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REPORT

THE RIGHT TO FREEDOM AND SECURITY OF PERSON IN THE REPUBLIC OF MOLDOVA

RETROSPECTIVE OF 2016

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CONTENTS

ABBREVIATIONS

CC	Criminal Code of the Republic of Moldova
CCP	Code of Criminal Procedures of the Republic of Moldova
CESCR	United Nations Committee on Economic, Social and Cultural Rights
CM	Committee of Ministers of the Council of Europe
CoE	Council of Europe
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CRPD	Convention on the Rights of Persons with Disabilities
DJA	Department for Judicial Administration
DPI	Department of Penitentiary Institutions
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
HRC	UN Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
MIA	Ministry of Internal Affairs of the Republic of Moldova
MoJ	Ministry of Justice of the Republic of Moldova
NAC	National Anticorruption Center
NGO	Non-governmental organization
NIJ	National Institute of Justice
OSCE	Organization for Security and Cooperation in Europe
SCJ	Supreme Court of Justice of the Republic of Moldova
SCM	Superior Council of Magistracy
UN	United Nations
UPR	Universal Periodic Review
"MNR"	Moldovan Nistrean Republic

INTRODUCTION

Pursuant to Article 5 of the European Convention on Human Rights (ECHR) and to Article 9 of the United Nations (UN) Covenant on Civil and Political Rights, every person has the right to freedom and security. One cannot be deprived of one's freedom, except for certain situations provided for by the law and having certain safeguards against arbitrariness. Thus, within the meaning of to Article 5 of the ECHR, deprivation of liberty refers not only to persons in custody, but also to any other form of detention in the custody of authorities.

Without access to fair justice, the rights and freedoms guaranteed by the Constitution of the Republic of Moldova cannot be achieved. „A strong and independent judicial system is essential to grant to any person the right to a fair trial when appearing before the court, as well as to an effective remedy when the rights of the persons have been violated. (...) reforms must always ensure guarantees against any inappropriate interference, so that judges be able to pronounce unbiased judgments, without the fear of repression *(RóisínPillay, Director of the ICJ Europe Programme)*".[1]

The results of Freedom House Report regarding the Republic of Moldova for 2015, 2016 and 2017 show worrying data on the democracy score and the judicial system. This Report showed that the democracy score is low. The issues from the judicial and corruption system were among the causes that led to the worsening of the situation in this area. The independence of judicial power declined from a rating of 4.75 (2015-2016) to 5.00 (first part of 2017). Negative coefficients in justice were due to intimidation of judges, lack of reforms to ensure integrity in the appointment of judges.[2]

During the last General Assembly of Judges of 11.03.2017, some judges made rough declarations about the integrity and independence of the judicial system.[3]

> *"The authority of the judicial system went to pieces. The society doesn't trust the justice sector...!"*, stated Tatiana Raducanu, member of the Superior Council of Magistracy.

During 2016, the prosecution bodies started to investigate corruption crimes more actively. Therefore, many officials were apprehended and arrested.[4] This phenomenon pointed out another issue – a differentiated, selected and unjustified application of preventive measures.

These conclusions are supported by the community of lawyers who mentioned cases of intimidation of judges in 2016[5]. In this context, on 3 March 2017, Lawyers" Union made an appeal to the General Prosecutor"s Office of the Republic of Moldova, Superior Council of Magistracy (SCM), Ministry of Justice of the Republic of Moldova (MoJ) and Supreme Court of Justice (SCJ) with regards to guaranteeing independence in bringing justice, including when

1 Monitoring Mission Reports in Moldova: more work needed to implement judicial reforms /ICJ – International Commission of Jurists/ https://www.icj.org/moldova-more-work-needed-to-implement-judicial-reforms/

2 Nations in Transit Report/The False Promise of Populism /https://freedomhouse.org/report/nations-transit/2017/moldova

3 http://www.jurnal.md/ro/justitie/2016/3/11/sageti-in-curtea-justitiei-mai-multi-magistrati-au-criticat-dur-sistemul-la-adunarea-generala-a-judecatorilor-csm-s-a-transformat-in-arma-secreta-a-guvernarii/

4 Ema Tabarta, former Deputy Governor at the National Bank of Moldova (NBM) and a chief of department were detained for 25 days http://www.zdg.md/stiri/stiri-justitie/ema-tabarta-ramane-in-arest; Eleven judges and three bailiffs were under pretrial detention on remand for 30 days http://unimedia.info/stiri/update-seriviciul-de-presa-al-cna-la-moment-noua-judecatori-si-un-executor-au-fost-plasati-in-arest-pentru-30-de-zile-94683.html;

5 Cases of the investigative judge, Dorin Muntean https://anticoruptie.md/ro/dosare-de-coruptie/societatea-civila-despre-urmarireapenala-pornita-pe-numele-judecatorului-dorin-munteanu-prin-astfel-de-actiuni-se-instaureaza-frica-in-randul-magistratilor,*„The civil society, about the criminal prosecution initiated against the judge Dorin Muntean: Such actions instill fear in magistrates"*

preventive measures are taken in criminal cases.[6] According to this appeal, the lawyers note with concern that lately their clients are put a pretrial detention excessively and unreasonably.

According to this Report, the right to a fair trial was violated frequently in 2016, some court hearings of increased public interest cases were held *in camera*, and the public didn't have access to information[7].

To describe more precisely the situation in this area, many reports, studies, cases and situations from 2016 were analysed. This Report will not touch on apprehension and the coercive preventive measure – house arrest, given that in 2016 some specific studies on these topics were already conducted. The first, conducted by Soros Foundation - Moldova,[8] where the issue about the frequency of requesting or applying house arrest in exchange of pretrial detention was analysed in considerable detail. The second reference report is the Report on the analysis of needs to regulate the arrest and apprehension by the police, developed under the *Project Procedural safeguards at the pretrial stage of the criminal proceedings* implemented by Soros Foundation-Moldova in partnership with the Ministry of Internal Affairs of the Republic of Moldova (MIA).

Thus, the recommendations of this Report addressed the elimination of all regulatory deficiencies and, maybe, to a higher extent, they addressed the change in the current practices that perpetuate the violation of the right to freedom and security of person in the Republic of Moldova.

6 Declaration of Lawyers" Union on guaranteeing the independence in bringing justice, including when preventive measures are taken in criminal cases http://uam.md/index.php?pag=news&id=875&rid=1201&l=ro

7 According to Amnesty International Moldova, the trial of a high official *in camera*, such as the case of Vlad Filat, led to more questions than answers. The defence pointed to procedural violations and the lack of equality of arms between the parties, but due to the *in camera* procedures, none of the claims could be verified independently. Journalists or activists didn't have access to the court room. The case of Veaceslav Platon can be mentioned in this regardhttp://agora.md/stiri/28505/amnesty-international-moldova-filat-platon-si-petrenco-nu-au-avutparte-de-un-proces-echitabil.

8 Alternative preventive measures to pretrial detention/empirical and theoretical analysis of the legal framework in the area (2016) chttp://soros.md/files/publications/documents/Masuri_alternative_arestare_preventiva.pdf

CHAPTER I.

LEGAL FRAMEWORK

Considering that international instruments applicable to the topic of this Report were addressed in many other works in detail, in this Report we will insist only on some of them.

A. INTERNATIONAL LEGAL REGULATIONS

The international regulatory framework sets out, as a matter of principle, certain international standards that outline the general framework to which states are required to report their internal legislation. Freedom and security of person is subject to several international provisions that the states have to apply immediately and effectively.

UN Mechanism for the Protection of Human Rights

a) Relevant conventions

The main source of all Conventions is the Universal Declaration of Human Rights, which provides in Article 3 that *„Everyone has the right to life, liberty and security of person"* (10 December 1948, UN General Assembly).

The Republic of Moldova has a rich experience in signing and ratifying acts of the UN human rights treaty system, which, in their turn, have a mechanism of periodic monitoring in the relevant Committee:

- International Covenant on Civil and Political Rights (ICCPR);
- International Covenant on Economic, Social and Cultural Rights;
- International Convention on the Elimination of all Forms of Racial Discrimination;
- Convention on the Elimination of All Forms of Discrimination against Women;
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- Convention on the Rights of Persons with Disabilities (CRPD);
- Convention on the Rights of the Child;
- Optional Protocol to the Convention against Torture.

Similar provisions are expressly specified in Article 9 of ICCPR, adopted by the UN General Assembly on 16 December 1966. UN Human Rights Committee (HRC) monitors the implementation of the aforementioned Convention, periodically develops certain General Comments. One of these comments refers to Article 9 of the Convention developed by the UN Committee.[1]

The safeguards regarding the protection of children's right to freedom are provided for in

1 General Comment No 35 CCPR/C/GC/35: Article 9 (Right to freedom)/16.12.2014/ http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11

Article 37(1)(b) of the Convention on the Rights of the Child: *„No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time".*

The Tokyo Rules, also known as *„United Nations Standard Minimum Rules for Non-custodial Measures*" also provide that in case of children, the deprivation of liberty shall be used as a means of last resort and for the shortest period of time.[2]

Persons deprived arbitrarily or unlawfully of liberty may file individual complaints to several bodies established under international treaties within the UN system:

- Human Rights Committee under the first Optional Protocol[3]
- Working Group on Arbitrary Detention [4]
- *UN Special Rapporteurs*

The Republic of Moldova developed declarations on the first and second ICCPR. These declarations refer to the limitation of their territorial applicability in respect of a part of the territory of the Republic of Moldova – the Transnistrian region: *„Until the full restoration of the territorial integrity of the Republic of Moldova, the Protocol shall be effective only on the territory effectively controlled by the authorities of the Republic of Moldova."*[5]

However, the Republic of Moldova recognized the HRC competence to receive and examine the communications of all persons under its jurisdiction. It is well-known that the people from the Transnistrian region are under the jurisdiction of the Republic of Moldova too[6], and the denial of safeguards of the First Optional Protocol to persons whose rights are violated, would lead to a conflict between the object and purpose of this Protocol.

b) Evaluation of the Republic of Moldova by HRC

On 18 – 19 October 2016, the HRC, at the 118th session, examined the third periodic report of the Republic of Moldova on ICCPR implementation.[7]The Committee consisting of 18 international experts drew up some recommendations to the Government of the Republic of Moldova that are to be implemented till the next session, 5 years from now.

