding other violations of Article 5 of the Convention were classified as isolated and deliberately omitted from the Questionnaire. This was done to avoid legal technicalities; otherwise the whole Survey would have been overburdened by seeking answers to less relevant issues for the Research.

In principle, the Questionnaire gathers individual opinions on whether the remand detention in the Republic of Moldova is a systemic problem and, if yes, what are its causes; either the problem emerges from the inconsistent implementation of the domestic law or it lies in the quality of law. The Research started from the assumption that the excessive use of detention stems rather from a deficient practical implementation of legislation, which is compatible with the Convention and was characterised as qualitative. Thus, some

of the parts of the Questionnaire were refined to test the professional ability to apply the domestic law in particular national and social context. The questions do not evaluate the knowledge of the law, but their main rationale was to collect:

- ▶ the legal professionals' collective views about the situation as a whole;
- ▶ information about whether they perceive the excessive use of detention in Moldova as a systemic problem; and
- ▶ the opinions about some fundamental patterns of violations attributed to their daily practice.

The Questionnaire neither sought opinions on the current law and its quality, nor about how the law should look like.

Arguing that the law still echoes social opinions, the surveyed legal professionals were not fully drawn from the domestic context in which they act. They were asked to answer whether they are still being influenced by certain well-settled habits or collective prejudices. An example of such influence is current overall perception about the character of house arrest. This particular measure is often perceived as a "release" from detention in custody rather than as another form of deprivation of liberty. Another misperception revealing social bias is that a compensation for unlawful detention could be awarded only to a non-guilty person.

On the contrary, the survey examined whether the legal professionals are being strictly confined to the prescriptive character of criminal procedure legislation. In addition, the Questionnaire aimed to ascertain whether the ever-changing legislation would make the law difficult to apply. It was assumed in this sense that the surveyed legal professionals would not be able to react in a timely manner to such frequent legislative changes.

In this rather social and non-legal sense, the Questionnaire was drafted to address large groups of persons, not only legal professionals. It seeks to establish a social connection with the decision-making process in remand detention proceedings. Moreover, the questions were drafted to test and draw conclusions for the benefit of a particular professional group of individuals (i.e. judges, prosecutors, defence lawyers, human rights defenders, etc.) and not the surveyed persons acting in their individual capacity. That is why the Survey gathered information for the statistical analysis of collective reaction, where individual answers were aggregated to draw a general conclusion related to each category of tested professionals loyal to their group. This type of holistic analysis gave an overall image on practices mirroring the collective attitudes, prejudices or social stigma present among the relevant groups.

Since the aim of the Questionnaires is wider than just to assess legal practice, the questions were not meant to be strictly legal, with too many technicalities and details. They were couched in plain language, understandable by both legal professionals and persons with no legal training. However, some of the questions simulated controversial legal problems. They reflected existed misinterpretations of the domestic law, as well as the Convention, according to the patterns of violations identified during the Research.

Ordering detention or awarding compensation is mainly a decision-making process performed on a case-by-case basis. It inevitably deals with particular circumstances and individual cases, which are difficult to generalise. Whether a given answer is right or wrong could not be predetermined in abstract terms. However, many individual cases imply similar controversial aspects, mostly stemming from legal confusions or social perceptions, not necessarily compatible with the domestic law and the Convention. Accordingly, the last part of the Questionnaire was drafted to explore these controversies and to test whether a given individual is able to choose a decision which would be the most appropriate from the perspective of the domestic law and the Convention.

Again, these multiple-choice-type questions aim to assess the collective reactions to these legal and social struggles hovering within the surveyed group. They do not evaluate whether an individual opinion expressed by the surveyed person is correct. Nor they meant to answer these controversies or to impose the right answers. This type of questions was inspired by the technique applied in legal case-study exercises, which seek to imitate a situation in order to test the ability of an individual to put his or her theoretical knowledge into practice. Here, the questions examined the ability of the group as a whole to apply some minimum standards of the domestic law and the Convention in hypothetical situations emulating one of the patterns of violations.

II. General description

All questions from the Questionnaire can be divided into three main types. First questions seek answers “in theory” and the second-type questions ask about “current practices”. The last type tests the skills to apply certain legal standards or ethic values in hypothetical situation. All these questions were assembled in separate sections according to their scopes. The Questionnaire consists of 19 questions divided under these three sections, but it collects general and thematic statistics.

The first six questions collect general information relevant for the purposes of the Research (see the Section “General Information”), whereas the remaining 13 questions are thematically focused on the following two main aims of the Survey, namely, to:

- (a) observe the general perception with regard to remand detention as a systemic problem; and
- (b) test collective reactions to the patterns of violations identified during the whole Research (see the Section “Thematic multiple-choice questions”).

Some of the questions from both sections ask for a general opinion about the systemic character of the problem but in a different manner (e.g. Questions nos. 5 and 6 with Questions nos. 7-9). This was done to rapidly switch from obtaining statistical information that could be general in character, to specific information for a particular group. This is also because an individual, regardless of his or her professional background, could not easily identify systemic patterns of a problem. Accordingly, some questions test both systemic and individual views and in this sense they intermingle.

The specific Questions contained in the relevant sections under the heading “Thematic multiple-choice questions” (Questions nos. 10-14) are mainly oriented to the legal professionals with decision-making powers, but they could be answered by other groups of persons such as paralegals, human rights defenders, legal scholars, etc. Although the latter groups do not have any real decision-making power to order detention, they could answer the questions and give valuable opinions from the perspective of an objective observer.

The final group of Questions (from Question no. 15 onwards) raise legal issues but use quasi-legal language. These questions could also be answered by an average person wishing to express his or her opinion involving an issue with detention. These are the questions inspired by the so-called “hypothetical situations often occurring in practice”, which seek an opinion, again legal or otherwise. In fact, they evaluate social tendencies, attitudes and prejudices, since this type of questions trick the tested subject into revealing the preferences of the group to which he or she belongs.

III. Assessment of answers

The first three Questions are about the tested group.

The 1st Question (“*interviewed professionals*”) identifies individual affiliation to a particular group (judges, prosecutors, defence lawyers, investigators, civic activist/human rights defenders, legal scholars, etc) and, thus, guides the whole analysis.

The Survey was carried out **only among legal professionals**. One Questionnaire was completed by a legal scholar. It was regarded as insufficient to draw overall conclusions about the relevant group and thus this Questionnaire was ignored. Accordingly, only the answers of judges, prosecutors and lawyers were analysed.

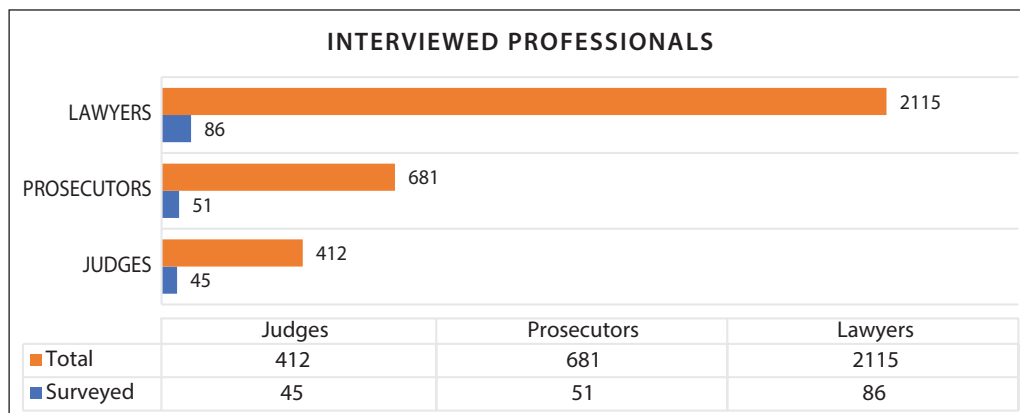
The official statistics¹ of 2018 provided that the Republic of Moldova counted 412 judges of the first- and second-instance courts. According to the same source, the **total** number of **lawyers** for the same year is 2115. The European Commission for the Efficiency of Justice (CEPEJ Reports² reveal that in 2016 the total number of prosecutors amounted to 681.

From these numbers, 45 judges, 51 prosecutors and 86 Layers were surveyed by the Questionnaires. It appears that these numbers seem to be insufficient (only 4% of lawyers, 7% of prosecutors and 11% of judges were questioned; see Chart No **1** below). However, these numbers are enough to draw the necessary conclusions for the benefit of each group as a whole, once the participants answer in the affirmative to the second question related to the relevance of remand detention in their professional activity.

Furthermore, the majority of lawyers in Moldova, as well as judges, are not involved in remand proceedings. The majority of them practice in civil matters. It could be reasonably assumed that the majority of prosecutors are involved in detention proceedings, which is partially true. A significant number of prosecutors hold administrative positions or perform in other fields of criminal justice, thus being rarely involved in detention proceedings. The actual ratio between the surveyed persons and total numbers of legal professionals must be interpreted in close connection with the below figures expressing overall professional experience and involvement in remand detention proceedings (see the 2nd and the 3rd Questions, respectively).

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1. The number of the legal professionals, 2014-2018. Data bank of Moldova http://statbank.statistica.md/pxweb/pxweb/ro/30%20Statistica%20sociala/30%20Statistica%20sociala_12%20JUS_JUSrev_JUS040/JUS040100rcl.px/?rxid=b2ff27d7-0b96-43c9-934b-42e1a2a9a774%22%20class=%22link_mail
 2. See the CEPEJ Report on the Republic of Moldova, Evaluation exercise - 2018 edition at para. 3.3.1.055 <https://rm.coe.int/republic-of-moldova/16808d028e>

Chart No 1



The 2nd Question (“*professional experience*”) concerns individual experience exercising legal profession and, thus, the reliability of the given answers. It asks the surveyed person to choose one from four categories: less experienced (up to 2 years), average (between 2 and 5 years), experienced (between 5 and 10 years) and highly experienced (10 years and above). Again, this is done for the purposes of assessing the surveyed person’s aptitude to express his or her views about the systemic character of the problem. The broader experience increases the reliability of answers.

As the figure below shows (see Chart no 2), most of the surveyed persons stated that they had more than ten years’ legal experience. In particular, these numbers include mostly prosecutors and judges, while lawyers’ experience was almost equally divided between more than five and more than ten years. A relatively average number of prosecutors and lawyers stated that they have up to two years’ experience. Accordingly, the reliability of their answers is relatively high, which would make up for the above weakness regarding a fairly low ratio of the surveyed professionals.

