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Report of the Centre for the Independence of
Judges and Lawyers

MOLDOVA: The Rule of Law in 2004

November 2004

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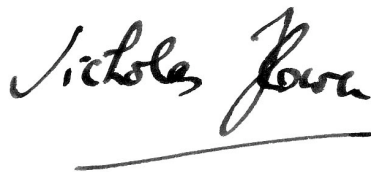
Annex 6 Recommendation No. R (94) 12, Council of Europe (1994)

Foreword

Since its independence, Moldova has been facing a difficult transition from authoritarian rule to democracy and the rule of law. During the Soviet era, justice was administered in the interest of the ruling Communist Party, particularly in politically sensitive cases. There was virtually no separation of powers between the executive, legislature and the judiciary. The judiciary acted largely as an instrument to rubber stamp decisions of the executive. The practice of so-called “telephone justice”, under which government officials instructed judges how to decide particular cases, was widespread.

The mission to Moldova carried out by the Centre for the Independence of Judges and Lawyers of the International Commission of Jurists (ICJ/CIJL) has concluded that, despite efforts by the post-independence Moldovan Government to reform its system of justice, the rule of law suffers serious shortcomings that must be addressed. The ICJ/CIJL found that the breakdown in the separation of powers has again resulted in a judiciary that is largely submissive to the dictates of the Government. The practice of “telephone justice” has returned. The executive is able to substantially influence judicial appointments through the Supreme Council of Magistracy that lacks independence. Beyond allegations of corruption, the Moldovan judiciary has substantially regressed in the last three years, resulting in court decisions that can pervert the course of justice when the interests of the Government are at stake.

It is vital for Moldova’s future that democratic principles are incorporated into its institutions and that the fundamental concepts of the separation of powers are made a reality. The executive should cease interfering in judicial matters and the independence of the judiciary should be fully respected. Unless Moldova adheres to the rule of law and human rights, the reform process undertaken since independence will be fruitless.

A handwritten signature in black ink, reading "Nicholas Howen". The signature is written in a cursive style and is underlined with a single horizontal line.

Nicholas Howen
Secretary-General
International Commission of Jurists

I. Executive Summary

1. Moldova is typical of the “Newly Independent States” which came into being following the collapse of the USSR in December 1991. As well as facing a protracted and painful transition from the Soviet system of state planning to a free market economy, it is seeking to make a decisive break from the judicial systems typical of the Soviet period.
2. In the former USSR, the judiciary was a low status profession, mainly staffed by women, as opposed to the prosecutor’s office, which was high status and mainly staffed by men. Both criminal law and civil law, while based on codes borrowed from the Swiss-German tradition, were seen as having a mainly educational function. All judges were members of the Communist Party, and were required to report regularly to their local Party committee. In addition, if a judge was faced with a politically sensitive case, she could be sure to receive a telephone call from the local Party Secretary – the so-called “telephone justice” – if she did not already implicitly know how to decide. The rule of law was in no sense respected.
3. In a short space of time, Moldova has attempted to implement the rule of law and create an independent judiciary. As noted below, it has ratified all the core UN human rights treaties. It has acceded to the Council of Europe. The accession process involves a comprehensive examination of existing law and practice to determine compatibility with Council of Europe standards and to recommend change. The adoption of the new Constitution and constitutional amendments have had the benefit of the authoritative expertise of the European Commission for Democracy through Law of the Council of Europe, better known as the Venice Commission. The Venice Commission plays a leading role in the adoption, in Eastern Europe, of constitutions that conform to democracy, human rights and the rule of law.¹

¹ For a further description of the work of the Venice Commission, see, <<http://venice.coe.int>>

4. Every new draft law is checked by Council of Europe experts. Where these concern the judicial system, the experts are experienced judges from a number of countries.
5. Moldova made substantial progress between accession in 1995 and 2001. That year witnessed an event so far unique to Moldova, of all the Newly Independent States: the return of the Communist Party to power in free and fair elections. Between 2001 and 2003 a number of reputable inter-state and non-governmental organisations raised serious concerns as to what appears to be a systematic undermining of the independence of the judiciary by the new government. President Voronin has made outspoken attacks on the judiciary, ostensibly for their injustice and corruption, a hallmark of his presidency. His inauguration speech and a more recent intervention are cited below.
6. This was the context for the visit of the International Commission of Jurists (ICJ) Centre for the Independence of Judges and Lawyers (CIJL). The findings of the ICJ/CIJL are that beyond allegations of corruption, the Moldovan judiciary has substantially regressed in the last three years. Most worrying is a return to a largely compliant judiciary and to “telephone justice”. The ICJ/CIJL not only identified and analysed this trend, but found that its source originated in the Supreme Council of Magistracy (SCM) which has become a conduit for the exercise of the President’s will.
7. This Report outlines the background and the dynamic processes leading to the context of the visit. It sets out in detail the ICJ/CIJL’s findings and the evidence upon which they are based.
8. The ICJ/CIJL’s recommendations focus on the SCM and the constitutional and legislative changes necessary to make it truly independent. The ICJ/CIJL also makes recommendations for judicial nomination and tenure.

II. Introduction

A. Terms of reference

9. The Terms of Reference of the ICJ/CIJL mission were as follows:

1. Terms of reference

- (i) The ICJ/CIJL will undertake a mission to the Republic of Moldova from 23 to 28 February 2004. The main purpose of the mission will be to evaluate and establish an objective account the independence of the judiciary, the functioning of the legal profession, and the role of prosecutors. In carrying out this assessment, the mission will be guided by relevant international standards, such as the United Nations Basic Principles on the Independence of the Judiciary, the United Nations Basic Principles on the Role of Lawyers, and the Guidelines on the Role of Prosecutors.
- (ii) In particular, the mission will look into the following subjects:
 - Systemic shortcomings of the judiciary that affect its independence, such as interference by other branches of Government in judicial proceedings and appointments
 - The role of the Office of the Prosecutor and the right to a fair trial
 - Corruption within the judiciary and funding of this organ
 - The organisation of the legal profession
- (iii) The purpose of these meetings will be to gather pertinent information on: the state of the judiciary in Moldova, the relationship of the Executive with the Judiciary, the factual circumstances surrounding recent reforms in the judiciary and an assessment of the same, and measures, if any, taken by the Government to preserve and protect judicial independence.

B. Composition and credentials of the Mission Team

10. The mission was composed of Madame Justice Claire L’Heureux-Dubé,² the mission Leader; Professor Bill Bowring, the mission Rapporteur;³ and Linda Besharaty-Movaed, the ICJ/CIJL representative.⁴

C. Meetings in Moldova

11. The ICJ/CIJL met a wide variety of interlocutors during the week spent in Moldova. These included the following:
- Members of the Judiciary: the Chairmen of the Constitutional Court, Supreme Court (and Supreme Council of the Magistracy – they are one and the same person), the Chisinau Court of Appeal, as well as its Vice-Chairman, three women judges from the Association of Judges of Moldova, and two District Court Judges.
 - The First Deputy Minister and a number of officials from the Ministry of Justice.

² B.A., LL.L., retired Justice of the Supreme Court of Canada, and former President (succeeding Justice Michael Kirby, referred to below) and for 15 years Commissioner of the International Commission of Jurists. Educated at College Notre-Dame and Laval University Law Faculty, LL.L. cum laude, 13 Honoris Causae doctorate degrees. A number of honours, including the Justice Prize from the Canadian Institute of the Administration of Justice, and the Order of Canada, Companion (2003). Called to the Quebec Bar, 1952. Practised with Bard, L’Heureux & Philippon (1952-73), known from 1969 as L’Heureux, Philippon, Garneau, Tourigny, St-Arnaud & Associates. Created Q.C. 1969. Puisne Judge of the Superior Court of Québec (1973-1979); Judge of the Court of Appeal of Québec (1979 – 1987); Puisne Judge of the Supreme Court of Canada (1987-2002).

³ Barrister at Law (Middle Temple and Gray’s Inn). Professor of Human Rights and International Law, London Metropolitan University. Director, Human Rights and Social Justice Research Institute, London Metropolitan University. Founder Member, Member of the Executive Committee of the Human Rights Committee of the Bar of England and Wales. Member of the Rule of Law Council, International Helsinki Federation. Trustee, Redress Trust. Member of the Council of Liberty, the National Council for Civil Liberties. Academic Co-ordinator, European Human Rights Advocacy Centre. Adviser on Access to Justice and Rights Issues in Russia for the Department for International Development, UK Government, 1997-2004. Wrote and monitored large projects on judicial reform in Russia and Ukraine. Expert to the World Bank, UNDP, UNHCHR, EU, Council of Europe and OSCE, in Russia and other states of the Former Soviet Union, as well as Central and Eastern Europe. Participant in Missions to Israel/Palestine, Nicaragua, El Salvador, Latvia, Malawi, South Africa. Author of numerous reports, journal articles, book chapters, and books on international law, human rights, and the law of the Former Soviet Union.

⁴ Legal Advisor, the International Commission of Jurists’ Centre for the Independence of Judges and Lawyers. Advocate, admitted to practice at the Bars of Massachusetts and California, Juris Doctorate, University of Connecticut, School of Law, 1988. Undertook ICJ/CIJL fact-finding and trial observation missions to Malawi, Turkey, and Lebanon.

