

To the Department for Execution of Judgments of the
European Court of Human Rights,
Committee of Ministers of the Council of Europe
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Chişinău, 21 April 2023

COMMUNICATION

in accordance with Rule 9.2 of the Rules for the supervision of the execution of judgments
SARBAN v. MOLDOVA
group of cases

This submission is presented by the Legal Resources Centre from Moldova (LRCM)¹ in the context of consideration of execution by the Republic of Moldova of the [Sarban group of cases](#) at the 1468th meeting (June 2023). The *Sarban* group of cases concerns various violations of the Art. 5 of the European Convention on Human Rights (ECHR), mostly related to pre-trial arrest. The last time this group of cases was discussed at the 1419th DH meeting (December 2021). The key recommendations made to the Moldovan authorities at that meeting are resumed as follows:

- a. provide updated information on number of persons detained on remand for 2021-2022.
- b. provide information on the current practices in the reasoning of court decisions ordering and extending detention on remand in recent years.
- c. provide information on the use of non-custodial alternatives to detention and about impediments preventing its wide use.
- d. examples of domestic courts case-law concerning the length of time taken to examine *habeas corpus* requests.
- e. submit information on the current practice as concerns summoning lawyers to hearings on detention on remand.
- f. inform about the progress made to amend the Law No. 1545.

This submission covers the general measures aimed at preventing the violation of Article 5 paras. 3-5 of the ECHR. It will not address the other issues from the *Sarban* group of cases. We rely upon our findings and recommendations and on the official data provided by the Agency for Court Administration (ACA).

On 23 March 2023, the Government of the Republic of Moldova submitted an [updated Action Report](#) for the execution of the *Sarban* group of cases. The report presents a positive dynamic in the remand procedures. The Government highlights a decrease in the number of persons subjected to remand. Based on the presented data, the Government argues that they have fulfilled all their obligations under Article 46 of the Convention with respect to this group of cases.

The LRCM respectfully disagrees with the Government's findings. While data for 2021-2022 presented by the Government suggests a modest decrease of the number of remanded persons compared to 2019, no substantive change in the applicability of arrest took place in Moldova in the last two years. It looks like the modest reduction is mainly due to pandemic when fewer criminal cases were initiated.

¹ The Legal Resources Centre from Moldova (LRCM) is a non-profit organization that contributes to strengthening democracy and the rule of law in the Republic of Moldova with emphasis on justice and human rights. We are independent and politically non-affiliated. In [2017](#), [2019](#) and in [2021](#), LRCM made others submissions on *Sarban* group of cases.

Furthermore, the number of remanded persons increased in 2022. Despite the reduction in the number of arrested persons, it does not appear that the judges examine thoroughly the remand requests. The rate of accepted arrest requests in the last two years remained around 92%, one of the highest rates recorded since 2006.