To this end, the report of the Committee referred, *inter alia*, to the observance in the Republic of Moldova of the freedom and security of person, recommending to the Government of the Republic of Moldova to *guarantee individuals in custody access to lawyers immediately after arrest and during all stages of detention.*

As regards the fact that in the Republic of Moldova suspects of crimes may be retained for 72 hours before being brought before a judge, the HRC experts made the following recommendation: *„The State shall observe its legislation and practice under Article 9 of the Covenant No 35 (2014), considering the General Comment No 35 (2014) on the freedom and security of person, according to which 48 hours is ordinarily sufficient to transport the individual and to prepare for the judicial hearing".*

2 http://www.unicef.ro/wp-content/uploads/practici-si-norme-privind-sistemul-de-justitie-juvenila-din-romania.pdf
3 http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx
4 http://www.ohchr.org/EN/Issues/Detention/Pages/WGADIndex.aspx
5 Promo-LEX alternative report, on 118th session of UNHRC, to the third Periodic report of the Republic of Moldova, page 5 https://promolex.md/3427-alternative-report-to-the-un-human-rights-committee-regarding-moldovas-third-periodic-report-regarding-the-implementation-of-international-covenant-on-civil-and-political-rights/
6 Case of Mozer v. Russia and Moldova; Application No11138/10, Judgment of 23 February 2016 (§ 333)
7 Concluding observations on the third periodic report of the Republic of Moldova (CCPR/C/MDA/CO/3 of 18 November 2016) http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fMDA%2fCO%2f3&Lang=en

The Committee also expressed concern that people of the Transnistrian region can not enjoy the same level of protection of their rights under the Covenant as other people in the rest of the country do and recommends the Republic of Moldova to *„review its policies and take all measures appropriate to ensure that individuals in Transnistria can effectively enjoy their rights guaranteed under the Covenant, including those that were the subject of the recommendations made by the United Nations Senior Expert on Human Rights in Transnistria, Thomas Hammarberg.*[8]

While acknowledging the measures taken by the State Party to promote and protect the rights of persons with disabilities, including policies to substitute institutionalization, the Committee expresses though the concern about: *„Forced detention of and the non-consensual administration of psychiatric treatment to persons with disabilities on the grounds of mental or intellectual incapacity".*

The recommendation, in this content, was to *„revise its laws and practices on forced detention on the grounds of mental or intellectual disability, with a view to ensuring that detention is applied, if at all, as a measure of last resort and for the shortest appropriate period of time, and that the existence of a disability shall never in itself justify a deprivation of liberty".*

c) UN Universal Periodic Review (UPR)[9]

The situation of human rights in the Republic of Moldova was examined on 4 November 2016 under the UPR Task Force of the United Nations Human Rights Council at Geneva. During the XXVI session of the UPR Task Force of the Human Rights Council, 75 states formulated questions and recommendations to the Government of the Republic of Moldova, covering a wide range of issues related to the protection of human rights in Moldova.[10]

The Republic of Moldova accepted the following recommendations formulated by the Member States concerning the freedom and security of person:

- Take the necessary measures to start developing the mechanism to monitor the human rights situation in the Transnistrian region, involving the civil society from both banks of Nistru River;
- Provide systematic support and assistance to victims of human rights violations in the Transnistrian region;
- Develop the national action plan on the deinstitutionalization and inclusion of people with disabilities in their communities to ensure their rights to live independently;
- Boost the approval of legislation aiming at guaranteeing the autonomy of disabled persons to improve their social inclusion.

d) United Nations Special Rapporteur on the Rights of Persons with Disabilities

As early as 5 august 2011, the UN Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment, established that the isolation of persons with disabilities, no matter for how long, may lead to a serious violation of fundamental rights and freedoms[11]. The isolation of people in psychiatric or social institutions for a long or indefinite time on the

8 Report on Human Rights in the Transnistrian Region of the Republic of Moldova (14 February 2013) https://assets.documentcloud.org/documents/889086/raport-onu-drepturile-omului-in-transnistria.pdf

9 https://promolex.md/evaluarea-periodica-universala/

10 Preliminary Report of the Task Force on the Universal Periodic Review*/ 8 November 2016 http://md.one.un.org/content/dam/unct/moldova/docs/pub/UPR%20Recommendations%202016_RO.pdf

11 Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment A/66/268 of 05 August 2011, p. 67-68, 78 https://documents-dds-ny.un.org/doc/UNDOC/GEN/N11/445/70/PDF/N1144570.pdf?OpenElement

grounds of disability doesn't have therapeutic and implicitly legislative support[12].

Following the visit in 2015, the United Nations Special Rapporteur on the rights of persons with disabilities analysed aspects regarding the deprivation of liberty of persons with disabilities[13]. The Special Rapporteur analysed how persons with disabilities are hospitalised in residential psycho-neurological institutions and in psychiatric hospitals. The Special Rapporteur underlined that persons with disabilities are often deprived of liberty for a long time on the grounds of a real or perceived disability. Many provisions that legitimise the forced detention and the non-consensual administration of psychiatric treatment to persons with disabilities constitute grounds for a long-term detention. The Rapporteur formulated following recommendations:

- To stop immediately the deprivation of liberty of persons with disabilities on the grounds of real or perceived disability and take prompt actions to review the legal provisions allowing at present the detention on the grounds of mental health or in mental health institutions, under obligations provided for in Article 14 of CRPD;
- To investigate and conduct a prompt and complete criminal prosecution of human rights violation cases that are invoked by persons with disabilities and/or by their families, by whistle-blowers and/or cases that are detected by the regulatory bodies.

Council of Europe Human Rights Protection Mechanisms

a) European Court of Human Rights (ECtHR)

The Republic of Moldova acceded to Council of Europe (CoE) on 13 July 1995. As Member State, it ratified the ECHR and most of additional protocols to this Convention.[14] The current regional standards on the observance of the right to freedom are included in Article 5 of the ECHR, as well as in some Recommendations of CoE (*see Annex 1*)

As with other international instruments, Moldova has made several declarations about the fact that certain international acts are not applied in the Transnistrian region[15]. Thus, in its instrument of ratification to the ECHR, Moldova declared: *The Republic of Moldova (...) will be unable to guarantee compliance with the provisions of the Convention in respect of omissions and acts committed by the organs of the self-proclaimed Moldovan Nistrean Republic within the territory actually controlled by such organs, until the conflict in the region is finally settled.*[16]

However, considering Article 57 of the ECHR, the ECtHR regards this declaration as void.[17]Thus, the Government should meet its commitments made under the Convention to all persons living on its territory, including to those from the Transnistrian region.

12 See the Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, A/63/175 (p.55 – 56) and CPT standards, p.58-64

13 The report of the Special Rapporteur on the rights of persons with disabilities concerning her mission in the Republic of Moldova of 2 February 2016, http://md.one.un.org/content/dam/unct/moldova/docs/pub/A%20HRC%2031%2062%20Add.2%20ro.pdf

14 http://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/chartSignature/3

15 See, for example: http://lex.justice.md/md/326262/ *(Law No 260 of 06.12.2007 Ratifying the Optional Protocol to the International Covenant on Civil and Political Rights)*; http://lex.justice.md/index.php?action=view&view=doc&lang=1&id=317005*(Law No 237 of 29.07.2006 on Accession to the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty).*

16 Parliament of the Republic of Moldova, Decision on Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms, 21 August 1997, para (1), available at: www.lhr.md/docs/hot.parl.1298.doc

17 See Catan and Others v. Moldova and Russia, European Court of Human Rights, Applications no 43370/04, 8252/05 and 18454/06, 19 October 2012, para 110; Mozer v. Moldova and Russia, European Court of Human Rights, Application No 11138/10, 23 February 2016, para 100.

In 2016, ECtHR registered 839 applications submitted against Moldova[18], by 17% less than in 2015. Despite the fewer applications, their number in relation to the country's population is very large, i.e. 4 times more than the European average. In 2016, Moldova ranked, in this respect, 7th of the 47 Member States of CoE. In 2016, at least 41 cases were referred[19], 14 of which were about the violation of Article 5 of the ECHR. Note that 9 of the 14 applications invoke violations of the right to freedom and security committed on the territory of the Transnistrian region. *(see Annex 2).*

In the communicated cases, the applicants invoked the violation of safeguards provided for in Article 5 paras (1),(3) and (4) of the ECHR;

- Unlawful detention – Article 5(1) of the ECHR;
- Lack of relevant and sufficient grounds to use the arrest – Article 5(3) of the ECHR;
- Lack of defence to access the criminal file materials, needed to challenge the applicant's detention – Article 5(4) of the ECHR.

In addition, in 2016, ECtHR pronounced 995 judgements, by 21% more than during the previous year[20], of which 23 relate to the Republic of Moldova[21]. Violation of Article 5 of the ECHR was found in 5 judgements *(see Annex 3).*

b) Committee of Ministers of the CoE

The Committee of Ministers supervises the execution of the ECtHR judgements, according to Article 46 of ECHR, and the fulfillment of amiable regulation clauses by the governments of CoE Member States.

Once registered with the Committee of Ministers procedure, the cases are classified in groups or examined separately if believed isolated. There are two ways in which the Committee of Ministers supervises the causes classified in groups: (i) in an advanced procedure, requiring more attention from the Committee of Ministers or (ii) in a standard procedure, where progress is registered and responding states have a wide margin of appreciation in the way they are implemented.

The Committee of Ministers, under Article 46 of the ECHR, monitors the execution by the states of individual and general measures. Individual measures imply, as the case may be, either the payment of damages, or the reopening of procedures and repair of judicial or forensic mistakes; removal of impunity or implementation of some special measures and instructions required by ECtHR in separated cases (release of unlawfully detained persons, reinvestigation of criminal cases, even the recalculation of criminal penalties, etc.).

The purpose of general measures is to prevent violations of the Constitution, remove systemic issues identified by the judgements of the European Court, which impose the need to adopt or amend regulatory acts, policy documents, initiate or change practices, training and other relevant measures. *(see Annex 4)*

18 The Republic of Moldova to the European Court of Human Rights in 2016. http://crjm.org/wp-content/uploads/2017/01/NA-CRJMCtEDO-2016-ro_Rev.031.pdf

19 Summary of data on the activity of the European Court of Human Rights in 2016 of 27 January 2017, LRCM/http://crjm.org/wpcontent/uploads/2017/01/NA-CRJM-CtEDO-2016-ro_Rev.031.pdf

20 2016 Activity Report of the ECtHR/ http://www.echr.coe.int/Documents/Annual_report_2016_ENG.pdf

21 Summary of data on the activity of the European Court of Human Rights in 2016 of 27 January 2017, LRCM

B. NATIONAL LEGAL REGULATIONS

According to Article 25 of the Constitution of the Republic of Moldova, nobody can be apprehended and arrested except for cases provided for by the law. The express provisions of Article 25 regulate the constitutional safeguards for the protection of person against excessive application of such a measure.

In 2016, some legal provisions on the individual freedom and security of person were subjected to a control by the Constitutional Court.

Thus, the first judgement relevant to the individual freedom is the one on the interpretation of Article 135(1)(a) and (g) of the Constitution of the Republic of Moldova[22], which entitled all courts of law to notify the Constitutional Court of the Republic of Moldova on the constitutionality of legal norms.

