

STUDY ON THE COMPULSORY BRINGING OF PERSONS IN FRONT OF THE JUDICIAL AUTHORITIES IN CRIMINAL MATTERS¹

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Abstract

The study will try to perform an in-depth analysis of the measure of compulsory bringing, assessing both the national legislation and the legislation of some European countries, namely: Austria, Bulgaria, Poland and the Netherlands. Due attention will be granted to the provisions of the current Criminal Procedure Code, which entered into force on the 1st of February 2014, as this piece of legislation brings some important changes regarding the compulsory bringing, some of them being the consequence of the convictions of Romania in front of the Strasbourg Court. Also, the paper will focus on case-law established by the European Court of Human Rights regarding articles 3 and 5 relating to the compulsory bringing. To close with, the study will give some conclusions regarding the conformity of the current Criminal Procedure Code of Romania with the standards imposed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and by the case-law of the European Court of Human Rights..

Keywords: *Compulsory bringing, ECHR, case-law, Criminal Procedure Code, trial, pre-trial, Romania, police*

I. Introduction

Over the last years, Romania has undergone a structural legislative reform, the essential pieces of legislation (the Codes) in criminal matters being drafted and adopted.

The adoption of the new criminal Codes represented for Romania a necessity and a consequence imposed by the evolution of the Romanian society and economy during the more than two decades that have passed since the December 1989

Revolution. Furthermore, the evolution of the Romanian society was significantly influenced by the accession to a number of international organisations, especially the Council of Europe and the European Union.

As a result new Codes entered into force on the 1st of February 2014, replacing the old ones (in force since 1969), namely *the new Criminal Code (Law No. 286/2009)*

¹ This paper is based on the expert report presented at the Compulsory bringing of persons to judicial authorities Workshop on 24th – 26th of October 2013, in Sofia (Bulgaria), as part of the “Capacity building of General Directorate Security staff in line with international standards to achieve a more effective judicial system” Project, General Directorate “Security”, Ministry of Justice (Bulgaria), implemented under the *Norwegian financial mechanism* (NFM 2009-2014), Program area 14 Judicial capacity building and Cooperation, in a partnership with the *Directorate General I – Human Rights and Rule of Law of the Council of Europe*.

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– *N.Cr.C.² and the new Criminal Procedure Code (Law No. 135/2010) – N.Cr.P.C.³.*

The package that made up the reform in criminal matters also required the elaboration and adoption of 5 new pieces of legislation, alongside with the new Criminal Code and the new Criminal Procedure Code, which were meant to facilitate the implementation of the two codes, but also covered aspects concerning the enforcement of custodial and non-custodial sanctions or measures and last, but not least, the organization of the probation system.

The following laws were elaborated and came into force on the 1st of February 2014:

- Law No. 187/2012 on enforcing the application of the new Criminal Code⁴;

- Law No. 252/2013 regarding the organization of the probation services⁵;

- Law No. 253/2013 on the execution of penalties and educative measures implying deprivation of liberty⁶;

- Law No. 254/2013 on the execution of penalties, educative measures and other measures ordered by the judicial body during the criminal trial, which do not imply deprivation of liberty⁷;

- Law No. 255/2013 on enforcing the application of the new Criminal Procedure Code⁸.

A presentation of the existing legislation in Romania, a brief analysis of the legislation of certain European states and an overview of the European Court of Human Rights (ECtHR) case-law will help us to assess more accurately the current situation regarding the order of appearance (compulsory bringing)⁹ and the enforcement of such order, consequently allowing us to look at the whole picture, having all the elements, thus drawing the best fitting solutions regarding the order of appearance (compulsory bringing), in full compliance with the European Convention for the Protection of Human Rights and Fundamental Freedoms¹⁰ (ECHR) standards.

I. National legal framework regarding compulsory bringing of persons in front of the judicial authorities in Romania

I. The fundamental law of the Romanian state, the Constitution¹¹, contains certain provisions which refer to the limitation of the individual freedom by stipulating, in art. 23, the principle according

² Published in the *Official Journal of Romania*, Part I, No. 510 of 24th of July 2009, as subsequently amended and completed.

³ Published in the *Official Journal of Romania*, Part I, No. 486 of 15th of July 2010, as subsequently amended and completed, which abolished Law no. 29/1968 regarding the Criminal Procedure Code (*Cr.P.C.*), republished in the *Official Journal of Romania*, Part I, No. 786 of 30th of April 1997, as subsequently amended and completed.

⁴ Published in the *Official Journal of Romania*, Part I, No. 757 of 12th of November 2012, as subsequently amended and completed.

⁵ Published in the *Official Journal of Romania*, Part I, No. 512 of 14th of August 2013.

⁶ Published in the *Official Journal of Romania*, Part I, No. 513 of 14th of August 2013.

⁷ Published in the *Official Journal of Romania*, Part I, No. 514 of 14th of August 2013.

⁸ Published in the *Official Journal of Romania*, Part I, No. 515 of 14th of August 2013.

⁹ Also named “warrant to appear”.

The terminology is not unitary. “*Order of appearance*” is used in the ECtHR *Case of Ghiurău v. Romania*, 20 November 2012, final: 29.04.2013, p. 17, while the “*warrant to appear*” is used in the ECtHR *Case of Creangă v. Romania*. Grand Chamber, 23 February 2012, final, p. 9.

¹⁰ Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in Rome on November 4, 1950, as amended by Protocol no. 11, together with Protocols no. 1, 4, 6, 7, 12 and 13, were ratified by Romania through Law no. 30/1994, published in the *Official Journal of Romania*, Part I, no. 135 of May 31, 1994.

¹¹ Republished in the *Official Journal of Romania*, Part I, No. 767 of 31th of October 2003.

to which the “*individual freedom and security of a person are inviolable*”. However, the fundamental law, as it is normal, focuses on cases in which the person’s individual freedom is very severely affected, namely those situations in which the person is deprived of his/her liberty, be it during the criminal investigation, as a preventive measure, or later, following the issuing of a final court decision which imposes imprisonment (or life imprisonment). Romania’s Constitution does not provide for specific norms concerning the enforcement of orders of appearance.

The right to life, as well as the right to physical and mental integrity of persons is guaranteed by article 22 of the Romanian Constitution, which also provides that no one may be subjected to torture or to any kind of inhuman or degrading punishment or treatment. Death penalty is prohibited.

So, in this context, considering the compulsory bringing as a form of limitation or even deprivation of liberty in the sense of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Constitution provides for safeguards regarding the protection against torture and inhuman or degrading treatments.

2. Although the study will focus on criminal matters, it is important to stress out that in Romania there is no unitary regulation regarding compulsory bringing of persons in front of the judicial authorities; instead there are specific provisions regarding criminal matters, civil

matters and mental health matters. Furthermore, none of the legal provisions contain a legal definition of the compulsory bringing, but rather some principles concerning orders of appearance, the institutions in charge and practical issues on the enforcement of these warrants.

The legal framework regarding the compulsory bringing is to be found in: the new Criminal Procedure Code (Law No. 135/2010); the Civil Procedure Code (Law No. 134/2010); Law No. 487/2002 on mental health and protection of people with mental disorders.

II. Compulsory bringing of persons in front of the judicial authorities in criminal matters.

I. Sedes materiae. General remarks.
To date the order of appearance is provided for both as related to the defendant and other parties in the new Criminal Procedure Code: *art. 108 para. 2.a), art. 120 para. 2.b), art. 184 para. 4 and 20, art. 209 para. 4, art. 258 para. 2, art. 265-267, art. 283 para. 1.b), art. 364 para. 5 and art. 381 para. 8.*¹²

The order of appearance was meant to be in the Romanian legal system an order issued by the criminal prosecution authority or the court to the police or other enforcement authority to bring a person in front of them, at the headquarters of the respective judicial authority, having been labelled initially in a way a compulsory measure due to the fact that the person whose presence is necessary within the

¹² The previous piece of regulation, found in the Law no. 29/1968 regarding the Criminal Procedure Code (*Cr.P.C.*), did not lack in criticism. One possible explanation which emerges from literature is based on the historical and teleological interpretation of the institute of the order of appearance: at the moment in time when it was regulated it was unconceivable for the totalitarian state that one of its citizens does not obey an order of appearance, this being the reason why they did not insist on a detailed regulation of this institute; this is how it became perhaps the most incomplete institute covered by the Criminal Procedure Code, even though it actually should be a legislative work with mathematical logic and accuracy. [Ghe. Neacșu, *Considerații privitoare la emiterea și executarea mandatelor de aducere (Considerations regarding the issuance and enforcement of the order of appearance)* (I), Dreptul Magazine, No. 9/2003, p. 173]

criminal procedure is brought in front of the judicial authority¹³.

Before analysing the provisions which refer to the order of appearance, mention should be made of the fact that *the law does not provide for a legal definition of it*.

In accordance with the provisions of *art. 265 para. 1-2 N.Cr.P.C.*, a person can be brought in front of the criminal prosecution authority or in front of the court by virtue of an order of appearance if, having been previously subpoenaed, the person did not appear without reason in front of the judicial body and it is necessary for the person to be heard or present or if the proper subpoenaing has not been possible and the circumstances indicate unequivocally that the person is absconding the reception of the subpoena.