- The Deputy General Prosecutor.
 - The Parliamentary Commissioner on Legal Affairs.
 - A number of former judges, including the three members of the Committee for the Independence of the Judiciary.
 - The Chairman, Vice-Chairman, and Head of the Censor Committee, of the Bar Association of Moldova.
 - The Dean of the Law Faculty at the State University, who is also Chairman of the Association of Lawyers of Moldova.
 - The three Parliamentary Advocates (Ombudsmen) at the Human Rights Centre.
 - Representatives of the Organization for Security and Cooperation in Europe (OSCE), UNDP and other international organisations.
 - Members of an opposition political party, including former judges and parliamentary advocates.
 - Representatives of a wide range of non-governmental organisations.
12. In Tiraspol, “capital” of the separatist Trans-Dniester region,⁵ the ICJ/CIJL met NGO representatives, advocates, the Chairman and Justices of the Constitutional Court, the Minister and Deputy Minister of Justice, senior Prosecutors, the Dean of the Law Faculty, Taras Shevchenko University, with students. The visit to Trans-Dniester was not intended by any means to recognize or confer legitimacy upon this separatist region.

III. Moldova: Country Background

A. Moldova

13. The Republic of Moldova occupies most of what has been known as Bessarabia. An independent Moldovan state emerged briefly in the 14th

⁵ In Russian “Predniestrovian Moldovan Republic” or “PMR”

century, but subsequently fell under Ottoman Turkish rule in the 16th century. After the Russo-Turkish War of 1806-12, the eastern half of Moldova (Bessarabia) between the Prut and the Dniester Rivers was ceded to Russia, while Romanian Moldova (west of the Prut) remained with the Turks. Romania, which gained independence in 1878, took control of the Russian half of Moldova in 1918. The Soviet Union never recognized the seizure and created an autonomous Moldavian republic on the east side of the Dniester River in 1924.

14. In 1940, Romania was forced to cede eastern Moldova to the U.S.S.R., which established the Moldavian Soviet Socialist Republic by merging the autonomous republic east of the Dniester and the annexed Bessarabian portion. Romania sought to regain it by joining with Germany in the 1941 attack on the U.S.S.R. Moldova was ceded back to Moscow when hostilities between the U.S.S.R. and Romania ceased at the end of World War II.
15. The Republic of Moldova declared its independence from the USSR on 27 August 1991, following the failed “putsch” – dissolution of the USSR took place in December 1991. Moldova’s population in 1997 was 4,320,000 and its capital is Chisinau (780,000 inhabitants). The Republic of Moldova is landlocked between Romania and Ukraine. Its ethnic composition is as follows: Moldovan/Romanian (65%), Ukrainian (13.8%), Russian (13%), Gagauz (3.5%), Jewish (1.5%), Bulgarian (2%), other (1.7%).
16. Moldova’s Head of State is the President, who is elected by Parliament in a secret vote. In February 2001, the Party of Moldovan Communists won more than two-thirds of the seats in the Parliament and selected party chairman Vladimir Voronin as President. Moldova’s Legislative Branch consists of a single-chamber composed of 101 members directly elected through proportional representation.

B. Trans-Dniester Region

17. A particularly serious problem facing Moldova concerns the Trans-Dniester region, a self-proclaimed republic over which the Moldovan

Government has no authority. Russian troops are stationed in the Trans-Dniester region⁶ and no free elections have been held since the establishment of its “government” in 1990.

18. The population of the Moldovan region of Trans-Dniester is 40% Moldovan, 28% Ukrainian, and 23% Russian. Moldova has tried to meet the Russian minority's demands by offering the region rather broad cultural and political autonomy. The dispute has strained Moldova's relations with Russia. The July 1992 cease-fire agreement established a tripartite peacekeeping force comprised of Moldovan, Russian, and Trans-Dniesterian units. Negotiations to resolve the conflict continue, and the cease-fire is still in effect. The OSCE, which has had an observer mission in place since 1993, acts as a significant mediator in facilitating a negotiated settlement between the President of Moldova and the leader of Trans-Dniester region.

C. Poverty

19. Moldova has been identified as the poorest member state of the Council of Europe at present. According to the Parliamentary Assembly, “The GNP has reduced by two thirds since independence. The country is struggling to survive and the vast majority of its 4.3 million inhabitants live in extreme poverty.”⁷ According to statistics by the World Bank, 23% of the population of Moldova lives below the national poverty line.⁸ UNDP reports that 22% of the population lives with less than \$1 a day.⁹ Poverty has led Moldova to become a major country of origin for women and

⁶ The April 2002 *Report of the functioning of Democratic Institutions in Moldova* by the Parliamentary Assembly of the Council of Europe states in paras. 111 – 112.

“The weapons stockpile [in Trans-Dniester] is the largest in Europe (excepting Russia)...There are conventional arms, but also nuclear (missile warheads) and chemical weapons. Transnistria is a powder keg.

Transnistria has become a centre for all kinds of trafficking, but especially arms trafficking. Ukraine and Romania are concerned by this problem. The traffic between Tiraspol and Odessa is estimated at 2 billion USD per year. It supplies the regional conflicts in the Caucasus (Chechnya, Abkhazia, Nagorno-Karabakh) and Africa. The customers are, of course, Hamas, Hezbollah and Al Q’aida. Customs control is obviously a problem for Europe and the whole world.”

⁷ Ibid.at para. 154

⁸ *Moldova at a Glance*, 8/26/03, available at <www.worldbank.org/data/>

⁹ Human Development Report, 2003, *Millennium Development Goals: A compact among nations to end human poverty*, UNDP, p. 201

children who are trafficked abroad for prostitution.¹⁰ Trafficking in organs is also reported to take place.¹¹

¹⁰ US Department of State, Country Reports on Human Rights Practices, Moldova, 2002, released 31 March 2003, paras at 15-17

¹¹ *Report of the functioning of Democratic Institutions in Moldova*, para. 159

IV. The Legal System in Moldova

A. The Soviet period

20. In Soviet times the Moldovan judiciary was a two-tiered system, with local courts and the Supreme Court of the Soviet Socialist Moldavian Republic, which, in turn, was subordinated to the Supreme Court of the USSR. There was no separation of powers and without the adversarial principle, trials were not only inquisitorial but were subject to so-called “telephone justice” in all cases in which the interests of the USSR and the Communist Party were concerned.

B. Court structure

21. Until February 2003, post-Soviet Moldova had a four-tiered court system consisting of the Supreme Court, the Court of Appeal¹², tribunals and district courts. In November 2002, the Moldovan Constitution was amended and in 2003, the tribunals were eliminated. The new system comprises the Supreme Court, Courts of Appeal, and ordinary courts. As declared by the Vice-Chairman of the Supreme Court of Moldova, Konstantin Gurschii in a meeting of the heads of a number of judicial instances in Moldova, “Five Courts of Appeal, which are the reorganized tribunals of Chisinau, Belti, Bender, Cahul and Comrat, will be set up in Moldova. Each of them will act in a district including several courts. A specialized Economic Chamber of Appeal will be set up in Chisinau on the basis of the Moldovan Economic Court. The Court of Appeal, which existed in Chisinau will be dissolved and its property will be transferred to the Supreme Court.”
22. The Military Court, the Economic Court of Chisinau Circuit and the Economic Court of Moldova are specialised courts within the judiciary, created to examine certain categories of cases. In 2000, administrative

¹² The Court of Appeal, located in Chisinau, had appellate and cassation jurisdiction over decisions of lower courts. It acted as a first instance in certain cases, most notably administrative cases against acts of central public authorities.

sections were created within the ordinary courts to review administrative acts.

23. The Supreme Court is the highest court in the judicial system, acting as a court of cassation and performing extraordinary review of judicial decisions. There are three modes for the review of judicial decisions: 1) appellate review (the Court may re-evaluate the facts); 2) cassation review (application of the law to the facts); and 3) extraordinary review, otherwise known as supervisory review (re-opening of a case upon discovery of extraordinary circumstances). The Supreme Court also exercises jurisdiction as a first instance court in certain cases, mainly criminal cases against high officials and judges. The Court can operate through its Civil, Criminal and Economic Chambers or collectively through the Plenum. The Plenum may issue general explanatory decisions that lie outside the context of a particular case in order to instruct lower courts on the interpretation and application of certain laws. However, these decisions are not binding and do not constitute precedents.
24. The lower courts (district and municipal courts - 44 in all) act as first instance courts for all criminal, civil, and administrative cases that are not specifically entrusted to other courts. The 2002 constitutional reform created courts of appeal, with similar jurisdictions to the former appellate courts.
25. The Constitutional Court is formally outside the judiciary and is independent of any other authority. It is the sole body which has constitutional jurisdiction and it performs the following functions: 1) rules on the constitutionality of Parliament's laws and decisions, of Presidential decrees and of Government decisions and ordinances, as well as of international treaties to which Moldova is a party; 2) interprets the Constitution; 3) formulates a position on initiatives to revise the Constitution; 4) confirms the results of republican referenda; 5) confirms the results of parliamentary and presidential elections; 6) ascertains the circumstances justifying dissolution of Parliament, dismissal of the President or the interim office of the President of Moldova, or the inability

of the President to perform his duties for more than sixty days; 7) decides exceptional cases of unconstitutionality of legal acts, upon notification by the Supreme Court; and 8) decides matters dealing with the constitutionality of political parties.