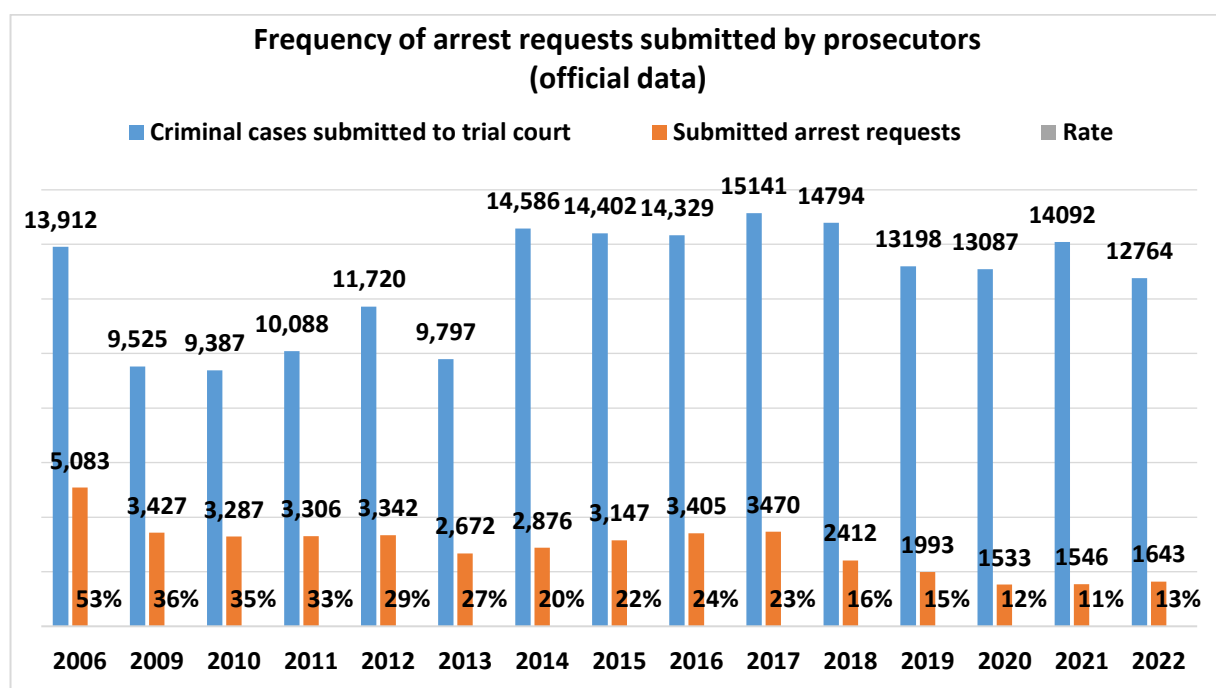
Despite important legislative measures taken by the Moldovan authorities, they did not fully fulfil all the obligations related to the execution of *Sarban* group of cases. While other amendments to the legislation are desirable, they will not have a decisive impact on respect of the ECtHR arrest standards. The authorities should take decisive measures to ensure that the judges and prosecutors respect and apply the language and the spirit of the legislation on arrest. The legislation should also be amended to offer the right to compensation for the persons remanded in breach of the ECtHR standards.

Our overarching conclusion remains that the 2016 amendment to the legislation, still, did not lead to a substantive improvement of the practice of judges and prosecutors related to remand, as confirmed in a [2020 CoE Report](#) and [2022 CoE Report](#). The LRCM calls on the Committee of Ministers to continue supervision of execution of this group of cases under enhanced procedure.