The suspect or the defendant can be brought by virtue of an order of appearance even if it was not subpoenaed, if this measure is needed for settling the case.

In spite of the fact that the legal text does not provide for a legal definition, the specialist literature agrees that it offers enough elements to allow for the determination of the legal nature of the order of appearance, namely *“a compulsory measure which resides in the obligation imposed to a person to let itself being brought in front of the judicial authority which issued the measure, accompanied by the person who was vested with the enforcement of the measure.”*¹⁴

It should be mentioned that the legal provisions regulating the order of appearance have been looked at by the Constitutional Court quite frequently, both

in relation to the provisions of the Fundamental Law and to the provisions of the international conventions and treaties concerning human rights to which Romania is a party, being found in compliance with these instruments¹⁵.

By Decision No. 885/2007¹⁶, the Constitutional Court decided that the legal provisions invoked were not in breach of the Constitutional standards for the following reasons: *“The Court acknowledges that the procedure rules stipulated in art. 183 and art. 184 Cr.P.C. [corresponding to art. 265-266 N.Cr.P.C.] are meant to ensure the good functioning of the criminal proceedings, without delays caused by the absence or refusal of the persons whose hearing or presence is considered by the court to be necessary. By the criticised provisions there is no violation of the individual freedom because the institution of the order of appearance is not equivalent with the institution of the custodial measures, as erroneously the claimant asserts. As a matter of fact, the exercise of some rights and freedoms can be limited for the accomplishment of the criminal instruction, so that the coercion of a person to appear in front of the court when the latter considers it necessary, does not affect in any way the principles of the rule of law.”*

For the reasons shown in the decision, the Court concluded that *“the provisions of art. 183 para. 1 and 2 Cr.P.C. [corresponding to art. 265-266 N.Cr.P.C.] are in accordance with the provisions of art. 23 para. 1 and 2 of the Constitution, of art. 5 para. 1 and 4 of the European Convention*

¹³ N. Iliescu in V. Dongoroz, C. Bulai, S. Kahane, N. Iliescu, G. Antoniu, R. Stănoiu, *Explicații teoretice ale Codului de procedură penală român. Partea generală (Theoretical explanations of the Romanian Criminal Procedure Code. General part)*, Vol. I, Romanian Academy Publishing House, Bucharest, 1975, p. 378.

¹⁴ I. Neagu, *Tratat de procedură penală. Partea generală. (Criminal procedure treaty. The General Part.)*, Universul Juridic Publishing House, Bucharest, 2010, p. 368.

¹⁵ Although the analysis was made on the basis of the previous Criminal Procedure Code (*art. 183 – 184*), the findings of the Constitutional Court are equally applicable to the new legal framework: *art. 265-266 N.Cr.P.C.*

¹⁶ *Constitutional Court Decision No. 885/2007*, published in the *Official Journal of Romania*, Part I, no. 750 of 5th of November 2007, concerning the incident of constitutionality of the provisions of art. 183 and art. 184 Cr.P.C.

on Human Rights, of art. 9 of the Universal Declaration on Human Rights, as well as with the provisions of art. 9 para. 1 and art. 14 para. 3.g) of the International Pact on Civil and Political Rights.¹⁷

Mention should be made of the fact that this measure is different from the right of the police to detain (hold) a person for up to 24 hours for investigative purposes. This is a general administrative measure that can be taken by the police on the basis of Law no. 218/2002 (on the organisation and functioning of the Romanian police) only if the person cannot be identified in another way; it is not taken with the aim of investigating a criminal offence¹⁸.

As regards the deduction of the time necessary for the enforcement of the order of appearance and the remand, unlike the previous regulation which led to inconsistent practice and literature, the N.Cr.P.C. expressly provides that, if a suspect or defendant has been brought in front of the criminal prosecution body or in front of the prosecutor in order to be heard, by virtue of a legally issued order of appearance, the term of the custody (24 hours at the most) shall not include the time period in which the suspect or the defendant were under the power of that warrant. (art. 209 para. 4 N.Cr.P.C.)

It should be stressed out that the legal framework does not expressly provide for the possibility of deprivation of liberty of a person as a precautionary measure for ensuring its appearance in front of the judicial authorities, so the order of

appearance remains the only possibility to compel a person to appear in front of the judicial authorities.

It is worth mentioning the fact that by virtue of art. 271 N.Cr.C. – *obstruction of justice*, justified by the realities of the judicial practice which often times is faced with a lack of cooperation from the part of the persons who are requested to lend their support to the judicial authorities, so that the refusal of one person to appear in front of the judicial authorities in spite of having been subpoenaed to or to obey to the enforcement of an order of appearance can make up the elements of this crime.

2. The body that issues the order of appearance. Conditions. As with the previous Criminal Procedure Code, the current Code provides that the order of appearance is issued only by the *criminal prosecution body (criminal investigative body¹⁹ - the judicial police; special investigative bodies – and the prosecutor) or by the court.*

The order of appearance as any order can be issued only within a current criminal proceeding (no matter if this is part of the criminal prosecution or the trial), not during the preliminary phase, when a criminal proceeding is not commenced²⁰.

The order of appearance is issued following a *resolution* (in case of the criminal prosecution authorities) or *court minutes* (in case of the court)²¹. Subsequently the procedural act is also used – the order of appearance as such, drafted

¹⁷ Constitutional Court Decision No. 1401/2009, published in the *Official Journal of Romania*, Part I, no. 855 of 9th of December 2009.

¹⁸ A.M. van Kalmthout, M.M. Knapen, C. Morgenstern (editors), *Pre-trial detention in the European Union*, Ed. Wolf Legal Publishers, Nijmegen, The Netherlands, 2009, p. 798.

¹⁹ For the opinion according to which criminal investigative bodies (police) cannot issue order of appearance see Ghe. Neacșu, *op. cit.*, p. 167.

²⁰ See the Constitutional Court Decision No. 210/2000, published in the *Official Journal of Romania*, Part I, No. 110 of 5th of March 2001.

²¹ Although the N.Cr.P.C. introduced an intermediate phase between the pre-trial stage and the trial stage, namely the preliminary chamber, an order of appearance cannot be issued, since this stage is an *in camera* procedure.

according with strictly regulated requirements.

To date, in order to be able to enforce an order of appearance against the suspect or defendant or any other person, the following conditions shall be met:

- there has to be an enforceable legal obligation to appear before the court;
- there has to be an order of appearance issued by the competent authority;
- the order of appearance has to have the contents provided for by law;
- the person has been previously subpoenaed. By way of derogation, the suspect or defendant can be compulsory brought even before being subpoenaed based on one simple condition – this measure is needed for settling the case.
- despite having been subpoenaed, the person did not appear on the date and at the place indicated in the subpoena;
- the hearing or the presence of the person is needed;
- the measure must not be unproportional in relation to the significance of the matter;
- the measure has to be carried out with a minimum of interference in terms of intensity and duration.

According with the general provisions, the resolution issued by the criminal prosecution body can be contested with the chief prosecutor in observance of the provisions of art. 370 para. 3 N.Cr.P.C.; the court minutes can be contested on the same occasion as the subject matter of the trial²².

Having regard to the fact that the enforcement of an order of appearance implies a manifest limitation of the

person's individual freedom, in 2003 (by virtue of Law No. 281/2003) two provisions were introduced in *art. 183 para. 3-4 from the previous Cr.P.C.* with the role to ensure that no abuse is committed by the state agents on occasion of the enforcement of these warrants. This means that persons compulsory brought cannot stay at the disposal of the judicial authority longer than the time which is strictly needed for their hearing, except the case in which the arrest or pre-trial detention of these persons was ordered. Similarly, the person who has been compulsory brought shall be heard immediately by the judicial body.

Unlike the previous regulation, *art. 265 para. 11-12 N.Cr.P.C.* expressly provides that compulsory brought persons shall stay at the disposal of the judicial body only for the time needed for their hearing or for effecting the act that made their presence necessary, however *not longer than 8 hours*, except the case when their arrest or pre-trial detention was ordered. The judicial body shall hear the compulsory brought person immediately or, as case may be, it shall effect immediately the act that made the person's presence necessary.

➤ In *Austria*, the enforcement organs are the *security police forces* and concerning the performance of the compulsory bringing *art. 47 of the Austrian Security Police Act* stipulates that it has to be carried out with respect to the human dignity of the concerned person in a most lenient way.

The enforcement organs are the security police forces who act on the grounds of *court or prosecution authority orders*²³.

²² According with *art. 370 para. 3 N.Cr.P.C.*, in the Romanian legal system the court minutes are court decisions rendered during the trial by which the subject matter of the case is not judged or settled, but rather incidental matters; they can also mark the ending of a court hearing, etc, the rule being that they can be challenged with the next upper court only with the subject matter of the case (*art. 408 para. 2 N.Cr.P.C.*).

²³ See „*Compulsory Bringing of Witnesses and Accused Persons from an Austrian Perspective*”, Dr. G. Walchshofer, p. 14, expert report presented at the Compulsory bringing of persons to judicial authorities Workshop

In view of the performance of the compulsory bringing (and other coercive measures encroaching the right of personal freedom) the Supreme Court of Austria repeatedly held that the measure must be implemented in a way that the interference with the right to personal freedom is kept to the necessary minimum in terms of intensity and duration. Therefore it would be considered a violation of the right to personal freedom, as guaranteed by art. 5 ECHR, if a person were brought with considerable time prior to the fixed hour of the court session (at least in the absence of justifying organisational circumstances)²⁴.