C. Conditions of service, appointment and removal of judges

26. According to law, all judges must be competent, hold a university degree in law, have requisite work experience, have no criminal record, have a good reputation, and know the official state language. Age and work experience vary according to the court, the requisites being higher for judges of the Constitutional Court. However, it is reported that the judiciary suffers from a lack of adequately trained staff and expertise. There have also been grave arrears in judges' salaries, which has exacerbated the corruption problem.
27. Judges of district/municipal courts, the Court of Appeal, and specialised courts are appointed by the President of the Republic of Moldova on the proposal of the Supreme Council of the Magistracy ("SCM"). Each judge is appointed for a five-year term, after which the judge may be reappointed through the mandatory retirement age (65 years).
28. Judges of the Supreme Court are appointed by Parliament on the proposal of the SCM. They serve through their mandatory retirement age.
29. Parliament, the Government, and the SCM each appoint two of the six judges to the Constitutional Court. They are appointed for a six-year term and can be reappointed, but only for a second six-year term.
30. The SCM includes certain *ex officio* members: the Minister of Justice, the Prosecutor General, the President of the Supreme Court and the President of the Court of Appeal. Furthermore, three members are elected by the Supreme Court and three by Parliament. This creates the very real

potential for other branches of power to exercise control over judicial appointments.

31. Before the Communist Party took power in 2001, judges were appointed for an initial 5-year term and, unless serious objections were raised, remained in their posts until retirement. This Report analyses the changes which have been made by the Communist Party.
32. According to the new law on judicial organisation, all Presidents and Vice-Presidents of tribunals and the Court of Appeals are appointed for a 4-year term instead of indefinitely, as was the case previously.
33. Regarding the composition of the judiciary, the ICJ/CIJL was informed by three serving women judges who are members of the Association of Judges of Moldova that there are 343 judges in all, 108 of whom are women. In the Court of Appeal, there are 33 judges, 12 of whom are women. Two of the chairmen of the Appeal Courts are women. There are still courts in Moldova which do not have any female judges. In the Constitutional Court one justice out of 6 is a woman.

D. The Office of the Prosecutor and the right to a fair trial

34. The Office of the Prosecutor is an autonomous office within the judiciary. Since 1997 prosecutors have had the right to open and close investigations without bringing the matter before a court. This has given them considerable influence over the judicial process. The Prosecutor General's office is responsible for criminal prosecution, the presentation of formal charges before a court, and the overall protection of the rule of law.
35. Regarding the right to a fair trial, defendants are, according to the law, presumed innocent. However, in practice the prosecutor's recommendations still carry considerable weight and limit the defendant's actual presumption of innocence. Defendants have the right to legal representation and if they cannot afford lawyer's fees the Government requires the local bar association to provide a lawyer. Since the Government is generally unable to pay ongoing legal fees, defendants

often do not have adequate legal representation. Even though defence attorneys have the right to have access to their clients and to review the evidence against them, prosecutors occasionally use bureaucratic manoeuvres to restrict that access.

E. Corruption and funding

36. There are allegations that corruption exists within the Moldovan judiciary yet the severity and extent of such claims is challenged by some judges. The judiciary is insufficiently funded and it can neither influence the allocation of funds to it nor control the administration of those funds.
37. The SCM is responsible for proposing a draft budget for all courts (except the Supreme Court, the Economic Courts and Constitutional Court, which all have their own separate budgets). This draft is reviewed by the Ministry of Finance and is usually significantly reduced before it reaches Parliament for final approval. Several judges with whom the ICJ/CIJL met claimed that the Moldovan Judges Association and judges are not consulted when budgets for the courts are drawn up.
38. The ICJ/CIJL received conflicting information as to judicial salaries. While these are low by European standards¹³ and it is arguable that higher salaries might help to prevent corruption, judges still receive a wide range of state benefits, including housing and social benefits. Furthermore, a number of interlocutors informed the ICJ/CIJL that judicial salaries compare favourably with most salaries in Moldova, which is, as indicated above, a very poor country. However, the ICJ/CIJL recognises that state benefits may tie judges too closely to the state: fear of losing benefits may make them more complaisant. The ICJ/CIJL therefore recommends that judicial salaries be further increased and that judicial training and ethics be enhanced to promote judicial integrity.

F. Response of the judiciary

¹³ A report by the Open Society Justice Initiative & Freedom house Moldova, *Monitoring the [sic] judicial independence in the Republic of Moldova*, 2003, states that a lower court judge's monthly salary is 16 Euros whereas the minimum cost of living per month constitutes 80 Euros, p. 59

39. According to the American Bar Association-Central European and Eurasian Law Initiative (ABA-CEELI), on 28 October 2003 the Moldovan Association of Judges (MAJ) reacted angrily to the accusations of corruption and incompetence made by President Voronin against the judicial system.¹⁴

40. The MAJ said in a statement that it

"supports the anti-corruption fight, but disagrees that the judiciary personnel is accused of behaviour unworthy of its obligations in admission of corruption acts and trafficking in influence. The appeals of certain citizens on other courts than judicial ones cannot serve as a ground to describe judicial decisions as illegal and to suspect the judges of corruption, material incentives or incompetence. The staff of the judiciary has condemned and condemns every abuse committed by certain judges while rendering justice. The annual statistics confirm that the absolute majority of civil, penal and administrative causes (more than 90 percent) are pronounced in strict accordance with legislation in effect that certifies the necessary justice act for a democratic society."

41. The Association continued:

"We consider it is time to express a univocal attitude towards judicial power, to support the formation of an independent judicial system, which would ensure justice for the entire society. The judiciary staff, parliament and government must do the best they can for this purpose. The image of judicial power depends, in particular, on judiciary staff, but not the least on the image created by executive and legislative powers in the society. Any control on judges, including ensuring transparency of their activity, must be carried out in line with the law by the Supreme Council of Magistrates, which is the only judiciary self-administration body and guarantor of the independence of the judiciary authority."

¹⁴ The Moldovan Association of Judges is a non-governmental organisation founded in 1994, which brings together 250 out of a total of 300 judges. The association is headed by Nicolae Timofti, judge in the Court of Appeal.

V. International Obligations

42. Since its declaration of independence from the USSR on 27 August 1991, Moldova has made great efforts to ratify and comply with international and especially European standards. Moldova was admitted to the United Nations in March 1992.

A. The United Nations

43. Moldova has ratified the following United Nations treaties: the International Covenant on Economic, Social and Cultural Rights (ICESCR - 26 April 1993); the International Covenant on Civil and Political Rights (ICCPR - 26 April 1993); the International Convention on the Elimination of All Forms of Racial Discrimination (CERD – 25 February 1993); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW – 31 July 1994); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT – 26 Dec 1995); the Convention on the Rights of the Child (CRC – 25 February 1993). In 2002 it ratified the two Optional Protocols to the CRC.
44. It has submitted periodical reports to the respective UN treaty bodies as follows: Core Document, 14 May 2001; ICCPR, 8 August 2001; CERD, 22 October 2001; CRC, 3 May 2002; CAT, 3 August 2002.

B. The Council of Europe

45. Moldova joined the Council of Europe on 13 July 1995 and by 26 April 2004 it had ratified a total of 53 Council of Europe treaties. These include a number of treaties which are particularly relevant for this Report. Moldova ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms on 12 September 1997, together with a number of protocols¹⁵, and the European Convention for the Prevention of

¹⁵ Moldova has ratified the following protocols: Protocol to the Convention for the Protection of Human Rights; Protocol to the General Agreement on Privileges and Immunities of the Council of Europe; Protocol No. 2 to the Convention for the Protection of Human Rights and Fundamental Freedoms, conferring upon the European Court of Human Rights competence to give advisory opinions; Protocol No. 3 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending Articles 29, 30 and 34 of the Convention; Protocol No. 4 to the Convention for

Torture and Inhuman or Degrading Treatment or Punishment on 2 October 1997¹⁶. A Moldovan judge of the Chisinau Court of Appeal, whom the ICJ/CIJL met is now a member of the European Committee Against Torture.

46. Moldova has also ratified the Criminal Law Convention on Corruption (into force on 1 May 2004) and the Civil Law Convention on Corruption (into force on 1 July 2004).

VI. Background to reforms

A. First phase: Reforms of 1991-2001

47. Even prior to accession to the Council of Europe, or indeed to adoption of its Constitution on 29 July 1994, Moldova began serious work on reform. On 19 June 1990, the Parliament of Moldova established a Commission to prepare a draft constitution.