In another judgment[23], the Court commented *inter alia* on the principle of proportionality and reasonableness,[24] thus the Constitutional Court mentioned that the pretrial detention should be applied only in cases where it is strictly necessary and where no other alternatives can be employed, and as a last resort measure, but not as a punishment measure.

The Constitutional Court decided[25] that under Article 25(4) of the Constitution, the pretrial detention shall be applied for a total period of 12 months, during which both the criminal prosecution and the judicial phase should take place.

In the same train of thoughts, by the Judgment No 9 of 29.04.2016 on the way of execution of the Constitutional Court Judgment No 3 of 23 February 2016 on regarding the challenge of the constitutionality of Article 186(3), (5), (8) and (9) of Code of Criminal Procedures (CCP) (duration of the pretrial detention), the Constitutional Court drew attention on the fact that the legal re-enactment of the deed must not result in the calculation of a new term of preventive detention of the person.

In another judgment[26], the Constitutional Court has ruled on the clarity of norms regulating the provisional release. In this respect, the Court found that Article 191 of the CCP institutes certain restrictions on human rights and freedoms, but without regulating the period of time for which provisional release may be ruled on under judicial control. This leads to a situation of uncertainty for persons provisionally released under judicial control, these being unable to adjust their behavior and defend their procedural rights. Thus, to remedy the regulatory gap and eliminate the unconstitutionality flaw, the Constitutional Court developed an appeal to the Parliament[27]to change the CCP, considering the rationale mentioned above.

22 Constitutional Court Judgement No 2 of 09.02.2016 construing Article 135(1)(a) and (g) of the Constitution of the Republic of Moldova http://www.constcourt.md/ccdocview.php?tip=hotariri&docid=556&l=ro

23 Constitutional Court Judgment No 3 of 23.02.2016 on regarding the challenge of the constitutionality of Article 186(3), (5), (8) and (9) of CCP (term of pretrial detention)/ http://www.constcourt.md/ccdocview.php?tip=hotariri&docid=557&l=ro

24 Report of the Constitutional Court on the exercise of the constitutional jurisdiction in 2016, Chisinau, 19 January 2017, p. 42.

25 Constitutional Court Judgment No 3 of 23.02.2016 on regarding the challenge of the constitutionality of Article 186(3), (5), (8) and (9) of CCPhttp://www.constcourt.md/ccdocview.php?l=ro&tip=hotariri&docid=557

26 Judgment No 17 of 19.05.2016 on regarding the challenge of the constitutionality of Article 191 of the Code of Criminal Procedures (provisional release under judicial control).

27 Address PCC-01/33g of 19.05.2016, CCJ No 17 of 19.05.2016

In another train of thoughts, the Constitutional Court declared inadmissible[28] a range of complaints where applicants invoked some inadequacies between the procedural – criminal legislation and the Constitution of the Republic of Moldova. Despite the fact that these complaints were declared inadmissible, the desire to put the legal provisions regulating the individual freedom and security under constitutionality control is obvious. This situation denotes the fact that some rules regulating the use of detention leaves room for interpretations in particular.

CCP and the Law on Mental Health regulate the way in which, in certain conditions, persons with mental disabilities can be deprived of liberty. These regulations are ambiguous, incomplete and abusive, due to the fact that they do not provide sufficient safeguards to avoid the arbitrary deprivation of liberty. Thus, Article 490 of the CCP provides for the forced institutionalization of arrestees for a psychiatric assessment. If signs of mental disorders are detected in a person, then he/she is transferred to a psychiatric institution to be examined for an indefinite period of time until it is established that his/her health condition improved. Compared to the deprivation of liberty as a preventive measure (detention), the deprivation of liberty for psychiatric examination is done without a mechanism of verification and control and without a periodical review of the need to institutionalize someone in a health facility.

The Law on Mental Health[29] regulates the conditions of forced institutionalization for out-patient treatment until a court judgement is issued. This rule allows health facilities to isolate persons with disabilities and administer them non-consensually a treatment during this time without a control mechanism.

28 Judgment No 6 of 26.02.2016 on the inadmissibility of the complaint no 5a / 2016 on the constitutionality control of Article 186(3), (8), (9) of the Code of Criminal Procedures of the Republic of Moldova no 122-XV of 14 March 2003.
Judgment No 16 of 23.03.2016 on the inadmissibility of the complaint no 23g/2016 on regarding the challenge of the constitutionality of Article 329(1) of the Code of Criminal Procedures of the Republic of Moldova.
Judgment No 27 of 29.04.2016 on the inadmissibility of the complaint no 45g/2016 on regarding the challenge of the constitutionality of certain provisions of the Code of Criminal Procedures of the Republic of Moldova (conditions for the application of preventive detention).
Judgment No 35 of 14.06.2016 on the inadmissibility of the complaint no 59g/2016 on regarding the challenge of the constitutionality of certain provisions of Article 329(2) of the Code of Criminal Procedures of the Republic of Moldova (challenge of the preventive measure).
Judgment No 45 of 08.07.2016 on the inadmissibility of the complaint no 79g/2016 on regarding the challenge of the constitutionality of certain provisions of Article 300(4) of the Code of Criminal Procedures of the Republic of Moldova.
Judgment No 66 of 12.10.2016 on the inadmissibility of the complaint no 120g/2016 on regarding the challenge of the constitutionality of Article 191(3)(3) of the Code of Criminal Procedures of the Republic of Moldova.
Judgment No 82 of 18.11.2016 on the inadmissibility of the complaint no 130g/2016 on regarding the challenge of the constitutionality of Article 63(2)(3) of the Code of Criminal Procedures of the Republic of Moldova (for how long a person is regarded as a suspect).

29 Law on Mental Health No 1402 of 16 December 1997, Article 28.

CHAPTER II.

MAJOR CHALLENGES

In the following part, the authors will draw attention to the most important challenges that saw a negative growth during 2016.

A. FREQUENT USE OF PRETRIAL DETENTION

Studies and reports of several specialized organizations proved that in the Republic of Moldova the most frequently used preventive measures is still the pretrial detention, and the *use of the pretrial detention is practically systematic.* Reducing excessive pretrial detention was acknowledged to be an element of good governance[1]. Pretrial detention is an exceptional measure, except for the case when the existence of some grounds justifying the maintenance of the preventive measure depriving of liberty is proved[2]. This principle was also formulated explicitly in the national legislation by Law No 100 of 26.05.2016[3]. This amendment was introduced to stress the exceptional character of the pretrial detention, and when a detention opportunity is examined the judges should prefer alternative measures to pretrial detention, analyzing if this could ensure the good performance of the prosecution to the same extent as the pretrial detention.

The monitoring results showed that pretrial detention, even after the 2016 legislative amendments, is regarded as a first-application measures rather than a preventive measure of last resort. The effects of pretrial detention, which are tougher than in the penitentiaries of the Republic of Moldova, are not considered either when choosing these measures.[4]

For about 14 years (2003-2016), the dynamics of prison population have seen diverse variations, from 10,925 persons in 2003 to 6,324 in 2010. Since 2011, this number increased so far by 300-500 of persons annually.[5]In January 2016, the number of prisoners exceeded the level of 2008, by 8,054 prisoners, of which 1,720 were subject to preventive measures. On 1 January 2017, the penitentiaries hosted 7,762 persons, of which 1,385 were subject to preventive measures.[6]

According to the Department of Penitentiary Institutions of the Republic of Moldova (DPI)[7]this increase is due to:

1 The practice of pre-trial detention in the EU, 2016/ https://www.fairtrials.org/wp-content/uploads/A-Measure-of-Last-Resort-Full-Version.pdf

2 Recommendation No R (99) 22 of 30 September 1999 of the Council of Europe concerning prison overcrowdinghttps://rm.coe.int/16804d8171

3 Article 185(1) of CCP of the Republic of Moldova, specifies that the pretrial detention shall constitute a measure of last resort and apply only if proved that other measures are not sufficient to eliminate the risks substantiating the arrest (introduced by the Law No 100 of 26.05.2016).

4 The detention in conditions below the guaranteed minimum in temporary detention facilities are being confirmed periodically by the Council for Torture Prevention. http://ombudsman.md/ro/advanced-page-type/npm-reports; In some of them: *cells are dirty and badly ventilated; some pretrial detention centres are not heated in winter; toilets are not sometimes not separated from the cell; medical records are filled in perfunctorily; prisoners are not provided continuous treatment, etc.* http://ombudsman.md/sites/default/files/document/attachments/raport_cpt_izolator_soroca_22.12.2016_2.pdf

5 Response of the Government of the Republic of Moldova of 16.03.2017, to CPT on its visit to the Republic of Moldova between 14 and 25 September 2015; https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806fdf66

6 Information on the number of persons held in the penitentiaries of the Republic of Moldova on 01.01.2017 https://drive.google.com/file/d/0B3cDJ-pp652HaHpnaUkwOHRuem8/view

7 Information presented by DPI in an international conference held in Kiev, http://webcache.googleusercontent.com/search?q=cache:5nr94uDR2egJ:kvs.gov.ua/zmi/5_Moldova_penitenciary_overpopulation.pptx+&cd=1&hl=ro&ct=clnk

- *frequent use of pretrial detention* – statistics show that about 1400 persons could be applied another preventive measure instead of detention, due to the fact that of them: 118 were later released given that the prosecution was terminated; 803 were released due to the change in the preventive measure – the arrest; 145 were released due to the dismissal of criminal cases, and 334 were convicted to non-custodial punishment;
- *reduced application of preventive non-custodial measures (alternative measures).*

According to statistics systematized by MoJ for the 12 months of 2016,[8] the rate of admission of prosecutors" motions is quite high. Thus, according to statistics, confirmed by the MoJ representative, the situation is as follows:

- 3,329 (84%) of 3,954 motions to issue an arrest warrant were admitted by the court
- 3,754 (86%) of 4,326 motions to extend the detention period were admitted by the court

Most of the arrest warrants and extensions of the arrest term have been settled and respectively issued by the Chisinau Courts, in particular by the Centre District Court (in 2016)[9].

Official statistical data confirm that since 2013 the number of motions to apply pretrial detention and the number of arrested persons increased by 20-25%. The rate of approved motions regarding pretrial detention also increased from 77.1% to 81.8% (*on the date the Information Note of the Legal Resources Centre from Moldova – September 2016 was published).* Since 2009, the number of arrested persons did not change significantly. This confirms the fact the Moldovan authorities do not use sufficiently the pretrial detention alternatives.[10]

The pretrial detention building of the National Anticorruption Center (NAC) was also overcrowded in 2016. It was found that, during this year, there were no free spaces for many days or even months. During 2016, the NAC detention facility hosted 210 persons, by 40 more people than in 2015, which was confirmed by NAC.[11]

The exceptional nature of deprivation of liberty must be particularly taken into account when it concerns juveniles subject to preventive measures. For example, in 2015, of 41 apprehended juveniles – 31 were put in pretrial detention, while in 2014 – only 16 juveniles were apprehended and 11 juveniles of them were put in pretrial detention. In 2016, 26 juveniles were put in pretrial detention. According to the 2016 Statistics on juvenile prisoners, systematized by DPI, the average term of detention of children until conviction in the prosecution phase lasts from 6 to 12 months in pretrial detention,[12] which is quite a long period for juveniles.

