

To the Department for Execution of Judgments of
the European Court of Human Rights,
Committee of Ministers of the Council of Europe

Chişinău, 7 september 2017

COMMUNICATION

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

SARBAN v. MOLDOVA group of cases

INTRODUCTION

This submission is presented in the context of consideration of execution by the Republic of Moldova of the Sarban group of cases at the 1294DH meeting of the Ministers' Deputies of the Committee of Ministers of the Council of Europe (19-21 September 2017). The Sarban group of cases concerns various violations of the Art. 5 of the European Convention on Human Rights (ECHR), mostly related to the arrest and detention in the criminal proceedings pending conviction.

The European Court of Human Rights (ECtHR) found more than 60 violations of art. 5 of ECHR in cases concerning Moldova. The most frequent violation, established in more than 20 judgments, related to the failure of domestic courts to give relevant and sufficient reasons when ordering or extending the applicants' detention on remand. This submission will exclusively refer to this aspect and the fairness of the remand procedures and will not address the other issues covered by the Sarban group of cases.

The submission was prepared by the Legal Resources Centre from Moldova (LRCM), an independent not-for-profit non-governmental organization based in Chişinău, Republic of Moldova. We strive to ensure a qualitative, prompt and transparent delivery of justice, effective observance of civil and political rights and an enabling environment for civil society organizations in Moldova. LRCM has an extensive expertise in monitoring the judiciary, reporting on human rights and strategic litigation before the ECtHR. We published two reports on the execution of ECtHR judgments by the Republic of Moldova, for the period [1997 to 2012](#), and [2013 to 2014](#).

This document is submitted in September 2017 because it is heavily based on official judicial statistics and the statistics for the first half of 2017. The 2017 data became publicly available only in August 2017, while the issues from the agenda of the 1294DH meeting were not known by us until recently.

(UN)FAIRNESS OF THE ARREST PROCEEDINGS IN MOLDOVA

Şarban and *Becciev* were the first judgments where insufficient reasoning of remand judgments was established. These judgments were delivered in October 2005. The arrests/extension of arrests were ordered by judges based on a simple reproduction of the legal grounds provided by the Criminal

Procedure Code (CrPC), without indication of specific reasons to consider as valid allegations that the applicant could hinder the investigation, abscond or commit other crimes. The judges did not try to combat the arguments brought by defence against the arrests. The problem of poor motivation of arrest orders does not reside in the legislation, but in the deficient practice of judges and prosecutors. The 2015 Action Plan, confirms that the Government is ready to accept this.

Although *Șarban* and *Becciev* judgments were issued 12 years ago, the practice of Moldovan courts in this respect is did not change. In 2007, in the *Mușuc* judgment, the ECtHR already underlined the frequent and repetitive nature of this violation. The judgments are lengthier, but, generally, the reasoning of arrest is still unconvincing. The ECtHR is periodically finding similar violations in Moldovan cases (4 such violations were established in the judgments delivered in 2015-2016). In July 2017, a group of cases containing allegations of violation of art. 5 para. 3 ECHR were communicated to the Moldovan Government by the ECtHR.

In their [2017 Action Report](#), the Moldovan Government informed the Committee of Ministers of the legislatives improvements adopted by the Government in 2016 and of the training on the subject provided to judges and prosecutors and called the Committee of Ministers to close the supervision of these cases. The Action Report does not contain any information about the impact of these changes on the judicial practice.

While we can agree that the legislative measures adopted by the Government are aimed at improving the respect of the right to liberty and removes several legislative inconsistencies with the ECtHR standards, we cannot agree that this is sufficient to close the supervision of execution of the *Sarban group* of cases by the Committee of Ministers. As highlighted above, these legislative changes will not automatically remove the most serious problems in the arrest procedures – poor motivation of judicial arrest orders. The judges were obliged to motivate their decisions on arrest from the very moment there were given the right to decide on arrest, in 1997, but they generally failed to comply properly with this legal obligation.

The practice of poor reasoning of arrest warrants can be explained by an earlier practice of the courts to frequently order arrests, poor reasoning of prosecutors' requests to authorize arrest, high workload of the investigative judges and their professional background (most of them are former prosecutors), limited time provided by law for the examination of the requests, lack of diligence of some judges, tolerance of this practice by the courts of appeal, poor professional level of many advocates, social cliché that the suspects shall stay in prison pending trial, as well as by corruption within the judicial system. Most of these caused are not addressed by the 2016 legislative amendments.