B. 1993 Reform Conference

48. The Moldovan Ministry of Foreign Affairs and the Presidium of the Parliament of the Republic of Moldova in conjunction with OSCE and its Office for Democratic Institutions and Human Rights (ODIHR) organized a conference in Chisinau in January 1993 to study judicial reform and the reform of law in a new Moldova. This conference was seen as an important first step in designing and developing new judicial and legal institutions in Moldova, after the collapse of the ex-USSR in 1991. Justice Michael D. Kirby represented the ICJ in this conference.¹⁷

the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto; Protocol No. 5 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending Articles 22 and 40 of the Convention; Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty; and Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms; Protocol No. 8 to the Convention for the Protection of Human Rights and Fundamental Freedoms; Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby

¹⁶ Moldova has ratified Protocols No. 1 and 2 to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

¹⁷ Then-President of the New South Wales Court of Appeal in Australia and Chairman of the Executive Committee of the ICJ. Justice Michael D. Kirby “Establishment of an Independent Judiciary in the

49. The discussion paper for the conference that was prepared by the Minister of Justice contained a chapter on the “third power” – the judiciary. The stated objectives of judicial reform were to: establish a system of laws based on the national traditions of the State and basic human rights; form legal conditions which would guarantee the independent functioning of the judiciary; replace the “repressive” accusatory system of law by one protective of human rights; and improve the access of citizens to courts of any instance, in accordance with law. One particular proposal was the establishment of courts of appeal, which did not exist during the Soviet period
50. Chapter four of the discussion paper made proposals for the appointment of judges. It proposed electing judges for life, after a preliminary probationary period. The removal of judges was to be confined to “a needed” case, and performed “exclusively by the people through its representative bodies by a special act, stated by law.” This power was explained as necessary to “guarantee the corresponding professional level and the moral purity of the judicial personnel.”

C. The 1994 Concept Paper

51. In a step towards making legal reforms real, in 1994 the Moldovan Parliament adopted the *Concept Paper for Judicial Reform*, aimed at creating a new status, structure, and areas of competence for the courts and changing the status of judges. The reforms were largely implemented by 1996. As reported recently by the Open Society Justice Initiative & Freedom House Moldova, the *Concept Paper*,

“elaborated a strategic view upon the new judicial system on which the Moldovan Constitution would have relied...after over half a century of totalitarianism, the legislator has set at the foundation of the new judicial system the principle of separation of state powers as well as justice being treated for the first time as a separate state

States of the Former USSR. The Case of Moldova” (December 1993) No.51 *The Review of the International Commission of Jurists*, pp.38-43

authority...it would not be exaggerated to emphasize the genuine revolutionary character of this Concept.”¹⁸

D. Laws and Codes enacted to implement reform

52. Parliament enacted the following laws to implement the reforms: Law on the Organisation and Operation of the Constitutional Court¹⁹ (13 December 1994); Law on the Judicial System (October 19, 1995); Law on the Status of Judges (July 20, 1995); Law on the Supreme Court of Justice (March 26, 1995); Law on Disciplinary Collegia and Disciplinary Responsibility of Judges (19 July 1996); Law on the System of Military Courts (August 1, 1996); and the Law on the Economic Courts (November 26, 1996). A Law on the Advocates Profession was not enacted until 19 July 2002.
53. However, the work of drafting new substantive and procedural codes took a great deal longer. Experts of the Council of Europe were heavily involved in commenting on the drafts of these new laws.
54. A new Civil Code, enacted on 6 June 2002, came into force on 22 June 2002.²⁰ A new Criminal Code was enacted on 14 March 2003, and came into force on 12 June 2003, replacing the Soviet-era code. The provisions of the new code introduce the concepts of the right to due process, the presumption of innocence, the right to refuse to provide self-incriminating testimony, and will protect against double jeopardy. The new code also prohibits detention for investigative purposes for a period longer than 12 months for adults and four months for those under the age of 18.
55. A new Criminal Procedural Code came into force on 7 June 2003²¹, followed by a new Civil Procedural Code on 12 June 2003²².

¹⁸ Open Society Justice Initiative & Freedom House Moldova, *Monitoring the [sic] judicial independence in the Republic of Moldova*, 2003, p. 50

¹⁹ http://www.ccrm.rol.md/index_en.html

²⁰ In Russian at http://www.cis-legal-reform.org/civil-code/moldova/civil-code-moldova-book-1_rus.html

²¹ In Russian at <http://www.lexinfosys.de/document.asp?id=7192>

²² In Russian at <http://www.lexinfosys.de/document.asp?id=7190>

56. All of these developments followed directly from Moldova's independence, the commitment in its new Constitution to creating a state bound by the rule of law and to Moldova's accession to the Council of Europe.

E. Second Phase: Counter-reform

57. The reform process has, however, taken a quite different direction following a change of political power in 2001.

F. The Communist election victory in 2001

58. The Communist Party swept to victory in parliamentary elections on 15 February 2001. 67.52 percent of registered voters cast their ballots. The Communist party received 50.07 percent of the vote and won 71 seats out of 110 in the new Parliament.²³ The Communists had campaigned on a platform of closer ties with Russia and promises of more jobs and food-price controls in one of Europe's poorest states.²⁴

59. Following the party's victory, the Communist leader Vladimir Voronin said that closer ties to Moscow were "inevitable," adding that he would call a referendum on whether Moldova should form a union with Russia and another former Soviet republic, Belarus. But he sought to reassure people that the party did not want the return of the communist system that collapsed in 1991, saying "It is not possible... to go back to the old times."

60. On April 4, 2001, the Parliament elected Voronin as President of the Republic.

G. Setting the stage: President Voronin's programme for the judiciary

61. In his inauguration speech President Voronin said in relation to law and the judicial system:

²³ See <http://www.ifes.md/elections/electionresults/2001parliamentary/>

²⁴ The Electoral Bloc "Braghis Alliance" (EBBA) came second with 13.36 percent of the vote and 19 seats. The Christian Democratic People's Party, which leans towards Western Europe, came third, with 8.24 percent of the vote and 11 seats.

“The word ‘law’ has become synonymous with ‘corruption’, the word ‘reform’ - with ‘stagnation’, ‘poverty’ and ‘trouble’. As a result, the international community regards us as the most corrupt country in Europe and the poorest country in the CIS. And it is not the case to blame the democratic West or contemporary Russia. Our politicians have followed uncritically the advice and suggestions coming from outside the country, often misinterpreted them being driven by their self-defense instincts and by their desire to be acknowledged by the foreigners. It was just the political vocabulary that underwent true reform.”

62. He thus made it clear that foreign assistance, by implication including from the Council of Europe, was to blame for the perceived failure of reform.

63. The President further added:

“Roughly, I see the current political situation as a unique chance to take the proposed path. This path is also a chance to put an end to the confrontation among the power branches, which has become traditional in Moldova. Over the last years this confrontation has literally deprived the country of its capacity for development. I believe that it is my duty to consolidate the vertical structure of the country’s leadership. The presidency, Parliament, Government and judicial power must once and for all abandon the narrow cadre of group, caste or party interests.”²⁵

VII. Reforms by the Communist Party

64. It soon became clear what President Voronin meant by “true reforms”, and by “consolidating the vertical structure of the country’s leadership.”

65. The main thrust of judicial reform consisted of laws amending and modifying the Constitution of the Republic of Moldova in addition to a

²⁵ See <http://www.ifes.md/elections/electionresults/2001presidential/speech/>

series of amendments made in 2002 and 2003 to the reforming laws enacted in previous years.²⁶

A. The crucial amendment to the Law on the Status of Judges

66. On 21 March 2003, Law No. 140-XV “On Amendments to Article 11 of the Law on Status of Judges No. 544-XIII of 20 July” came into force. The amendment was as follows:

“Refusal, including repeated, by the President of Moldova, of candidates proposed for appointment to the position of judges until retirement age, serves as the basis for taking by the Supreme Council of Magistracy of a proposal the freeing of the judge from the position (i.e., dismissal).”

67. The ICJ/CIJL was informed that until 2002 there were no known cases where a candidate proposed by the SCM was not appointed by the President.²⁷ The new provision above, however, significantly reduces the role of the SCM in the appointment of judges while strengthening the hand of the executive over this process. Pursuant to this new mechanism, candidates who are believed by the SCM to be entirely suitable for appointment, following reconsideration, can nevertheless be dismissed if the President considers them unsuitable, without recourse to any remedy and possibly without knowing the reason for their dismissal. The ICJ/CIJL finds that this new procedure conflicts with Council of Europe standards and is extremely dangerous as it gives the President virtually unlimited powers over the appointment of judges.

68. The ICJ/CIJL also heard that prior to 2001 the President approved judicial candidates proposed by the SCM whereas now he is directly involved in the selection process as well. Furthermore, it is reported that before 2001, contrary to present practice, there was no checking of a candidate’s

²⁶ The Law on the Judicial System of 8 May 2003 (N. 191-XV) and 29 May 2003 (N. 206 XV), and the amendments to the Law on the Status of Judges, of 21 March 2003; 8 May (N. 191-XV); and 29 May 2003 (N. 206 – XV)

²⁷ There were, however, many cases where candidates who applied to the SCM were not accepted by it.

background by the security services. There is still no provision in the law for such checking, nevertheless it is carried out.