The conditions under which compulsory bringing may be conducted lawfully are as follows:

- there has to be an enforceable legal obligation to appear before the court;
- the person has to be duly subpoenaed and cautioned about the consequence of compulsory bringing in case of non-obedience;
- the compulsory bringing must use the most lenient means to achieve the intended result;
- it must not be unproportional in relation to the significance of the matter;
- it has to be carried out with a minimum of interference in terms of intensity and duration²⁵.

➤ In **Bulgaria**, in criminal proceedings, the failure of a defendant or of a witness to appear before a judicial system

body or an investigating pre-trial authority (for the purpose of the court proceeding or the pre-trial proceedings) is ensured by compulsory bringing²⁶.

The competence for issuing an order of appearance in criminal matters rests upon the judicial system bodies, namely, the court during the trial or the prosecutor and the investigating bodies (investigating magistrates and investigating police) during the pre-trial stage.

The preconditions for issuing an order for compulsory bringing are as follows:

- the person whose testimony or appearance is requested has been duly summoned by serving of a writ of summons;
- the person fails to appear before the judicial system body;
- the person has been warned about the consequence of not complying or not appearing;
- the person fails to provide good excuse for not making a show, thus obstructing justice.

➤ In the **Netherlands**, a court order for the transfer of a person to a court session can be issued by the presiding judge if the conditions set out in the law are met.

In the Dutch criminal system the measure of compulsory bringing is considered a coercive measure and it implies deprivation of liberty, being used for the establishment of the truth, ensurance of a fair trial and compliance with the adversarial procedure rules²⁷.

on 24th–26th of October 2013, in Sofia (Bulgaria), as part of the “Capacity building of General Directorate Security staff in line with international standards to achieve a more effective judicial system” Project, General Directorate “Security”, Ministry of Justice (Bulgaria).

²⁴ See „Compulsory Bringing of Witnesses and Accused Persons from an Austrian Perspective”, Dr. G. Walchshofer, *op. cit.*, p. 12.

²⁵ See „Compulsory Bringing of Witnesses and Accused Persons from an Austrian Perspective”, Dr. G. Walchshofer, *op. cit.*, p. 12-13

²⁶ It is considered that the implementation of compulsory bringing constitutes a lawful limitation of the freedom of movement (Art 2 of Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms).

²⁷ See „Court orders for the transfer of persons to court sessions”, R. Steinhaus, p. 3-4, expert report presented at the Compulsory bringing of persons to judicial authorities Workshop on 24th – 26th of October 2013, in Sofia (Bulgaria), as part of the “Capacity building of General Directorate Security staff in line with international

➤ In *Poland*, the competent legal authorities which can issue a compulsory bringing order²⁸ are high ranking legal authorities: during the trial - *the court* conducting proceedings in a given case and - during the stage of pre-trial penal proceedings - *the public prosecutor*, the form of their decision being the order (issued by the court) or the ruling (issued by public prosecutor)²⁹.

The measure of compulsory bringing is considered as a kind of deprivation of liberty for a short period of time of a person who, after being correctly subpoenaed and warned about the legal consequences of not appearance, failed to perform his/her procedural duty, namely to be physically present in due time in the place indicated in a subpoena and who didn't provide reasonable excuse. This kind of deprivation of liberty, aiming to force the person's appearance at the place of performing the procedural activities with his/her obligatory presence, shall be treated as *ultima ratio*, and is always based on competent legal authority's written decision which can be a subject of an interlocutory appeal and which is executed by the police or another legal enforcement agencies³⁰.

The conditions provided by the Polish law are as follows:

- the accused was correctly cautioned in writing about his duties;
- the accused was dully subpoenaed and warned that his/her presence is mandatory;
- the accused failed to appear;
- the accused failed to provide excuse or the excuse was not accepted by the court³¹.

3. Persons against which the order of appearance can be issued. In the Romanian legal system (*art. 265 N.Cr.P.C.*), the issuance of the order of appearance in criminal matters can be effected against *any person* who has been previously subpoenaed, has not appeared without reason in front of the judicial body and whose hearing or presence is needed. Also, the Code provides for a new situation in which the person can be brought by virtue of an order of appearance – if the proper subpoenaing has not been possible and the circumstances indicate unequivocally that the person is absconding from the reception of the subpoena.

Concluding, it can be said that the issuance of an order of appearance is not restricted to witnesses only. From this point of view the order of appearance can be issued for witnesses, but also for experts, interpreters, aggrieved parties or damaged third parties etc.

standards to achieve a more effective judicial system" Project, General Directorate "Security", Ministry of Justice (Bulgaria).

²⁸ Special regulations concerning immediate compulsory bringing during the trial are provided for in *art. 276§1 of the Polish Criminal Procedure Code* (immediate compulsory bringing to the trial of the accused who, after giving testimony, left the trial without permission of the presiding judge) and *art. 282 of the Polish Criminal Procedure Code* (immediate compulsory bringing to the court of the accused who did not attend the trial - within the competence of the presiding judge).

²⁹ See „*Compulsory bringing of persons to judicial authorities on the ground of Polish legal system*”, D. Mazur, p. 10, 14, expert report presented at the Compulsory bringing of persons to judicial authorities Workshop on 24th – 26th of October 2013, in Sofia (Bulgaria), as part of the “*Capacity building of General Directorate Security staff in line with international standards to achieve a more effective judicial system*” Project, General Directorate “Security”, Ministry of Justice (Bulgaria).

³⁰ See „*Compulsory bringing of persons to judicial authorities on the ground of Polish legal system*”, D. Mazur, *op.cit.*, p. 5.

³¹ See „*Compulsory bringing of persons to judicial authorities on the ground of Polish legal system*”, D. Mazur, *op.cit.*, p. 14.

The wording „*any person who has been previously subpoenaed*” employed in the law text allows for a broad interpretation of the persons who can be brought by virtue of an order of appearance in front of the judicial authorities, the issuing authorities having to decide on the need of ordering the compulsory bringing of a person, whereas the need and the justification for the issuance of the order of appearance have to be found in the document by virtue of which the order of appearance is issued (prosecutor’s resolution or the court minutes).

By way of derogation from the general rule, the suspect or the defendant can be brought by virtue of an order of appearance even if he/she was not subpoenaed, if this measure is needed for settling the case, as it is provided for in *art. 265 para. 1 N.Cr.P.C.* If the judicial body considers that the presence of the suspect/defendant is needed, it can also order his/her bringing *by virtue of an order of appearance even in those cases in which the law allows for the representation of the suspect/defendant according with art. 96 N.Cr.P.C.*

Also, the Code contains a more than welcome provision, namely the obligation of the judicial authority to notify the *suspect/defendant* about his/her obligation to appear in front of the judicial bodies, being warned that in case of default of appearance an order of appearance can be issued against the person and that in case of absconding from justice the court can order the person’s arrest [*art. 108 para. 2.a) N.Cr.P.C.*].

During the trial, the court can order the bringing of the defendant by virtue of an order of appearance, if it considers that his presence is needed (*art. 364 para. 5 N.Cr.P.C.*).

The Romanian law does not provide for any derogation from the common law of the civil law systems concerning the compulsory bringing of underaged children.

However, the Code provides for some special rules which regulate the behaviour of the underaged child who is a suspect or a defendant.

When the suspect/defendant is an underaged *child who is younger than 16*, on occasion of any hearing or appearance of the underaged child in front of the criminal prosecution authority, it shall subpoena the parents and, if case be, the legal custodian, guardian or the person who is in charge with the upbringing or monitoring of the underaged child, as well the General Direction for Social Assistance and Child Protection from the town where the hearing takes place. When the suspect or the defendant is an underaged child older than 16, these persons shall be subpoenaed if the judicial authorities consider this appropriate. In any case, the fact that the persons who have been legally subpoenaed to assist at the hearing or confrontation of the underaged child do not appear, does not hinder the performance of these acts. (*art. 505 N.Cr.P.C.*)

Similarly, *during the trial*, except to the parties, subpoenas shall be sent to the Probation Office, the underaged child’s parents or, as case be, the legal custodian, guardian, the person who is in charge with the upbringing and monitoring of the child, as well as other persons who have the right and are obliged to give explanations, come up with requests and proposals concerning the measures which shall be taken. The fact that the persons who have been legally subpoenaed do not enter the proceedings does not hinder the judgment. (*art. 508 N.Cr.P.C.*)

With regard to the *witness*, similarly to the provisions set out for the suspect or defendant, the judicial body must inform him/her about the obligation to appear in front of the judicial authorities, being warned that in case of non-compliance with this obligation an order of appearance can be

issued against him/her [art. 120 para. 2.b) N.Cr.P.C.].

According with the applicable legal provisions which regulate the hearing of the witness, expert or interpreter during the trial - art. 381 para. 8 and 11 N.Cr.P.C., if one or more *witnesses* are not present, the court can order either the continuation of the trial or the postponement of the case. The witness whose absence is not justified can be brought by enforcing an order of appearance. These provisions apply correspondingly also in case of the hearing of *the expert or the interpreter*.