Here is a relevant case proving how serious is the situation when it comes to explaining the need to put in pretrial detention a juvenile who was found guilty of an attempted theft of goods worth MDL 585, released from criminal liability and application an educational measure – the warning.

8 MoJ studies and analyses/ http://justice.gov.md/pageview.php?l=ro&idc=56&#idc=53&
9 MoJ studies and analyses/ http://justice.gov.md/pageview.php?l=ro&idc=56&#idc=53&
10 Communication submitted under Article 9.2 of the Regulation of the Committee of Ministers by groups of cases Ciorap v. Moldova (detention conditions) (Legal Resources Centre – September 2016), page 8: http://crjm.org/wp-content/uploads/2016/11/Comunicare-Ciorap-2016-ro.pdf
11 The temporary detention facilities of the country – more overcrowded than ever/ http://www.canal2.md/news/izolatoarele-din-tara-mai-aglomerate-caniciodata_57656.html
12 2016 Statistics of juvenile prisoners / Department of Penitentiary Institutions of the Republic of Moldova https://drive.google.com/file/d/0B3cDJpp652HTHhLbFJUSmE1Znc/view

When the juvenile left the country, he/she was not subject to any preventive measure prohibiting to leave the country. The prosecutor challenged the sentence, and at the appeal hearing he asked for the minor to be put on the wanted list and applied pretrial detention for 30 days, on the grounds that the juvenile is running away from the trial. The prosecutor's motion was fully admitted by Chisinau Court of Appeal. To substantiate the adopted resolutions, the Court of Appeal specified that the juvenile was repeatedly summoned to court hearings, but the juvenile failed to appear and did not even inform the court about the reasons for not appearing in court, even though the court knew that the juvenile was abroad, according to the information in the „Access" database. The second appeal court has subsequently found that, by the admission of the pretrial detention of the juvenile by the Court of Appeal, Article 5(1) of ECHR was violated, quashing the resolution that provided for the application of pretrial detention[13]

Therefore, if the juvenile is applied a preventive measure – it must be as short as possible, as it is similar to the constraints one is subject to when serving a prison sentence, and the arrest can substantially affect the social, family and professional reintegration of the juvenile.

Against this context, the Recommendation No (2003) 20 of the Committee of Ministers (CM) under Council of Europe is relevant, according to which: „where possible, alternatives to remand in custody should be used for juvenile suspects; custodial remand should never be used as a punishment or form of intimidation of juvenile (...)'. UN documents also recommend not to put juveniles in pretrial detention, except for the cases of particularly serious crimes committed by older juveniles, and in this case, to limit the length of preventive detention, juveniles to be separated from adults, and such judgments should, in principle, be pronounced, after prior consultation with a social service, with a view to selecting alternative proposals.

B. INEFFICIENT EXAMINATION OF MOTIONS AND COURT RESOLUTIONS ON ARREST

We find that the legislation offers enough safeguards against the misuse of preventive custodial measures. Over the years, after the new CCP was adopted in 2003, several amendments to the CCP were meant to introduce the said standards one at a time. The constitutionality of the CCP provisions was checked against the Constitution of the Republic of Moldova (Article 25/1) in the part referring to the arrest procedure, aimed at alignment of the institution with ECHR jurisprudence standards. Thus, the national legal framework meets the international standards in general terms, although there still are several problematic provisions relating to the legal regulations on apprehension[14].

As mentioned in 2014 by the MoJ in its study on CCP compatibility with Article 5 of ECHR, the ECtHR found that namely the aspects of substantiating judgements on application/prolongation of the pretrial detention and house arrest caused the most problems. The problem is valid both in the courts of first instance and in the courts of appeal. A vast jurisprudence exists in this regard. Thus, the problem pointed out by the ECtHR in its judgements vs the Republic of Moldova lies in the fact that most national courts, when applying and prolonging the arrest, do not develop sufficiently one or more key reasons to justify it.[15]

13 http://jurisprudenta.csj.md/search_col_penal.php?id=7554(File no 1 1r-arrest-17/2016)
14 For more details see p. 21-22 of the Report on the analysis of needs to regulate the arrest and apprehension by the police. Ministry of Internal Affairs and SOROS Foundation Moldova / Chisinau 2016.
15 http://justice.gov.md/public/files/file/studii/studii_srsj/Studiu_de_compatibilitate_cu_prevederile_art._5_din_CEDO-MJ-2014.pdf

In 2016, these international standards were still not fully applied in the national practice. After studying a large number of prosecutors' motions, as well as courts' judicial practice in their examination, we noted several problematic aspects to be touched upon in this chapter.

Reasoning of prosecutors' motions and judges' resolutions on the arrest using general and abstract wordings

Having analysed a range of prosecutors' motions and judgements on the arrest, as well as the information available on open sources, in 2016 we can see that both the prosecutors and investigative judges *tend to avoid individual motivation for each separate case.* They do not perform an individualized assessment of the risks that appear when someone is put under arrest, the grounds for arrest being perfunctory. The fact that requests/resolutions are motivated using simple stereotypical wordings stands out. Thus, both prosecutors who submit motions and the investigative judges use standard phrases.

The procedural legislation clearly provides for the possibility of applying coercive preventive measures (including the arrest) only if the risks invoked in Article 176 of CCP are supported by evidence. However, deviations from the legislation in force and from the ECtHR practice still persist. We note that the use/prolongation of the pretrial detention is often substantiated by the gravity of the offence or by its potential severity. The presumption practice is still in use. Under it, in the absence of the pretrial detention measure, use of non-custodial interrogation could contribute to commission of new criminal acts.

For instance, judges and prosecutors do not give detailed description of the „risk to escape' or interfere in the administration of justice by influencing the witnesses, destroying evidence, when referring to the individual circumstances.

Examples from a case where charges were pressed under Article 151(1) of the Criminal Code of the Republic of Moldova (CC)[16]:

- „The persistence of the risk of disappearance results from the imprisonment sanction...'; „The danger of disappearance of the accused from the law enforcement bodies is also confirmed by the objective data supporting the fact that he is able to take actions in order to avoid the possible detention by absconding."
- „The court considers that application of the preventive measure in the form of detention is necessary since the crime he is accused of is itself of the high social threat to the social values protected by the law."
- „The pretrial detention is justified, since the lawyer didn't present any evidence of the fact that the preventive measure in the form of detention would not be appropriate."

Another example of the case of charges under Article 186(5)[17]:

- „Suspicions of the prosecution that the defendant could abscond, impede establishment of the truth or commit other criminal acts is proved by the actual situation of the defendant and namely by the fact that he is accused of committing a serious crime, for which the criminal law provides imprisonment for over 2 years...".

Both prosecutors and judges often confine themselves to the following reasons and wordings: „to ensure or to improve the criminal proceedings...". Indeed, preventive measures are first of all needed to achieve their general goals: to ensure proper conduct of the criminal proceedings,

16 Extract from a resolution issued by the Criuleni Court (article 151(1))CP – intentional severe bodily injury and damage to health).
17 Extract from the resolution issued by the Botanica District Court under Article 186(5) CP – theft committed on an especially large-scale).

or to hinder the suspect, accused or defendant from absconding from the criminal prosecution or from the court[18]. However, referral to this provision often clears the way for arbitrariness and even abuse on the part of investigative judges, since the wording is too general and can be interpreted conveniently[19].

Though the legislator introduced the judges' obligation to clearly establish the risks under Article 185 CCP[20] directly in the procedural rules, this did not change the vicious practice used by the judges, many times found by the ECtHR.

A representative case of serious problems related to the application of preventive measures, which happened at the end of 2015 – beginning of 2016, is the case of „Petrenco group".[21] The reasonable suspicion of committing mass disorders as per Article 285(1), (2), (3) CC was invoked as a ground for apprehension. Prosecutor's motion was motivated simply by quoting legislation and ECtHR precedents, not referring to the facts and evidence. As a result, the prosecutor's motion was admitted in full, while the judge in its resolution invoked the exact same arguments as used by the prosecution:

- „the reasonable suspicion that leads to the necessity to apply pretrial detention ... is the fact that according to the data resulting from the criminal prosecution, based on the nature and gravity of the crime and the punishment to be applied, there exists the risk that the accused could abscond from the criminal prosecution body and the court of law, thus impeding the establishment of the truth during the criminal proceedings";
- „When submitting the motion for applying the pretrial detention, the prosecutor took into account the character and the level of harm of the offence, the circumstances it was committed in, considering the time of commitment as well".

The case is very illustrative, since the exact same motions with similar reasons[22] were invoked in the cases of the 6 other persons detained together with Grigore Petrenco.

Another case that generates questions as well is the arrest of a group of people who participated on 24 April 2016 in an anti-government protest in Chisinau. During the event, a wrangle emerged among some of the protesters and the police. The protest participants were arrested 10 days after the protest. The General Prosecutor's Office submitted a motion requesting the application of the preventive measure in the form of the arrest to the four of them. Both the prosecutor and the judge substantiated the application of arrest by the risk that the said persons could prejudice the criminal proceedings by concealing the crime traces, without explaining why they consider these risks to be real and sufficient. The court of law also didn't explain why the measures alternative to the preventive one (e.g. provisional release under judicial control or on bail, obligation not to leave the country or settlement, personal guarantee or guarantee of an organisation, etc.) cannot be applied. The court did not confute the arguments the defence invoked against the detention, as well. The arrest raises even more questions, when considering that the arrested persons were free for at least 10 days following the protest of 24 April 2016[23].

Having analysed the motions and resolutions examined for this report, we can say that both the judges and the prosecutors continue to use the same wordings or pieces of text (copy-

18 Article 175(2) CCP.
19 About excesses and arbitrariness in pretrial detention/ https://www.juridice.ro/471824/despre-excese-si-arbitrar-in-materia-arestarii-preventive.html
20 Law on Amendments and Addenda to the CCP No 122-XV of 14 March 2004: http://lex.justice.md/md/365963/
21 The Case of Petrenco Group Came to Trial: They Risk to Be Sentenced to up to 8 Years of Imprisonment/http://independent.md/dosarul-grupului-petrencoajuns-instanta-risca-pana-la-8-ani-de-inchisoare/#.WPoKttKGPIU
22 In the case of *Dolgova v. Rusia No 11886/05,* the Court considered that such approach is incompatible with the guarantees provided by the Article 5(3) of the Convention, since it allows to keep people in detention without analysing, on case by case basis, the reasons that justify the need to prolong the detention.
23 http://amnesty.md/ro/despre/blog/societatea-civila-condamna-actiunile-autoritatilor-fata-de-mai-multi-participanti-la-protestul-din-24-aprilie-2016/

paste), abstract references to laws or simply quotations of the procedural legislation in their judgements. Most often, these procedural acts do not contain the counter-arguments of the opposite party (especially, of the defence).