B. Proposed Constitutional amendments

69. In conjunction with amendments to laws, constitutional amendments relating to parliamentary immunity, the status and powers of the ombudsman, the organization of the courts of law, the status of and removal of judges, and the composition and powers of the SCM were also put forth.²⁸ The last three are reviewed.
70. Regarding the **organization of courts of law**, it was proposed to amend Article 115(1) of the Constitution. Thus, the provision stating that, “Justice shall be determined by the Supreme Court of Justice, the Court of Appeal, by tribunals and the courts of law” was replaced with “Justice shall be determined by the Supreme Court of Justice and courts of law of different levels.” The effect of this modification was to reduce the number of levels of court from four to three, through the abolition of the Court of Appeal.²⁹ This was in line with reforms proposed before the Communist victory in 2001.
71. Another major reform was to change provisions of Article 116 of the Constitution relating to the appointment and removal of judges and the role of the SCM in this process. The SCM was created by the Constitution of 1994 and by the Law on the Supreme Council of Magistracy of 19 July 1996, as amended by the Law of 2 February 2000.
72. The effect of the changes to the SCM would be mainly that the appointment of judges would be a matter for Parliament rather than the President but still upon the proposal of the SCM and that in contravention of the irremovability provision of Article 116 (1), Parliament would have a role in the appointment, transfer and removal of judges. However, as stated by the Venice Commission expert who examined these constitutional

²⁸ Council of Europe, Venice Commission, *Opinions on the draft law on modification and amendment to the Constitution of the Republic of Moldova*, Opinion by J. Hamilton, CDL-AD (2002)

²⁹ Ibid

amendments, “It is not clear from the text what exactly that role [of Parliament] would be.”³⁰

73. The expert continued further that,

“On the whole, the proposed amendments [on the status of judges] do not clarify the uncertainties in the text, which are many. The tendency of the amendments again represents a shift away from regulation in the Constitution towards regulation by law. It would be preferable that matters of such fundamental importance be clearly provided for in the Constitution and be subjected to the control of the Constitutional Court.”³¹

74. Regarding constitutional changes to modify the composition and the powers of the SCM pursuant to Articles 122 and 123, the Venice Commission expert was likewise sceptical. The net effect of the changes was to empower Parliament’s power over this body. Thus, pursuant to these changes, the Minister of Justice, President of the Supreme Court and Prosecutor General would continue to be *ex officio* members of the SCM while the provision under which judges themselves and the Parliament could elect three members to the this body would be abolished. Another important change was that Parliament could provide for any method of appointment of SCM members other than the *ex officio* members and would be able to fix their numbers. Moreover, pursuant to these modifications, the SCM would be empowered to remove judges. This would be in contravention of Art. 116 of the Constitution which provides that judges are irremovable under the law. Furthermore, the organization and functioning of the SCM would be established by a law made by the Parliament.³² These fundamental amendments led the Venice Commission expert to conclude that,

“It seems clear that the changes proposed in relation to the SCM would represent a decisive shift away from control by the judiciary over its

³⁰ Ibid

³¹ Ibid

³² Ibid

own affairs toward control by Parliament, and thereby constitute a potential threat to judicial independence of a serious nature.”³³

75. There is a sharp divergence of view as to the purpose and effect of the recent reforms to the judicial system between leading judicial officials and former judges and members of non-governmental organisations with whom the ICJ/CIJL met.
76. According to many informed sources, including former judges and non-governmental representatives, the changes to the SCM have the principal effect of further empowering its Chairman who has an exceptionally important *ex officio* role. It has frequently been alleged, by a wide variety of reliable sources, that the current Chairman of the SCM does not exercise her powers independently.
77. The ICJ/CIJL was informed that a congress of all the judges in February 2004 elected the current composition of the SCM. The current SCM Chairman allegedly presented a list of candidates who were “more comfortable for the government.” Reportedly, all the judges voted for the alternative candidates in secret ballot, but when the Chairman of the Court of Appeal asked for an open vote, candidates favored by the SCM Chairman were elected.
78. The ICJ/CIJL heard the views of the present Chairman who stated that the SCM proposes to the President one candidate for position of regular judge and three for court chairmen. She said that every qualified person has the right to submit themselves and the SCM will study their file. The SCM then selects candidates according to a competition between applicants taking into account information known to the SCM. In her view, the President’s administration has and should have the right and competence to prepare an additional file on a candidate, since they have access to security and other information not available to the SCM. She is satisfied with the recent amendments to the SCM which state that if the President twice refuses a candidate proposed by the SCM, the SCM must dismiss

³³ Ibid

that person. She did not believe that this jeopardized the independence of the judiciary. She stated that previously judges were appointed for life but there were allegedly problems with misconduct and the SCM had to send a submission to the President for dismissal. However, the SCM would prefer that they, and not the President, decided on prolongation of a judge's career after 5 years.

79. The ICJ/CIJL finds that concerns relating to reforms of the SCM, compounded by the appointment of its present Chairman and the manner in which she is employing her very considerable powers, indicate that the SCM itself is not independent and that it is playing an active role in ensuring that new appointments to the judiciary are likely to be subservient to the requirements of the Communist Party.
80. The ICJ/CIJL is furthermore concerned that the changes in relation to the SCM do not reflect the standards laid down in the *European Charter on the Statute for Judges*.³⁴ Article 1.3 of the *Charter* provides:

“In respect of every decision affecting the selection, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an *authority independent of the executive and legislative powers* within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary. ” (italics added)³⁵

81. The Consultative Council of European Judges (“CCEJ”) stated, in 2003:

“After hearing a statement by the Moldovan delegation on the country's judicial system and system for appointing judges, the CCJE noted that the arrangements for the appointment of judges and composition of Moldova's Judicial Service Commission were not consistent with the requirements of the European Charter on the Statute for Judges or its own Opinion No. 1 (2001). It noted that the executive

³⁴ DAJ/DOC (98) 23, Strasbourg, 8-10 July 1998

³⁵ Please refer to Explanatory Memorandum to Article 1.3 of the European Charter on the Statute for Judges, DAJ/DOC (98) 23, Strasbourg, 8-10 July 1998, Annex 5

(in particular the President of the Republic) and the legislature could freely intervene in the process of appointing judges...³⁶

82. This view is confirmed by Mr Gheorghe Susarenco, previously a Judge,³⁷ and former Chairman of the Moldovan Association of Judges. On 26 March 2003 he published an article on the internet entitled “Legal System in the Republic of Moldova” wherein he sharply criticized the amendments to the SCM.³⁸ He wrote that it was the role of the SCM, and not that of the President of Moldova or of Parliament to “evaluate the qualities for candidate for judge or deputy chairman of court.”³⁹

83. The International Helsinki Federation for Human Rights has also expressed its misgivings regarding the changes to the SCM, stating,

“Parliament again rejected the recommendation of the European Commission for Democracy through Law [Venice Commission], and adopted provisions which, among other things, undermined the independence of the Superior Council of the Magistracy. This key professional body also responsible for the nomination of judiciary candidates was transformed into a consultative body whose opinion no longer had any weight.”⁴⁰

³⁶ Council of Europe, CCJE (2003) 38

³⁷ Gheorghe Susarenco, whom the Mission met, teaches civil procedure at the University, and until June 2003 was a judge in the Administrative Section of the Chisinau Tribunal. He did not agree to be moved.

³⁸ <http://www.azi.md/print/23418/En>

³⁹ Ibid

⁴⁰ International Helsinki Federation for Human Rights, Human Rights in the OSCE Region, Report 2003, p. 276

VIII. Adoption of the legal reforms by Parliament in disregard of recommendations of the Council of Europe

84. On 8 May 2003, Parliament adopted legislation on the organization of the judiciary. The experts appointed by the Council of Europe expressed their concern that this law did not conform to standards on the independence of the judiciary.⁴¹ They stated that, “It should be underlined that the law adopted on 8 May missed an opportunity to clarify some of the Constitutional provisions criticised by the Venice Commission and reinforce the guarantees for judicial independence.”⁴²
85. Regarding the appointment and confirmation of judges by the President of the Republic, the Council of Europe experts were concerned that Art. 116 of the Constitution had been interpreted so as to permit the President to bypass the SCM in appointing judges, including Courts’ Presidents and Vice-Presidents. It pointed out that this contradicted Art. 123 of the Constitution which gave the SCM powers to appoint and manage judges’ careers. The Council of Europe experts recommended that a new law be passed whereby the President should justify his decision in cases where he refuses to follow the decisions of the SCM to appoint judges and that the SCM’s decision should be considered as binding.⁴³
86. Regarding provisions in the 8 May legislation on disciplinary sanctions against judges, the Council of Europe’s experts stated that, “the law should enumerate and precisely define the grounds on which disciplinary matters should be launched against judges, according to the European Charter on the Status of Judges.”⁴⁴
87. The removal of one judicial level of the courts pursuant to the 8 May law was not criticized per se by the Council of Europe’s experts. However,

⁴¹ Council of Europe, Memorandum to the Secretary General, Main experts’ proposals to be further considered within the framework of the judicial reform in Moldova, 22 May 2003

⁴² Ibid

⁴³ Ibid

⁴⁴ Ibid

concerns were raised as to the status of on-going cases for which the possibility of appeal should be kept open.⁴⁵

88. Furthermore, the Council of Europe encouraged the Moldovan authorities to provide an opportunity for judges to provide their input into the re-appointments “organized by the law of 8 May to guarantee respect for the principle of irremovability.”⁴⁶

89. The Moldovan Government did not act on this advice. As stated by the Secretary-General of the Council of Europe in the *Information Report on Recent Developments in the co-operation with Moldova* (July – December 2003),

“This legislation was adopted by the Parliament on 8 May 2003, before an expert report could be discussed with the Moldovan authorities (expert meeting in Strasbourg on 19-20 May 2003) and *does not take into account some essential expert comments regarding judicial independence.*” (italics added)⁴⁷

90. As Parliament adopted the aforementioned law on the organization of the judiciary on 8 May without taking into account the recommendations of the Council of Europe experts, a procedure (such as a new law or amendments to the legislation) should be put into place whereby the experts’ concerns are reflected in the law.