The order of appearance (as well as the judicial fine) can be ordered against *the representative of the legal person or its mandatary*.

Art. 283 para. 2 and 4.b) N.Cr.P.C. concerning judicial infringements allows for the sanctioning of the unjustified default of appearance of the witness, aggrieved party, civil party or damaged third party with a judicial penalty ranging from 250 lei to 5.000 lei and if the unjustified default of appearance is committed by the expert or the interpreter, the judicial penalty ranges from 500 lei to 5.000 lei.

A fine from 250 lei to 5.000 lei can also be applied for leaving without permission or a justified reason the place where the person is to be heard. (art. 283 para. 2 N.Cr.P.C.)

➤ In *Austria*, individuals who by law have to appear before the court and fail to do so eventually have to be brought by force. Compulsory bringing, of course, will constitute regularly an infringement of the fundamental right to personal freedom, since this act includes, as the case may be, the application of immediate force and thus the limitation of movement for the concerned

person. The legal framework regarding compulsory bringing, indeed, provides for rules where and in which cases compulsory bringing has to be applied, but remains silent on the act (execution of this coercive measure) itself³².

In principle, *the witnesses and the suspects or defendants* who are on the loose have to be subpoenaed for hearings, which applies both for the pre-trial and the main-trial (art. 153 of the *Criminal Procedure Code of Austria*). Compulsory bringing only is admissible if the duly subpoenaed person does not appear and if he/she was cautioned about the consequences. An exception is made for suspect or accused if there are sound reasons for the assumption that he/she may elude justice by fleeing or in cases of danger of collusion. In these cases the compulsory bringing may be ordered without prior subpoena³³.

Compulsory bringing can be applied also for court *experts and interpreters* in cases of unjustified default of appearance. In this sense, according to art. 242 of the *Criminal Procedure Code of Austria*, if witnesses or experts, despite having been subpoenaed, do not appear at the court trial, the president can order their immediate bringing.

➤ In *Bulgaria*, in criminal proceedings, the failure of *a defendant or of a witness* to appear before a judicial system body is ensured by compulsory bringing.

According to art. 71 para. 1 of the *Criminal Procedure Code of Bulgaria*, where the accused fails to appear for interrogation without good reasons, he/she shall be brought in by compulsion where their appearance is mandatory, or where the competent body finds this to be necessary. The accused may be brought in by

³² See „*Compulsory Bringing of Witnesses and Accused Persons from an Austrian Perspective*”, Dr. G. Walchshofer, *op. cit.*, p. 1.

³³ See „*Compulsory Bringing of Witnesses and Accused Persons from an Austrian Perspective*”, Dr. G. Walchshofer, *op. cit.*, p. 15

compulsion without prior subpoenaing³⁴ where he/she have absconded or has no permanent residence.

➤ In **Poland**, a compulsory bringing order can be issued against *the suspect, accused, witness, expert, interpreter or specialist*³⁵.

Compulsory bringing of the *accused* is done according to the general provision of *art. 75§2 of the Polish Code of Criminal Procedure*, the measure being applied only in respect to the accused who was correctly cautioned in writing about his rights and duties prior to his/her first examination during preparatory proceedings or by the court. Compulsory bringing can be ordered for any kind of procedural action with mandatory presence of the accused at the stage of preparatory proceedings or at the stage of court proceedings³⁶.

Polish Code of Criminal Procedure introduces a wide range of measures aiming to force subpoena persons to perform their procedural duties or to punish them for wrongdoing in this respect. Those provisions are applicable to *witnesses, experts, interpreters and specialists*. Amongst those measures there is the compulsory bringing measure, applicable to the *witnesses*. Only in exceptional cases it can be applied to *experts, interpreters,*

specialists. For example when there is no possibility to replace expert's opinion by opinion of another expert or there is no possibility to hire another interpreter or specialist, than those who were originally subpoenaed³⁷.

4. Enforcement of the warrant.

Concerning the enforcement of the order of appearance, we would like to note that the new Code has a more flexible approach of the institutions competent to enforce them and does not detail expressly these institutions, but merely mentions the fact that they are represented by the *judicial police forces and any other public order authorities [such as the police³⁸, gendarmerie (riot police) or local (community) police³⁹]*. No matter which of these authorities enforce the warrant, the activities carried out on occasion of the enforcement of the order of appearance shall be recorded in a minutes which has to provide information about: full name and capacity of the person who drafts the minutes; the place where it is drafted; mentions about the activities carried out (*art. 266 para. 1 and 6 N.Cr.P.C.*).

The police force vested with the enforcement of the order of appearance goes to the address indicated in the warrant, presents the warrant to the person who shall

³⁴ According to *art. 178 para. 1 and 2 of the Criminal Procedure Code of Bulgaria*, subpoenas, notifications and papers shall be served by officials of the respective court, the pre-trial authorities, municipality or mayor's offices. Where service cannot be performed in such a way, it shall be carried through the services of the Ministry of the Interior or of the Ministry of Justice.

³⁵ See „*Compulsory bringing of persons to judicial authorities on the ground of Polish legal system*”, D. Mazur, *op.cit.*, p. 7.

³⁶ See „*Compulsory bringing of persons to judicial authorities on the ground of Polish legal system*”, D. Mazur, *op.cit.*, p. 13-20

³⁷ See „*Compulsory bringing of persons to judicial authorities on the ground of Polish legal system*”, D. Mazur, *op.cit.*, p. 21, 23.

³⁸ Art. 31 para. 1.d) of Law No. 218/2002 concerning the organisation and functioning of the Romanian Police, published in the *Official Journal of Romania*, Part I, No. 305 of 9th of May 2002, as subsequently amended and completed, provides for the obligation of the *police* to enforce the orders of appearance issued in accordance to the legal provisions.

³⁹ Art. 6.j) of the Local Police Law No. 155/2010, published in the *Official Journal of Romania*, Part I, No. 488 of 15th of July 2010, as subsequently amended and completed, provides for the obligation of the *local police* to enforce only orders of appearance issued by the criminal prosecution authorities and courts within a certain jurisdiction and which refer to persons residing within that jurisdiction.

be brought in front of the judicial authority⁴⁰ and accompanies the person to the place indicated in the warrant. The enforcement of the order of appearance involves, as a matter of principle, the actual bringing of the person to the issuing body and in case of refusal, the use of public force⁴¹.

If the person referred to in the order of appearance cannot be brought because of medical reasons and if the person vested with the enforcement of the order of appearance does not find the person referred to in the order of appearance at the address indicated, he shall make inquiries and if not successful, in both situations he has the obligation to draft a record about the impossibility to enforce the order, which is to be forwarded immediately to the criminal prosecution body or to the court⁴² (*art. 266 para. 3 and 4 N.Cr.P.C.*).

Finally, *art. 266 para. 5 N.Cr.P.C.* provides for special rules applying to armed forces staff, stating that the enforcement of the orders of appearance concerning military staff is performed by the commander of the military unit, the commander of the garrison and by the military police.

It should be mentioned that, according with the provisions of *art. 283 para. 1.b) N.Cr.P.C.* concerning judicial infringements, non-fulfillment or wrong fulfilment by the judicial police forces or by any other public order authorities of the duty

of the personal delivery or service of subpoenas or other procedure acts, as well as the non-enforcement of the order of appearances, during the trial is considered to be judicial infringement and is sanctioned by judicial fine ranging from 100 lei to 1.000 lei.

➤ **Austria.** Since court organs do not exert by themselves immediate force for criminal proceedings the Austrian judiciary relies throughout on the *police*. The legal and doctrinal basis for this co-operation between the judiciary and the police is *art. 22 of the Austrian Federal Constitution Law* and *art. 76 para. 1 of the Criminal Procedure Code of Austria*⁴³.

➤ In **Bulgaria**, in criminal proceedings, the failure of a defendant or of a witness to appear before a judicial system body is ensured by compulsory bringing.

The General Directorate “Security”, a body which is organised under the Minister of Justice, has the competence to render assistance to judicial system bodies in subpoenaing of persons in cases where the implementation of this obligation has been obstructed, on the one hand and to bring individuals to a judicial system body by compulsion where this has been ruled by a judicial system body, on the other hand. (*art. 391 para. 1 and 3 Judicial System Act of Bulgaria*)

⁴⁰ It should be noted that the place where the person has to be brought does not necessarily have to be the headquarters of the issuing authority, but rather the place where the issuing authority ordered the person to be brought (for example a secondary headquarter, territorial office, crime scene, etc.)

⁴¹ Ghe. Mateuț, *Tratat de procedură penală. Partea generală. (Criminal procedure treaty. The General Part.)* Volume II, C.H.Beck Publishing House, Bucharest, 2012, p. 783.

⁴² The new text is much preciser and clearer, as the previous Code made mention about „any other reason”. The previous wording was criticized just because of the use of the „any other reason” had the order of appearance not essentially different from the subpoena, as the police agent as enforcement authority could not use, except for the situation provided for in *art. 184 para. 3¹ Cr.P.C.*, compulsory means against the person who refused to be picked up and brought by virtue of the order of appearance. (Ghe. Mateuț, *op. cit.*, p. 784)

⁴³ See, „*Compulsory Bringing of Witnesses and Accused Persons from an Austrian Perspective*”, Dr. G. Walchshofer, *op. cit.*, p. 2.