In 2013, Soros-Moldova Foundation published the [Report in Romanian on observance of the right to liberty at the criminal investigation stage in the Republic of Moldova](#). The Report was based on the analysis of the judicial practice. 652 files were studied, representing 24.8% of all arrest case-files examined in that period. The report concludes, *inter alia*, to the following:

- a) Usually, the reasoning of the prosecutors' requests for pre-trial arrest or its extension was limited to the description of the charge and transcription of the grounds for arrest provided by the CrPC. Prosecutors do not describe in sufficient details the circumstances that justified the arrest. Preventive arrest authorized during criminal investigation may not exceed 30 days, and the prosecutor may ask the investigation judge to extend the arrest. Many requests for extension of arrest differ insignificantly from the requests which served initially as the basis for ordering the arrest. They also do not provide reasoning to what extent the circumstances that initially served as the ground for arrest remain relevant. In 80% of the requests examined, prosecutors invoked all three risks that could justify the arrest. Frequent invocation of all three risks in the same request suggests that prosecutors were unsure whether the evidence held was sufficient to arrest the person and therefore they invoked all risks as a precaution;

b) Republic of Moldova can „be proud” for having a rich ECtHR case-law on the right to liberty. However, we could find references to the ECtHR case-law in none of the 652 prosecutors’ requests examined. Prosecutors did not make reference to the ECHR in their requests for arrest, except in a few cases where the ECHR was abstractly invoked;

c) Requests for arrest must be accompanied by evidence which needs to support the arguments invoked in the request. In 9% of the examined requests for arrest and in 68.1% of the requests for extension of arrest, no evidence was attached. Nevertheless, in many cases where no evidence was attached to the request, the request was upheld. Apparently, this is explained by the fact that judges study the materials of the criminal case „under conditions of confidentiality” and do not show these documents to the defence. In about 31% of all arrest case-file studied, there is evidence confirming that the investigative judges studied confidentially the materials of the criminal case. Although this is not in line with the ECHR, judges were refusing access of the defence to the materials of the criminal case submitted by the prosecutor, invoking the confidentiality of the criminal investigation.

d) During the period July – December 2011, 1,425 requests for authorization of arrest were examined in the Republic of Moldova. 85% of them were fully or partially upheld. In seven courts, requests for arrest were upheld in 100% of cases. Out of 1,207 requests for extension of arrest which were examined, 83.1% were fully or partially upheld. In 12 out of 41 courts where investigative judges are operating, 100% of requests for extension of arrest were fully or partially upheld. Given the questionable quality of requests for arrest, this percentage is alarming;

e) Comparing to 2005, court orders became lengthier, as relevant legislation and standard are now reproduced in all decisions adopted by the same judge. However, the real reasons that justify the arrest or extension of arrest is described in a concise and abstract manner. In most cases, investigative judges do not explain their position in relation to the reasonable suspicion, though this is an essential condition for arresting a person;

f) Investigative judges often invoke the ECtHR case-law when reasoning their decisions. However, these references are purely declarative. Often the solution offered in the arrest warrant is contrary to the ECtHR case-law cited in the same decision;

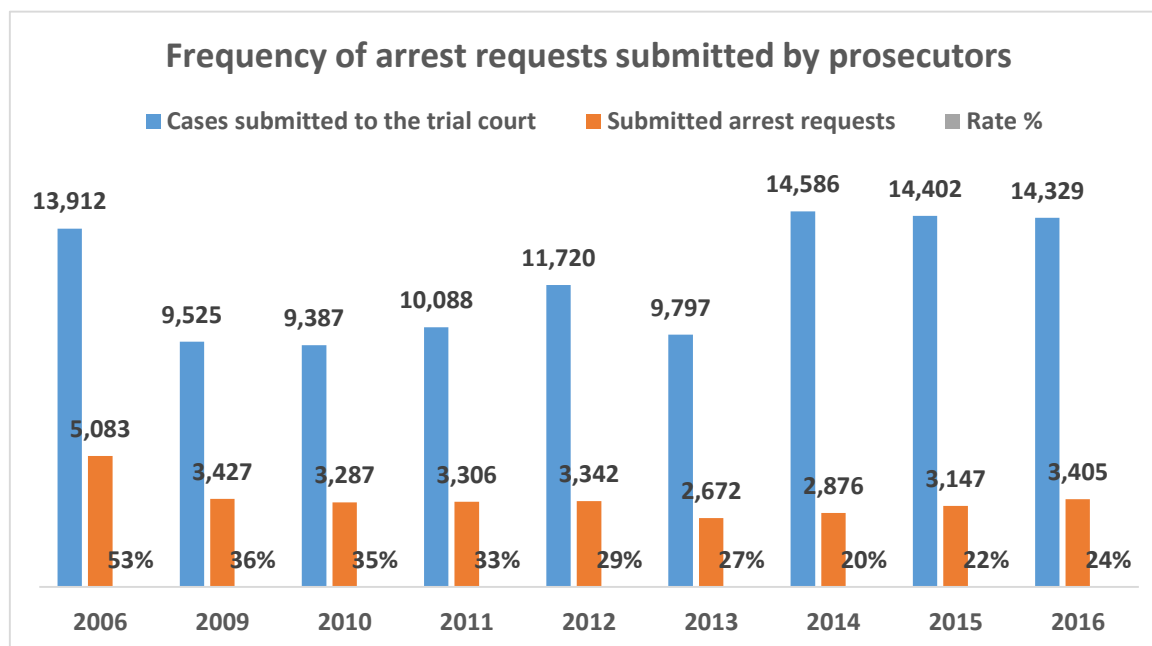
g) Investigative judges uphold more than 80% of the requests for arrest. However, in the second half of 2011, only 22% of the orders issued by the investigative judge were challenged. This phenomenon may be explained by the mistrust of the defence in the efficiency of appeal against arrest warrants. Such an approach is not unreasonable, considering that while most orders of the investigative judges are poorly motivated, in the second half of 2011, courts of appeal upheld only 14% of the appeals lodged by the defence;