Chart No 2

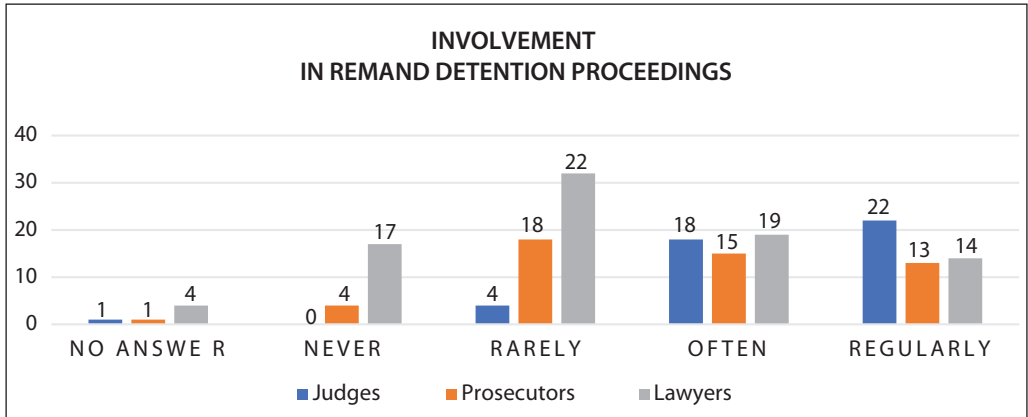


The 3rd Question (*“involvement in remand detention proceedings”*) relates to the specific experience in matters covered by the Research. It asks whether the surveyed person’s opinion is actually relevant for the purposes of the Research and to what extent. It distinguishes four types of involvement in remand detention proceedings, from irrelevant, less relevant, average and highly relevant (i.e. “never”, “rarely”, “often” and “regularly” involved in detention proceedings). The answers to this question would not undermine the reliability of opinions related to the specific legal questions, except when the person has no legal education and never been involved in detention proceedings, which is not the case in the present Survey.

However, this answer would be less important for an evaluation of opinions concerning the systemic character of the problem, since the overall experience sought by the 2nd Question is the principal criterion. In any case, both the 2nd and the 3rd Questions, if assessed in conjunction could bring added value to the assessment of the reliability of the opinions as a whole.

Chart no 3 shows the figures related to the specific experience of the participants in the Survey. More than a half of the interviewed professionals are often involved in this type of proceedings or participate in them on a regular basis. Almost 37% of lawyers, however, stated they are rarely involved in these proceedings and 20% of lawyers said they never attended them. This number decreases the relevance of the whole group’s answers in comparison with the reliability of answers given by prosecutors and judges, who declared themselves to be more experienced in these proceedings.

Chart No 3



The following Questions examine the subjective perceptions of the participants concerning the systemic patterns.

The 4th Question (*“institutional root-causes of the problem”*) seeks a general opinion about institutional attribution of responsibility for problems emerging in detention proceedings, should the participant in the Survey consider that they exist. It asks whether the problems could be caused by either one or both of the main institutions which play the key-roles in detention proceedings, i.e. the judiciary and the prosecution service (the 2nd and 3rd check-

boxes); alternatively, whether the blame could be attributed to the incompatible practices framed in rather abstract terms such as “the incoherent application of the law” (the 1st check-box). This question is delicate since it explores subjective and collective perceptions of a particular group towards its own responsibility or the responsibility of others. For example, it is expected that judges and prosecutors would rather blame each other and, thus, choose either judicial or prosecutorial practice as the root-cause of problems.

Defence lawyers could be reasonably expected to select both options and just one, but not the choice related to the general incoherent application of law (the 1st check-box). However, the best answer to this question would be to attribute collective responsibility by ticking the general inconsistency of practical implementation of the law, thus implicitly acknowledging the shared responsibility. The best situation is, of course, when the surveyed person ticks that box which allocates responsibility to his or her own group.

This Question has also the “other” alternative (the 4th check-box), by which other factors could be blamed, including the defence lawyers (by both judges and prosecutors). By this option the surveyed person becomes neutral and this opinion is less relevant for the purposes of the Research.

The results of the Survey were virtually predictable. Almost a half of all respondents preferred to blame the opposite branch for being the cause of the excessive use of detention; 54% of interviewed prosecutors attributed the responsibility to incoherent judicial practice, whilst 58% of judges did the opposite, blaming the prosecutors. Lawyers, on the other hand, chose both options emphasizing that the principal causes of the problem are both the incoherent judicial and prosecutorial practices (almost 74% of lawyers answered in the alternative by ticking both answers).

Interesting results were obtained in another half of the respondent groups. For example, whilst some of the judges preferred to blame themselves for incoherent judicial practice (18%), others acknowledged that excessive detention is due to the general inapplicability of the law (20%). Only a small number of the surveyed prosecutors (6%) admitted that they were responsible for the excessive use of detention proceedings, whilst the other part (16%) almost reached the number of judges attributing the responsibility to the incoherent application of law. Lawyers, who considered that detention is due to the general inapplicability of law were in the minority (16%).

Some of the respondents selected the “other” alternative describing their own views about the causes of the problem. However, all were irrelevant. For example, many lawyers chose to blame either or both judicial and prosecutorial practices by writing down their answers in the box entitled as “other causes”. Accordingly, these written answers were attributed to the statistical data described above. A small number of prosecutors and one judge ticked the “other causes” box without providing an explanation.

Chart no 4 illustrates these figures showing both the number of answers and distribution of options expressed as a percentage.

Chart No 4

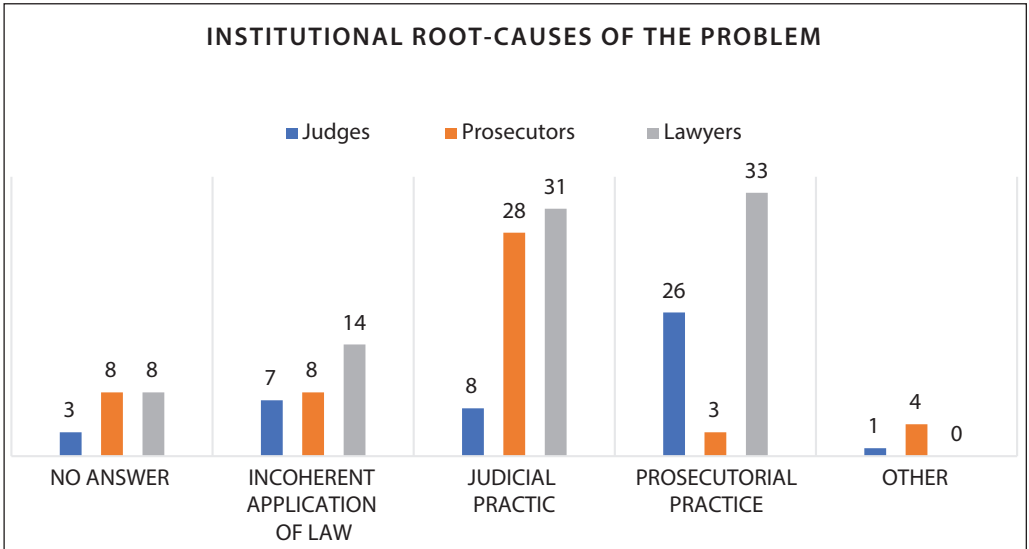
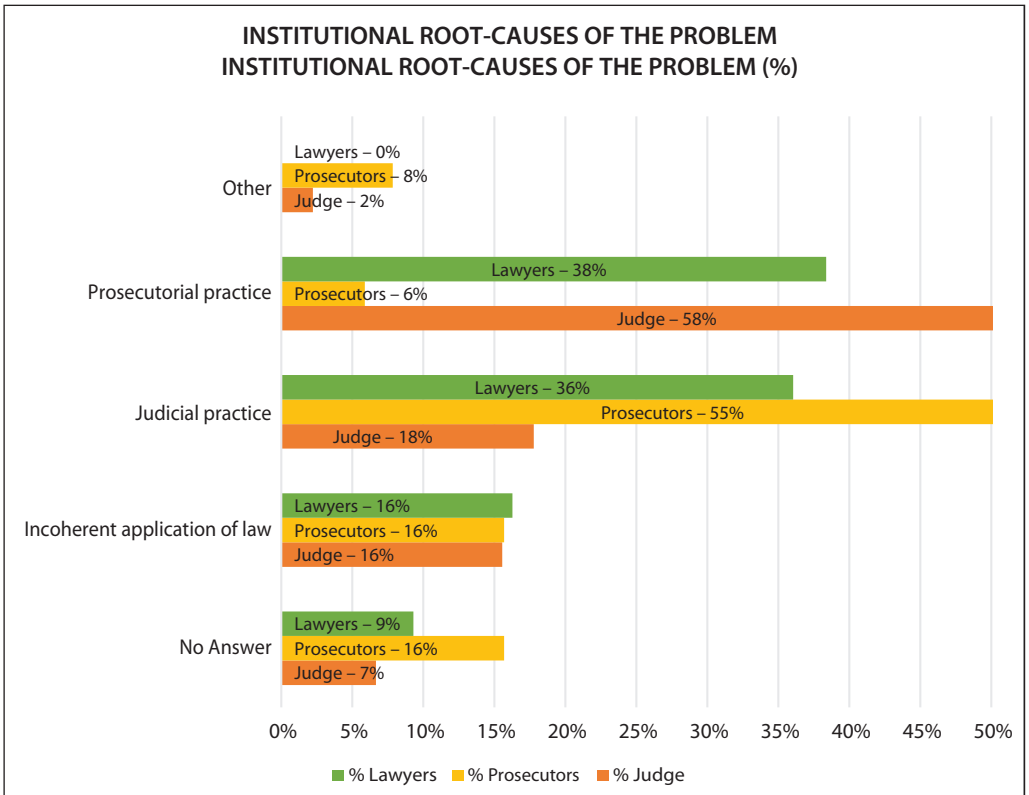


Chart No 4.1

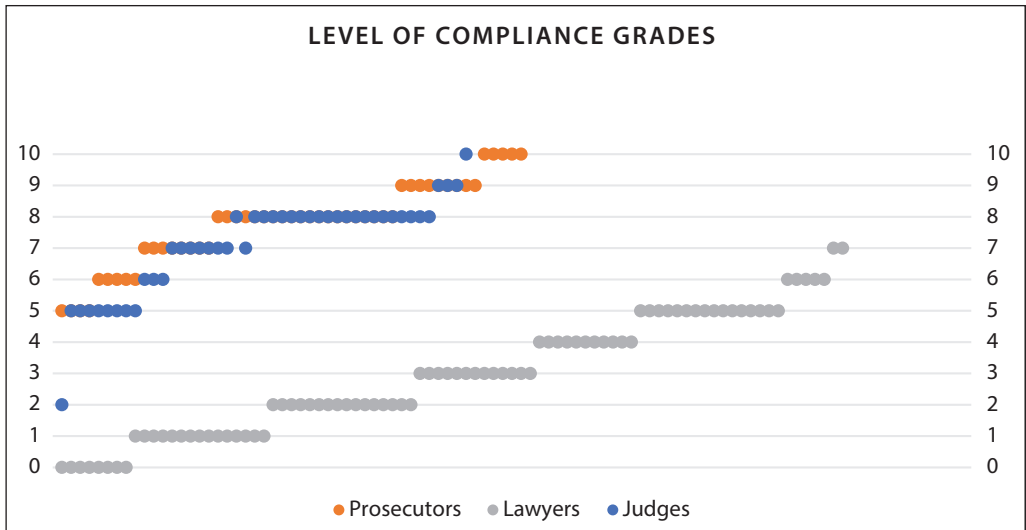


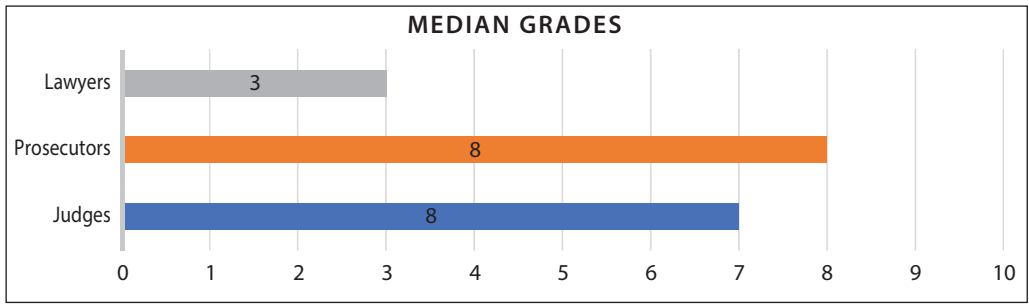
The 5th Question (“*level of compliance*”) evaluates the subjective perception of the level of compliance of practices with the domestic law, asking the interviewed person to grade it as either the worst or the best on the scale from one to ten. These grades could vary depending on the affiliation of the interviewed person to a particular group. However, this question aims to observe, based on the statistical data, the individual perceptions within the affiliated group taken as a whole. It could show that even in the group itself, the subjective perceptions could differ. The subjective evaluations of the group members could fluctuate and reveal an inconsistency and disagreements within the group.