Art. 22 of the Austrian Federal Constitution Law: “All authorities of the Federation, the Länder [federal states] and the municipalities are bound within the framework of their legal sphere of competence to render each other mutual assistance.”

The competence of the General Directorate "Security" to enforce compulsory bringing when this measure is ordered by a judicial system body concerns both trial and pre-trial stage.

During the pre-trial stage, the compelled attendance of persons, witnesses and defendants, before the investigating police is ensured by the police.

Military service officers shall be brought in by the respective military bodies.

The procedure for enforcing an order of appearance for the witness is the same as the one prescribed by the law for the accused.

➤ In *Poland*⁴⁴, the *police and other authorized law enforcement agencies* have the competence to enforce the compulsory bringing of a person, having the right to check the identity of concerned person⁴⁵, apprehend persons in cases indicated in Criminal Procedure Code and other statutory regulations⁴⁶, conduct a search of persons and premises in cases indicated in Criminal Procedure Code⁴⁷ and the right to use coercive measures and firearms⁴⁸ in cases indicated in the Coercive Measures Act⁴⁹.

5. Use of force. The possibility of entering a person's domicile or company's headquarters. Unlike the previous Code, the

N.Cr.P.C. stipulates expressly that the means of coercion can be used against any person: the person vested with the enforcement of the warrant serves the warrant to the person who is the subject of the order of appearance and requests the person to accompany him. In case the person indicated in the warrant refuses to join the person invested with the enforcement of the warrant or tries to flee, the person shall be brought by coercion⁵⁰ (*art. 266 para. 1 N.Cr.P.C.*).

The *coercion* that can be used with a view to enforcing the order of appearance can only be physical coercion, the mental coercion being inherent to the voluntary compliance with the enforcement of the order of appearance. The use of force by the enforcement bodies is performed with a clear aim, that is as much as needed for the enforcement of the warrant, namely for bringing the subject of the order of appearance in front of the criminal prosecution authority or in front of the court which subpoenaed or notified him, in compliance with certain limits, as for example those imposed by article 3 of the European Convention⁵¹.

The conventional character of the legal provisions which allow for the enforcement

⁴⁴ See „*Compulsory bringing of persons to judicial authorities on the ground of Polish legal system*”, D. Mazur, *op.cit.*, p. 46-57.

⁴⁵ *Art. 15.1.1 of the Polish Police Act* - Act of 6 April 1997 about the Police; consolidated text published in Official Journal of Law 2011 No 287, item 555 and § 1 p.4-7 of “*Polish Police Selected Powers Ordinance*” - Ordinance of Council of Ministers from 26 July 2005 about way of exercising selected powers by police force, published in Official Journal of Law 2005 No 141, item 1186.

⁴⁶ *Art. 15.1.2 of the Polish Police Act.*

⁴⁷ *Art. 15.1.4 of the Polish Police Act.*

⁴⁸ *Art. 16 of the Polish Police Act.*

⁴⁹ Act of 24 May 2013 about the Coercive Measures and Firearm, published in Official Journal of Law 2013, item 628 [“the Coercive Measures Act”].

⁵⁰ The new provisions are very much different from the repealed Code. In the previous law, despite the fact that the text stipulated that the order of appearance can be issued against any person, it expressly regulated the case in which the accused, defendant or witness refused to obey the order of appearance or tried to flee; in such cases, the person shall be brought by coercion in front of the criminal prosecution authorities or in front of the court. This means that the Romanian law-maker, despite the fact that it allowed for the issuance of an order of appearance against any person who needed to be heard or to be present within the criminal proceedings, the use of means of coercion for the enforcement of the order of appearance could only be legitimate against the accused or defendant and witness.

⁵¹ Ghe. Mateuț, *op. cit.*, p. 780.

of the order of appearance by using means of coercion has been looked at in the specialized literature⁵², which noted, on the one hand, that in case the suspect or defendant refuses to enter the hearing or tries to flee, the police or gendarmerie forces can order within the enforcement of the order of appearance the detention of the persons in the sense of art. 5 para. 1 of the European Convention and the compulsory bringing of the persons in front of the criminal prosecution authority or in front of the court. On the other hand, there is a deprivation of liberty, strictly subject to the aim of the hearing by the criminal prosecution authorities or by the court, given that according with *art. 265 para. 11 N.Cr.P.C.* persons brought by virtue of order of appearances are "at the disposal" of the judicial body. The author considers that only if the order of appearance is ordered by the court, the measure of the deprivation of liberty complies with the requirements of art. 5 para. 1.b) of the European Convention. Having regard to the fact that by this measure a deprivation of liberty in the sense of art. 5 para. 1.b) can be achieved, the court is obliged to justify the decision by which it orders the issuance of the order of appearance, in order to remove any free will in the field of deprivation of liberty.

Based on the provisions of the repealed Code, the literature⁵³ has noted, justifiably, some deficiencies in the regulation of the procedure of the enforcement of the order of

appearance. If the provisions introduced by Law No. 281/2003 did respond to the practical needs of the compulsory enforcement of an order of appearance, in cases in which the accused or defendant refused to obey the warrant, the situation was not the same when any other person than the accused or defendant or witness refused to obey the warrant or when the subject of the warrant was found at his place of residence or even at another person's place of residence and refused to allow for the police agent to enter the premises⁵⁴, thus implicitly defying the warrant, cases in which, according to former regulations, the enforcement of the order of appearance was in practice impossible.

In this sense, *art. 265 para. 4-9, N.Cr.P.C.* solved the difficulties met in the practice concerning the enforcement of the warrant, as it provides for the possibility of entering a person's domicile or company's headquarters without the subject's consent with a view to enforce the order of appearance, which can be ordered during the criminal prosecution stage at the justified request of the prosecutor by the so called „liberty and custody judge” (French system: *juge des libertés et de la détention*) from the court which would be competent to judge the case in first instance or from the same level of jurisdiction court where the prosecution office is situated where the prosecutor comes from or, during the trial, by the court.

⁵² M. Udriou, O. Predescu, *Protecția europeană a drepturilor omului și procesul penal român (European protection of human rights and Romanian criminal trial)*, C.H.Beck Publishing House, Bucharest, 2008, p. 406-407.

⁵³ Ghe. Mateuș, *op. cit.*, p. 785; I. Rusu, *Executarea mandatului de aducere. Opinii critice. Propuneri de lege ferenda (The enforcement of the order of appearance. Critical opinions. Lege ferenda amendments) (I)*, Dreptul Magazine, No. 6/2004, p. 189-192; T. Hâj, *Executarea mandatului de aducere. Opinii critice. Propuneri de lege ferenda (The enforcement of the order of appearance. Critical opinions. Lege ferenda amendments) (II)*, Dreptul Magazine, No. 6/2004, p. 192-195.

⁵⁴ In this context the text of art. 27 para. 1 of the Romanian Constitution is relevant, saying that „the domicile or residence are inviolable, so that no one can enter or stay in the domicile or residence of a person without the person's consent”. The exceptions are strict interpretations and are provided for in para. 2 of art. 27 of the Constitution: a) carrying into execution a warrant for arrest or a court decree; b) removing a risk to someone's life, physical integrity, or a person's assets; c) defending national security or public order; d) preventing the spread of an epidemic.

The request filed during the criminal prosecution stage concerning the issuance of an order of appearance is looked at in closed session (not public) without having subpoenaed the parties, the judge ordering the admission or dismissal of the request by virtue of a final minutes.

With a view to enforcing the warrant issued by the „*liberty and custody judge*” or by the court, the competent authorities can enter the home or headquarter of any person where there is an indication that the person sought for is likely to be found, in case the person refuses to cooperate, hinders the enforcement of the warrant or for any other grounded reason in proportion with the aim of the warrant (*art. 266 para. 2 N.Cr.P.C.*).

The performance of a house search with a view to catching the suspect is provided for expressly in *art. 157 para. 1 N.Cr.P.C.*

This situation in which there is no information on the suspect or defendant’s location has to be distinguished from the order of appearance where there is a suspect or defendant in the case and his domicile or residence is known. The house search can be ordered during the criminal prosecution by the “*liberty and custody judge*” and within the trial by the court (*art. 158 N.Cr.P.C.*).

6. Mandatory forensic expertise. Criminal Procedure Code. *Art. 184 N.Cr.P.C.* provides for certain cases in which the performance of a psychiatric assessment is mandatory and should be done in specialized medical facilities.

In case the suspect or defendant refuses during the criminal prosecution or the trial the performance of the mandatory psychiatric forensic assessment (*art. 184 para. 4 N.Cr.P.C.*) or does not show up for the examination with the psychiatric forensic commission, the prosecutor, the „*liberty and custody judge*” (at the request of

the criminal investigation authority) or the court will *ex officio* issue an order of appearance for the appearance in front of the psychiatric forensic commission.

If it considers that an exhaustive examination is needed, which requires the hospitalization of the suspect or of the defendant in a specialized medical facility and the person refuses the hospitalization, the forensic commission has to inform the criminal prosecution authority about the need for the measure of involuntary hospitalization for a period of maximum 30 days, which can be extended only once, for 30 days at the most. The period in which the suspect or the defendant was hospitalized in a special facility for the performance of the psychiatric assessment will be deducted from the duration of the penalty according with *art. 72 of the Criminal Code*.