IX. Parliamentary working group

91. The Moldovan authorities set up a Working Group on 7 November 2003 “to elaborate proposals for improvement of legislation regarding the efficiency and quality of justice and that the Council of Europe’s recommendations will serve as a basis for this exercise.”⁴⁸

⁴⁵ Ibid

⁴⁶ Ibid

⁴⁷ *SG/Inf(2003)46 12 January 2004* < [⁴⁸ Ibid](http://www.coe.int/t/e/SG/Secretary-General/Information/Documents/Other-reports/SGINF(2003)></p></div><div data-bbox=)

92. As reported by the American Bar Association – Central European and Eurasian Law Initiative, (“ABA-CEELI”), this was the initiative of President Vladimir Voronin, who wrote to Parliament that, “due to the unsatisfactory professional background of judges, and the violations they commit, unfair decisions are often taken that cause citizens’ indignation.” According to this report, “the President maintained that 65 percent of people addressing him claim they suffered from judiciary’s [sic] injustice, ‘so the situation must be changed.’”⁴⁹
93. The working group consists of 11 people representing the Parliament, Presidential Administration, the Ministry of the Interior, Supreme Court, the Governmental Law-Making Centre, Ministry of Justice, General Prosecutor's Office, and the State Chancellery Office. Later, a Bar representative will be added to the team. It is noteworthy that judges will be in a small minority.⁵⁰
94. The group is tasked with finding ways to optimize the judicial system, raise the responsibility of judges, strengthen the struggle against corruption in courts and ensure their transparency.⁵¹
95. In light of the above-mentioned far-reaching adoption on 8 May 2003 of legislation on the organization of the judiciary whereby the independence of the SCM is compromised, courts have been reshuffled and control by the judiciary over its affairs has shifted to Parliament (as controlled by the Communist Party), it is not clear whether the Parliamentary Working Group is willing or able to restore judicial independence.
96. The ICJ/CIJL is of the opinion that pushing through legislation on the organization of the judiciary without taking into account the warnings of the Council of Europe on the effects of such wide-sweeping reforms is a demonstration of the Government’s express will to control the judiciary.

X. International Concern Regarding Judicial Independence in Moldova

⁴⁹ Reported by ABA-CEELI *Significant Judicial Developments*, Fall 2003 http://www.abanet.org/ceeli/areas/judicial_reform/sjd_fall.03.html

⁵⁰ Ibid

⁵¹ Ibid

97. Reports by the United Nations Human Rights Committee, 2002⁵², the Council of Europe Rapporteurs, April 2002⁵³, the Consultative Council of European Judges (CCEJ), 2003⁵⁴, the OSCE, August 2003⁵⁵, Freedom House, 2003⁵⁶, the United States State Department Country Report on Human Rights, 2004⁵⁷, and the Report by Open Society Justice Initiative and Freedom House Moldova, 2003⁵⁸, all raise serious concerns as to the declining independence of the judiciary in Moldova since the elections of 2001. Excerpts from their reports are set out at Annex 1.

⁵² Concluding observations of the Human Rights Committee: Republic of Moldova. 26/07/2002. CCPR/CO/75/MDA. (Concluding Observations/Comments) Distr.GENERAL CCPR/CO/75/MDA 26 July 2002

⁵³ Doc. 9418, 23 April 2002, Report of the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe, rapporteurs: Mrs Durrieu and Mr Vahre, Functioning of democratic institutions in Moldova, <http://assembly.coe.int/Documents/WorkingDocs/doc02/EDOC9418.htm>

⁵⁴ Report of the 4th meeting Strasbourg, 24-28 November 2003, Strasbourg, 15 December 2003 CCJE (2003) 43 [ccje/doc2003/ccje(2003)43e]

⁵⁵ OSCE 2003 Office for Democratic Institutions and Human Rights REPUBLIC OF MOLDOVA LOCAL ELECTIONS 25 May and 8 June 2003 OSCE/ODIHR Election Observation Mission Report Warsaw 14 August 2003

⁵⁶ <http://www.freedomhouse.org/research/nitransit/2003/moldova2003.pdf>

⁵⁷ Country Reports on Human Rights Practices for 2003 Released by the Bureau of Democracy, Human Rights, and Labor February 25, 2004 <http://www.state.gov/g/drl/rls/hrrpt/2003/27854pf.htm>

⁵⁸ Gheorghe Susarenco, Alexandru Tanase “Monitoring the judicial independence in the Republic of Moldova”, National Report 2003, Open Society Justice Initiative and Freedom House Moldova – in Romanian, English and Russian, p.82

XI. Findings of the ICJ/CIJL

A. The judicial system

Nomination of Judges

98. The ICJ/CIJL reiterates the grave concerns of the experts of the Council of Europe that changes to Article 116 of the Constitution on the appointment and confirmation of judges have been interpreted so as to permit the President to circumvent the SCM.⁵⁹ The ICJ/CIJL urges the Moldovan authorities to respect international standards on the nomination, recruitment and appointment of judges as cited below.

99. Recommendation N.R(94) 12 of the Council of Europe Committee of Ministers⁶⁰ provides,

“All decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency. The authority taking the decision on the selection and career of judges should be independent of the government and the administration. In order to safeguard its independence, rules should ensure that, for instance, its members are selected by the judiciary and that the authority decides itself on its procedural rules.

However, where the constitutional or legal provisions and traditions allow judges to be appointed by the government, there should be guarantees to ensure that the procedures to appoint judges are transparent and independent in practice and that the decisions will not be influenced by any reasons other than those related to the objective criteria mentioned above. These guarantees could be, for example, one or more of the following:

- i. a special independent and competent body to give the government advice which it follows in practice; or
- ii. the right for an individual to appeal against a decision to an independent authority; or
- iii. the authority which makes the decision safeguards against undue or improper influences.⁶¹

⁵⁹ See para 82

⁶⁰ Recommendation No. R (94) 12 of the Committee of Ministers to Member States on the Independence, efficiency and role of judges, (*Adopted by the Committee of Ministers on 13 October 1994 at the 518th meeting of the Ministers' Deputies*). Attached as Annex 6

⁶¹ See also Explanatory Memorandum to Article 1.3 of the European Charter on the Statute for Judges. Attached as Annex 5

100. Furthermore, Paragraph 11c of the UN Singhvi Declaration⁶² states: “Participation in judicial appointments by the Executive or the Legislature or the general electorate is consistent with judicial independence so far as such participation is not vitiated by and is scrupulously safeguarded against improper motives and methods. To secure the most suitable appointments from the point of view of professional ability and integrity and to safeguard individual independence, integrity and endeavour shall be made, in so far as possible, to provide for consultation with members of the judiciary and the legal profession in making judicial appointments or to provide appointments or recommendations for appointments to be made by a body in which members of the judiciary and the legal profession participate effectively.”

Dismissal of Judges

101. The ICJ/CIJL heard credible reports that a number of judges lost their jobs in the course of the reforms of 2002-3⁶³ (whereby the number of courts was reduced from four to three).
102. These reports confirmed the allegation contained in the 2003 Freedom House report, as follows:

“In April 2002, the Moldovan Association of Judges (MAJ) signalled that the government had started a process of “mass cleansing” in the judicial sector. Seven judges lost their jobs, including Tudor Lazar⁶⁴, a

⁶² The UN Commission on Human Rights, at its forty-fifth session, by resolution 1989/32, invited governments to take into account the principles set forth in Dr. Singhvi’s draft declaration, *The Draft Universal Declaration on the Independence of Justice* (the “Singhvi Declaration”), in implementing the *United Nations’ Basic Principles on the Independence of the Judiciary*, which had been endorsed by the UN General Assembly in 1985. See, *CIJL Bulletin* No. 25-26 (April-October 1990) *Special Issue: The Independence of Judges and Lawyers: A Compilation of International Standards*, p.38

⁶³ International Helsinki Federation for Human Rights states that, “Following the adoption of these legislative changes, President Voronin removed about 30% of all judges, without any allegations of misconduct or disciplinary [action] being initiated against them. In addition,, some 50% of all judges have not had their position extended beyond the expiry of their five-year term.” *Human Rights in the OSCE Region*, Report 2003, p.277