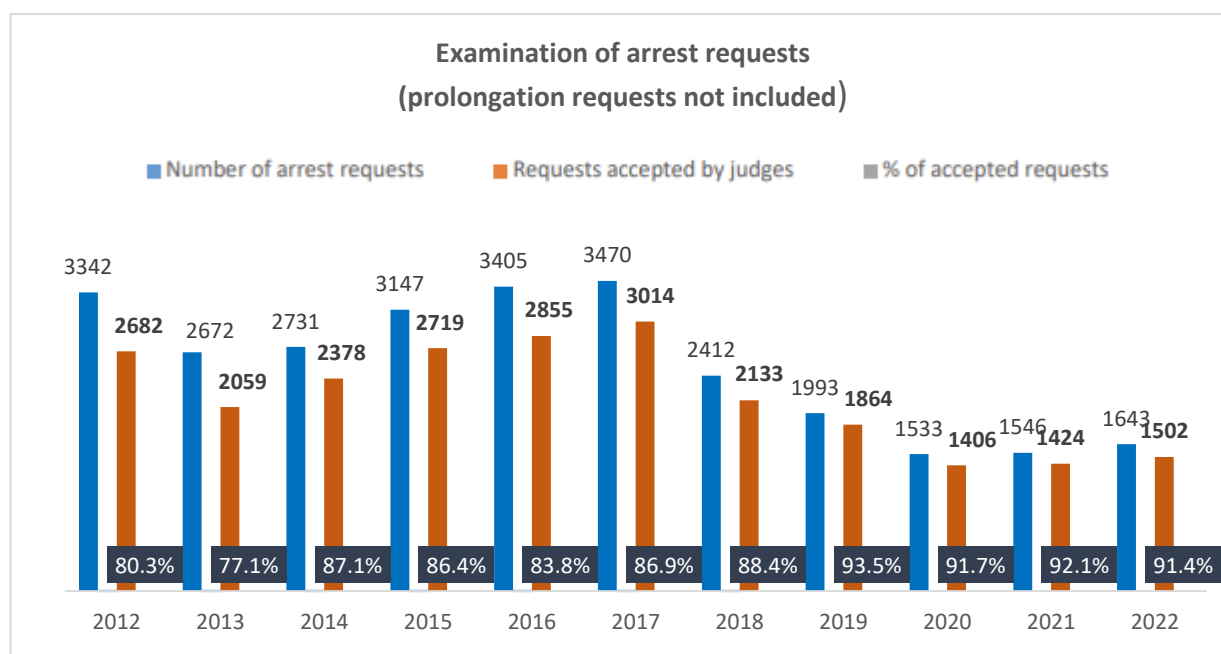
PRACTICE ON ARREST

Sarban was the first Moldovan judgment finding that there was insufficient reasoning of remand judgements. It was delivered 17 years ago. Poor motivation of remand judgements is still a serious problem in Moldova, despite the improvement of the legislation in 2016. It generally does not reside in the legislation, but in the deficient judicial practice. The judicial practice is influenced by the insufficient independence of judges, prosecutorial bias of many investigative judges and by the widespread phenomenon of application of arrest from the past.

The next table presents the [official data of the ACA](#) concerning the number of submitted arrest requests. It is compared to the number of criminal cases submitted to the courts [reported by the General Prosecution Office](#). According to these statistics, in 2020-2022, the prosecutors were submitting judicial arrest requested in 11-13% of meritorious cases. This is one of the lowest percentages in recent years, but the number of criminal files submitted to the court in 2021-22 was also low. Thus, it seems that every tenth person suspected of committing a crime was arrested in Moldova.



The number of arrests authorized by judges is more informative for assessing whether the procedural guarantees against unwarranted arrest are applied in practice. The next table presents the official data (first instance court) concerning the outcome of the arrest procedures. In 2021 - 2022 accepted arrest rate was extremely high (around 91.5-92%). This rate is the highest rate recorded, except 2019 (93.5%).



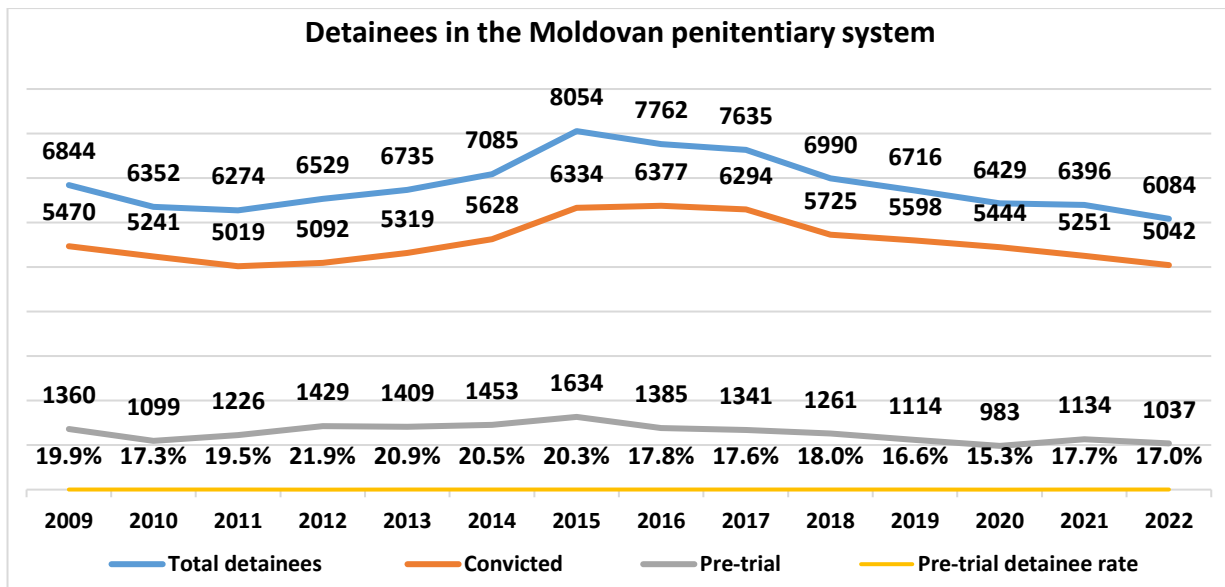
The reduction of the number of arrest requests in last years should be treated cautiously. It was not determined by a substantive change of the judicial practice or attitude. It is rather a result of the reduced number of criminal cases (probably caused by pandemic). This data confirms that no substantive change in the applicability of arrest took place in Moldova in the recent years. Despite the reduction of the number of the arrested persons, it does not appear that the judges examine more thorough the remand requests. On the contrary, the rate of accepted arrest requests increased. Such high figures raise serious questions as to the efficiency of the judicial control over the arrest procedures. As the [2022 CoE Report](#) highlighted (pag.43), the investigative judges' activity in period 2017-2021 leaves the impression that they formalize the legality of the acts and actions of the prosecutors, without effective and efficient judicial supervision. The study reveals the perpetuation of the practice regarding the excessive application of the arrest.

