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**INTERNATIONAL COMMISSION OF JURISTS' SUBMISSION TO THE UNIVERSAL PERIODIC REVIEW OF MOLDOVA**

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Composed of 60 eminent jurists and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the rule of law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952 and active on five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

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ICJ submission to the Universal Periodic Review of Moldova

## **INTERNATIONAL COMMISSION OF JURISTS' SUBMISSION TO THE UNIVERSAL PERIODIC REVIEW OF MOLDOVA**

### **Introduction**

1. The International Commission of Jurists (ICJ) welcomes this opportunity to contribute to the Human Rights Council's (HRC) Universal Periodic Review (UPR) of Moldova.

### **The independence of the judiciary**

2. **The independence of the judiciary** is essential to protection of human rights, including the right to fair trial, the right to liberty, protection against torture and other cruel, inhuman or degrading treatment, and the right to an effective remedy for violations of human rights. It is protected under Article 14 ICCPR as part of the right to a fair trial. The UN Human Rights Committee in its General Comment 32 affirms that the following elements are essential for a court or other tribunal to be considered to meet the requirements of independence under Article 14 ICCPR: "...the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature."<sup>i</sup> States must enshrine such independence in law and ensure that judicial matters are adjudicated independently and impartially.<sup>ii</sup> Self governance of the judiciary guarantees and contributes to strengthening the independence of the judiciary and the effective administration of justice.<sup>iii</sup>

3. The Moldova Constitution provides for judges to be independent in the exercise of their functions.<sup>iv</sup> However, in practice the executive's extensive influence over judicial matters as well as the high level of corruption and perception of corruption<sup>v</sup> have undermined judicial independence in the country.

4. **The Superior Council of Magistracy** (SCM) is the main governing body of the judiciary in charge of judicial appointments, evaluation of judicial performance, promotions, inspection and disciplinary matters.<sup>vi</sup> The SCM is composed of 12 members, including, six judges elected by secret vote by the General Assembly of Judges, three lay members (professors of law) appointed by the Parliament by a majoritarian vote and three ex-officio members (the President of the Supreme Court of Justice, the Minister of Justice and the Prosecutor General).<sup>vii</sup> The six members who are judges are elected by the General Assembly of Judges from all levels of judicial instances.<sup>viii</sup>

5. The ex-officio membership of the SCM of the Ministry of Justice and the Prosecutor General necessarily constitutes an interference of these powers with the independence of the judiciary.<sup>ix</sup> According to applicable international standards on the independence of the judiciary, while a mixed composition of supreme Judicial Council is permitted, judges should constitute the majority or a "substantial

majority” of the Supreme Council of the Judiciary.<sup>x</sup> Furthermore, according to international standards, there should be limitations on non-judicial membership of the High Judicial Councils. In particular, members of the executive or law enforcement representatives should not become members of Judicial Councils.<sup>xi</sup> According to the Special Rapporteur on the Independence of Judges and Lawyers, “[j]udicial councils should include judges among its members. To avoid the risk of corporatism and self-interest, the councils may also include lay members, for example lawyers, law professors, jurists, Bar members, as well as individuals of acknowledged reputation and experience. Active politicians and members of the legislative or executive branches of power must not simultaneously serve on a judicial council. The judicial members of a council should be elected by their peers following methods guaranteeing the widest representation of the judiciary at all levels. Certain members of a council, for example the President of the Supreme Court, can be selected ex officio.”<sup>xii</sup>

6. Furthermore, the ex-officio membership of the President of the SCJ contributes to the dominant hierarchical culture within the Moldovan judiciary.<sup>xiii</sup> In this connection, it is apparent that some elements of the procedure of electing and appointing the SCM members continues to impair the SCM’s ability to function as an independent body. During its mission to the country, the ICJ was told by local stakeholders that rather than playing an effective **role of defending the independence of the judiciary**, institutionally and in respect of individual judges the SCM has become an instrument of pressure on individual judges and a threat to their independence.<sup>xiv</sup>

7. A fundamental problem in the work of the **SCM** is lack of transparency. Holding its meetings behind closed doors and failure of the SCM to provide reasoning of decisions contributes to these concerns.<sup>xv</sup>