⁶⁴ Todor Lazar, whom the Mission met, is now Head of the Judicial Department of the Mayor’s Office. He worked 9 years as a prosecutor and also as a Deputy of Commissariat. He was a judge for 12 years at all levels up to Court of Appeal, but was dismissed in 2002, when his mandate expired. He was proposed three times.

member of the court of appeals, and Gheorghe Ulianoschi⁶⁵, the chairman of the Chisinau Tribunal. In the case of Lazar, the move was likely revenge for decisions by the court of appeals that favoured the Bessarabian Metropolitan Church and local oil importers over the government. The situation worsened when President Voronin refused to prolong the mandates of 57 other judges. The MAJ conveyed a statement on the matter to Council of Europe rapporteurs who were in Chisinau at the time on a fact-finding mission.”⁶⁶

103. The current SCM Chairman, on the other hand, was adamant that no judges lost their jobs when the Tribunals were abolished. She said that some were appointed to the Court of Appeal, but some had to leave, since there were too many. Some were promoted to the Supreme Court – 18 in all. There were three judges transferred to the lowest level, but they kept the salary they had before. Some members of the Moldovan Bar also said that if individual judges say they have been dismissed, this is often more of a pretext. Some of the judges who were dismissed were dismissed for good reason. In the advocates’ opinion, the judicial reorganisation, especially the abolition of the tribunals, was not intended as a pretext to dismiss judges

104. Comments by experts of the Council of Europe as well as reports by independent organizations such as the International Helsinki Federation for Human Rights and Open Society Justice Initiative and accounts by several judges whom the ICJ/CIJL met indicate that there is an erosion of the independence of the judiciary. Further, these reports and interviews lead the ICJ/CIJL to be extremely concerned at allegations that the reduction in the number of tribunals has resulted in the dismissal of a number of judges, especially those who are seen to be opposed to the policies of the government.

⁶⁵ Gheorghe Ulianoschi, whom the Mission met, is a former Chairman of a District Court, and worked for 20 years in the lower courts and the Supreme Court. He was Chairman of the Chisinau Tribunal. He told the Mission Team that he was dismissed by the current government in 2002. He now teaches criminal law at the university, and practises. He created the MAJ in 1994, and was its Vice Chairman. He is now taking a case to the European Court of Human Rights.

⁶⁶ <http://www.freedomhouse.org/research/nitransit/2003/moldova2003.pdf>

B. Judicial salaries and the budget

105. Although the ICJ/CIJL heard complaints from judges about the level of judicial salaries, which are low by European standards, the combination of judicial salaries and additional benefits to judges are entitled allows them to earn a respectable living.
106. Until 2004, the Ministry of Justice which adopted the budget for the courts, with the exception of the Supreme Court, decided judicial salaries. The Ministry informed the ICJ/CIJL that reform of the judicial system is a priority for the Government. The Ministry is now looking to increase the salary of judges as well as the position of Court Chairmen, who are not only judges but administrators. The Ministry also argued that judicial salaries are already very good compared with most of the population. However, judges claim that they are not consulted in determining the judicial budget, as they rightly should be.⁶⁷ The ICJ/CIJL recommends that the Moldovan Judges Association and individual judges be fully consulted by the Ministry of Justice regarding their needs when drawing up the budget. It is of great concern that the Ministry of Justice does not currently appear to take the view of the judiciary into account in this regard.

C. Judicial resources

107. The insufficient funding of the judiciary results in a lack of basic material in some lower courts. The Open Society/Freedom House reports that some courts do not paper or electricity.⁶⁸ The report states that due to an insufficiency of appropriate court premises, the Ciocana sector court was physically located in a factory and as the Ministry of Justice failed to pay the bills for leasing this space, the court sessions took place in “cold and darkness.”⁶⁹ There is also a serious shortage of computers and law libraries. Nevertheless, judges of the Constitutional Court do have access

⁶⁷ The Chairman of the Constitutional Court was strongly in favour of a Judicial Department under the Supreme Court, to take charge of the finances and administration of the judicial system, as in Russia – rather than leaving this under the control of the Ministry of Justice, thus leaving the judicial system at the mercy of the Executive.

⁶⁸ Note 11 at 58

⁶⁹ Ibid

to a computer and the internet, and a Chisinau District Court visited by a member of the ICJ/CIJL was well-equipped and housed.

108. The ICJ/CIJL finds it incumbent upon the Government to provide an adequate budget for the judiciary such that minimal working conditions, such as a proper courtroom, adequate writing material, and access to computers and law libraries exist.

D. Judicial Corruption

109. All interlocutors agreed with President Voronin that judicial corruption exists yet there were differences of opinion as to the degree of phenomenon. Neither the Dean of the Law Faculty (a former Constitutional Court justice and Chairman of the Association of Moldovan Lawyers) or the SCM Chairman could identify what percentage of judges is corrupt. The Dean believed that it was high but the SCM Chairman held the view that the allegations were exaggerated. The ICJ/CIJL recognises that by its very nature it is practically impossible to put a percentage figure on judicial corruption.
110. The Deputy Prosecutor confirmed that there is corruption, but indicated “this is life when salaries are so low”. The ICJ/CIJL asked him why so few judges are prosecuted on corruption charges. His reply was that the prosecutors need concrete facts before they can start a prosecution. However, they also need the agreement of the President of Moldova and of the SCM that a judge should lose immunity. This contradicts what the ICJ/CIJL was told by SCM Chairman - that effective measures are taken against corruption in the judiciary. Just three weeks prior to the visit, at the request of the Prosecutor’s Office, the SCM removed the immunity of a judge. In the last three years there have been three other requests, which the SCM accepted, but the cases were discontinued by the Prosecutor, she said.

111. According to ABA-CEELI, the Moldovan judges have in recent months reacted angrily to allegations of corruption. In about October or November 2003, the Moldovan Judges' Association sent a letter to the General Prosecutor, Vasile Rusu, with a demand that he bring an action against Moldovan Bar Union chairman George Amihalachioae (whom the Mission met). Following the President's intervention, Amihalachioae published an article in *The Capital* newspaper claiming that "an absolute majority of judges in Moldova take bribes." The Association perceived that statement as libel, and demanded that the General Prosecutor investigate that statement, prove that it was unfounded, and thus rehabilitate the image of judges in the society.⁷⁰
112. The ICJ/CIJL formed the view that while a serious problem of corruption exists, there are allegations that accusations of corruption are deliberately used by President Voronin first, in order to provide him with grounds to attack the judiciary, and second, to divert attention from the most serious and insidious problem facing the independence of the judiciary in Moldova, the slide back – the regression – to practices which are highly reminiscent of the Soviet period, and which are analysed in the following section.

E. "Telephone justice"

113. Several former judges informed the Mission that real corruption in Moldova does not take the form of bribery, but trafficking in influence – "telephone justice". There is now a tacit agreement between the Government and the judiciary to follow the Government's orders such that judges will not rule against the State in cases where the state is a party. It was alleged that the Chairman of the Supreme Court will give instructions to Chairmen of regional courts and that final drafts of judgments against the state are checked by the Department for Fighting Economic Corruption, and a report is then sent to the President.

⁷⁰ Also at http://www.abanet.org/ceeli/areas/judicial_reform/sjd_fall.03.html

114. The former judges also told the ICJ/CIJL that in various districts now there are special sections of the Communist Party; the secretary of the Communist Party can give direct instructions to the Chairman of the Court. All new Supreme Court judges who were nominated last year have been invited to speak to the Communist faction without whose approval the former will not be appointed.
115. The 2003 Soros/Freedom House Report pinpointed this problem in another way:
- “... there has been instituted the practice of “taking under control” certain files, presenting interest to the Communist leaders or to state authorities. This practice implies the following: the High Council of the Magistracy [SCM] or the Supreme Court (both institutions are chaired by the same person) receives instructions from the President’s office, from Government or Parliament, referring to the concerned case and required solution (such instructions also exist in oral form). Following these instructions, the Supreme Court or High Council of the Magistracy addresses directly to the chairman of the court, where the particular case is being considered with the order to “take under personal control” the examination of one or other particular file. The so-called “taking under control” in fact represents direct instructions on solutions for specific cases.”⁷¹
116. A former Judge confirmed the criticisms made by the 2003 Report referred to above. In his opinion there is no rule of law in Moldova. Judges are not independent, with the exception of the Constitutional Court. The authorities do apply pressure and “telephone justice” does exist. For example, if there is a case on privatisation, the judge will not decide in accordance with law, but in accordance with the wishes of the authorities.
117. One advocate informed the ICJ/CIJL about a case in which he defended, where a candidate was excluded from standing for election - the case of

⁷¹ The authors state “Due to the imminence of reprisals, this report will not quote names or other sources of this information. We will only mention that these actions are not singular and bear a general character.” – p.82

Vasile Colta, Mayor of Hincesti, heard in April 2003. The new District Court Chairman had been appointed by the Communist Party and had the power to decide who should hear the case. He chose to hear the case himself, and decided against the Mayor. This was seen to be an example of the practice of “taking cases under control.”