In at least 30 judgments, Moldova has been convicted before the ECtHR due to insufficient reasoning of investigative judges' decisions. Usually, judges use "copy-paste", particularly when extending remand. Judges relied on the same grounds repeating them without reviewing them in substance and subsequent decisions were copies or mostly like previous ones or refusing to review the new circumstances indicated in the motions to review them².

The high prison population can be also an indicator of excessive use of arrest. For instance, according to the 2021 SPACE Report, on 31 January 2021, Moldova had 159.8 detainees per 100,000 inhabitants, while the European median is 101.8³. Moldova is always in the top 10 Council of Europe countries with the highest per capita prison population.

² <https://rm.coe.int/report-research-pre-trial-detention-eng-final/16809cbe15> (pp. 41-44)

³ See the 2021 SPACE I Prison Populations Report, page 32, available at https://wp.unil.ch/space/files/2022/12/SPACE-I_2021_FinalReport.pdf

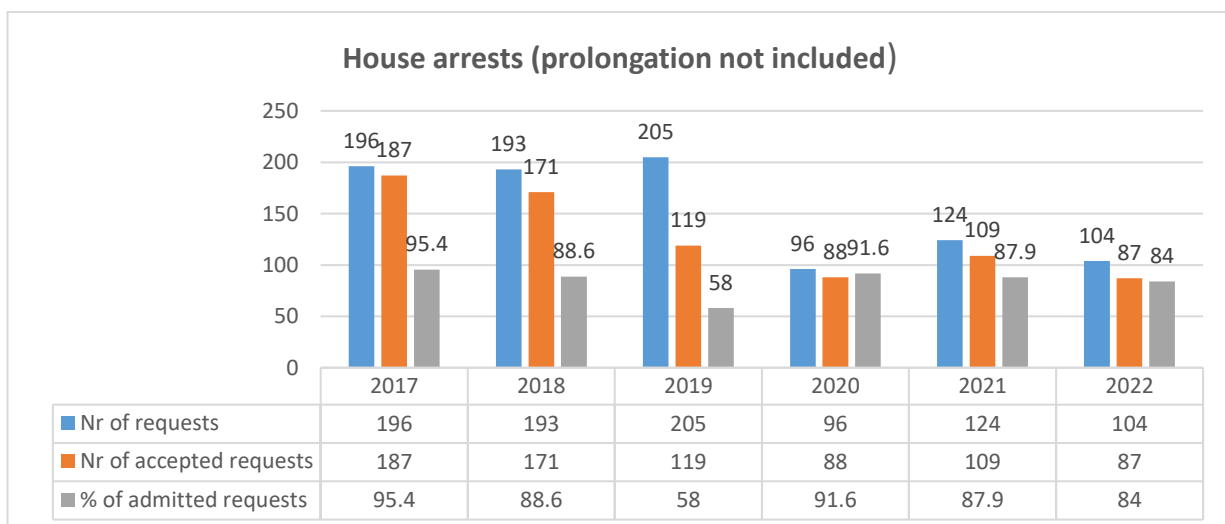


Moreover, according to the [last report of the Moldovan Penitentiary Authority](#), on 31 December 2022, 17% of prison population were pre-trial detainees. This rate increased compared to 2019-2020.