h) Cassation courts uphold on average only about 20% of appeals on points of law against arrest warrants. More than half of the appeals on points of law which were upheld in July-December 2011 were lodged by the prosecutors. The admission rate of the appeals on points of law lodged by the prosecutors is three times higher than the admission rate of the appeals on points of law lodged by the defence. Most likely, this phenomenon is explained by the prosecutorial bias of the judges from the courts of appeal;

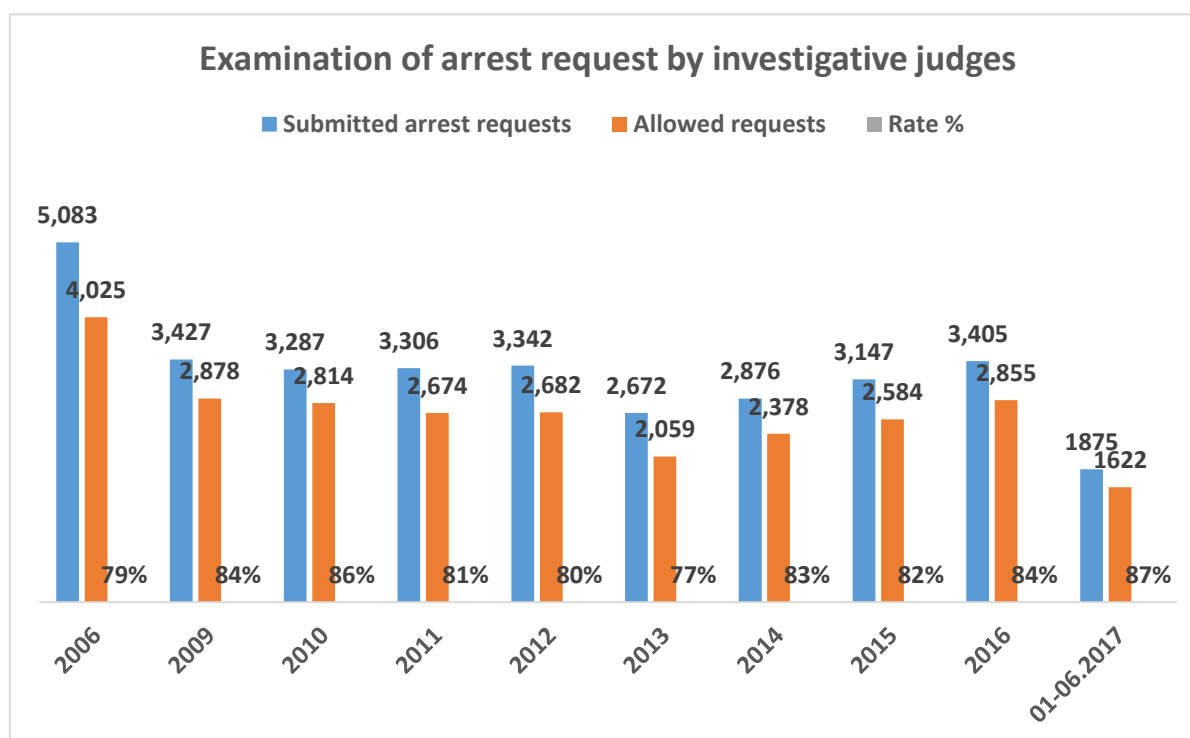
i) Similar to the investigative judges, courts of appeal are mostly arguing their decisions by using general and abstract reasoning, without making reference to the circumstances of the case and without responding to the arguments invoked by the parties. Deficiencies in motivating the decisions of the courts of appeal encourage deficient practices of the investigative judges. Apparently, judges of the courts of appeal have a much more reserved attitude than investigation judges in relation to application of non-custodial measures.