For instance, in the judges' resolutions we can often find the following wordings justifying the application of arrest as a preventive measure:

- „To apply the arrest in order to enhance the public's trust in the way the judicial authorities apply the law".
- „The non-custodial investigation could contribute to commission of new criminal acts by the suspect/accused".
- „The risk that a person absconds from court depends on the complexity of the criminal case, the gravity of the crime the person X is charged with...".
- „*Arrest is needed to guarantee the execution of the possible criminal punishment*'. Even at admission of the first prosecutor's motion the judge can invoke it as justification of the arrest. Thus, such justification implies the situation of an existing but unenforced conviction judgement.

„The need to complete the criminal prosecution'. The court stipulated a principle, according to which the collection of evidence does not fall within the purpose of preventive measures.[24] While representing the primary goal of the preventive measures, proper conduct of the criminal proceedings cannot serve as a ground for the arrest.

A person's prolonged detention creates an impression of the said person's guilt, contrary to the guarantee of the presumption of innocence provided for in the Constitution of the Republic of Moldova. Moreover, the ECtHR precedents established that during the criminal proceedings the arrest of the defendant/accused should not appear as an anticipation of the prison sentence.

Failure to indicate in the resolution on pretrial detention the reasons justifying the inefficiency of other measures alternative to the pretrial detention, is expressly provided in the Article 185 of CCP

Another regular problem fueled by the insufficient reasoning in prosecutors' motions and resolutions on arrest is that neither prosecutors **nor judges justify the decreased efficiency of a non-custodial sentence.**

Moreover, despite the measures alternative to arrest provided by the law, the prosecutors request namely deprivation of liberty (either at home or in a penitentiary). Some prosecutors and judges see the house arrest as termination of the deprivation of liberty measure. The experts, however, point at the fact that both the pretrial detention in a penitentiary and the house arrest represent deprivation of liberty. While the prosecutors do not provide enough evidence for applying the most drastic measures, the judges do not even request such evidence, which later leads to numerous cases of violation of human rights. These are some of the conclusions of the survey conducted by Soros Foundation-Moldova.[25]

While settling the issue of application or prolongation of the pretrial detention, the investigative judge shall be entitled to order (in presence of reasons and conditions provided by the law)

24 ECtHR, Case Turcan and Turcan, judgement on 23 October 2007, para 51.
25 Pretrial Arrest in the Republic of Moldova and in European Countries. Comparative Research: https://www.soros.md/press/cercetare-arestareapreventiv%C4%83

another non-custodial preventive measure[26]. After analysing the data provided by the authorities and the formed practice we find a situation when neither prosecutors nor judges are inclined to apply more often the measures alternative to arrest.

Thus, according to the MIA response of 26 January 2017:

- In 2015, 3,503 persons were apprehended:
  - no justifiable reasons to suspect the commission of crime – 2 persons released;
  - no grounds to continue deprivation of liberty – 1,587 persons released;
  - pretrial detention – in regard to 1,708 persons;
  - house arrest – in regard to 148 persons;
  - judicial control – in regard to 58 persons.
- In 2016, 3,676 persons were apprehended:
  - no justifiable reasons to suspect the commission of crime – 4 persons released;
  - no grounds to continue deprivation of liberty – 1,447 persons released;
  - pretrial detention – in regard to 1,936 persons;
  - house arrest – in regard to 210 persons;
  - judicial control – in regard to 79 persons.

Unjustified extension of a person's arrest and inefficiency of appeals against the arrest applied by the investigative judge

Arrest is a temporary and provisional measure, because it is established for a definite period of time and lasts as long as the reasons why an arrest was ordered exist and shall be lifted immediately when such reasons cease to exist. As the deprivation of liberty continues and gets prolonged, the presumption in favour of discharge increases. Pretrial detention must be checked on regularly, any of the involved parties being able to initiate such a verification.[27]

In the case *Buzadji vs. the Republic of Moldova*, the Court found that provisions of Article 5(3) were violated (Right to liberty and security) after he was subject to detention pending trial for ten months, while the national courts invoked, in essence, the same reasons. The Court also found that the reasons given by the national courts for ordering and prolonging the detention had been stereotyped and abstract as well as inconsistent. Their decisions quoted the grounds for detention without any attempt to show how they had applied concretely to the specific circumstances of his case.

Having analyzed the way these principles stated in the case-law of the Court are applied by the courts from the Republic of Moldova, we can see that the same issue was perpetuated for years and no significant change in this respect is felt. We notice that most often the prosecutor does not bring any new evidence in order to maintain the detention, while in the justification part of judge resolutions one can find just 1-3 paragraphs that state as arguments some standard template-like phrases. It is important that the same standard template-like phrases can be found as justification in the resolutions of other judges on other cases. This proves the lack of an individual consideration of the need to apply detention.

26 Article 185(3) CCP.
27 Article 186(9) of CCP of the RM.

They also often use general and abstract wording when verifying the need to maintain pretrial detention, such as: *"the circumstances that justified the apprehension of this person still hold their evidentiary effect and due to the severity of the imputed act, the absolute need to isolate them from society persists"; "the factual and legal grounds that substantiated the issue of the arrest warrant (...) have not changed and to their largest extent continue to be valid"*.[28]

Frequent enforcement of custodial measures is also determined by the stereotype thinking of some judges, who do not consider thoroughly the motions of prosecutors where they ask for ordering an arrest or prolonging it, but also because of the fear induced by some cases when judges were sanctioned for applying measures that were different from what the prosecutor requested.

In this context, the case of judge Dorin Munteanu is very illustrative: he was prosecuted for refusing to prolong the arrest warrant of an accused person. However, the decision to refuse the prolonged arrest was made because the prosecutor refused to submit evidence that would confirm the need to keep the accused under arrest, even though the judge had previously asked for this[29]. The press release of the General Prosecutor's Office said that the Prosecutor's Office was discontent with a judge not accepting the motion of a prosecutor to arrest a person. The reasons the Prosecutor's Office invoked in order to start criminal proceedings – the "unjustified" hearing of a witness and stating that the incriminated act was not a crime – are arguable. The CCP binds the judge that considers prosecutor motions of arresting someone to check whether the imputed act is a crime or not and hear the relevant witnesses invited by the defence. If the imputed act is not considered a crime, the judge is obliged by law to reject the arrest request. Should the prosecutor be not convincing enough in the arresting proceedings in connection with the risk of absconding or elements of crime, this is the prosecutor's omission, not judge's.[30]

This case is very relevant, because when the investigative judge emphasises systemic issues, for which is being currently prosecuted, namely no justification of the prosecutor motions to apply pretrial detention and its prolongation. In this case, the investigative judge Dorin Munteanu explained that after the 20 days of pretrial detention expired, the prosecutor requested to prolong the provisional measure – pretrial detention. In this respect, the investigative judge explained that the 20-day period of pretrial detention granted by the court was used inefficiently by the prosecutor.[31]

This case is very illustrative, given that as of 31 January 2017 the acquittal rate in the Republic of Moldova is under 3%, significantly below the average of the countries with an advanced democracy[32].

It is recommended for the judges to ask regularly for new evidence regarding the need to maintain pretrial detention in each particular case and follow how "diligently the criminal investigation/proceedings are conducted. The example of the judge that rejects the option of pretrial detention because the prosecutor did not undertake certain procedures in a particular case should be applied as good practice and should become a rule, not an exception.

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28 Abstracts from judicial resolutions on ordering arrest.

29 Incredible statements of the investigative judge who was prosecuted after not prolonging the arrest of an accused person https://www.zdg.md/stiri/stiri-justitie/doc-declaratii-incredibile-ale-judecatorului-de-instructie-urmarit-penal-dupa-ce-nu-a-prelungit-arestul-unui-invinuit

30 A new precedent endangers the independence of judges in the Republic of Moldova http://www.crjm.org/precedent-ce-pune-in-pericolindependenta-judecatorilor-din-republica-moldova/

31 Explanatory Note of 26 January 2017 *to the Notification of the Prosecutor General of the Republic of Moldova No 881 of 24.01.2016 regarding the investigative judge Dorin Munteanu, addressed to the Superior Council of Magistracy*. https://www.scribd.com/document/338196040/Not%C4%83-Explicativ%C4%83-DM#download&from_embed
https://www.zdg.md/stiri/stiri-justitie/doc-declaratii-incredibile-ale-judecatorului-de-instructie-urmarit-penal-dupa-ce-nu-aprelungit-arestul-unui-invinuit

32 Statement: Another precedent endangers the independence of judges in the Republic of Moldova http://crjm.org/wp-content/uploads/2017/02/17-01-31-CRJM-apel-Dorin-Munteanu.pdf

The issue of no substantiation of judge resolutions on the prolongation of pretrial detention in Moldova is valid for the courts of appeal, too. The courts of appeal have the mission to control the legality of deprivation of liberty and if they find that it is illegal, they should order the release of the person in custody. The legality of detention is appreciated both from the perspective of domestic law, but also from the perspective of Convention provisions. It is worth mentioning that the only remedy against an unjustified arrest is an appeal in connection with CCP, but, as national practice shows, the violations found until 2016 continued further on.

Violation of the principle of equality of arms is favoured by the non-disclosure of information

When considering the prosecutor's motion to apply detention, the prosecution and the defence are still on unequal positions, which contradicts the principles of equality and adversarial procedure embedded in the Constitution of the Republic of Moldova.

The defence counsel, the suspect, the accused, the defendant have the right to access materials and evidence provided by the prosecutor, as well as prosecutor's motion to apply, prolong, revoke, replace the coercive procedural measure.[33]

Though this aspect is explicitly regulated, unfortunately we can still see the practice of not submitting case materials regarding the reasons of arrest or not offering access to the relevant part of the criminal case file *(except for some pages that include the motion for detention, charges and minutes of the apprehension, which is already known by the defence, etc.)* before the court hearing where the motion for applying or prolonging the pretrial detention is examined.

In most cases the defence either has no access to the materials that the prosecutor submitted to the judge or the enclosed materials include no evidentiary information related to the risked invoked in the prosecutor's motion.