8. **Judges are appointed** by the President of the Republic of Moldova upon a proposal submitted by the SCM, with the exception of the judges of the SCJ, who are appointed by the Parliament.<sup>xvi</sup> The ICJ notes the persistence of a high level of political pressure on judges in Moldova and the hierarchical judicial culture.<sup>xvii</sup> Among other issues, the process of electing judges by their peers suffers from lack of transparency.<sup>xviii</sup> The ICJ further notes examples of deadlock during the appointment process for judges, when for example, the Parliament, in order to refuse an appointment, simply failed take a decision, leaving the nomination pending.<sup>xix</sup> Contrary to this practice, it is essential that decisions on appointment by the SCM be publicly reasoned based on objective criteria and that Parliament be obliged to accept the nomination if it has taken no action after a certain period of time.<sup>xx</sup>

9. According to international standards, the appointment of the judges to their offices must be conducted in an independent manner and through transparent procedures that are based on objective criteria, including skills, knowledge, experience and integrity of the candidates.<sup>xxi</sup> In Moldova, **the process for selecting and appointing judges in Moldova** does not provide for sufficient safeguards to protect against undue interference.<sup>xxii</sup> There is reportedly a lack of proper reasoning in the selection of candidates and discriminatory selection by the SCM.<sup>xxiii</sup>

10. As regards **security of tenure** during the judicial career, judges who are initially appointed for a five-year term of office.<sup>xxiv</sup> After the expiration of the five-year term, judges are appointed to this position until reaching the age limit fixed by the law.<sup>xxv</sup>

The temporary (five-year) initial appointment period can have an adverse effect on judicial independence and impartiality.<sup>xxvi</sup> There is enhanced potential for a judge to be influenced by considerations extrinsic to the judicial function when the judge must submit to what is an effective reappointment procedure.<sup>xxvii</sup>

11. The existence of **corruption** in different branches of the state power in Moldova, including the judiciary, has been recognized at both national and international levels.<sup>xxviii</sup> This is demonstrated for example in the reports by the SCM on the appointment or promotion of the judges (judge candidates) with integrity issues and the failure of the authorities to take adequate steps in respect of the corruption claims raising doubts on the integrity of the judges.<sup>xxix</sup>

12. **The disciplinary system for judges** in Moldova is mainly regulated by Law no. 178 of 25 July 2014 on the Disciplinary Liability of Judges.<sup>xxx</sup> Decisions to dismiss judges are made by the Disciplinary Board and subject to the review of the SCM and to judicial review.<sup>xxxi</sup> Grounds of disciplinary proceedings against judges may undermine their independence.<sup>xxxii</sup> For example, judges may be dismissed on grounds of issuing a decision in breach of the law or of fundamental rights. This may lead to disciplinary proceedings being triggered even before a final decision by the last instance court is issued and may constitute undue pressure on the internal independence of appellate judges, as well as the judge of first instance.<sup>xxxiii</sup> Furthermore judges may be dismissed based on two negative evaluations (insufficient qualification determined at two consecutive evaluations) or a failed evaluation. Disciplinary proceedings should not be linked to evaluation assessments and should relate only to disciplinary offences provided by international standards.<sup>xxxiv</sup>

## Recommendations

20. The ICJ therefore calls on the WG and the Council to make the following recommendations to the Moldovan authorities concerning the independence of the judiciary:

- i. Take measures of reform in respect of the administration of justice with a view to ending the undue interference of the executive with the judiciary, including in the selection, appointment, promotion, transfer, secondment or any other aspects of the management of the career of judges;
- ii. Ensure that the SCM is independent from the executive, including by amending its composition to ensure that it consists predominantly of judges appointed by the judiciary itself, that it is pluralistic and competent to decide on all issues relating to the functioning of the judiciary and is empowered to uphold the independence of the judiciary;
- iii. To strengthen the anti-corruption legal framework universally, consistently and indiscriminately enforced to prevent corruption with regard to judges, notably to prevent the appointment and promotion to judicial positions of candidates with integrity risks.

iv. In light of the recommendations of the ICJ and other international bodies, to improve the national law and the practice in line with the international standards on independence of judiciary to ensure that the SCM fulfils its role as defender of the independence of the judiciary and the rule of law in Moldova.

## ENDNOTES

<sup>i</sup> Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007), para. 19.