118. A number of serving and one former judge denied that this process was taking place. The women judges with whom the ICJ/CIJL met indicated that they had been judges for many years – one for 22 years, the other 17 years, since June 2003 in the Supreme Court. In their opinion a judge was subject to pressure only if s/he wanted to be. The Chairman of the Chisinau Court of Appeal also told the Mission that although telephone justice existed in the Soviet period, the democratic reforms associated with independence in 1990 also involved the dismissal of 95% of all judges. Thus, in his view the problem of “telephone justice” no longer exists.
119. Furthermore, the Parliamentary Advocate Alina Ianucenco, for many years a judge, strongly refuted any suggestion of a return to “telephone justice”. Indeed, she insisted that this practice did not exist in the Soviet period. She had never received any phone calls in her 27 years experience. She worked first in the District Court of Chisinau, then from 1984 in the Supreme Court.
120. Some members of the Moldovan Bar, whom the ICJ/CIJL met, gave a more nuanced account. They informed the ICJ/CIJL that the law provides that judges should be impartial. They indicated that the law sets out many good principles, and a judge can, if s/he wants, be independent. It is the judge’s own choice to be subject to pressure. But there are certainly a few judges who are very careful of the government. The advocates confirmed that there are issues in which there is pressure on judges. They confirmed that there is a particular problem with the position of court chairmen and vice-chairmen. If the chairman receives a phone call on some case, a judge subject to pressure will have to decide whether to stay and be promoted, or resign. Many new chairmen and vice-chairmen, they told the ICJ/CIJL, do keep quiet.

121. The ICJ/CIJL found that the odious practice of “telephone justice” has indeed returned to Moldova, and is compounded by the fact that, due to the constitutional reforms, it is easier to appoint judges who will be compliant and will rule in favor of the governing party. Reportedly, many compliant judges have been already appointed. In sum, the Mission found that there was indeed a gradual but accelerating regression in the direction of a subservient judiciary, not oppressed or threatened, but quietly doing that which is expected by the authorities. This is a very serious threat to the independence of the judiciary.

F. Functioning of the advocates’ profession

122. The leaders of the Moldovan Bar (the Chairman, Vice-Chairman, and head of the Censor Committee) informed the Mission that there are 1,200 advocates in Moldova, of whom approximately 40% are women. The bar has commissions on discipline, qualifications, audit, and budget.
123. There have been two laws on advocates: in 1997 and 2002. The recent law unified the bar. The first draft of the new law was disapproved by the experts of the Council of Europe, and on 5 October 2000 the Committee of Ministers of the Council of Europe adopted a Resolution “General Principles on Lawyers Activities”. This Resolution guided the final drafting of the new law.
124. The Ministry of Justice still plays a large role in the life of the bar. The Ministry gives the advocate’s licence. Advocates have had real problems in getting paid for their work ex officio for poor clients. Two strikes were held by the advocates, between 1 -10 October 2003, and 17-20 May 2003. Almost all advocates participated and there were no repercussions. The Ministry then backed down and paid the advocates’ fees.
125. The ICJ/CIJL found that the bar is lively and independent, though the reported clashes between the bar and the Moldovan Association of Judges give rise to concern. There are clearly too few advocates in Moldova, and this has repercussions for access to justice.

G. Current proposed reforms

126. The Parliamentary Commissioner for Legal Affairs informed the ICJ/CIJL that Parliament is considering a number of amendments to the laws on the judicial system. There are three draft laws: (1) on the Judicial System; (2) on the Supreme Court; (3) on the SCM.
127. All the drafts have been examined by experts from the Council of Europe which has made recommendations. They also have a list of recommendations from a Working Group of deputies and civil society, on (1) transparency of judiciary and nominations for judicial appointment; (2) increasing the responsibilities of the judges, through good selection procedures; (3) corruption. The meetings of the Working Group are open to the public. There will also be major changes on continuing judicial education and on judicial selection.
128. However, despite promises made during the meeting, the ICJ/CIJL was unable to obtain copies of any of these drafts: It was indeed stated to the ICJ/CIJL later that the draft laws have not yet been drawn up but that Working Groups will be set up to do the same. Thus, at this stage, the exact nature of the proposed draft laws is unclear. The Government should ensure that the existing laws are in conformity with the aforementioned Council of Europe standards.

H. The Trans-Dniester region

129. The Mission spent a day in Tiraspol, the “capital” of the separatist Trans-Dniester region. Interviews were limited and did not produce the necessary data upon which the ICJ/CIJL could draw conclusions with respect to legal reforms in this contentious region. The ICJ/CIJL found no reason to challenge the prevailing view that if Moldova is to some extent sliding back into Soviet habits, the Trans-Dniester region is still firmly located in the Soviet period. Nevertheless, resolution of the long-standing separatist conflict between Moldova and Trans-Dniester will almost certainly require a constructive engagement with any Trans-Dniesterian lawyers who wish to take the rule of law seriously.

XII. Recommendations

130. In common with the various reports whose conclusions are summarised in this Report and in Annex 1, the ICJ/CIJL is of the opinion that there are disturbing aspects of developments since 2001 that could seriously compromise or even destroy judicial independence in Moldova. There is in a real sense a “regression” to past practices of the Soviet era, as described by one interlocutor.

129. First and foremost is the role of the Supreme Council of Magistracy. Especially in Moldovan conditions, this body needs to be thoroughly independent and a true champion of judicial independence. At present it is, to too great an extent, subject to influence or pressure from the executive and legislative power (in present-day Moldova one and the same thing).

130. It is not acceptable that the President should have the powers of selection as well as confirmation of appointment of judges that he now enjoys. There are serious concerns that the reforms to the SCM have strengthened the power of the executive and the legislative to appoint judges, thereby jeopardizing judicial independence.

131. The ICJ/CIJL recognises that removal of the present threat to independence of the judiciary is primarily a political question, to be resolved through the democratic process. But it is plain that current constitutional provisions and amended legislation are inadequate and incompatible with European and United Nations standards.

Supreme Council of Magistracy

134. The Mission Team therefore recommends:

- That Parliament adopt a suitable constitutional amendment, to ensure that the SCM is in line with the European Charter on the Statute for Judges, namely that it be “[a body] independent of the executive and legislative within which at least one half of those who sit are judges elected by their peers.”

- The constitutional amendment should provide that an independent SCM has overall responsibility for the following functions: 1) the selection, recruitment and appointment of judges; 2) the discipline of judges or the termination of their office; 3) the development to their careers, and 4) the administration of the courts.
- Legislation should be adopted to ensure that elections to become members of the SCM by serving judges are free and fair and genuinely reflect their views. The judges on the SCM should be elected by their peers and the method of electing judges to this body must guarantee the widest representation of judges.

Nomination of judges

135. The SCM should not have responsibility for the nomination of judges. This should be the function of a separate statutory commission composed of representatives of the judiciary, academics, the Bar, the public, and representatives of the main political parties.
136. This commission should submit a shortlist to the President, who should then choose one candidate from the list. The President should not have the power to reject all the candidates or select others who are not on the list.

Tenure and dismissal

137. Judges should be appointed for life or until statutory retirement age. Impeachment by Parliament should be the only way to dismiss a judge, and only for misconduct, as strictly defined by law. Legislators should have regard to Principle 12 of the UN Basic Principles on the Independence of the Judiciary, which states: "Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office where such exists."
138. Legislators should also take account of Principle 26(b) of the UN Draft Universal Declaration on the Independence of Justice (the "Singhvi Declaration): "The proceedings for judicial removal or discipline when

such are initiated shall be held before a Court or a Board predominantly composed of members of the judiciary. The power of removal may, however, be vested in the Legislature by impeachment or joint address, preferably upon a recommendation of such a Court or Board."⁷²

139. The ICJ/CIJL recommends legislative reform of disciplinary provisions to bring them fully into line with European and other international standards.

Judicial Education

140. Judicial education and training should be placed under the authority of the reformed SCM and should pay the closest attention to training in European standards and the jurisprudence of the European Court of Human Rights as well as to judicial ethics and the role of the judge in a democratic society.
141. In this regard, the Bangalore Code of Judicial Conduct, a universal statement of judicial ethics that was drafted by judges from both the common law and civil traditions advises judges of newly independent countries what is expected of them and informs the public what they can rightly expect from judges. Last year, in a resolution the UN Commission on Human Rights noted these Principles and called upon member States, the relevant UN organs, intergovernmental organizations and non-governmental organizations to take them into consideration.⁷³ All efforts should be made to translate the Principles into Romanian as well as Russian and to widely disseminate them in Moldova.

Telephone Justice

142. Under no circumstances must the executive or legislative engage in controlling the decisions of judges through “telephone justice.” This form of corruption greatly undermines the actual and perceived independence of the judiciary whose main role is to protect human rights and the rule of law.

⁷² Set out in *CIJL Bulletin* No. 25-26 (April-October 1990) “Special Issue: The Independence of Judges and Lawyers: A Compilation of International Standards”, p.38

⁷³ 2003/43

Legal Aid

143. The role of the parliamentary advocates in the provision of legal aid must be enhanced. Lawyers should be encouraged to offer their services to indigent clients or vulnerable persons who have difficulty in obtaining access to justice such as women, children, handicapped persons, and minorities. The government must ensure that lawyers are paid for their legal services to members of these groups.