As mentioned in the case-law of the Constitutional Court⁵⁵ „*the examination of art. 117 Cr.P.C. [currently, art. 184 N.Cr.P.C.] reveals the fact that this does not introduce a criminal law sanction, but a process related measure which judicial authorities have to enforce when there are doubts concerning the mental state of the accused or defendant and when the performance of a psychiatric assessment is considered to be necessary. The need for hospitalization is determined by the fact that the assessment is carried out in specialized medical facilities, (...) and the hospitalization and examination of the accused or defendant are carried out both in his interest and for «the accomplishment of the criminal instruction» referred to in art. 49 para. 1 of the Constitution [which became art. 53 after the republication of the Constitution in 2003].*”

If the person against whom the measure of placing in a medical facility for the purpose of performance of the

⁵⁵ *Constitutional Court Decision No. 76/1999*, published in the *Official Journal of Romania*, Part I, no. 323 of 6th of July 1999.

assessment was ordered considers that the measure was ordered illegally or that the hospitalization period exceeded the necessary time and has thus led to harming his legitimate interests, the person can complain against the measure in compliance with *art. 339-341 N.Cr.P.C.* or can go directly to court. In such circumstances, the measure of hospitalization for the time necessary is in compliance with art. 53 para. 1 of the Constitution which says that the exercise of some rights and freedoms can only be restricted by law and only if it is necessary, among other things, for the accomplishment of the criminal instruction. Furthermore, the provisions of para. 2 of art. 53 of the Constitution are also met, the limitation being proportional with the situation which caused it.

Concerning the procedure for placing the accused/defendant in a hospital for the performance of the mandatory psychiatric assessment, the specialized literature⁵⁶ considers that this is a deprivation of liberty in the sense of the ECHR and that the *de lege lata* regulation violates the provisions of art. 5 para. 1.b) ECHR because:

- o it is not a deprivation of liberty ordered by a judge;
- o it has a punitive character and does not aim at executing an obligation which a person has and which the person did not meet, even though it could have met;
- o it does not offer any guarantee against the arbitrary, as the custodial measure can extend over an uncertain period of time;
- o it does not regulate the possibility of a control of the legality or opportunity of the deprivation of liberty by a judge.

➤ In *Bulgaria*, according to *art. 337 para. 1 of the Civil Procedure Code of*

Bulgaria, the person whose interdiction is sought shall be heard by the court in person and, if necessary, shall be brought by compulsion. Where the person is in hospital and the state of their health state does not permit to be brought in person at the hearing, the court shall be obliged to acquire immediate impression of the person's condition.

The Health Act, in art. 165 para. 2, regulates the execution of a court order for compulsory commitment of a person for treatment or of a court ruling for performance of expert. In this sense, the effective court order for compulsory commitment and treatment, as well as the court ruling to appoint a forensic psychiatric examination shall be implemented by the respective medical facilities, and where necessary with the assistance of the Ministry of Interior.

III. European Convention for the Protection of Human Rights and Fundamental Freedoms. European Court of Human Rights case-law.

1. European Convention for the Protection of Human Rights and Fundamental Freedoms. Human rights protection is of paramount importance in the present days. In this respect, special attention needs to be given to the protection of the persons deprived of their liberty as they are in a fragile position and it is the duty of the state to ensure the full respect of their fundamental rights. The European system established by the Council of Europe constitutes a bulwark in protecting the fundamental rights and freedoms of the persons deprived of their liberty⁵⁷.

⁵⁶ M. Udriou, O. Predescu, *op. cit.*, p. 409-410

⁵⁷ R.-F. Geamănu, *Use of force and instruments of restraint – an outline of the Romanian legislation in the European context*, The International Conference CKS-CERDOCT Doctoral Schools, Challenges of the Knowledge Society, Bucharest, April 15-16, 2011, CKS-CERDOCT eBook 2011, Pro Universitaria Publishing House, 2011, p. 112,

The unconditional terms of article 3 also mean that there can never, under the Convention or under international law, be a justification for acts which breach the article. In other words, there can be no factors which are treated by a domestic legal system as justification for resort to prohibited behaviour – not the behaviour of the victim, the pressure on the perpetrator to further an investigation or prevent a crime, any external circumstances or any other factor⁵⁸.

In assessing some cases of use of force or instruments of restraint, the European Court of Human Rights defined the conditions in which the policemen or prison officers may use these means. On the one hand, it is obvious that the use of a certain amount of force in case of resistance to arrest, an attempt to flee or an assault on an officer or fellow prisoner may be inevitable. On the other hand, the form, as well as the intensity of the force used should be proportionate to the nature and the seriousness of the resistance or threat⁵⁹.

In its jurisprudence the ECtHR stressed out repeatedly that persons deprived of their liberty are vulnerable and it is the duty of the national authorities to protect their physical well-being, whereas the use of physical force or other means of restraint have to be strictly necessary and have to be required by the prisoner's own conduct. In other words, in respect of a person deprived of his or her liberty any recourse to physical force which has not been made strictly

necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in article 3 of the Convention⁶⁰.

The use of means of restraint in other circumstances than those provided by the Convention or by the Strasbourg case-law diminishes human dignity and is, in principle, an infringement of the right set forth in article 3 of the Convention. In this sense, Romania was convicted in some cases before the European Court, as the use of force or other instruments of restraint was not legal and proportionate to the nature and the seriousness of the resistance or threat⁶¹.

According to the well-established case-law of the Court, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see, *inter alia*, *Price v. the United Kingdom*, no. 33394/96, § 24, ECtHR 2001-VII). In order for a punishment or treatment associated with it to be “inhuman” or “degrading”, the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment (see *Labita v. Italy* [GC], no. 26772/95, § 120, ECtHR 2000-IV)⁶².

available at: http://cerdoct.univnt.ro/index.php?option=com_content&view=article&id=54&Itemid=63&dir=JSROOT%2FCKS%2F2011_15_16_aprilie&download_file=JSROOT%2FCKS%2F2011_15_16_aprilie%2FCKS_CERDOCT_2011_eBook.pdf, accessed 01.03.2014.

⁵⁸ A. Reidy, *The prohibition of torture. A guide to the implementation of Article 3 of the European Convention on Human Rights*. Human rights handbooks, No. 6, Directorate General of Human Rights, Council of Europe, 2002, p. 19, available at: <http://echr.coe.int/NR/rdonlyres/0B190136-F756-4679-93EC-42EEBEAD50C3/0/DG2ENHRHAND062003.pdf>, accessed 25.02.2014.

⁵⁹ P. van Dijk, F. van Hoof, A. van Rijn, L. Zwaak, editors, *Theory and practice on the European Convention on Human Rights*, 4th edition, Intersentia Publishing House, Antwerpen-Oxford, 2006, p. 426.

⁶⁰ ECtHR judgement from December 4, 1995, final, in the case of Ribitsch v. Austria (1), para. 38.

⁶¹ R.-F. Geamănu, *op. cit.*, p. 116.

⁶² ECtHR, judgment from November 20, 2012, in the case of *Ghiurău v. Romania*, para. 52-53.

From the *procedural point of view*, where an individual raises an arguable claim that he has been seriously ill-treated in breach of article 3 of the Convention, the member state has an obligation to initiate a thorough, prompt, independent and effective investigation, which should be capable of leading to the establishment of the facts of the case and, if the allegations prove to be true, to the identification and punishment of those responsible. This means that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions. They must take all reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence etc. Any deficiency in the investigation which undermines its ability to establish the cause of injuries or to identify the persons responsible will risk falling foul of this standard. For an effective investigation into alleged ill-treatment by state agents, such investigation should be independent⁶³. In considering all these aspects, the Court found a violation of article 3 of the Convention under its procedural head in several cases against Romania, as the national authorities failed to fulfill their obligation to conduct a proper official investigation into the applicant's allegations of ill-treatment, capable of leading to the identification and punishment of those responsible⁶⁴.

Article 5 of the Convention sets out a fundamental right, namely the protection of

the individual against arbitrary interference by the State with his or her right to liberty.

Persons deprived of their physical liberty shall mean, in accordance with the ECtHR case-law, persons who are deprived of their liberty in accordance with a procedure prescribed by law by arrest or detention. So, in this sense, all the principles set out by the Strasbourg Court regarding the use of force and instruments of restraint against persons deprived of their liberty will apply in all the cases mentioned in art. 5 para. 1 of the Convention⁶⁵.

In proclaiming the "*right to liberty*", paragraph 1 of art. 5 contemplates the physical liberty of the person; its aim is to ensure that no one should be deprived of that liberty in an arbitrary fashion. Sub-paragraphs (a) to (f) of art. 5 para. 1 contain an exhaustive list of permissible grounds on which persons may be deprived of their liberty, and no deprivation of liberty will be lawful unless it falls within one of those grounds. The Court also reiterates that in order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5, the starting point must be his concrete situation, and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation of and restriction upon liberty is merely one of degree or intensity, and not one of nature or substance (see *Austin and Others v. the United Kingdom* [GC], nos. 39692/09, 40713/09 and 41008/09, § 57, 15 March 2012)⁶⁶.