<sup>ii</sup> United Nations Basic Principles on the Independence of the Judiciary (UN Basic Principles), adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, Principles 1 & 2.

<sup>iii</sup> The General Assembly of the European Network of Councils for the Judiciary (ENCJ), met in Budapest (H), on 21-23 May 2008, para. 1

<sup>iv</sup> The Constitution of the Republic of Moldova, 27 August 1994, article 116.1: "Judges sitting in the courts are independent, impartial and irremovable according to the law"; The Law on the Status of a Judge (no. 544-XIII of 20 July 1995) affirms that "judges shall be independent, impartial and immovable and shall be subordinate only to the law, article 1(3): "judges shall make decisions independently and impartially and shall act without any direct or indirect restrictions, influences, pressures, threats or interventions from any authority, including judicial ones. The hierarchical organisation of jurisdictions shall not affect the individual independence of the judge." Article 15 of the Law on the Status of a Judge, which lists the obligations of judges, states that judges shall be obliged to be impartial and to ensure the defence of a person's rights and freedoms, honour and dignity.

<sup>v</sup> Action against Corruption in the Republic of Moldova, Technical Paper Review of the Composition and Operation of the Superior Council of Magistracy of the Republic of Moldova, December 2020, <https://rm.coe.int/eccd-mld-tp1-scm-composition-and-operation-eng-2768-5146-2403-v-1/1680a1963b>, p. 11.

<sup>vi</sup> The Constitution of the Republic of Moldova, article 123; Law on the Superior Council of Magistracy, No. 947, 19 July 1996, article 1.

<sup>vii</sup> Law on the Superior Council of Magistracy, No. 947, 19 July 1996, article 3; The Constitution of the Republic of Moldova, article 122.

<sup>viii</sup> The Constitution of the Republic of Moldova, article 122: (1) The Superior Council of Magistrates consists of judges and university lecturers elected for a tenure of 4 years. (2) The President of the Supreme Court of Justice, the Minister of Justice and the Prosecutor General are ex-officio members of the Superior Council of Magistrates; Law on the Superior Council of Magistracy, No. 947, 19 July 1996, article 3.

<sup>ix</sup> The International Commission of Jurists, "Only an empty shell: The undelivered promise of an independent judiciary in Moldova", A mission report, 2019; The International Commission of Jurists, Reforming the Judiciary in Moldova: Prospects and Challenges, 2013.

<sup>x</sup> Opinion no.10 (2007) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society, adopted by the CCJE at its 8th meeting (Strasbourg, 21- 23 November 2007), para. 18; Venice Commission, Report on the Independence of the Judicial System Part I: The Independence of Judges Adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010), [http://www.venice.coe.int/webforms/documents/?pdf=CDLAD\(2010\)004-e](http://www.venice.coe.int/webforms/documents/?pdf=CDLAD(2010)004-e), para. 32.

<sup>xi</sup> CCJE, op. 10, para. 23; Also see UNSR Judicial Council Report, para. 107: "Active politicians and members of the legislative or executive branches of power cannot simultaneously serve on a judicial council.."; Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia - Judicial Administration, Selection and Accountability - Kyiv, 23-25 June 2010 (Kyiv Recommendations), Recommendation 7;

<sup>xii</sup> Report of the United Nations Special Rapporteur on Independence of Judges and Lawyers, on judicial councils, UN Doc A/HRC/38/38 (2 May 2018) ("UNSR Judicial Council Report"), para 107.

<sup>xiii</sup> The International Commission of Jurists, "Only an empty shell: The undelivered promise of an independent judiciary in Moldova", A mission report, 2019, p. 46.

<sup>xiv</sup> The International Commission of Jurists, "Only an empty shell: The undelivered promise of an independent judiciary in Moldova", A mission report, 2019, p.45.

<sup>xv</sup> The International Commission of Jurists, "Only an empty shell: The undelivered promise of an independent judiciary in Moldova", A mission report, 2019, p.46

<sup>xvi</sup> Article 116 of the Constitution of the Republic of Moldova.

<sup>xvii</sup> The International Commission of Jurists, "Only an empty shell: The undelivered promise of an independent judiciary in Moldova", A mission report, 2019, p. 28; Venice Commission, Joint Opinion on The Draft Law on Amending and Supplementing the Constitution with respect to the Superior Council of Magistracy, Opinion No. 983 / 2020, CDL-AD(2020)001, 20 March 2020, paras. 26-27.