As mentioned above, here the choices are numerical and vary from one to ten. The statistical analysis calculated a *median number* from all grades awarded by each participant and this number was attributed to the group as a whole. For example, the judges graded the detention proceedings mostly by 7s and 8s, but there was one 2 and many 5s. An *average number* in this situation would be less relevant for the Research because it would be greatly skewed by small values. On the contrary, some prosecutors awarded high grades (10s and 9s) and they would also artificially increase the value of the average grade. Thus, the median number represents the best option to observe how a particular group evaluated the general level of compliance of detention proceedings with the domestic law and the Convention.

Chart no 5 below shows these grades awarded by each group. Both judges and prosecutors awarded a relatively high median grade of 8 while all lawyers evaluated remand proceedings in the negative, which in medium did not exceed the grade of 3. Thus, the overall conclusion is that both prosecutors and judges are generally satisfied with the remand proceedings, while lawyers mostly see them in the negative light.

Chart No 5





The 6th Question (“when violations mostly occur”) attempts to identify when, at what stages of the criminal proceedings, the main problems of compliance arise. It separates remand proceedings into four main stages according to the rationale of the Criminal Procedure Code. Firstly, violations could appear pending the stage of arrests. The next two stages are those when initial detention was ordered and then extended during the pre-trial investigation. The last stage is the judicial examination when detention could be ordered or extended pending trial.

This question slightly attributes responsibility to each of the groups (the judiciary or the prosecution service) but its main aim is to observe the factual situation, at least from the subjective perception of the surveyed person. In other words, it establishes the principal area in which the law encounters difficulties in its application; where there are more risks and where the patterns of violations are observable.

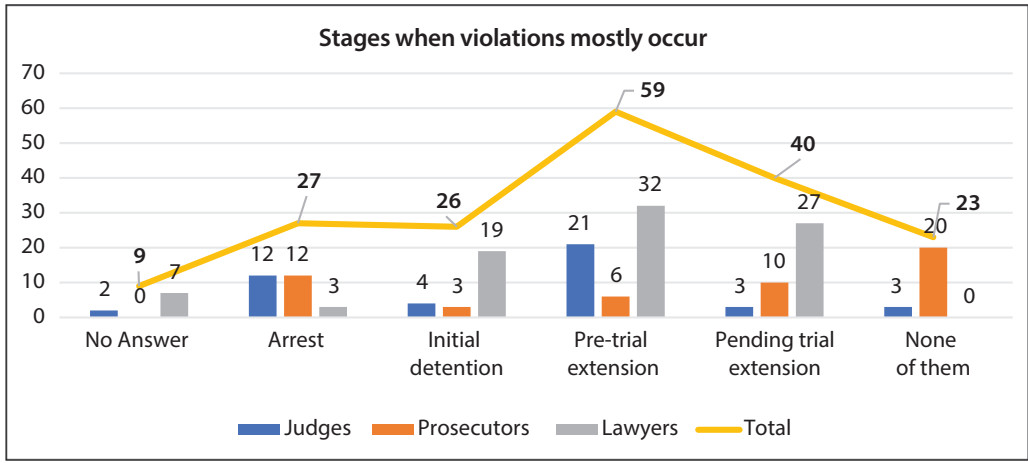
For example, if the Survey would reveal that application of the law is deficient at the first stages of remand proceedings (arrests or initial ordering of detentions) than the data would confirm conclusions about the patterns regarding the lack of reasonable suspicion since it is when they frequently occur. If it is the next stages, pending extension of detention either in the pre-trial or trial stages, then it is likely that the substantive problems lie within the pattern related to the lack of proper judicial reasoning on the grounds of detention. This does not mean that other patterns are left without attention since they could appear at any stage of remand proceedings. However, in the worst scenario, if the data are dispersed rather than equally distributed between all stages, this will prove that the practice is deficient overall, irrespective of the stages of remand proceedings.

If the groups’ answers are to be taken *en bloc*, the below findings prove the worst scenario that the practice is overall deficient. On the contrary, if the answers are separated by groups of the surveyed persons, the results could be different. For example, in the lawyers’ opinion, the extension of detention in the pre-trial stage of criminal proceedings is viewed as the primary milestone where the most violations of the right to liberty usually occur. The minority of questioned judges and prosecutors agreed with this assumption. However, half of the judges and prosecutors pointed out that, in their opinion, the violations often take place at the stage of arrests, when they are mostly attributed to the law-enforcement authorities or criminal investigators. In their opinion, this stage of arrest is attributable neither to the judges nor to the prosecutors, who retain fewer decision-making powers in arresting persons for the first three days, unless they check

the legality of such measure of deprivation of liberty. In the next stages, when a judge decides on ordering detention and its extension for a longer periods of time following the prosecutorial motions, both the judges and prosecutors play the key-roles as primary decision-makers. Thus, they would assume their accountability for violations in these stages, with exception of prosecutors who tend to delegate the full responsibility for ordering detention and extension on the judges.

In general, the prosecutors’ opinion was the most fairly distributed indicating that violations would occur in almost all stages of criminal proceedings. However, this opinion was reduced by half following the opinions of prosecutors who considered that at no stages of criminal proceedings any violations take place. This opinion was supported by judges but in minority. As far as the lawyers are concerned, their opinion was distributed quite equally between all three main stages of remand proceedings, i.e. the initial detention order, its extension in pre-trial and pending trial stages. The chart below illustrates this distribution of opinions among all groups.

Chart No 6

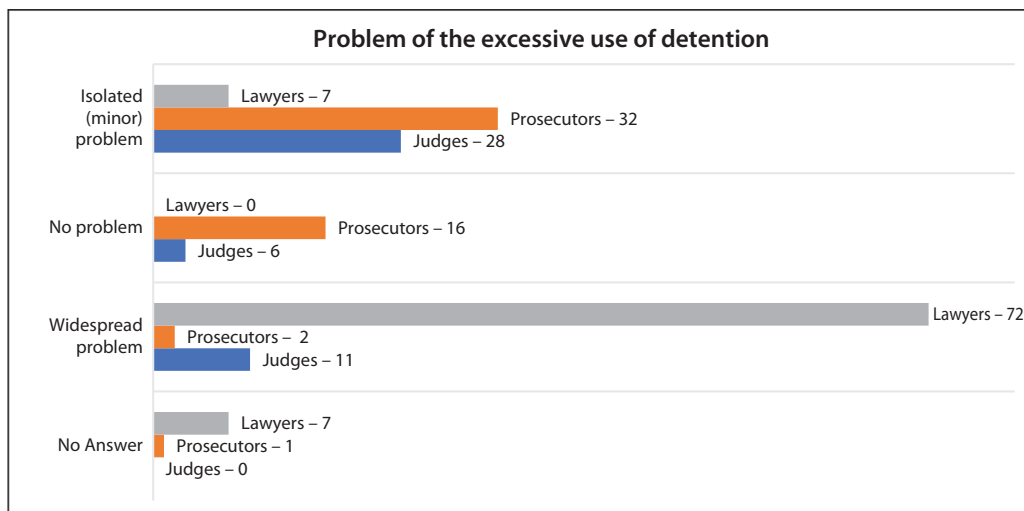


The next questions continue to assess the opinions on systemic patterns but in more detail.

The 7th Question (“*problem of excessive use*”) is bipolar seeking an opinion on the alleged problem of the excessive use of detention. It asks whether the problem is acknowledged in general or not. It provides also for an intermediary option, asking whether the surveyed person accepts that the problem exists but it is rather isolated and reveals no systemic patterns. In any case, the principal aim of this question is to evaluate the opinion about the extent of the excessive use of detention, i.e. whether the interviewed person would agree that the problem seems to be widespread or not.

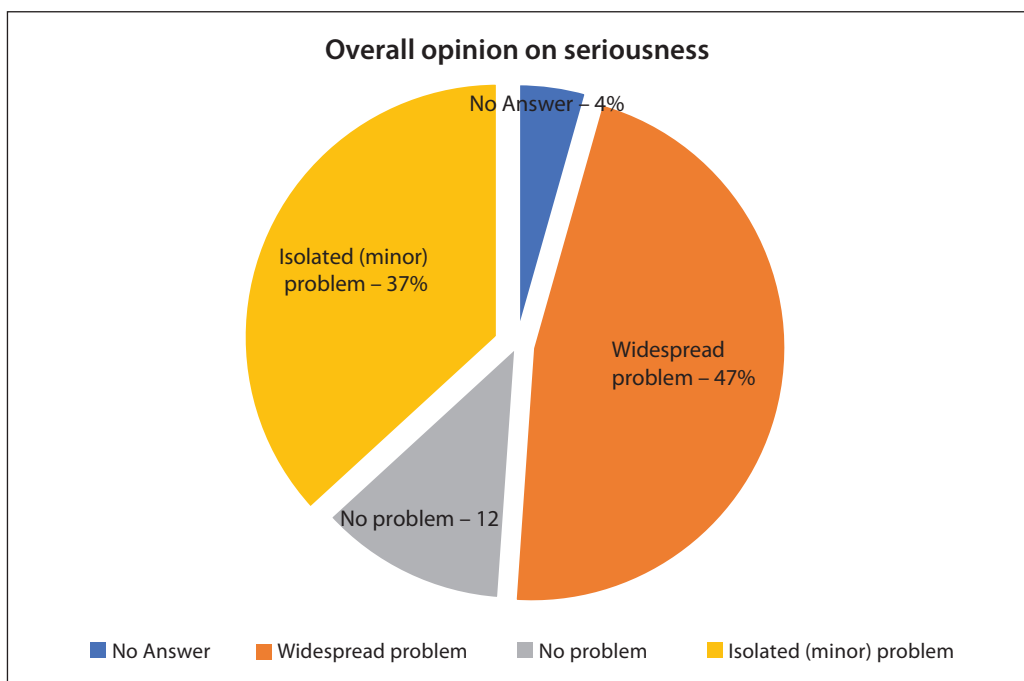
As it can be seen from **Chart no 7 and no 7.1** below, the vast majority of both judges and prosecutors acknowledged the existence of the problem but classified it as minor in character. Lawyers, on the other hand, almost unanimously considered that the problem with detention is widespread and could have reached a systemic level.