ALTERNATIVES TO ARREST

The Criminal Procedure Code, as amended in 2016, provides in clear terms that the remand should be applied as an exceptional measure, when alternatives to remand are not sufficient to mitigate the risks justifying the arrest.

Even if house arrest is not an alternative to arrest, the statistics of the ACA (which substantially differ of the ones presented by the Governmental Agent) suggest that even house arrest rarely applied in Moldova. For example, in 2021 the prosecutors submitted 1,546 remand requests. The number of house arrest requests was 12 times smaller (124). A similar or even worse pattern is observed in 2022, the prosecutors submitted 1,643 remand requests and only 104 house arrests requests, thus, the house arrest requests was requested 16 times less often.



The bail is generally not applicable in Moldova. Based on the [reports of the General Prosecutor's office](#), in the period 2017-2021, it was applied to only 10 people, sometimes – in the case of economic crimes/white collar crimes. In 2022 - it was applied only to 2 persons. The data from this section confirm that authorities should take considerable measures to ensure the wide application of alternatives to

remand. Electronic monitoring of persons released from detention is already applicable in Moldova. However, its application is limited, despite wide technical possibilities available. [In almost all studies that analysed](#) the institution of arrest, it was recommended to strengthen alternative measures to arrest, and introduce bail and judicial control as standalone non-custodial preventive measures (currently they can be ordered by the judge only if the remand request is dismissed).

COMPENSATION FOR THE BREACH OF ARTICLE 5

The Moldovan legislation (Law no. 1545/1998) grants the right to claim damages for the breach of Article 5 ECHR only upon acquittal. The ECtHR already found in the last years (2018 – *Cotet case*, 2019 – *Gorea case*, 2021 – *Muradu case*) that this situation is contrary to Article 5 para. 5 of the ECHR. At least at two last CDDH meetings, the Moldovan authorities were requested to ensure the possibility of any person detained in breach of Article 5 to apply for compensation. Since then, we are not aware of any measure taken by the Moldovan authorities in that respect, while Law no. 1545-XIII was not amended to provide such a right.

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

Even assuming that such a right exists, it has been established by the ECtHR in more than 10 judgments that the compensations awarded by the Moldovan judges for the breach of the Convention were manifestly insufficient⁴. This practice of awarding poor compensation for the breach of human rights is still widespread in Moldova. As it appears from the 2023 action report of the Government, no trainings were provided to judges on this matter.

INDEPENDENCE OF INVESTIGATIVE JUDGES

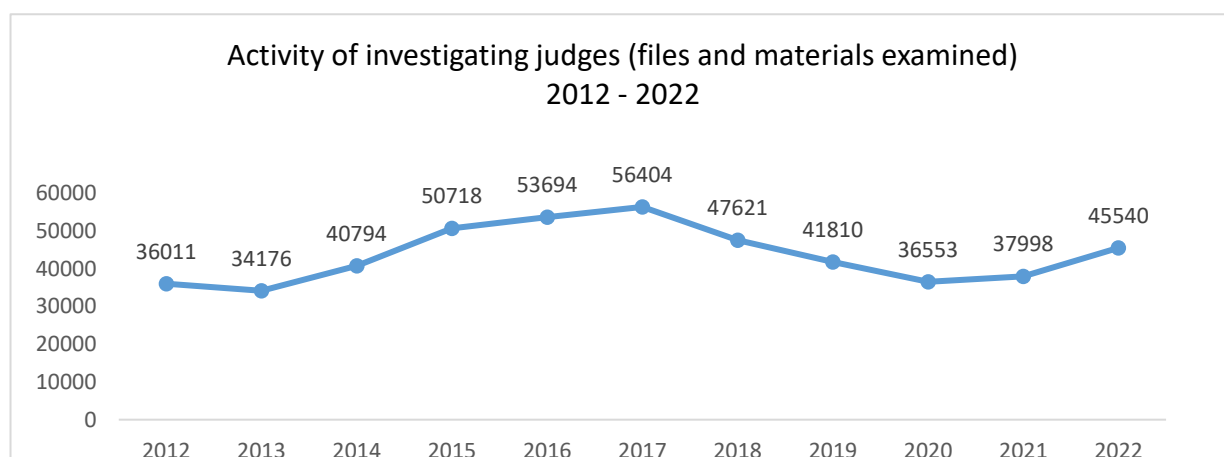
The Moldovan judiciary includes between 42-45 investigative judges This number was established based on the assumption that every court of law must have at least one such judge. However, at the district level, the judge who exercises the powers of the investigative judge also examines criminal, civil, or misdemeanour cases. Therefore, the number of investigative judges has not increased very much in the past ten years, but their workload is still considerably high.