⁶³ ECtHR judgement from January 26, 2006, final, in the case of *Mikhenyev v. Russia*, para. 107-108 and 110.

⁶⁴ *Barbu Anghelescu v. Romania*, ECtHR judgement from October 5, 2004, final, para. 70; *Bursuc v. Romania*, ECtHR judgement from October 12, 2004, final, para. 110; *Dumitru Popescu (no.1) v. Romania*, ECtHR judgement from April 26, 2007, final, para. 78-79; *Cobzaru v. Romania*, ECtHR judgement from July 26, 2007, final, para. 75; *Alexandru Marius Radu v. Romania*, ECtHR judgement from July 21, 2009, final, para. 47 and 52; *Boroancă v. Romania*, ECtHR judgement from June 22, 2010, final, para. 50-51

⁶⁵ R.-F. Geamănu, *op. cit.*, p. 114.

⁶⁶ ECtHR, judgment from November 20, 2012, in the case of *Ghiurău v. Romania*, para. 76-78

Regarding the deprivation of liberty with a view to guaranteeing the enforcement of a legal obligation⁶⁷ the European Court of Human Rights showed⁶⁸ that there has to be a violation of an obligation which a person has and which the person could have met and the deprivation of liberty has to be imposed in order to ensure the execution of that obligation and is not of a punitive nature. The obligation has to be a lawful obligation, it has to have a specific and concrete, not a general character, it has to meet the requirements of the European Convention and it must have emerged prior to the date of the deprivation of liberty. Furthermore, there has to be some proportionality between the importance within a democratic society of ensuring the immediate enforcement of an obligation and the importance of the right to liberty, the term of the detention being a relevant factor in establishing this proportionality. Other key factors in this respect are: the nature of the obligation arising from the relevant legislation including its underlying object and purpose; the person being detained and the particular circumstances leading to the detention; and the length of the detention⁶⁹.

In the Romanian law, for example, there can be such a *limitation or even deprivation of liberty in case of an order to bring the person in front of the criminal prosecution authorities or in front of the court or in case of hospitalisation with a view to performing the compulsory psychiatric expertise.*

2. European Court of Human Rights case-law. As regards Romania's convictions by the European Court of Human Rights we would like to note that they mainly concerned the enforcement of orders of

appearance [ECtHR judgement from 23 February 2012, Grand Chamber, final, in the case of *Creangă v. Romania*; ECtHR judgement from 20 November 2012, final, in the case of *Ghiurău v. Romania*].

Of course, the study will also assess other ECtHR judgements given against other Member States on the topic of compulsory bringing in criminal matters (ECtHR judgement from March 27, 2012, final, in the case of *Lolova-Karadzova v. Bulgaria*).

Further below we will present some of the essential elements concerning subject matters and legal issues considered by the Court in Strasbourg in the cases brought against Romania concerning the violation of art. 5 of the Convention, but also some subject matter related to elements extracted from the communicated cases regarding Romania (*Gabriel Aurel Popoviciu v. Romania. Application no. 52942/09, lodged on 16 September 2009; Iustin Robertino Micu v. Romania. Application no. 41040/11, lodged on 22 June 2011; Valerian Dragomir v. Romania. Application no. 51012/11, lodged on 3 August 2011*).

➤ In the case of ***Creangă v. Romania (Grand Chamber)*** the applicant alleged, in particular, that his deprivation of liberty from 9 a.m. to 10 p.m. on 16 July 2003 had been unlawful, as had his subsequent placement in pre-trial detention. He relied in particular on art. 5§1 of the Convention. (*para. 3*)

What is relevant in relation to the present study is the fact that the Court found that there had been a violation of *art. 5§1 of the Convention* on account of the applicant's deprivation of liberty on 16 July 2003, at least from 12 noon to 10 p.m. and, also, on

⁶⁷ For details see M. Udroui, O. Predescu, *op. cit.*, p. 404-406.

⁶⁸ See ECtHR, judgment from March 24, 2005, in the case of *Epple v. Germany*, para. 43-45; ECtHR judgement from September 25, 2003, in the case of *Vasileva v. Denmark*, para. 36-37; ECtHR, judgment from February 22, 1989, in the case of *Ciulla v. Italy*, para. 36.

⁶⁹ See ECtHR judgement from September 25, 2003, in the case of *Vasileva v. Denmark*, para. 38.

account of the applicant's placement in pre-trial detention on 25 July 2003.

The Court (Grand Chamber) reiterated its established case-law to the effect that art. 5§1 may also apply to deprivations of liberty of a very short length (see *Foka v. Turkey*, no. 28940/95, § 75, 24 June 2008) and noted that in the instant case, it is not disputed that the applicant was summoned to appear before the National Anti-Corruption Prosecution Service headquarters (NAP) and that he entered the premises of the prosecution service at 9 a.m. to make a statement for the purpose of a criminal investigation. (*para. 93, 94*)

The Court noted further that the applicant was not only summoned but also received a verbal order from his hierarchical superior to report to the NAP. Subsequently, the Court stated that, while it cannot be concluded that the applicant was deprived of his liberty on that basis alone, it should be noted that in addition, there were other significant factors pointing to the existence of a deprivation of liberty in his case, at least once he had been given verbal notification of the decision to open the investigation at 12 noon: the prosecutor's request to the applicant to remain on site in order to make further statements and participate in multiple confrontations, the applicant's placement

under investigation during the course of the day, the fact that seven police officers not placed under investigation had been informed that they were free to leave the NAP headquarters since their presence and questioning was no longer necessary, the presence of the gendarmes at the NAP premises and the need to be assisted by a lawyer. (*para. 97*)

Concluding, the Court found that the applicant did indeed remain in the prosecution service premises and was deprived of his liberty, at least from 12 noon to 10 p.m. (*para. 100*) and at least from 12 noon, the prosecutor had sufficiently strong suspicions to justify the applicant's deprivation of liberty for the purpose of the investigation and that Romanian law provided for the measures to be taken in that regard, namely placement in police custody or pre-trial detention; however, the prosecutor decided only at a very late stage to take the second measure, towards 10 p.m. (*para. 109*)

Finally, the Grand Chamber considered that the applicant's deprivation of liberty on 16 July 2003, at least from 12 noon to 10 p.m., had no grounds in domestic law⁷⁰ and that there has therefore been a violation of art. 5§1 of the Convention. (*para. 110*)⁷¹

⁷⁰ For comparison, see the ECtHR judgement from June 24, 2008, in the case of *Foka v. Turkey*, para. 86 – 89: The Court was of the opinion that the applicant was deprived of her liberty in accordance with a procedure prescribed by law “in order to secure the fulfilment of any obligation prescribed by law” within the meaning of art. 5§1.b) of the Convention and reiterated that in this case nothing proved that the deprivation of liberty at stake exceeded the time necessary for searching the applicant's bag, imposing a fine on her and fulfilling the relevant administrative formalities. It accordingly found no appearance of arbitrariness.

Finally, it was to be observed that both at the Ledra Palace crossing point and at the police headquarters, the applicant was clearly requested to give her bag to the police officers who declared that they wanted to search it. Even assuming that the applicant was not given any other oral or written explanation, under these circumstances, the reasons of her arrest should have been clear to her.

Accordingly, the Court ruled that there had not been a violation of art. 5§1 and 2 of the Convention in the case.

⁷¹ The ruling of the Court was the same as the one of the Chamber. In this sense, the Chamber noted in that, having been issued on the basis of a prosecutor's order in accordance with domestic law, the warrant for pre-trial detention could cover only the same period as that specified in the order. In the instant case, although it did not indicate the time from which the measure took effect, that warrant could not constitute a legal basis for the preceding period, which was not mentioned in the order. Consequently, *the Chamber considered that the applicant's deprivation of liberty from 10 a.m. to 10 p.m. on 16 July 2003 had had no basis in domestic law and that accordingly, there had been a breach of art. 5§1 of the Convention. (para. 66, 67)*

The conclusion was the same regarding the applicant's placement in pre-trial detention on 25 July 2003: the Court agreed entirely with the Chamber's conclusions that the applicant's deprivation of liberty on that particular date did not have a sufficient legal basis in domestic law, in so far as it was not prescribed by "a law" meeting the requirements of *art. 5§1 of the Convention*. For the reasons given by the Chamber, it considered that there had been a violation of that provision. (*para. 121*)

➤ A similar situation was acknowledged by the Court in the case of *Lolova-Karadzova v. Bulgaria*, where the applicant alleged, in particular, that her detention from about 10 a.m. on 18 October to 3 p.m. on 19 October 2006 had been in breach of *art. 5§1 of the Convention*. (*para. 3*).