Chart No 7



Overall, almost a half (47%) of all participants in the Survey indicated that the problem is systemic. 37 % considered that it is isolated and the rest of 12% stated that the detention in Moldova does not raise any problem at all. 4 % did not answer.

Chart No 7.1



The 8th Question (“*systemic problem*”) follows the same reasoning and seeks opinions related to the alleged systemic feature in the event of an affirmative answer(s) to the above question. It, however, focuses on the inner character of the problem but not on its extent. This aspect should be clarified. One needs to distinguish the widespread features of a problem, which refer to its scale, seriousness or repetitiveness. Another feature of a problems is its systemic pattern, which include some structural, innate, dysfunctions rooted either in practices or in the law. A widespread problem is always rooted in such structural dysfunctions, meaning in the systemic patterns, thus leading to a number of repetitive violations. However, the systemic feature of a problem should not be evaluated only by the reference to its widescale consequences. The violations could be less extensive in numbers or even appear as isolated but the problem could still remain systemic because of its structural dysfunction. Such a structural dysfunction could or could not potentially elevate into large scale violations in the future. Accordingly, the relation between the seriousness of a problem and its systemic character should not be analysed solely by the number of violations it may lead to. In other words, the systemic character of the problem lies in its premises while its extensiveness is just one of the would-be consequences.

If the interviewed person agrees with the systemic patterns it is likely that he or she would answer the affirmative by ticking the 2nd check-box. Otherwise, the answer would again deny the existence of the problem as such. The answers to the question provide for the third option to excuse oneself by being unable to assess the systemic character of the problem, though this does not mean that the surveyed person would disregard its existence. The main aim of this question is to determine, whether the tested groups acknowledge the problem as such and, thus, whether the person is prepared to accept its roots, imbedded into institutional practices, mentality or routine patterns.

The results actually for the most part repeat the above findings following the Question 7 concerning widespread character and seriousness of the problem. In fact, the answers to this question clarify the above opinion. Here the same method of assessment was applied, which is it to distinguish opinions between the groups and then to assemble them together drawing conclusions irrespective of the surveyed persons’ professional affiliation.

As it can be observed from **Chart no 8**, the majority of judges (60%) and prosecutors (59%) denied the existence of the alleged systemic patterns of the excessive use of detention. These figures nearly correspond to the opinions expressed following the above question expressing opinion that whilst it is a minor and isolated the problem still exists. 16 % of the interviewed judges and 19% of prosecutors answered that they are unable to assess the systemic patterns, which does not equate to denying that the problem exists but rather to their inability to evaluate its systemic features. Indeed, not all are able or willing to classify the problem as structural, i.e. deeply rooted in the system or rules and practices, but this does not mean that they deny its existence. This argument is proven by the lawyers’ answers, of whom 14% stated that they were unable to assess the systemic patterns; in their answers to the above question none of the lawyers denied the existence of the problem. The vast majority of the interviewed lawyers (76%) agreed that the problem is systemic, because of its widespread character, while a part of them declared themselves unable to assess if it is systemic.

The interesting data could be observed in the opinions expressed by judges and prosecutors (31% and 8%, respectively) concerning the systemic problem. Answering the previous question on the alleged widespread features, only a few of them acknowledged the existence of the problem in larger scales. Following the answers to this question, the numbers of prosecutors and judges accepting the systemic character did not change. This proves that, according to some of the surveyed professionals, the systemic character of the problem does not equate to its alleged pandemic features. In other words, their opinion was that the problem could be systemic, i.e. imbedded in some incompatible practices, but still it could be less widespread all the same. However, this is a minority opinion and as indicated by the next Chart, the systemic features of the excessive use of detention are usually associated with the scale of the problem.

Chart No 8

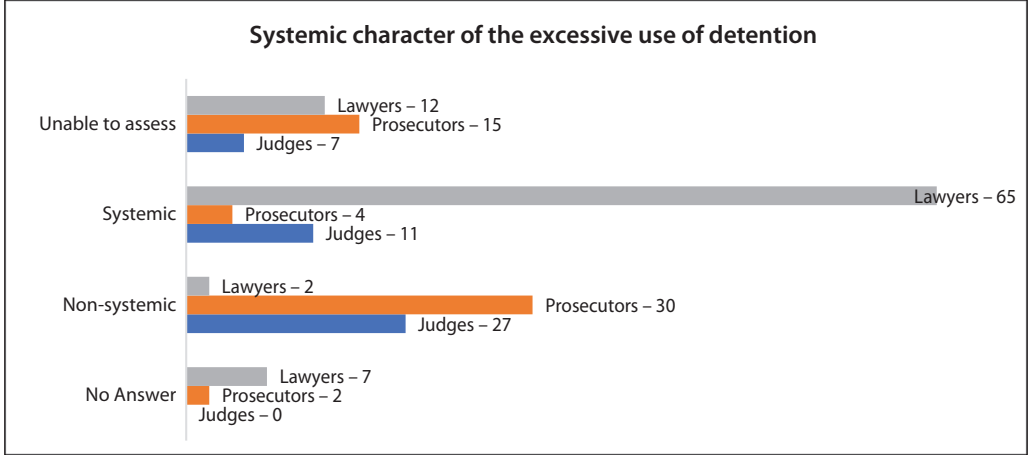
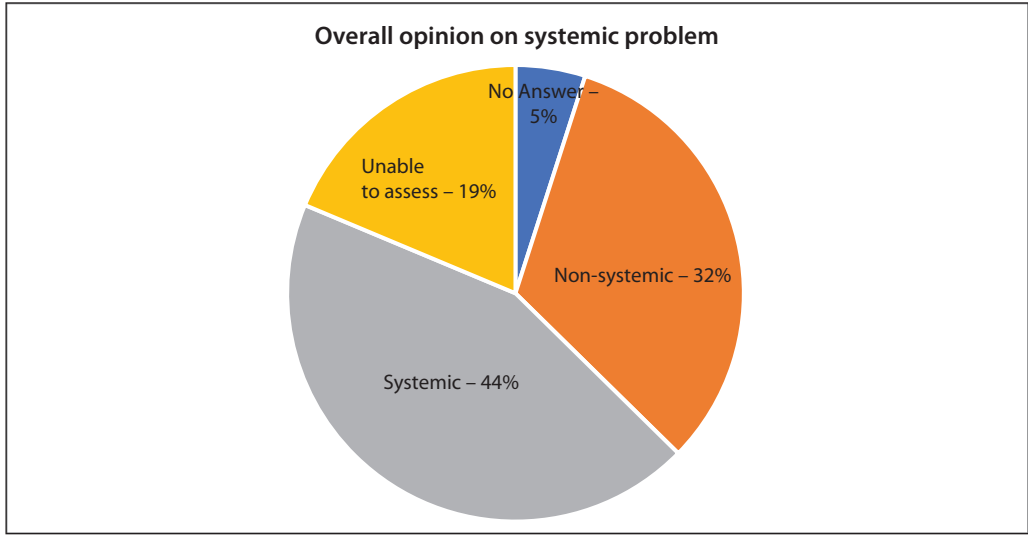


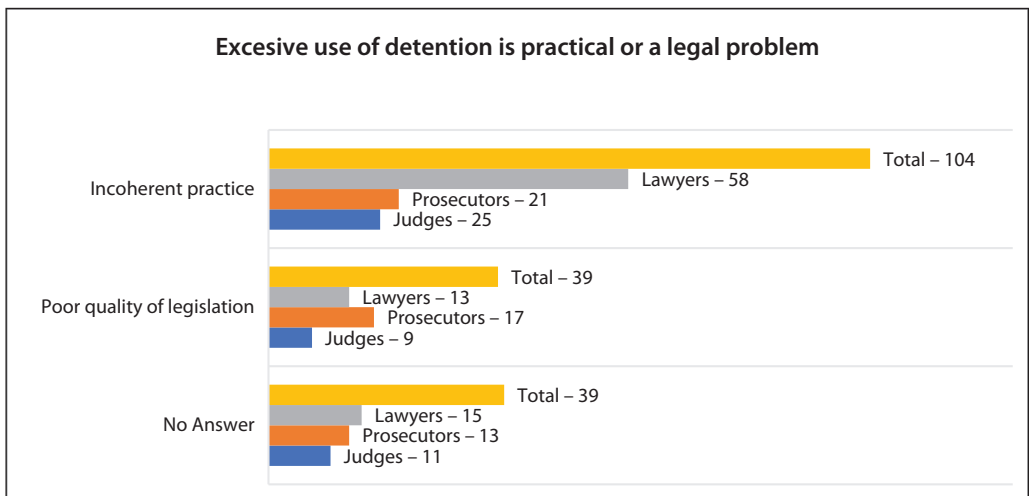
Chart No 8.1



The 9th Question (“*practical or legal problem*”) concerns the substantive character of the problem framed as either legal or practical. It reiterates the principal Research question whether the alleged excessive use is determined by normative issues such as the quality of the legislation or rather by its incoherent implementation.

This Question must be interpreted in connection with the Questions 7 and 8 and it confirms the preliminary conclusions drawn from the above. The majority of all groups agreed that the problem of the excessive use of detention stems from the incoherent application of legislation, as opposed to the quality of law. Those who considered that the poor quality of procedural legislation is the cause of the excessive use of detention were equal to those judges, prosecutors and lawyers who gave no answer to this question. In any case, in each group one opinion prevailed that the problem of widespread detention in the Republic of Moldova is caused by the incoherent application of legislation.

Chart No 9



The following Questions are specifically directed at legal professionals and they seek opinions on three key-identified patterns of violations, specifically concerning the practice on the reasoning of “reasonable suspicion” and “grounds” for continuous detention, as well as the effectiveness of the compensation scheme for unlawful deprivations of liberty.

The 10th Question (*understanding of the meaning of “reasonable suspicion”*) is categorical and asks whether the meaning of “reasonable suspicion” is understood in practice. Its rationale stems from the presupposed confusion between the concept of “reasonable suspicion” as the lawful basis for arrest and/or detention and “criminal charges” brought by prosecution on the merits of the case. A negative response would seriously undermine the surveyed person’s professional capacity to understand the meaning of lawfulness in detention proceedings.

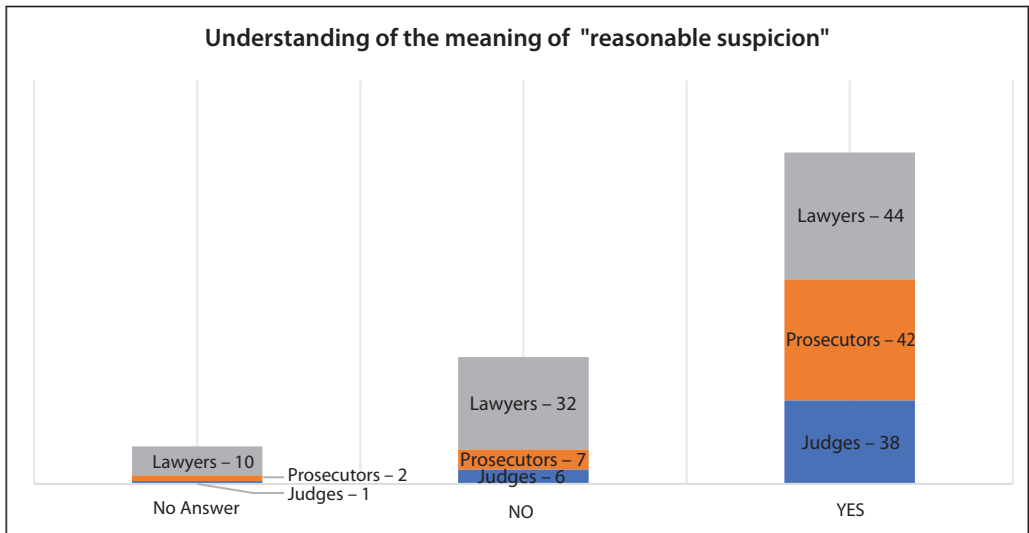
Chart no 10 illustrates that most of the questioned legal professionals share a common understanding of the concept on “reasonable suspicion”; the majority of the answers were

affirmative. Thirteen participants (of whom one judge, two prosecutors and ten lawyers) did not answer the question, which could be construed as negative answers.