In one case, the prosecutor attached as evidentiary materials justifying the arrest some case documents that were already known to the defence or that included no whatsoever evidence of the risks invoked by the prosecutor: *order starting the criminal prosecution, a carabineer's denunciation, minutes of the hearing of that carabineer, abstract from the state register of population, apprehension minutes, order on conduct of the criminal prosecution by a group of prosecutors and officers*. Thus, these acts proved neither the reasonable suspicion of the commission of the offense in question nor the risks invoked by the prosecutor as a justification for the application of the arrest.

Another example from the application challenging the aspect of constitutionality, filed by the lawyer Gheorghe Ulianovschi in file No 16-492/2016,[34] indicates that in 2017, the issue that *materials and evidence confirming or invalidating the insufficiency of other preventive measures, the grounds for the application of pretrial detention and house arrest are not annexed* is present in more than one case, it is a systemically vicious practice, which has not changed despite ECtHR's findings in the cases against the Republic of Moldova. Although the complaint was declared inadmissible for procedural reasons, this decision is relevant as Constitutional Court

33 Article 66 (21), Article 68 (2), Articles 307 and 308 of CCP: The materials confirming the grounds for applying pretrial detention or house arrest shall be enclosed to the prosecutor's motion. The motion and the materials confirming the grounds for applying pretrial detention or house arrest shall be submitted to the accused, defendant, and defence counsel at the moment when filing the motion on applying pretrial detention or home arrest.

34 CC Judgment No 1 of 19.01.2017 on the inadmissibility of the complaint no 2g/2017 regarding the challenge of the constitutionality of Article 308(1) and (2) of the CCP (application of pretrial detention). http://lex.justice.md/index.php?action=view&view=doc&lang=1&id=369429

of the Republic of Moldova reiterated the importance of complying with Article 308 of the CCP, namely: „*... the evidence or information justifying the application of the arrest is contained in the procedural documents accompanying the prosecutor's motion and must be attached to the file, with access for the party, even at the risk of revealing some aspects the prosecutor still wanted secret.*"

Another common problem, both at the time when the person is taken initially under arrest and upon prolongation, is that the arguments of the defense are not treated in the same way as the prosecutors' are and they often do not influence the court's decision on arrest. In most cases, lawyers' motions are rejected without indicating explicitly the reasons for the rejection. The defense arguments and evidence in favor of the revocation of arrest or change of the preventive measure, in most cases being ignored, are sometimes not even reflected by the courts in their judgments.

If this practice continues, the Republic of Moldova will continue to be convicted at the ECtHR, since the Court has held that the practice of not disclosing the file materials related to the grounds of arrest, together with the omission of the courts to bring enough reasons for arrest, strengthens – in a legitimate way – the impression of the accused that the detention was arbitrary (§63 Turcan vs. Moldova *Application No 39835/0523* October 2007).

C. RIGHT TO FREEDOM AND SECURITY OF PERSONS WITH INTELLECTUAL AND PSYCHOSOCIAL DISABILITIES

The right to freedom and security of person acquires specific forms and specificities in the context of persons with intellectual and psychosocial disabilities. It should be noted that, based on the existing practices of deprivation of legal capacity[35] and the doctrine of medical need,[36]the freedom and safety of persons with intellectual and psychosocial disabilities is constantly violated under the pretext of some medical or social needs and protection of the person. In this respect, the practices that could lead to the institutionalization of a person and the deprivation/limitation of liberty and security in this way are to be defined.

Deprivation of legal capacity and institutionalization in health or residential facilities

The Civil Code provides for the possibility of depriving the individual of its legal capacity, if the person, because of a psychiatric disorder, cannot become aware of or manage their actions[37].

Thus, at least formally, in order to ensure the protection of the rights and interests of an alleged incapacitated person upon conclusion of legal acts, persons with intellectual and psychosocial disabilities declared as incapacitated shall be granted guardianship. Most of those declared incapacitated never restore their legal capacity, and the state of extreme vulnerability that predisposes to institutionalization remains a lifelong *status quo*. The vast majority of these people are admitted to psychiatric facilities.

The direct effect of the deprivation of legal capacity is ignoring the consent of the person in all the spheres of life, but especially in terms of institutionalization in various psychiatric facilities

35 Article 24, Civil Code of the Republic of Moldova No 1107 of 06.06.2002.
36 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez / A/HRC/22/53/1 February 2013, p.31-35.
37 Article 24, Civil Code of the Republic of Moldova No 1107 of 06.06.2002.

and administration of treatment. The Committee on the Rights of Persons with Disabilities has established that there is a close link between the deprivation of legal capacity, discrimination and placement of a person in a specialized institution[38].

The hospitalization or institutionalization of a person with intellectual and psychosocial disabilities can be done by force, without the consent of the person or voluntary on the basis of his/her consent. The hospitalization of the patients without emergency situations is determined largely by the socio-economic situation of the person, the absence of permanent housing. Many patients confirm that they are forced to give consent for hospitalization because they cannot buy the necessary medication. Placement in residential institutions can be done on the basis of the request of relatives (to guardianship authority) or guardian[39].

Thus, the isolation in medical or residential facilities and the social exclusion of people with disabilities remains an „ordinary" practice often applied by the authorities. In addition, the Law No 60 on the Social Inclusion of Persons with Disabilities[40] does not contain any relevant provision regarding the right of persons with disabilities to live in the community and their freedom to choose the place of residence.

D. DEPRIVATION OF LIBERTY IN THE TRANSNISTRIAN REGION

Despite restricted access to the region, the Promo-LEX Association did not stop monitoring whether human rights are observed in the Transnistrian region and discovered dozens of new cases of illegal detention. As a result, we can say that the observance of the right to freedom and security in the Transnistrian region is a much more acute issue than in the rest of the country[41].

In 2016, the ECtHR pronounced the judgement in the *Mozer vs. the Republic of Moldova and the Russian Federation* case[42], which is extremely important, since it analyses the capacity of the „judicial system" of the „Moldavan Nistrean Republic" („MNR") to order the arrest or detention of a person.

In the said judgement, the Court underlined that contrary to the constitutional law, which was subject to expert review and monitored by several international bodies, the so-called legislation that applies to the Transnistrian region has never been subject to a review. Thus, arrest and sentencing decisions taken by the so-called Courts on the basis of some local acts cannot be regarded as adopted under a judicial tradition compatible with international human rights standards.

At the same time, the Court came to a conclusion that the „courts" and other „MNR" authorities do not have the right to order arrest or detention of persons, since they are the part of a system which operates „under constitution and legislation', which do not reflect a judicial tradition compatible with ECHR in order to allow the persons benefit from its guarantees.

Thus, based on the principles established by the Court in the case of *Mozer v. the Republic of Moldova and the Russian Federation* and on the analysis performed after monitoring of the situation with application of pretrial detention in the region during the period that followed

38 Committee on the Rights of Persons with Disabilities, C/CHN/CO/1, 15 October 2012, p.38.
39 Report of the Institutional Ombudsperson of the Psychiatric Hospitals on the observance of the patients' rights in the psychiatric hospitals during April – September 2012, page 9.
40 Law on Social Inclusion of Persons with Disabilities/http://lex.justice.md/md/344149/
41 *U.S. Department of State Report on Human Rights Practices in Moldova for 2016,* https://www.state.gov/documents/organization/265662.pdf
42 ECtHR, Case of Moser v. Moldova and Russia, application No 11138/10 of 23 February 2016/ http://hudoc.echr.coe.int/eng#{"fulltext":["Mozer"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-161055"]}

the facts of this case, we can say that in 2016 the right to liberty and security of person remains the most violated one in the region. Most frequently this right interferes with the violation of other rights, such as the right not to be subjected to torture or even the right to life. Thus, the conditions in which persons are deprived of liberty in the Transnistrian region endanger the health and life of every prisoner.

It is already a common fact in the region that the „courts" in the majority of cases support the prosecutors and send persons to temporary detention facilities upon prosecutor's first request. Based on the aforesaid, it is safe to say that a practice where arrest is applied as a rule and not as an exceptional measure, is already established in the Transnistrian region.

Lack of procedural safeguards in the „MNR legislation" for examination of cases of pretrial detention.

The „MNR" provisions of the criminal procedure are vague and unpredictable, they do not enumerate clearly and explicitly the grounds to apply the most severe preventive measure – arrest. The cliché phrases used by the „courts" conceal the total lack of grounds for arresting persons, while the „investigators' do not bother collecting and submitting evidence to the „court" for it to justify somehow the application of this exceptional preventive measure.

In case of serious crimes, the arrest is automatically applied to each suspect/accused under the „law", based on a single reason – severity of the crime the person is suspected in/accused of.[43]

According to „CCP of MNR", the pretrial detention can also be applied if for the incriminated offence the law provides a sanction of over 3 years of imprisonment, when it is impossible to apply a „less restrictive" preventive measure, while the request of the investigation body can contain only the reasons and grounds of the pretrial detention.[44]

The „law" applied in the Transnistrian region provides for the detention based only on the lack of a „MNR" residence visa[45]. Thus, the population of the right bank of the Nistru River and foreign citizens can be automatically apprehended and placed in pretrial detention only on the basis of an assumption that they could abscond.

In all criminal cases the Promo-LEX Association had the access to, we found that when applying the preventive measure of arrest, in a range of cases the „court" uses the same cliché phrases to justify its resolutions, such as:

- severity of the incriminated crime, the „court" has every reason to assume that the accused person could abscond from the „criminal prosecution" and examination of the case in „court" and commit other offences;
- while being at liberty, the person could impede the establishment of the truth;
- the need to take certain procedural actions necessary to complete the „criminal prosecution".

43 Article 78 of the „CCP of MNR": pretrial detention may be applied to persons accused of committing a serious and very serious crimes (...), as well as to the persons with two or more previous convictions for serious and very serious crimes, only on the basis of the severity of the crime/ http://www.vspmr.org/legislation/laws/zakonodateljnie-akti-pridnestrovskoy-moldavskoy-respubliki-v-sfere-sudoustroystva-i-protsessualjnogo-prava/ugolovno-protsessualjniy-kodeks-pridnestrovskoy-moldavskoy-respubliki.html

44 Article 78(1) of the „CCP of MNR"/http://www.vspmr.org/legislation/laws/zakonodateljnie-akti-pridnestrovskoy-moldavskoy-respubliki-v-sfere-sudoustroystva-i-protsessualjnogo-prava/ugolovno-protsessualjniy-kodeks-pridnestrovskoy-moldavskoy-respubliki.html

45 Article 78(16) of the „CCP of MNR"/http://www.vspmr.org/legislation/laws/zakonodateljnie-akti-pridnestrovskoy-moldavskoy-respubliki-v-sfere-sudoustroystva-i-protsessualjnogo-prava/ugolovno-protsessualjniy-kodeks-pridnestrovskoy-moldavskoy-respubliki.html

It is already a common problem when the „court" chooses pretrial detention based on vague grounds and information not confirmed by the available materials. In the said context it is safe to say that a practice of obligatory pretrial detention is already established in the Transnistrian region, in some situations – regardless of the need and with no reasonable grounds to apply it.