The District Court observing that it was necessary to complete the proceedings within a reasonable time held that the applicant should therefore be brought before it for the next hearing with the assistance of the police. It did not specify any legal ground for this order. It scheduled the next hearing for 19 October 2006 at 3 p.m. Since the applicant's lawyer was present at the hearing, the applicant was considered duly informed of the order. (*para. 13*)

Around 10 a.m. on 18 October 2006 the applicant was detained⁷² by the police and taken to Sofia Prison, where she remained until the next morning. In the morning of 19 October 2006 the applicant was escorted by train and car from Sofia to Asenovgrad (160 km), attended the hearing at 3 p.m. and made submissions, after which she was released. In a judgment of the same date the District Court acquitted her. (*para. 14, 15*)

The Court held that it was not disputed that the applicant remained under the constant supervision and control of the police authorities from about 10 a.m. on 18 October until 3 p.m. on 19 October 2006, or twenty-nine hours, and that she spent a considerable amount of that time in Sofia Prison. The Court was therefore satisfied that she was "deprived of her liberty" within the meaning of *art. 5§1 of the Convention*. (*para. 27*)

The Court noted that the domestic court did not specify the legal grounds for its order and did not state expressly that the applicant's attendance was necessary for establishing the truth pursuant to *art. 269 (2) of the Criminal Procedure Code of Bulgaria* but rather justified it with the need to secure her own procedural rights. Furthermore, the application of *art. 71 (2) of the Criminal Procedure Code of Bulgaria* also appeared problematic since the applicant neither absconded nor was without a permanent address. (*para. 31*)

The Court observed that the applicant was arrested on the day before the hearing and remained in custody for almost thirty hours. The distance between her home town and the town where the hearing was held, 160 km, was not such as to justify such a long period of detention. The Court was not persuaded that the authorities could not have taken less radical measures in order to secure the applicant's attendance in court. Moreover, by arresting her one day earlier they did not even give her a chance to show good faith and comply with the court order of her free will. In view of these circumstances, the Court considered that the authorities failed to strike a fair balance between the need to ensure the fulfilment of the applicant's obligation to attend a court

⁷² According to *art. 71 of the Criminal Procedure Code of Bulgaria*, if the accused party fails to appear for interrogation without good reasons, he/she shall be brought in by compulsion where his/her appearance is mandatory, or where the competent body finds this to be necessary. The accused party may be brought in by compulsion without prior subpoenaing where he/she has absconded or has no permanent residence.

hearing and her right to liberty, thus it considered that there has been a violation of *art. 5§1 of the Convention*. (para. 32, 33)

➤ In the case of *Ghiurău v. Romania* the applicant alleged, among other matters, that he had been subjected to ill-treatment in violation of art. 3 of the Convention and that the authorities had not carried out a prompt and effective investigation of that incident. Relying on *art. 5§1 of the Convention*, he claimed that he had been unlawfully held in police custody between 4 p.m. on 27 November 2006 and 2 a.m. on 28 November 2006. (para. 4)

The compulsory bringing of Mr. Ghiurău raised allegations regarding the eventual violation of *articles 3 and 5§1 of the Convention*.

Regarding the alleged violation of *art. 5§1 of the Convention*, the Court concluded that the measure complained of started at about 4 p.m. on 27 November 2006 and lasted until 1.52 a.m. the following day. Further, it noted that the applicant was guarded by police officers continuously and that at no point during the journey from Borş to Cluj was the applicant allowed to leave of his own free will. It also notes that the applicant was guarded by the police officers also while in hospital and in the ambulance transporting him from Huedin to Cluj Hospital. The Court therefore considered that the applicant was under the authorities' control throughout the entire period, and concludes that he was deprived of his liberty within the meaning of *art. 5§1 of the Convention*. (para. 79, 80)

The Court observed that the prosecutor's order of 27 November 2006 issued on the basis of art. 183§2 of the Romanian Code of Criminal Procedure did

not contain any reason justifying the measure. The Court therefore concluded that by omitting to specify the reasons on which it was based, the prosecutor's order failed to conform to the rules applicable to domestic criminal procedure. Furthermore, the Court doubted whether the applicant's deprivation of liberty and his transport to a city located 200 km from his home, escorted by ten police officers, was necessary to ensure that he gave a statement and considered that the above circumstances disclosed that the applicant was not deprived of his liberty in accordance with a procedure prescribed by domestic law, which renders the deprivation of the applicant's liberty between 4 p.m. on 27 November 2006 and 2 a.m. on 28 November 2006 incompatible with the requirements of *art. 5§1 of the Convention*. (para. 85 - 88)

Concluding, the Court found that there has therefore been a violation of *art. 5§1 of the Convention*.

Regarding the alleged violation of *art. 3 of the Convention*, the Court noted that the applicant was in possession of two medical certificates attesting that he had sustained injuries while in police custody. He lodged a criminal complaint against the police officers whom he accused of subjecting him to degrading and ill-treatment, but the complaint was twice dismissed by the prosecutor on the grounds that there was a lack of evidence that the offences in question had been committed. Furthermore, the Court observed that essential evidence was not gathered or was gathered with delay by the prosecutor, despite clear instructions in this respect from the Ploiesti Court of Appeal, which had twice remitted the case to the Prosecutor's Office⁷³. (para. 59, 65)

⁷³ In particular, the Court noted that the prosecutor questioned the police officers and the applicant's lawyer who had been present at the scene of the incident, but no other witnesses. There is no explanation as to why the medical staff and/or patients of the two hospitals where the applicant was hospitalised, the driver of the ambulance, or the nurse who accompanied him from Huedin to Cluj, had not testified before the domestic authorities. Also, the Court was concerned about the way the prosecutor disregarded the statements made by the applicant's lawyer, who was

Having regard to the mentioned deficiencies identified in the investigation and to the fact that after more than five years since the applicant had lodged his criminal complaint not a single final judicial decision had been taken on the merits of the case, the Court concluded that the State authorities failed to conduct an effective investigation into the applicant's allegations of ill-treatment, thus there has accordingly been a violation of *art. 3 of the Convention*. (*para. 69, 70*)

Short key elements need to be addressed regarding some of the ***communicated cases against Romania*** dealing with the compulsory bringing measure in criminal matters.

In this sense, in the ***Valerian Dragomir v. Romania*** case (application no. 51012/11, lodged on 3 August 2011), invoking *art. 5§1 of the Convention*, regarding the compulsory bringing order, the applicant complained that there was no legal basis for his detention from 9.30 p.m. on 8 February 2011 to 10.30 a.m. on 9 February 2011. In this respect he claimed that a person deprived of liberty on the basis of an order to appear should be immediately brought before the investigation body and heard.

On 8 February 2011 police officers belonging to the National Anticorruption Directorate carried out a search at the applicant's home⁷⁴. The search started at 6 a.m. and lasted about three hours. At about 9 a.m. the police officers informed the applicant that an order to appear before the National Anti-Corruption Prosecution Service had been issued on his behalf, at 9.15 a.m. he was taken to the headquarters of the Timiș County Police Inspectorate, at

about 2 p.m., he was embarked with one hundred other police and customs officers on a bus trip to the National Anti-Corruption Prosecution Service headquarters in Bucharest (he alleged that during their trip to Bucharest he could not get off the bus and could not use his mobile phone or contact his lawyer) and at about 9.30 p.m., after a trip of almost 600 km they arrived in Bucharest, at National Anti-Corruption Prosecution Service headquarters.

After almost thirteen hours, at 10.30 a.m., on 9 February 2011, he was taken to the prosecutor's office and he was informed in the presence of his lawyer about the charges against him.

At about 10.55 a.m. he was informed of the prosecutor's order to remand him in custody for twenty-four hours, subsequently being kept standing in a corridor until 8 p.m., when he was taken to the Bucharest Court of Appeal for the examination of the prosecutor's request concerning his pre-trial detention; the hearing started at 10.30 p.m. and lasted almost one hour and the court granted the prosecutor's request and ordered the pre-trial detention of the applicant for twenty-nine days, namely from 9 February until 10 March 2011.

Conclusions

As it can be noted, after drafting a short overview on the Romanian legislative reform in criminal matters, the study makes an extensive analysis of the institute of compulsory bringing, looking at the problem both on national level (with focus on the Romanian system, but also providing relevant information about Austria,

present when the events of 27 November 2006 occurred and noticed that the prosecutors did not explain why her statements would be less credible than those of the police officers. (*para. 66, 67*)

⁷⁴ The applicant was a customs officer at the Moravița border checkpoint at that time and was considered to be part of the criminal group by the investigation authority. On 3 February 2011 a criminal investigation was initiated against him for suspected adhering to a criminal group and bribery.

Bulgaria, Poland and the Netherlands) and on international (European) level.

In this sense, the paper focuses on the presentation of the national legal framework regarding the compulsory bringing of persons in front of the judicial authorities in Romania, followed by the compulsory bringing of persons in front of the judicial authorities in criminal matters.

To close with, the paper dwells on the standards of the European Convention for the Protection of Human Rights and Fundamental Freedoms, providing some ideas about relevant judgements given by the European Court of Human Rights.

Having a look at the national legislative provisions in the context of the case-law of the Strasbourg Court, one can note that the previous provisions comprised in the Criminal Procedure Code did not lack

criticism. Moreover, the same provisions created difficulties into day-to-day practice, as the institute of compulsory bringing had quite a few shortcomings (e.g. no maximum length of the measure provided in the law, there was no possibility to enter someone's home in order to enforce the bringing order).

In assessing the current legal provisions, it can be noticed that the new Criminal Procedure Code has indeed overcome the gaps and difficulties encountered by the previous Code, as the new one contains some clarifications and also some new provisions (some of them imposed by the difficulties encountered in daily practice, some demanded by the convictions of Romania in front of the Strasbourg Court – as it was the case with establishing a maximum length of the measure).

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