The figures allow to conclude that the concept of reasonable suspicion does not raise practical issues among the judges and prosecutors. They distinguish this concept from “criminal charges” seen it as either the condition for a lawful detention or the *prima facie* ground substantiating official opening of a criminal investigation. But the reasonable suspicion is not enough to substantiate criminal charges and criminal responsibility; the later require higher standard of proof in criminal proceedings. In this sense the answers collected from judges and prosecutors confirmed the supposition that the concept of a reasonable suspicion is not misplaced in their practice.

However, only half of the lawyers stated that they understand the meaning of a “reasonable suspicion”. This could be the result of the defence role that the lawyers play in criminal proceedings. Defence lawyers would prefer to see the concept of a “reasonable suspicion” connected to the general criminal responsibility in a given case, because, in their opinion, the lack of the former discloses the absence of the later. Accordingly, they see the reasonable suspicion as equal to criminal accusation and final indictments. In other words, they tend to observe the reasonable suspicion as primary ground supporting criminal prosecution or criminal responsibility in general. That is why, when dealing with detention proceedings, lawyers would be inclined to disregard the narrow meaning of reasonable suspicion and, thus, misinterpret this question by answering that they do not understand its meaning. It could be that the lawyers imply that the meaning of a reasonable suspicion should be broader than that strictly confined to detention proceedings.

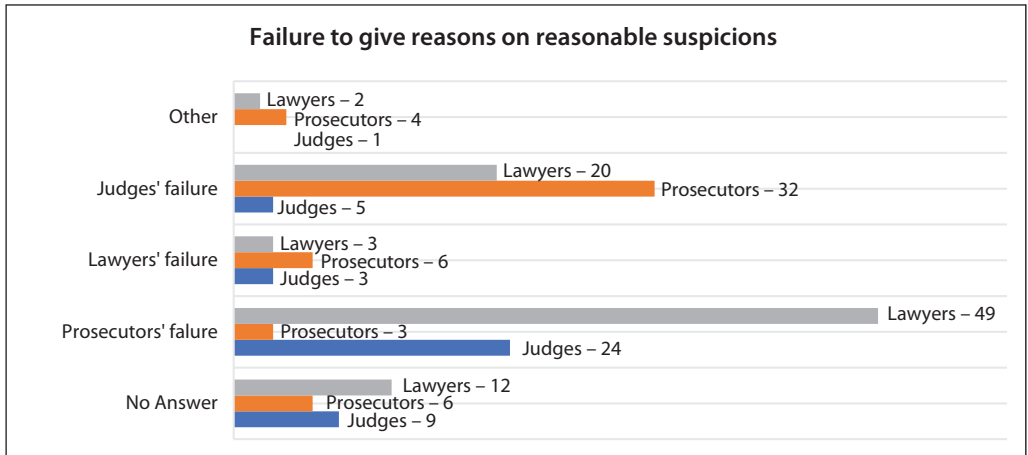
Chart No 10



The 11th Question (“*failure to give reasons for reasonable suspicions*”) tries to identify the difficulties in giving reasons on “reasonable suspicion” and whose task is to provide these reasons. As with the 4th Question, this one tentatively explores the delicate relationship between the three main actors participating in detention proceedings, judiciary, prosecution and defence. It refers the surveyed person to either one or two options, thus revealing whom he or she would blame for the failure to give reasons. It is likely that the groups would be tempted to blame each other, so that their answers would appear to be rather subjective. However, if the surveyed person would tick the box regarding the group to which he belongs than the answer could be regarded as objective. Only the answers taken as a whole could give a valuable insight about the causes of failures in reasoning on “reasonable suspicion” while deciding on detention.

The answers to this question proved the above rationale. Indeed, most of the surveyed prosecutors blamed lawyers for not providing sufficient counter-arguments against their own reasoning on reasonable suspicion. Lawyers, on the other hand, blamed both the prosecutors and judges for the failure to justify the existence of a reasonable suspicion. Still, they held the prosecutors responsible for insufficient reasoning. Almost 58% of the interviewed lawyers declared that prosecution fails to substantiate “reasonable suspicion”. Judges echoed the opinion of lawyers in this regard; 60% of judges held the prosecutors responsible for the same failure. Thus, the answers were mostly subjective and reflected professional loyalty. Only a small number of interviewed professionals provided an objective overview of their own failures. 9% of judges, 6% of prosecutors and 4% of lawyers stated that the failure to justify the reasonable suspicion was due to their own mistakes.

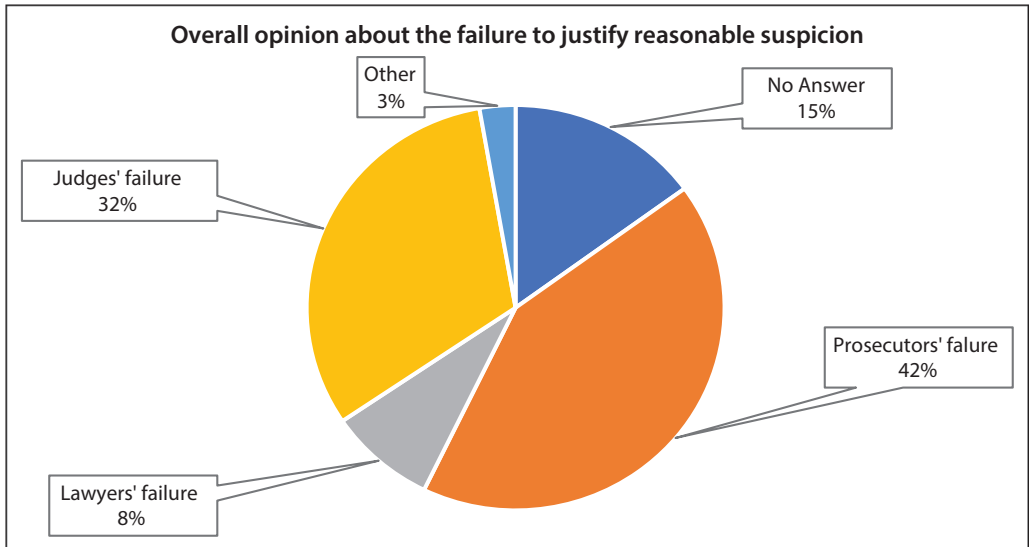
Chart No 11



It must not be forgotten that the Questionnaire evaluates subjective perceptions of the interviewed groups. It is not an objective-oriented analysis like the assessment of detention practices made by the Check-lists during the Research. Accordingly, whilst taking into account these elements of subjective professional loyalty, the overall results of the Survey express how the judges, prosecutors and lawyers observe their own practices, even when they criticize each other. Taken together with the objective findings

on the reasoning on reasonable suspicion following the assessment by the Check-lists, the Questionnaires could bring added value to the Research. The subjective perceptions of the interviewed groups on their own failures and the failures of others to provide reasons for their detention orders reflect the current practices and the modalities of application of the law.

It is undisputable that any legal practitioner who applies the law cannot disregard his or her own perceptions and the professional loyalty. Moreover, if all answers attributed to all three groups participating in the detention proceedings are to be analysed as a whole, their subjectivity and professional loyalty could be disregarded. Thus, the below chart assembles all the data expressed in their percentual value with the reference to each the professional group, revealing the opinions of the surveyed persons who would be responsible for the failures to provide reasoning.



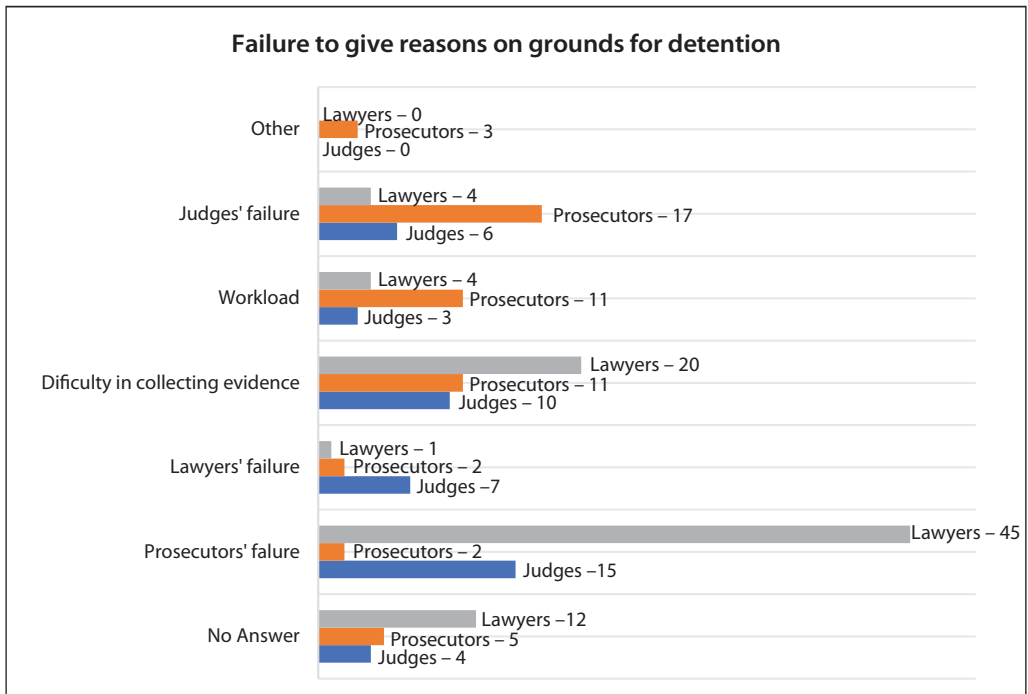
According to this interpretation of the answers, the group of prosecutors is considered the most responsible (42%) followed by judges (32%). Lawyers, on the other hand, bear less responsibility for these failures (8%). However, 15% of the interviewed professionals attributed the responsibility to no one, accordingly they do not think of any failures at all. Other answers are so insignificant in numbers (3%), that they do not merit an analysis in depth.

The 12th Question (*"failure to give reasons for the grounds for detention"*) is the same as the previous question but refers to the reasoning on the grounds for detention. In other words, this question seeks to identify the difficulties encountered in reasoning on continuous detention and whom these failures could be attributable to. The three original options, with reference to judiciary, prosecution and defence failures, are supplemented by other two specific choices concerning the judicial workload and practical difficulties in collecting evidence for substantiating the grounds of detention. These choices resemble systemic patterns and the responsibility for these causes of unreasoned decisions on detention on

remand could be attributed to no group in particular. Thus, they are objective and depend less on the subjective perceptions of the surveyed persons.