The practice when persons deprived of liberty in the „MNR" wait for the sentence under the custody of „militia bodies" and are not always timely transferred to the „detention facilities" of the penitentiaries, still persists. As a result, the risk of being ill-treated by the „investigation bodies" is extremely high. This was confirmed by the „Ombudsperson" of the region in the 2016 report as well.[46]

The Promo-LEX Association continues to receive complaints from the relatives of victims placed under pretrial detention in the detention facilities of the Transnistrian region. One of the most recent cases documented by Promo-LEX Association is the case of Lypovchenko,[47] who was sentenced to 3 years and 6 months of imprisonment by the „Tiraspol City Court" for a note made in an old notebook saying „Transnistria can be set in order only if the UN forces get involved". He was sentenced in his absence because the judge considered he „spoke too much". Initially, he was placed in pretrial detention without indicating what the term of arrest was. Though his health has been deteriorating every day, the arrest was prolonged every so often for no particular reason, with maximum use of general wordings.

It is not a single example, but rather a consistent practice of initial application of arrest without specification of its term, invoking only the socially-dangerous nature of the incriminated offence.

Thus, the „judges" who order arrests consider (without making any references or examining any evidence in this regard) that only the seriousness of the incriminated crime can serve as a sufficient reason for supposing that the convict could abscond from the „criminal proceedings" and commit other crimes.

Besides the standard set of phrases used by the „courts" of the region, the most frequently invoked reason is the fact that the accused person is the citizen of the Republic of Moldova and thus could escape.

The „automatic" extension of the period of arrest and the inefficiency of judicial control

An important safeguard is the existence of a periodic jurisdictional control of legality of detention. The right to jurisdictional control of the detention should be granted to persons that are subjected to any form of deprivation of liberty – be it lawful or unlawful,[48] and it is necessary to actually ensure access to an „independent and impartial court" to challenge the unlawfulness of detention. These persons and their representatives should have the possibility to be heard by this „court".

Although the „law" of the region provides for the right to appeal against the arrest warrant, it

46 „In Transnistria, those sentenced to imprisonment for the first time are kept together with those with prior convictions'http://pitkamnet.mediacenter.md/pridnestrovie/docladi_acti_reagirovania/1369-v-pridnestrove-vpervye-osuzhdennye-k-lisheniyu-svobodysoderzhatsya-s-licami-neodnokratno-sudimymi.html

47 Torture in the Transnistrian Region is a Norm - Case Lypovchenko/https://promolex.md/1491-tortura-in-regiunea-transnistreanaeste-o-norma-cazul-lypovchenko/?lang=ru
Moldova, Republic of: Ill-treatment and denial of adequate medical care for Mr. Oleksandr Lypovchenkohttp://www.omct.org/urgentcampaigns/urgent-interventions/moldova/2016/05/d23784/

48 ECtHR, the case of A. and Others v. the United Kingdom of Great Britain and Northern Ireland, para. 202.

does not provide clearly for any safeguard that this mechanism actually works and is not only on paper. One's term of arrest is being extended automatically without looking into whether there actually are reasons to keep the person in custody or not.

The „Supreme Court of MNR" uses the same, repetitive and template-like reasons to extend the pretrial detention. In none of the cases the Promo-LEX Association monitored or represented did we find a concrete justification for maintaining pretrial detention. Often, they say this is a way to mitigate the risk that the detainee would try to run away from „criminal prosecution". However, there are no facts regarding applicant's attempts to run away from prosecution or from the trial of the case in „court". Also, they say that the investigation needs to end first, which is not reason enough to keep a person in pretrial detention. The „courts" do not look into alternatives to pretrial detention.

In all cases where, initially, the person was arrested and charged with severe crimes – the period of detention was extended automatically, the „judicial oversight" being only perfunctory, which is the same as not having any such oversight, even in cases where there are good reasons not to arrest the person. Thus, when it comes to extending the period of detention, the so-called „courts" copy, most of the times, entirely previous rulings and provide the same reasons – *socially-dangerous nature of the crime the detainee was charged with, and it is likely that the detainee will commit other offences and that the detainee will run away from investigation and its finalization.*

The courts and other authorities of the „MNR" do not meet the conditions regarding independence and impartiality

Until 2012, the Soviet legislation used to be applied (the Moldovan Soviet Socialist Republic, the Moldovan Autonomous Soviet Socialist Republic), but with essential amendments. Some reforms were made in 2012. The criminal law was amended (including the CCP provisions). Law enforcement bodies underwent reforms too. In general, the local law was de-harmonised from the law of the Russian Federation. The reform of the judicial system started by appointing persons loyal to the leader of Tiraspol (back then – E. Sevciuc) in positions of Chairs of courts. By resorting to influence peddling, they confirmed tens of raider attacks and convicted people that the leader of Tiraspol told them to. There is no regulatory framework that would guarantee the quality of the „body of judges".

To establish whether a judicial body is independent or not, the ECtHR believes that the following elements need to be analysed: the member-appointment procedure, for how long one has worked in a particular position, whether there are any guarantees whereby they would not be subject to pressures and whether this body has the external attributes of independence. The court established that the judicial body needs to be independent. The Beijing Declaration provides for one more criterion – that of the independence of persons, and it demands for one to be of the highest legal qualification[49]. Therefore, there must be an independent mechanism to recruit and apply disciplinary sanctions on magistrates. The CoE provides that the authority in charge of the selection and career of judges must be independent from the Government and from the administration.[50]

49 Item 14 and 15 of the *Beijing Declaration* / http://www.cristidanilet.ro/continut/carti-monografii/2007-ghid-factori-presiune-conflicteinteresei/128-03-independena-i-imparialitatea-justiiei-standarde-internationale#_ftn26

50 Principle I, Item 2, letter c) of the Recommendation (94) 12 of the CoE / http://www.cristidanilet.ro/continut/carti-monografii/2007-ghid-factoripresiune-conflicte-interesei/128-03-independena-i-imparialitatea-justiiei-standarde-internationale#_ftn26

As a consequence, according to the regulations on the „justice system" in the region, the procedure by which „judges" are appointed is perfunctory and non-transparent, since their appointment is far from following the recommended procedure. The methods of selection and appointment of judges are not in line with international standards on judicial independence. The independence of the judicial system is declarative, as the executive power – represented by the President of the Tiraspol administration and by the „Ministry of Justice" – has levers to control the different areas of the „judicial system".[51]

According to the so-called Constitution of the „MNR" – ***the „President" is the guarantor of the independence of justice.***[52]

It looks like the guarantor of the independence of the judicial system is the head of the executive power who, as a matter of fact, appoints the judges. Although international standards provide that the judicial authority must be independent both from the executive and from the stakeholders.

The procedure whereby judges are appointed is perfunctory. The „President of the MNR" appoints the „city judges" of the „Supreme Court". The decisions the „President" takes are not necessarily in line with the recommendations of the Judicial Department[53] or of the qualification commissions chaired by the Chairs of the courts, who are yet again appointed by the „MNR President". There is no other alternative independent body to monitor and respond. The civil society and the local media are made silent or ignored.

There is no such thing as „investigative judges" in the Transnistrian region. The warrants for someone's arrest are issued by the „judges" who can later participate in the trial of the case. It is essential for a procedure taking place in a „court" that is competent as provided for in Article 5 of the Convention to have all the features of a fair trial as provided for in Article 6, particularly in terms of independence and impartiality. Accordingly, impartiality is at risk if the same „judge" that ruled on the arrest of a person or its extension, also rules on whether the detainee is guilty or not.

To conclude, as long as there is no legitimate „judicial system" in the Transnistrian region that is based on a judicial tradition compatible with the ECHR – the detention of any person in the prisons from this region will continue to be illegal and arbitrary.

The arrests that the „MNR courts" decide on goes beyond any reasonable limits

Another serious issue typical of the arrests in the Transnistrian region is that the detainees are held in custody for excessivelly long periods of time. This turned already into a repressive practice against businessmen in particular, so as to take their businesses over. This vicious practice is determined, to a great extent by the so-called „procedural legislation" applied, and by the Soviet-like political subordination and mindset of the „body of judges", the establishment of which, in the Transnistrian region, was unlawful.

According to Article 79 of „CCP of MNR" – a person cannot be held in custody for longer than two months. While if it is not possible to finalize the criminal prosecution, if there are no reasons to amend or cancel pretrial detention, this period may be extended to six months. However,

51 After the candidate passes the examination, the Commission in charge of certifying judges check again the same documents submitted before the examination, and issues then a decision of admission or rejection that can be appealed. If the candidate is accepted, the Commission sends the documents to the Chair of the Court, who then sends them to the „President of the MRT" for him to issue a decree of appointment.

52 Article 80 of the „MRT Constitution".

53 Since 2005, this Judicial Department is being led by a person (Curisico Vladimir) who – before holding this office – worked in the „MRT prosecutor's office", but his position there is not specified / http://supcourtpmr.org/sud-deportam.html

according to another regulation (Article 212/1), supplementing the aforementioned article, this term may be extended, if needed, by another three months. With regards to persons charged with serious crimes and very serious crimes – a 12-month long term of detention is provided for. However, the „court" may extend this term too by three months, according to Article 212/1 of the „CCP of the MNR", whenever it is necessary. The limits of such extensions are not provided for.

This was confirmed not only by the innumerable cases of persons held in custody for lengthy periods of time, but also by Thomas Hammarberg – Senior Expert, who back in 2013 addressed the issue of the time that a detainee in the Transnistrian region is held in custody for in his report. According to him, it is the judge who rules on the extension of the detention period, the longest one can be held in custody for the preliminary investigation is nine months long in case of minor crimes, and 18 months – in case of serious crimes. Nevertheless, once court proceedings start, the court of law may rule to extend the detention period, without specifying a time limit.[54]

54 Report of 14 February 2013 regarding Human Rights in the Transnistrian Region of the Republic of Moldova / by Thomas Hammarberg, Senior Expert https://assets.documentcloud.org/documents/889086/raport-onu-drepturile-omului-in-transnistria.pdf

RECOMMENDATIONS

Recommendations on reducing the use of preventive detention:

1. Implement the Resolution 2077 (2015) 1 adopted by the Parliamentary Assembly of the CoE[55], that the Republic of Moldova also voted for[56], which requires Member States to take measures to reduce the practice of pretrial detention by:

- Increasing the accountability (awareness) of prosecutors and judges with regards to the legal limits provided for by the national legal framework / ECHR regarding the pretrial detention and the negative consequences of pretrial detention on the detainees, their families and on the society as a whole;
- Ensuring that the judges will not have to face the consequences of having rejected the solicitation of a prosecutor to put someone in pretrial detention;
- Ensuring that there actually is equality of arms between the prosecution and the defence, granting the lawyers free access to the detainees and to the materials sent by the prosecution to court to confirm the detention of the person concerned;
- Not using pretrial detention for purposes other than dispensing justice.