The findings from the above report, even if related to 2011, are still relevant. This is confirmed by the official statistics of the Judicial Administration Agency. The number of arrest requests submitted by the prosecutors in 2016 to investigative judges is very close to the number of requests submitted in 2009 (when hundreds of young persons were abusively arrested following Parliamentary elections unrests) and is even higher than in 2011 (the data analysed in Soros-Moldova Foundation Report). Moreover, since 2014, there is a tendency in the prosecution service to request more often the

remand. In 2014 the remand was generally requested in 20% of meritorious criminal cases. In 2016, the remand was requested in 24% of such cases. The official statistics for the years 2006, 2009-2016, is presented in the below table. The number of arrest requests refers to the number of people sought to be arrested by the prosecutors. It does not include the requests for prolongation of the arrests already granted. Other some 5,000 arrest prolongation orders are issued annually.



The number of submitted remand requests is of a little relevance as long as ill-founded requests are dismissed by the judge. However, the official data proves the contrary. The rate of allowed arrest requests in 2016 was of 84%. Moreover, since 2011, this rate is increasing. It appears that in 2017 the rate of allowed arrest request will be even higher than in 2016. The statistics for January-June 2017 shows that 87% of the submitted requests were allowed by the investigative judges. This is the highest rate since 2006 (please see the next chart).



The 2017 statistics clearly confirms that the 2016 amendments to the legislation did not produce any

practical impact yet. It is impossible to make the rules for issuing the arrest requests more rigid and, as an effect, to have more arrests authorized. Logically, it should be the opposite.

The rate of the allowed arrest requests is in fact even higher. The below figures refer to the arrests ordered by the first instance court judges. A considerable part of their decisions to dismiss the arrest requests is later quashed and the arrest is ordered by the courts of appeal. As highlighted in the Soros-Moldova report quoted above, in 2011 the admission rate of the appeals lodged by the prosecutors was three times higher than the admission rate of the appeals on points of law lodged by the defence. In 2017, this phenomenon became even more discrepant. Between 29 June and 14 July 2017, the Chişinău Bar monitored the examination of appeals in the remand proceedings by the Chişinău Court of Appeals*. This court examines more than ¾ of all the remand appeals from Moldova. Out of 200 appeals of the defence, only 4 (2%) have been allowed. Out of 29 appeals of the prosecutors against the refusals to order arrest, 9 (31%) have been allowed and the arrest was ordered.

The respect of the right to liberty in the remand proceedings was the subject of the first Conference of the justice actors organized in Moldova. On 31 May 2017, more than 150 judges, prosecutors and lawyers discussed the problems encountered in the remand proceedings. [The final resolution adopted at the Conference](#) (text available in Romanian) mentions with concern the insufficient motivation of the remand requests of the prosecutors, the high rate of allowed requests and the superficial examination of these requests by judges.

The high rate of arrest and the superficial examination of remand requests by the judges cannot be explained by the insufficient knowledge of the judges dealing with arrest proceedings or inadequate legislation. They are well trained and the Moldovan legislation always imposed the obligation of fair remand proceedings. There are other factors that determine this reality, including the fragile independence of Moldovan judges. In January 2017, [one judge has been even criminally charged for dismissing the remand request of the prosecutor](#). He was accused that he heard a witness in the remand proceedings and established that no sufficient evidence was presented by the prosecutor to confirm the reasonable suspicion that a crime was committed. In a public statement, [the NGOs called this accusation against a judge that properly applied the ECtHR standards as a threat against for independence of judges](#). There will be not so many judges taking the risk to dismiss the remand requests of the prosecutors in these circumstances.

RECOMMENDATIONS

In the light of the insufficient practical impact of the 2016 legal improvements to the remand procedure, as well as of the recent events hindering the independence of Moldovan judges, we call the Committee of Ministers not to close the supervision of execution of the Sarban group of cases in part of the fairness of the remand proceedings. The Moldovan authorities should be also urged to ensure that the 2016 legislation is respected in practice by judges and prosecutors.

* The motive for monitoring was the manifestly pro-accusatorial attitude of the Chisinau Court of Appeal in the remand proceedings. Due to disregard in practice of the ECtHR standards, the Moldovan Bar is now considering to go on strike.