The answers reveal the same subjective perceptions and professional loyalty element. The surveyed professionals remain determined to shift the blame onto the other groups rather than to attribute responsibility to their own failures. However, the two additional options (“difficulty in collecting evidence” and the “workload”) distributed the answers almost equally between all participants. This proves the above assertion that all three groups, if taken together, could provide an objective overview despite their subjective preferences and affiliation to their own professional group.

Chart No 12



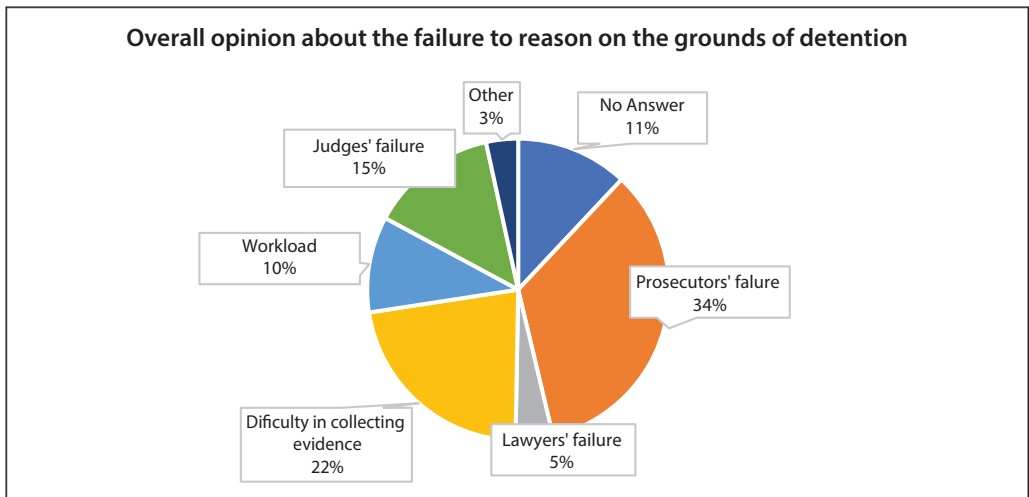
Using the same method of analysing the answers as a whole, the data revealed that the overall opinion points to the excessive workload and the difficulty in collecting evidence as the principal causes of unreasoned judicial decisions in detention proceedings. To this could be added another cause that is the prosecutors’ failure to reason their motions to remand, which was mentioned almost in unison by the majority of the surveyed professionals. However, the failures of judges should not be disregarded, since they play a key role in this process. If the difficulty in evidence collection could be connected to the failures of the prosecution to reason their motions to remand, the “workload” criterion relates to the judicial activity. Indeed, the prosecutors collect evidence, not judges. In this sense, the “workload” is usually mentioned as an excuse for not reasoning the detention orders and judicial decisions to extend detention along with the prosecutor’s failures to

produce evidence. For the most part, the “workload” and, thus, the lack of sufficient time is the judges’ argument for the brevity of their reasoning on detention.

The judges’ failures connected with the “workload” argument constitutes 25% of the expressed opinions, whilst the prosecutors’ failures to reason and difficulties in collecting evidence amount to 56%. Thus, the practical demands of the investigation and an efficient mechanism for collecting evidence, which is the exclusive task of the prosecution during the pre-trial detention proceedings, appears to be the principal element that supports the overall opinion that the lack of reasoning in the detention decisions is due to the failures of the prosecutors.

Nevertheless, the judges’ failures, which are not only due to an excessive workload, is no less an important factor. In the contrary, according to the opinion of the interviewed persons, there is a difficulty in evidence collection and, thus, the prosecutors fail to reason their motions to remand. The judges should not be blamed at all for these failures in evidence collection because they would not order or extend detention without proper evidence. However, they are still being criticized by the whole group, and quite extensively, for not reasoning their decisions to remand, with or without the arguments about the “workload” or the “difficulties in collecting evidence”.

Accordingly, the data assembled below should be given a qualitative assessment. They illustrate the root-causes of this situation, because they express an overall perception of all three groups of professionals, regardless of their professional loyalty and affiliation.



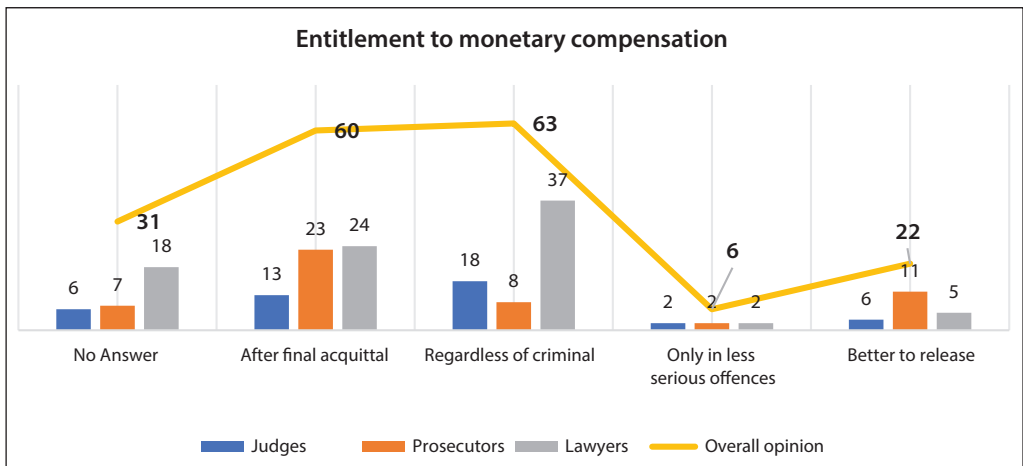
The 13th Question (“*monetary compensation for unlawful detention*”) relates to the right to monetary compensation for violations of the right to liberty. It frames the optional answers to ascertain whether the surveyed person considers that this right should depend on seriousness of criminal charges, the outcomes of the criminal case or, alternatively, on release of the alleged victim of an unlawful detention. Reiterating the case-law of the ECtHR, the right to compensation should be enforceable and autonomous; it should not be dependent on the final acquittal of the detainee or termination of the criminal proceedings against him/her on exonerative grounds. Thus, this question tricks the interviewed person

by testing his or her ability to distinguish this right from the merits of the criminal case. It aims to determine whether the legal professionals are prepared to accept the right to compensation connected only to the question of lawfulness of detention, irrespective of the gravity of the criminal charges or and guilt.

The answers were equally divided between two contrary options, that the monetary compensation either depends on the final acquittal or it is not. The answers shifted slightly the balance to the second option, i.e. that compensation for a breach of the right to liberty should be awarded regardless of the criminal charges and outcomes of the case. This means that the accused could be convicted but still paid for damages, if his or her detention was in breach of the Convention. This latter opinion prevails between lawyers and judges. The prosecutors, however, are adamant in their answers for the so-called rehabilitation grounds for compensation. The majority of prosecutors considered that the right to compensation arises only after the final acquittal. Moreover, many of them considered that the release from unlawful detention is the better option and the only form of “compensation” available to the victim.

Another interesting result emerges from the answers of lawyers, many of whom either did not answer to this question or had the same opinion as the prosecutors regarding the right to compensation. They considered it as dependent on the final acquittal of the defendant. There is only one explanation to that opinion, which is the provisions of the current law (Law no. 1545/1998). The law established this dependency and the lawyers merely uphold this legal rationale. All the same, the judges’ and prosecutors’ answers sharing this lawyers’ opinion could be explained by the same provisions of the law. However, the ECtHR case-law requires the autonomous character of the right to compensation for a breach of the right to liberty, irrespective of the outcomes of the criminal case on the merits. The Law no. 1545/1998 provides otherwise and, thus, it confuses the surveyed legal professionals. Accordingly, despite of positive answers to this question, which uphold the requirements of the ECtHR’ case-law, the confusion among legal professionals concerning the accurate interpretation of the right to compensation still persists.

Chart No 13



The 14th Question (*“House Arrest and Detention”*) explores the difficulties in ordering detention and house arrest. The question starts from the premise that there is still confusion in practice regarding the role and legal status of house arrest in relation to detention in custody.

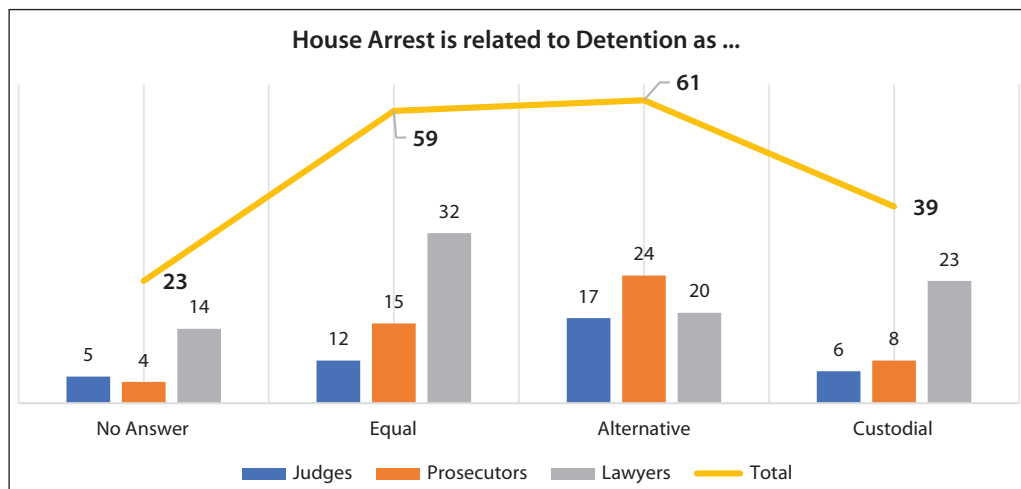
House arrest is a relatively new measure for legal professionals in Moldova. Since its introduction in 2002, it was instantly perceived by practitioners as an alternative to detention. It was not primarily considered as another, separate, form of deprivation of liberty with its own requirements and legal status. Thus, this question explores the relationship between these two forms of deprivation of liberty by proposing three optional answers: affirmative, negative and intermediate.

Pursuant to the first option, the correct one, both detention and house arrest constitute deprivations of liberty with similar solid requirements of judicial reasoning and proportionality. The second answer tricks the surveyed person by placing house arrest as an alternative to detention, because of its less serious character. If selected, this option would prove the above assumption that despite of the clear provisions of procedural law and the ECtHR’s case-law, there still could be confusion in practice, how the legal regimes of detention and house arrest correlate with each other. The last, intermediate, answer is wrong since it implies that house arrest is a custodial measure. Only detention is a custodial measure and from this point of view, it is not the same as house arrest.

Chart no 14 below revealed that the overall opinion about the relationship between these two measures is divided among lawyers, judges and prosecutors. Most of the prosecutors (47%) considered that the requirements of these measures are not the same and house arrest is an alternative measure in relation to detention. 44% of judges shared this view, while the majority of lawyers (37%) preferred to consider both measures as equal. Again, the interesting results were obtained following the analysis of the answers to the 3rd option, which classifies both measures as custodial in character. Here the minority of prosecutors and judges is almost equal with those who did not answer the question. However, 27% of lawyers, who considered both measures as custodial, exceeded those lawyers (16%) who regarded house arrest as an alternative to detention.