The data below reveals that, in the last three years, the workload of investigative judges has decreased. The decrease of about 25% in the volume of work in the period 2020-2021 may be due to the suspension of the activity of courts and prosecutors' offices for certain periods of time, generated by the coronavirus pandemic. Even with the decrease in the workload, a simple calculation shows us that an investigative judge would have to examine on average more than 840 motions per year (based on 2021 data)⁵. This figure is even higher for the investigative judges in Chisinau and Balti. In 2022, the workload returned to the 2018 level. This directly impacts the possibility of performing a qualitative examination of the materials that fall within the exclusive competence of the investigative judge. In the period of 2017-2021, the examination of arrest, house arrest, and their prolongation requests, constitutes 13%

⁴ LRCM, Synthesis of the violations found by the ECHR regarding the Republic of Moldova (from September 1997 to September 2022), available at: <https://crjm.org/wp-content/uploads/2022/09/Sinteza-Violarilor-CEDO-de-catre-RM.pdf>

⁵ Council of Europe, Study on the activity of investigative judges in the Republic of Moldova, elaborated at the request of the Ministry of Justice of the Republic of Moldova (2022), page. 18, available at: https://www.coe.int/en/web/chisinau/-/study-on-the-activity-of-investigative-judges-in-the-republic-of-moldova?fbclid=IwAR2VbD24sESVIKTocJN0gPblMDX4aZcZ-0BmY8lw_zWQmKpJINw8eiz8C7Q

of its total workload⁶. Therefore, it is hard to expect investigative judges' thorough examination of arrest procedures with such a workload.



On the other hand, any judge in Moldova can be appointed as investigative judge, even a newly appointed one. It is hard to expect from a newly appointed judge to act independently, particularly bearing in mind that Moldovan judges should be reappointed after first 5 year of office. Furthermore, the investigative judges should take complicated decision, in a short time, without the defence being present, on very intrusive measures. Also, the Moldovan judiciary does not have a strong record of independent judges. In this context, it is unrealistic to expect that the newly appointed judges are in the position to serve properly as investigative judges. This problem was recognized by the Moldovan Parliament in 2016, when the minimum threshold of 3 years of experience as a judge was introduced⁷. It was excluded in 2018 without any explanation. Furthermore, only few experienced judges accepted to be appointed as investigative judge. As a result, most of the investigative judges are former prosecutors or criminal investigators, or judges without any experience or with a very short experience as a judge. This explains in full why the control of the investigative judges in Moldova is insufficient.

RECOMMENDATIONS

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

- a. Moldovan judges and prosecutors respect in practice the guarantees of Article 5 of the Convention, in particular the verification of the reasonable suspicion of the crime and examination of all the relevant evidence brought before them.
- b. Alternatives to remand are effectively used in practice.
- c. Investigative judges enjoy full independence in practice, including that the legal requirements for appointment as investigative judge offer sufficient guarantees for their independence and efficiency.
- d. The workload of investigative judges is balanced to permit a thorough examination of cases put before them.
- e. Any person detained in breach of Article 5 is entitled to compensation, irrespective of the verdict on the merits of the charges brought against him/her.

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

⁶ Ibidem, pp.20-21

⁷ The mandatory requirement of at least 3 years of experience of a judge, introduced in 2016, was removed from the law on 12 January 2018 (Law no.315, of 22 December 2017, in force from 12 January 2018). The Parliament advanced no justification for this amendment. It appears that it was done at the request of the SCM, as many experienced judges refused to work as investigative judge.