ROUND TABLE
THE SETTING UP OF EFFECTIVE DOMESTIC REMEDIES TO CHALLENGE CONDITIONS OF DETENTION

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Compensatory remedies and the Moldovan experience

The opinions expressed in this document are those of the author.

Dear Colleagues and Participants,

I am tempted to begin my presentation with general assumption about the importance of introduction of domestic remedies as a key task for domestic authorities. I am particularly attached to the idea that an effective domestic remedy system is the core basis for the entire Convention system securing protection of human rights in the Europe. We have already heard here this reasoning and I have nothing but to subscribe to it.

An effective system of domestic remedies is the sole measure that puts in practice the well-known and much discussed **principle of subsidiarity**. Indeed, I should not recall further what the principle of subsidiarity means. It is, however, my view that often the principle of subsidiarity is misunderstood. To the consequential extent, the rules of exhaustion of domestic remedies and the States' duty to introduce such remedies have also diverse interpretations.

While discussing the questions of subsidiarity and the remedies, we must realise the very core of these key-concepts, meaning that they both refer to the relation of the Convention with the domestic legal systems and, most importantly, **to the scope of securing respect of human rights domestically, at the national level**. We must nevertheless understand that subsidiarity and the requirement to introduce remedies have not the goal to avoid the Court's jurisdiction but rather to guarantee the rights in our countries. Therefore, the subsidiarity means in particular that it is '*appropriate that the national courts should initially have the opportunity to determine questions of the compatibility of domestic practices and law with the Convention and that, if an application is nonetheless subsequently brought before the Court, it should have the benefit of the views of the national courts, as being in direct and continuous contact with the forces of their countries*'[1].

The introduction of remedies is therefore a duty for the authorities and, in particular, for the domestic courts, especially in the situations when the domestic law is silent or gives a slightest opportunity to perform such a duty. The domestic courts should cover this gap by their jurisprudence and bring the Convention from the Strasbourg at the national level.

This was the task of our courts in the Republic of Moldova when it comes to the question concerning remedies against poor conditions of detention.

Before sharing our experiences concerning the introduction of judicial compensatory remedies, allow me to explain the background of the problem that the Republic of Moldova has faced up. By a number of judgments against the Republic of Moldova, the European Court has held that the problem concerning inhuman conditions of detention is widespread, unfortunately. **The Republic of Moldova inherited old penitentiary system, which is far from appropriate to the European standards.** Although, the European Court did not observe a systemic problem in this situation, despite of a large number of complaints, it nevertheless pointed out that the State has not provided any means for redressing the situation and there is no remedy available.

This was held in 2007, despite of the Government's unsuccessful attempts to convince the European Court that the applicants could and should have exhausted civil remedies seeking a compensation for their poor conditions of detention, as a last resort. The European Court disagreed with this objection, basically, on account that **the civil remedies invoked by the Government were too much general and covered all situations concerning the liability of all public institutions[2].** Moreover, the European Court expressly noted that the remedy concerning conditions of detention should not be only compensatory in its nature. It also must be able to alleviate the alleged breaches or to put them at end. The civil remedies, as explained by the Government, did not suffice and could not achieve this result.

Here when the Supreme Court intervened and started to extend its own case-law in view of making the national remedies effective. **The growing number of similar complaints brought before the European Court required attention from all authorities concerned.** The Supreme Court took its leading role and

[1] See among other authorities A. and Others v. the United Kingdom [GC], no. 3455/05, § 154, ECHR 2009-…; Al-Skeini and Others v. the United Kingdom [GC], no. 55721/07, § 99, 7 July 2011

[2] See Sarban, §§ 57-62; Holomiov, §§ 101-107, Istratii and Others, § 38, Modarca, § 47, and Stepuleac, § 46). The Court has concluded on each occasion that the remedies suggested by the Government were not effective in respect of individuals currently in detention. In Malai, §§ 42-46, the Court found a violation of Article 13 of the Convention, concluding that "it has not been shown that effective remedies existed in respect of the applicant's complaint under Article 3" concerning conditions of detention.

considered that the lack of express provisions in the domestic law, which allow neither consideration of similar complaints nor the compensations for inhuman conditions of detention, should be covered by its own case-law.

The domestic legislation allows any person to sue the authorities for any alleged violation of the rights. This is a rule. However, the legislation contains no specific provisions, which would even recognise the inhuman conditions of detention as an issue or that would establish such a right. **Nevertheless, nothing precludes the domestic courts and in particular the supreme jurisdictions to assume the role of the European Court and to bring the Convention into their case-law**. And, the Supreme Court did this by including into its practice the possibility of monetary compensation against inhuman conditions of detention.

I will explain this practice and our experience in detail.

First, I would like to note over certain challenges in implementation of this initiative by our Supreme Court. By this, we will better understand what good and wrong experiences were. **Second**, I will resume how the Supreme Court has overcome these challenges and what conclusions we may draw up from that experience.

The Supreme Court, at the relevant time, has begun to be particularly interested by the idea of implementation of the entire European court's case-law. Many judges were eager to apply the Convention directly in their practice. I am not saying that now the situation has changed. Indeed, all judges and the Supreme Court, in particular, are continuing to apply the principle of direct implementation of the Convention into national legal order through judicial practice. The major challenge, however, in the direct implementation was **that the domestic legislation does not expressly prohibit such an application but it does not expressly require that direct implementation either.**

The Moldovan Constitutional Court has developed this relation between the Convention as an international treaty and the Constitution as the cornerstone of the entire domestic legislation. It has ruled that the Convention, as an international treaty, has direct application in the domestic legal practice in cases when:

- a piece of domestic legislation or a particular provision is contrary to such a treaty; or
- the legislation lacks any provisions concerning a particular aspect implying international obligations of the Republic of Moldova.