These results prove that lawyers consider that both measures are serious, whilst incorrectly treating house arrest as a custodial measure. Nevertheless, the overall opinion of all groups is slightly shifted towards classifying house arrest as an alternative measure, mainly due to the opinion of the majority of the judges and prosecutors. Without calculation of lawyers’ answers, the results raise concerns because both judges and prosecutors wrongly treat house arrest as less serious measure of deprivation of liberty.

Chart No 14



The next five questions aim to evaluate practical skills in relation to the principal identified patterns of violations. Although, these questions seem to explore the same elements as above, they employ another method of assessment, i.e. by testing the ability to resolve a hypothetical case-study.

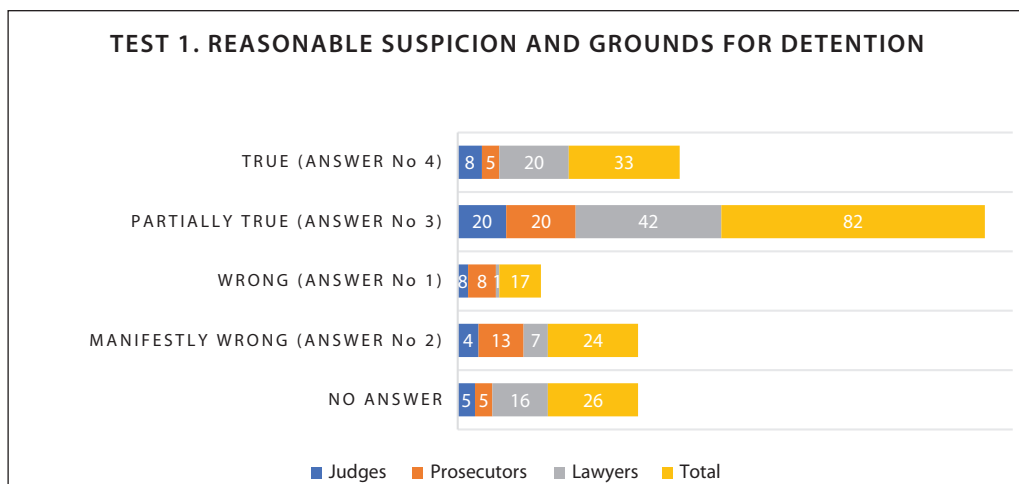
The 15th Question simulates a situation asking whether detention could be used for other purposes than those habitually used in practice. It gives four options, one of which is correct (Answer no. 4) and another is partially accurate (Answer no. 3).

This question aims to test the ability of the surveyed person to distinguish between the acceptable and inadmissible grounds for lawful detention. The detention could not be used for the purpose of collecting evidence and investigation. Most importantly, it could not be used in the absence of “a reasonable suspicion”. The situation depicted by this question qualifies a potential detainee as the witness in bad faith who withholds information about a crime. He or she is not an author of that crime, thus under no reasonable suspicion and legal basis for detention.

Chart no 15 below shows that the tested professionals unfortunately still fail to understand the key elements of a compatible detention. Even if the majority of those surveyed correctly answered this question that the situation does not provides for grounds of detention, their answer, was however, partially correct.

In this emulated situation, when an individual possesses information about future criminal act or about preparation of a crime and he or she is unwilling to reveal it, almost half of the all participants (82 (45%)) classified that person as a suspect but with no grounds for detention. Another part (33 (18%)) answered correctly. They considered that detention is inapplicable due to the lack of reasonable suspicion, which makes other questions concerning the grounds for detention irrelevant. The rest of the surveyed participants (24 (13%)) answered manifestly wrong, because they considered that person as a defendant and his or her refusal to cooperate with the investigating bodies is already a sufficient ground for detention, which is also needed for the prevention of a serious crime. A minority (17 (9%)) were wrong by choosing the interests of justice as sufficient ground for detention. 14% (26 of participants did not answer at all.

Chart No 15



In general, these answers demonstrate that legal professionals still find it difficult to distinguish between the reasons supporting reasonable suspicion and those related to the acceptable grounds of detention. It is a positive trend that neither the majority of judges nor prosecutors would use detention to extract information or employ it as a measure of persuasion in criminal proceedings (Answer 3). However, one fact still raises concerns. Small number of judges and prosecutors, along with lawyers, would use detention for the purposes of investigation of serious crimes. According to the conditions of the case-study, the person who merely withholds information is not even an accused in criminal proceedings and, thus, the criterion of seriousness of the crime is totally irrelevant for detention proceedings (Answer 2). Similarly, a small number of the surveyed professionals would use detention as punishment for withholding information needed for the purposes of investigation. They defend this option by the interests of justice (Answer 1), which is inapplicable to the present situation.

The 16th Question again explores the dilemma between two types of judicial reasoning, one based exclusively on acceptable grounds for detention and the other on the merits of criminal charges. It tests the surveyed person’s ability to distinguish between the aspects related to the justification of the detention and the defence position on the criminal charge, which normally does not concern the grounds for detention. In other words, whatever the defendant’s pleadings, remand detention could not be used to persuade the accused to plead guilty or confess. It could not be used to circumvent the defendant’s right to remain silent either. This rationale extends to any preventive measure applied in criminal proceedings, whether it is a custodial or not. Accordingly, Answer no. 3 is correct stating that pleading guilty must not be connected to the grounds of detention or used in judicial reasoning to remand. Nor it is as a condition for release.

Yet again, the results were mostly positive. The majority of those surveyed (79 (43%)) correctly stated that detention should not be connected to the defendant’s confessions. In contrast to the above answers, the present question did not raise serious confusions. A minority of participants answered partially true, i.e. that pleading guilty proves the veracity

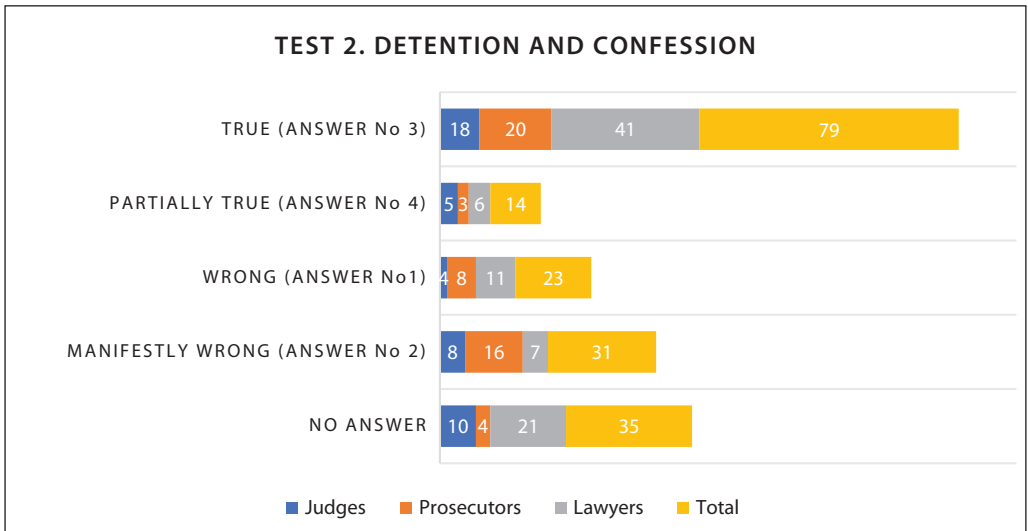
of the grounds for detention. However, as with the previous case-study, the relatively high number of manifestly wrong answers (31 (17%)) and the even bigger number of those undecided, who did not answer (35 (19%)), disqualify these positive results. Taken in comparison, the number of the surveyed persons who answered correctly is almost equal with those who did not. This equality shows that almost a half of the surveyed professionals still wrongly perceive the confession as the condition that alleviates detention.

On the other hand, if the answers are to be separated in by the surveyed groups, the situation becomes even more worrying. The number of judges who gave correct answers was almost equal to those who remained undecided and did not answer (22% to 18%, respectively). The same is true for the prosecutors, except that the numbers of correct answers are nearly equal to those manifestly wrong answers (39% to 31%, respectively). This ratio of the prosecutors' answers can be explained by their accusative function; a confession makes it easier to secure a guilty verdict and using whatever procedural measures, including detention, would ease the task of prosecution in criminal proceedings.

However, the situation with judges raises many concerns if the relationship between the positive and the manifestly wrong answers, plus the lack of answers, is to be examined in detail. The lack of answers to this relatively simple question, from the judges' perspective, must be qualified as a negative answer. The number of manifestly wrong answers from judges (8 (18%)) together with those who gave no answer (10 (22%)) is equal to the number of right answers (18 (40%)). This means that half of the judges failed this test and they do not separate the confession from the reasoning of detention.

The vast majority of the lawyers answered this question correctly (41 (48%)), although the number of those who did not answer (21 (24%)) is worrying. Lawyers, by the their very defensive function in criminal proceedings, should not tolerate such as method of procedural persuasion by using detention for determining the defendant to confess.

Chart No 16



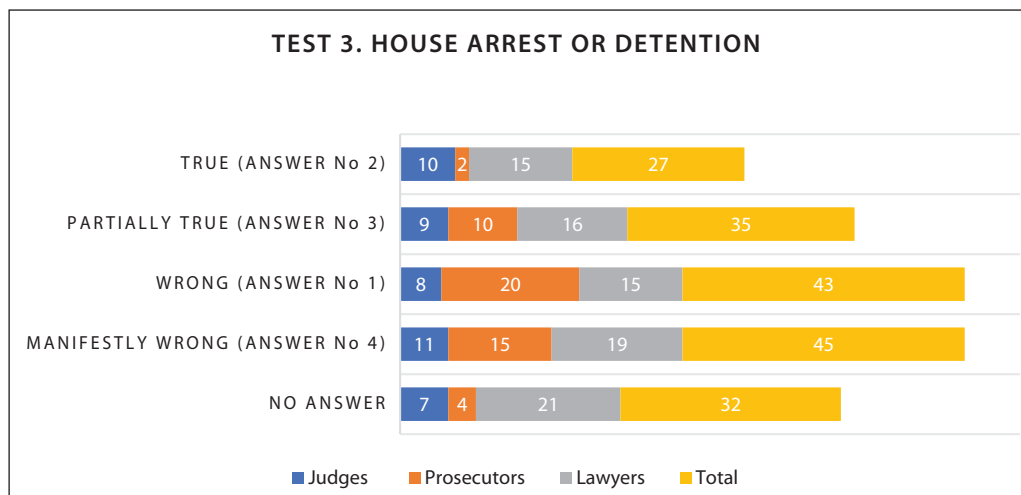
The 17th Question tests skills in examination of the grounds for detention and providing reasons. It simulates a situation, which occurs in practice quite often, when prosecutors and judges need to assess the risks of fleeing. In this case-study, the defendant supposedly had booked a ticket but did not buy it yet. To avoid detention, he proposes his travel documents as a guarantee for not being deprived of liberty. The required judicial reasoning must always start by the principle presumption of liberty. It is wrong to draw unfavourable inferences and to ignore other alternatives proposed by the defendant instead of his detention in custody (in the present case the voluntary surrender of travel documents).