<sup>xviii</sup> Declaration, Civil society organizations express regret for the reduced level of transparency of election to the Superior Council of Magistracy, <https://crjm.org/wp-content/uploads/2017/10/2017-10-17-Declaratie-transparenta-alegeri-CSM-2017-ENG.pdf>.

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- <sup>xxix</sup> E.g. Parliament's refusal to appoint Viorica Puica to the SCJ contravenes the law and undermines the efforts to build an independent and professional judiciary, <https://crjm.org/en/refuzul-parlamentului-de-a-o-numi-pe-viorica-puica-la-csj-contravine-legii-si-submineaza-eforturile-de-a-edifica-o-justitie-independentă-si-profesionista/>; The International Commission of Jurists, "Only an empty shell: The undelivered promise of an independent judiciary in Moldova", A mission report, 2019, p.28.
- <sup>xx</sup> The International Commission of Jurists, "Only an empty shell: The undelivered promise of an independent judiciary in Moldova", A mission report, 2019, p. 28.
- <sup>xxi</sup> UN Basic Principles on the Independence of the Judiciary, Principle 10; Universal Charter of the Judge article 9; European Charter on the Statute for Judges, para.2.1; Council of Europe, Recommendation No.R (94) 12 Principle I.2; ICJ Practitioners Guide, International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors, Geneva, 2007, p. 41.
- <sup>xxii</sup> The International Commission of Jurists, "Only an empty shell: The undelivered promise of an independent judiciary in Moldova", A mission report, 2019, pp.5, 6 and 47.
- <sup>xxiii</sup> The International Commission of Jurists, "Only an empty shell: The undelivered promise of an independent judiciary in Moldova", A mission report, 2019, pp.11, 27.
- <sup>xxiv</sup> Article 116 of the Constitution
- <sup>xxv</sup> Article 116 of the Constitution
- <sup>xxvi</sup> The International Commission of Jurists, "Only an empty shell: The undelivered promise of an independent judiciary in Moldova", A mission report, 2019, p.49; Venice Commission, Joint Opinion on The Draft Law on Amending and Supplementing the Constitution with respect to the Superior Council of Magistracy, Opinion No. 983 / 2020, CDL-AD(2020)001, 20 March 2020, pp. 5-6.
- <sup>xxvii</sup> The International Commission of Jurists, "Only an empty shell: The undelivered promise of an independent judiciary in Moldova", A mission report, 2019, p. 49
- <sup>xxviii</sup> The International Commission of Jurists, "Only an empty shell: The undelivered promise of an independent judiciary in Moldova", A mission report, 2019, p.7; Council of Europe, Action against Corruption in the Republic of Moldova, Technical Paper Review of the Composition and Operation of the Superior Council of Magistracy of the Republic of Moldova, December 2020, <https://rm.coe.int/eccd-mld-tp1-scm-composition-and-operation-eng-2768-5146-2403-v-1/1680a1963b>, p. 6; Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights Rapporteur, Report on Judges in Poland and in the Republic of Moldova must remain independent, Doc. 15204, 05 January 2021.
- <sup>xxix</sup> The International Commission of Jurists, "Only an empty shell: The undelivered promise of an independent judiciary in Moldova", A mission report, 2019, p.35.
- <sup>xxx</sup> Law on the Disciplinary Liability of Judges, No. 178, 25 July 2014
- <sup>xxxi</sup> Law on the Disciplinary Liability of Judges, No. 178, 25 July 2014, articles 8, 39 and 40.
- <sup>xxxii</sup> The International Commission of Jurists, "Only an empty shell: The undelivered promise of an independent judiciary in Moldova", A mission report, 2019, p.42; Law on the Disciplinary Liability of Judges, No. 178, 25 July 2014, article 4.
- <sup>xxxiii</sup> The International Commission of Jurists, "Only an empty shell: The undelivered promise of an independent judiciary in Moldova", A mission report, 2019, p.42; Law on the Disciplinary Liability of Judges, No. 178, 25 July 2014, article 4.
- <sup>xxxiv</sup> The International Commission of Jurists, "Only an empty shell: The undelivered promise of an independent judiciary in Moldova", A mission report, 2019, p.50.