2. Implement the recommendations of the HRC[57] by launching the initiative to reduce the length of a person's apprehension period to 48 hours at most.

3. Apply as rarely as possible preventive measures, against juveniles, in the form of pretrial detention.

4. Improve the special training for judges and prosecutors strengthening their professional capacity regarding the correct use of the ECtHR practice when examining and applying preventive custody.

Recommendations regarding the right to freedom and security of persons with intellectual and psychosocial disabilities:

5. Implement efficiently and as soon as possible the international recommendations[58], particularly:

- Repeal the legislative provisions allowing for the arbitrary deprivation of freedom of persons with disabilities and adopt a legislative framework that would prohibit the psychiatric detention on civil or criminal grounds only on the basis of a psychiatric diagnosis and / or on the basis of a risk that one perceives oneself and others to be exposed to;
- To stop immediately any coercive intervention or treatment for mental health or for any other situation, if the person concerned did not give his/her free and informed consent;

55 Resolution 2077 (2015) 1 of the Parliamentary Assembly / Abuse of Pretrial Detention in States Parties to the European Convention on Human Rights http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbnQvbncveG1sL1hSZWYvWDJILURXLWV4dHIuYXNwP2ZpbGVpZD0yMjIwNiZsYW5nPUVO&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNsdC9QZGYvWFJlZi1XRC1BVC1YTUwyUERGLnhzbA==&xsltparams=ZmlsZWlkPTIyMjA2

56 Voting resultshttp://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-en.asp?FileID=22206&lang=en

57 Final conclusions on the third periodic report of the Republic of Moldova to HRC (CCPR/C/MDA/CO/3 of 18 November 2016) http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fMDA%2fCO%2f3&Lang=en

58 The report of the Special Rapporteur on the rights of persons with disabilities concerning her mission in the Republic of Moldova of 2 February 2016, http://md.one.un.org/content/dam/unct/moldova/docs/pub/A%20HRC%2031%2062%20Add.2%20ro.pdf;
The Report of the UN Committee on the Rights of Persons with Disabilities of 12 April 2017 / http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fMDA%2fCO%2f1&Lang=en; Final conclusions on the third periodic report of the Republic of Moldova to HRC (CCPR/C/MDA/CO/3 of 18 November 2016) http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fMDA%2fCO%2f3&Lang=en

- Make sure that persons with disabilities, charged with an offence, are granted their right to a fair trial on equal terms with others.

Recommendations Regarding to the Right to Freedom and Persons Security in the Transnistrian Region:

6. The Government of the Republic of Moldova should include on its negotiations agenda matters regarding the monitoring, promotion and defence of human rights in the Transnistrian region.

7. The constitutional authorities should withdraw the „statements" regarding the territorially-limited application of the Optional Protocols to ICCPR, worked out by the Republic of Moldova alongside their ratification.

8. The Government of Moldova should implement the recommendations developed under the UPR of the Republic of Moldova, conducted by the UN Human Rights Council and the UN Human Rights Committee, and namely:

- Review the policies regarding the measure that need to be taken to make sure that the people living in the Transnistrian region enjoy the rights guaranteed by the ICCPR[59].

9. The Government of the Republic of Moldova should initiate a dialogue to identify suggestions regarding an efficient mechanism for the monitoring of the human rights situation in the Transnistrian region of the Republic of Moldova by involving the civil society.

10. The Government of the Republic of Moldova should start developing a mechanism whereby it could help defend and assist people from the Transnistrian region whose fundamental rights and freedoms were violated.

59 Final conclusions of the third periodic report of the Republic of Moldova of the HRC of 18 November 2016 (CCPR/C/MDA/CO/3 of 18 November 2016) http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fMDA%2fCO%2f3&Lang=en Preliminary Report of the Working Group on the Universal Periodic Review* Republic of Moldova, of 8 November 2016 http://md.one.un.org/content/dam/unct/moldova/docs/pub/UPR%20Recommendations%202016_RO.pdf

Annex 1
Recommendations of the Council of Europe

No of recommendation	**Name of the document**
Recommendation No R (92) 16	On the European rules on community sanctions and measures
Recommendation No R (99) 22	Concerning prison overcrowding and prison population inflation
Recommendation Rec (2000)22	On improving the implementation of European rules on community sanctions and measure
Recommendation Rec (2003)22	Of the Committee of Ministers to member states on conditional release (parole)
Recommendation Rec (2006)13	On the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse
Recommendation No R(98) 71	Concerning the ethical and organizational aspects of health care in prison
Resolution 2077 (2015) 1	Regarding the abuse of pretrial detention in States Parties to the European Convention on Human Rights

Annex 2

1	Feodor Neicovcen and Fiodor Moscoglo v. the Republic of Moldova, communicated on 1 September 2016.
2	Galina Enachi vs. the Republic of Moldova, communicated on 28 June 2016.
3	Serghei N. Yesipov vs. the Republic of Moldova and the Russian Federation, communicated on 16 June 2016.
4	Igor Bondarenco vs. the Republic of Moldova, communicated on 16 June 2016
5	Elena Dobrovitchi vs. the Republic of Moldova and the Russian Federation, communicated on 16 June 2016
6	Valerii Istratii vs. the Republic of Moldova and the Russian Federation, communicated of 16 June 2016
7	Ostap Popovschi vs. the Republic of Moldova and the Russian Federation, communicated on 16 June 2016
8	Alexandru Ursu vs. the Republic of Moldova and the Russian Federation, communicated on 16 June 2016
9	Natalya Shapoval vs. the Russian Federation, communicated on 16 June 2016
10	Oksana Ionova vs. the Republic of Moldova and the Russian Federation, communicated on 16 June 2016
11	Valentin Babchin vs. the Republic of Moldova and the Russian Federation, communicated on 16 June 2016
12	Ivan Rosip vs. the Republic of Moldova and the Russian Federation, communicated on 16 June 2016
13	Alexandru Ialamov vs. the Republic of Moldova, communicated on 8 June 2016
14	Oleg Iurcovschi and others vs. the Republic of Moldova, communicated on 22 February 2016

Annex 3

Excerpt from the National Action Plan implementing the 2014-2016 RM-EU Association Agreement

1	In the case of *Balakin vs. the Republic of Moldova (59474/11) of 26.01.2016),* ECtHR found that Article 5(3) of the ECHR was violated as the person concerned was held in custody for 29 months without enough evidence. The courts of law did not substantiate their assumptions regarding the risk that the applicant might shirk responsibility or the likelihood that the applicant would offend again, or that proofs would be forged or that the witnesses would be influenced, two years since the proceedings were initiated.
2	In a similar way to the previous case, in *Caracet vs. the Republic of Moldova (16031/10) of 16.02.2016,* the ECtHR also found that Article 5(3) of the ECHR was violated as there were not enough grounds for a 14-month-long pretrial detention. Thus, the national courts of law did not explain what was the reason that made them believe that, once freed, the applicant would have hidden away, committed other offences or disturbed public order, and did not prove how could the applicant have obstructed justice or influence the witnesses, especially once the criminal investigation ended.
3	In *Savca vs. the Republic of Moldova (17963/08) of 15.04.2016,* the ECtHR found that Article 5(3) of the ECHR was violated as the pretrial detention of the applicant for the maximum term of 12 months – as provided for in the Constitution – was illegal, given that the law, particularly Article 186(9) of the CCP, did not provide clearly for the circumstances under which the detention of this person could have been extended.
4	The case of *Buzadji vs. the Republic of Moldova (23755/07) of 05.07.2016,* where the ECtHR established that Article 5(3) of the ECHR was violated as there were not enough, nor relevant grounds for the pretrial detention of the applicant for 10 months, is one to be taken as a reference when it comes to observing individual freedom and the security of persons. In its judgement, the ECtHR addressed the extent of judges" obligation to substantiate the detention decisions, as the simple reasonable suspicion that a particular offence was committed is no longer enough as initial justification of detention. Keeping someone under detention because the prosecutor was passive in looking for evidence is an obvious violation of the presumption of liberty. Detaining someone after the investigation ended only for that person to get acquainted with the criminal prosecution file and prepare the defence is also incompatible with Article 5(3) of the Convention.
5	On 23 Federation 2016, the ECtHR pronounced its judgement in the case of *Mozer v. the Republic of Moldova and the Russian Federation (No 11138/10).* The Mozer case is important because it enriches the case law of ECtHR regarding the compliance of the documents issued by the Transnistrian „judicial system" with the ECHR. The stance taken in this case will serve as a precedent for the examination of future cases. The ECtHR reiterated its previous case law, according to which, the simple fact that certain documents or decisions harming human rights are issued by the authorities of certain regions that were not acknowledged internationally does not lead necessarily to their incompatibility with ECHR standards (e.g. Cipru v. Turkey, §231, 236, 237). It matters for the system that these authorities are part of to follow „judicial traditions that are compatible with the ECHR". As a conclusion, according to the ECtHR – any limitation of the rights enshrined in the ECHR by a document issued by the „Transnistrian judicial system" is in conflict with the ECHR. The Court reiterated its findings from previous judgements – that the Russian Federation may be imputed for the action that the „Transnistrian authorities" took.[1]

1 ECtHR finding: "The decisions issued by the Transnistrian „judicial system" are not compatible with ECHR" / Legal Resources Centre from Moldova (LRCM)
http://www.crjm.org/constatarea-ctedo-deciziile-emise-de-sistemul-judiciar-transnistrean-nu-sunt-compatibile-cu-cedo/?output=pdf

Annex 4

SOME OF THE KEY ISSUES ON THE AGENDA OF THE CM OF THE CoE:[1]	
Legality of detention and other related issues:	
Violating the right to freedom of persons held in custody despite no reasonable suspicion	*The Gutu Group (20289/02)* Final judgement on 07/09/2007 Advanced procedure *The Musuc Group (42440/06+)* Final judgement on 06/02/2008 Advanced procedure *The Brega Group (52100/08+)* Final judgement on 20/07/2010 Advanced procedure
Other aspects of the violation of the right to freedom in the context of unlawful detention:	
Lack of relevant and sufficient reasons for pretrial detention and its extension; Not allowing the defence to look into the file, without good reason	*The Sarban Group (3456/05+)* Final judgement on 04/01/2006 Advanced procedure

1 Country factsheet /Committee of Ministers of the Council of Europehttps://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680709756