Accordingly, Answer no. 2 is the best option providing that the risk of fleeing is low (the ticket is only booked and not bought). The partially correct answer is that house arrest is still applicable (Answer no. 3), although with slightly inaccurate justification for it. This option is mistaken because each measure of deprivation of liberty must be reasoned only on acceptable grounds; house arrest could not be ordered only because it is a less serious measure and could, thus, be used as an alternative to detention. Other options are wrong since they completely dismiss the option of house arrest and select detention as the better option.

The answers to this test appeared to be quite surprising. Almost all groups of the surveyed professionals were equally divided between “wrong” and “manifestly wrong” answers (43 (24%) and 45 (25%)). The correct answer was given by the minority (27 (15%)) and a few more respondents (35 (19%)) answered partially true, which is equal to those who did not answer at all (32 (18%)). The last number of respondents, who gave no answer, is also a negative result.

Almost the same distribution of right and wrong answers could be observed in each group, with the exception of prosecutors whose ratio between answers vary significantly. The judges were divided almost equally between all five options; correct answers were given by 22% of the surveyed judges while 20% answered partially right. 18% and 24% answered wrongly and manifestly wrongly, respectively. 16% did not answer. The answers of lawyers were correct in 17% and partially right in 19%, wrong in 22% and manifestly wrong in 19% of cases. 24% of lawyers gave no answer at all. The prosecutors had two right answers and ten partially true answers (4% and 20%, respectively). Although there were fewer unanswered replies (8%) in comparison with judges and lawyers, the prosecutors had the biggest ratio of wrong and manifestly wrong answers (39% and 29%, respectively).

Chart No 17



The overall conclusion from the present test is obvious; legal professionals still encounter difficulties in distinguishing between detention and house arrest. Most of them would prefer a severe measure to avoid the risks of fleeing justice. Taking this data in connection with the Answers to the 14th Question, the present test only confirms the above findings. Judges and prosecutors, even lawyers, still confuse these two types of deprivation of liberty and consider house arrest rather as release from detention, thus less serious and requiring little reasoning and justification. In other words, house arrest would constitute a secondary option in comparison with detention. They would verify first whether the detention is more appropriate for the defendant instead of house arrest. As required by the principle of the presumption of liberty, the reasoning should be otherwise; if detention is the most serious type of deprivation of liberty than it should be the measure of last resort when no other less intrusive measure is applicable.

The 18th Question examines in depth the understanding of reasonable suspicion, either as a precondition for lawful deprivation of liberty or as an element the criminal charges. According to the Moldovan domestic procedural legislation, reasonable suspicion constitutes the ground for initiation of investigation, whilst Article 5 of the Convention construes it narrowly as the precondition for deprivation of liberty in criminal proceedings. Thus, Answer No.1 would be the best option for this question since judges will be restricted to apply the provisions of the domestic law. It could be deducted from the domestic law that in the absence of a reasonable suspicion the whole prosecution is questionable, therefore no preventive measure, non-custodial or otherwise, is applicable. Moreover, Answer no. 2 focuses on the grounds for detention that should not normally be employed in the reasoning of any preventive measure in criminal proceedings (i.e. the seriousness of the crime). Accordingly, this is a wrong answer.

Like the answers to the 10th Question analysed above, the results of the present test only confirmed that the surveyed legal professionals, in general, understand the meaning of reasonable suspicion and its role in detention proceedings, as well as how it affects

other preventive measures. Almost half of them gave true answers (101 (55%)). Even quite significant number of wrong answers (54 (30%)) plus the number of unanswered question (27 (15%)) could not outweigh the positive results.

Similarly, the answers revealed that only lawyers, in contrast to judges and prosecutors, are misguided by the concept of reasonable suspicion. 34 (40%) of lawyers answered wrongly that reasonable suspicion relates to the seriousness of the crime. This could be explained by the persisting confusion, mostly among defence lawyers, that “a reasonable suspicion” should be proven at the level of criminal indictments. In fact, it does not require such a level of proof, but lawyers do require serious evidences of suspicions when detention is involved. For that reasons, lawyers would rather connect the meaning of “a reasonable suspicion” with the seriousness of criminal charges. They hardly see it as the sole criterion for the lawfulness of detention or any other preventive measure in criminal proceedings.

Chart No 18



The 19th Question deals with the problem of the right to compensation. It asks whether a person is entitled to compensation for breaches of his or her right to liberty, regardless of criminal liability and the gravity of offence. It is closely connected to the 13th Question.

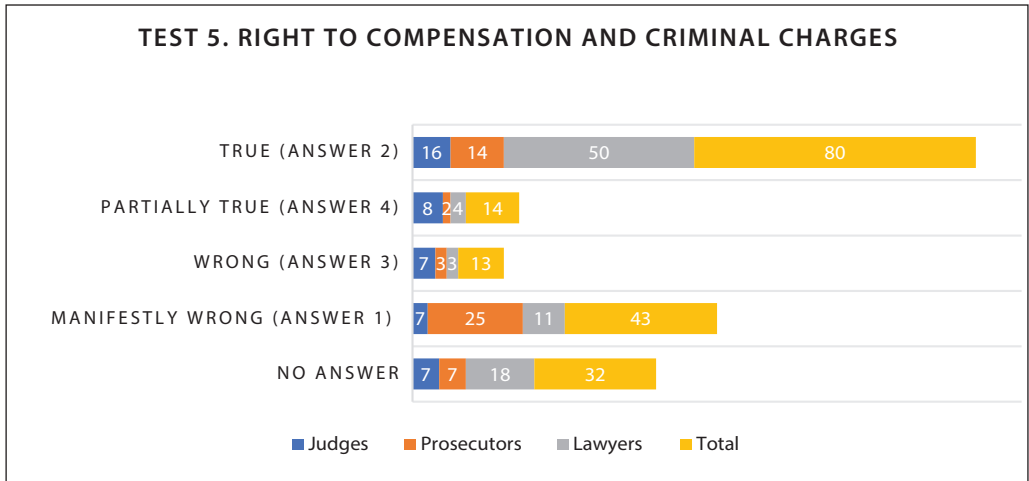
The current standard is that compensation is due notwithstanding the decision on the merits of criminal case. In other words, once a person has been detained unlawfully or without the grounds justifying a continuous deprivation of liberty, the violation becomes autonomous and does not concern the merits of criminal charges. Accordingly, all answers, except Answer no. 2, are wrong because they make the right to compensation conditioned on the decision concerning the merits of the defendant’s guilt. Answer no. 4 is partially true, because it still grants the right to compensation, albeit weakened because of some reasoning still connected to the merits of criminal charges.

The results analysed below in Chart no **19** show that most of the respondents (80 (44%)), again the vast majority of whom were lawyers (50 (58%)), answered correctly. They distinguished the right to compensation from the outcomes of criminal case and the

gravity of charges. The majority of prosecutors (25 (49%)), rather unsurprisingly, selected the wrong option, saying that no compensation is due since the defendant was sentenced.

Judges seem to be divided between the correct and partially correct answers (16 (36%) and 8 (18%), respectively). They still distinguish the right to compensation from criminal charges and the outcomes of criminal case. These results run against the judges' answers to the 13th Question, where they were divided between the autonomous character of the right and its alleged connection with criminal charges. However, this could be explained by the same controversy emphasized in the analysis of the Answers to the 13th Question. The provisions of law no. 1545/1998 link the right to compensation with the final acquittal, whilst Article 5 § 5 provides that this right is autonomous from the merits of the criminal charges. This controversy divides the judges' opinions, because many of them refused to answer this question (7 (16%)), and this should be viewed as a negative answer. Prosecutors and lawyers, on the other hand, uphold their opinions without visible disparity. In contrast to prosecutors, lawyers consider that compensation is unrelated to the criminal charges.

Chart no 19



CONCLUSIONS

The number of legal professionals participated in the Research is representative. Their answers are reliable and mostly relevant for the purposes of the Research, because the majority stated that they have adequate professional experience and are regularly involved in remand detention proceedings.

The level of compliance of detention practices with the Convention and domestic law received very low grades from lawyers and relatively higher grades from both judges and prosecutors. Still, the total score raises concerns; it is almost exactly in between negative and positive evaluations. Thus, the Survey revealed an average level of compliance, receiving six out of ten. In addition, according to the expressed opinions, the violations of the Convention and domestic law mostly occur at the pre-trial stage of criminal proceedings and mainly when ordering an extension of detention. However, many violations were attributed to the short time arrests conducted by investigation bodies under prosecutorial supervision.

The majority of surveyed professionals agreed that the excessive use of detention is a widespread problem in the Republic of Moldova. The group of lawyers was particularly assertive in this regard. However, a minority of judges considered it serious but isolated. Similar results were received regarding the questions on the systemic character of the problem. Most lawyers thought that the excessive use of detention is a systemic problem because it is widespread, whilst other groups did not see the issue in such a negative light.

All three groups of judges, prosecutors and lawyers blamed each other for the problem. They all mostly referred to the lack of appropriate judicial practice and prosecutorial failure to substantiate motions to remand. Lawyers were also “honourably” mentioned for their lack of sufficient arguments and less active role in remand proceedings. Overall, the answers as to those bearing institutional responsibility for the problem were equally divided between all three groups. More generally, all groups agreed that the excessive use of detention is a problem caused mainly by deficient implementation of the current domestic law. The quality of the current legal framework, however, did not raise any serious concerns and it was marked as satisfactory.

As to the patterns of violations identified by the Research, the vast majority of the surveyed professionals, mostly lawyers and less so prosecutors and judges, declared that they encounter difficulties in understanding the meaning of “reasonable suspicion”. Whilst lawyers perceive this requirement as related to the criminal charges, almost all judges and prosecutors consider that this requirement related to detention and opening of criminal investigation. Moreover, the last two groups of legal professionals are able to clearly distinguish between their legal reasons on reasonable suspicion and the grounds for continuous detention, while lawyers do not separate these arguments in the same fashion.

The responsibility for the failures to provide reasons on reasonable suspicion in remand proceedings was almost equally divided between judges and prosecutors; they were blamed by lawyers for the failure to substantiate and to produce evidence. Similar answers were given about the failure to give reasons for the grounds for detention, which in this case was, for the most part, attributed to the judges and the courts’ workload. However, the challenge to collect evidence by prosecutors has been mentioned as the key element

of such a failure. With these considerations in mind, in general, the prosecutors' failures received the highest scores and were habitually mentioned by lawyers as the principal cause for non-reasoned decisions ordering and extending detention.

The results concerning the relationship between house arrest and detention were predictable. The majority of the surveyed legal professionals considered that it is mainly a relation of subordination. In their predominant opinion, since the detention is the most serious form of deprivation of liberty it should be examined at first and other alternatives receive less attention. In this sense, house arrest appears as collateral, an alternative measure or even a "release" from detention. As a result, the reasoning on both measures disregards of the principle of presumption of liberty. The surveyed legal practitioners would prefer primarily to assess the applicability of the most serious measures of deprivation of liberty and then, after the detention is found inapplicable, they would shift their reasoning on other non-custodial and less intrusive alternative measures.

As expected, the right to monetary compensation for unlawful detention remains controversial among the surveyed legal professionals. Half of them consider it as autonomous from criminal charges. The other half linked the right to compensation with exculpatory outcomes of criminal case or eventual dismissal of all criminal charges. In other words, legal professionals are not yet prepared to accept that a convicted person should benefit from the right to compensation for unlawful detention.

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