Of course, our Constitution and every bit of legislation have similar provisions regulating the relation between the international law and domestic law. However, for a judge, who delivers individual justice these general provisions seem to be not enough to be put in practice. The judge requires practical application and the law should be clear enough, not only for the persons to whom it addresses but also for the judge who applies the law.

The essence of the problem lays in our formal legal system where the judge is limited by the texts and the existence of the law. When it comes to rule on the situations, which are not covered by any domestic legislation, the judge could hesitate in applying directly the international law because of its general and changing nature. To the contrary, I note over different role of the judge in our formal system (which is a civil law system) and the common law system, where the judge is a practitioner and a lawmaker. The judge in our system cannot be a lawmaker. The judge is an executioner of the law and ne or she applies the law as it stands. This was the major challenge what the Supreme Court has met in its direct implementation and application of the European Court's case-law.

It was decided by the Supreme Court judges that the above considerations of the Constitutional Court and the subsidiarity requirement would empower the Supreme Court to intervene and *to set up new case-law* what concerns a remedy for inhuman conditions of detention. The Supreme Court also has taken into consideration that the executive and legislative branches were quite passive in this sense. We should acknowledge that quite few politicians and officials would be interested in spending money for improving conditions of detention or compensating detained persons. This initiative is often unpopular in the contrary to increasing salaries or improving the system of social benefits. Therefore, the Supreme Court has considered that it should step in and to rise the attention over the problem by its own case-law.

Strictly speaking, it easy to say this – let us change our case-law and solve the problem. It is hard then to implement this saying in practice. Therefore, the **second challenge** was to identify the way of doing this

implementation. It was decided that the domestic case-law should be set up by an *extensive legal interpretation*; likewise the European Court does in its case-law and by making *direct references* to that case-law[3]. The next step was *identification of pieces of legislation*, which would serve as a base for extensive interpretation. It should have been a law that governs the criminal aspects and allows for civil compensation in criminal matters. This law also should have established the principle of State's responsibility or at least a responsibility of a public body or institution to which the failure would be attributable. And, the last but not least, there should have been *an individual case* or an action coming from an applicant unsatisfied with his or her conditions of detention. This applicant should have been persistent in seeking a relief before all domestic courts and who finally should have reached the Supreme Court.

Here I will explain a little our legal system in the Republic of Moldova, which is actually quite similar to many systems of our neighbours. We have three principal branches of legislations covering criminal, civil and administrative aspects of detention. The *Criminal legislation* cannot offer a relief to a detainee because this legislation applies against that detainee. Such a legislation cannot be coercive and compensatory all together. The *Administrative system* regulates quite different relations between an individual and the public administrative bodies. It covers the governance act, which in our situation is enforcement of punishments and detentions on remand. It can eventually offer a relief by alleviating the conditions of detention but under the judicial authority only. The *Civil system*, and in particular the civil courts can accept complaints from detainees but only in situations when a civil liability could be engaged. The civil courts cannot clash into the jurisdiction of the criminal courts and order other forms of relief such as releasing, transfer into other detention facility with better conditions of detention or alleviating the existing conditions. The civil courts can engage only a financial responsibility of public institutions.

So, this was the **third major challenge** which the Supreme Court has met. While examining certain claims against the inhuman condition of detention, the Supreme Court had to act as a civil court only and to order compensation outside the criminal aspects of the case. This was the most difficult task, because as we have heard here and as I underlined above – when the question comes to remedy the inhuman conditions of detention **the very core principle of such remedy is that only monetary compensation does not suffice.**

And the **last challenge** was the authorities' resistance to the newer approach of the Supreme Court granting compensations. All authorities objected to the compensatory relief and claimed that they are doing already much enough to secure appropriate conditions of detention to the detainees, even in lack of sufficient financial funds and state budget austerity. They also noted that the compensations would burden further the narrow budget of the penitentiary system and this fact would not contribute to its improvement. This challenge, actually, has led the Supreme Court to award low compensations in order to find balance between the competitive interests of the authorities and the detainees.

In the meantime, these poor compensations have fallen again into the European Court's attention. The Court has found that, despite of highly commendable initiative to apply the Convention directly, small amounts granted for compensation are insufficient to consider that the Supreme Court has fulfilled its duty to remedy the alleged violations. There have been certain cases in the European Court's jurisprudence against the Republic of Moldova with the same reasoning. One case concerned small compensation granted for poor conditions of detention and insufficiency of medical assistance[4].

The latter case has been much discussed within the lawyers' community and has become leading in our domestic *opinio juris.* This is why, the Supreme Court has considered necessary to deliver its explanatory decision[5] in which it explained its approach and the way of implementation of judicial compensatory

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[3] Recently, the Supreme Court gave more importance to the principle of direct application of the Convention and the European Court's case-law in the domestic legal system. The Supreme Court has directed all domestic courts to apply the Convention and the Court's case-law as a mandatory in their judgments. In this sense, the Supreme Court ordered by that all domestic courts should examine and refer in their judgments to the Convention and the Courts case-law likewise the Court does (see the Explanatory Decision of 09 June 2014). This would allow the domestic courts to examine the cases in line of the Court's jurisprudence and to award satisfactions if the domestic law does not provide or the potential applicants has no other means to seek remedy.

[4] See *Ciorap 2 v. the Republic of Moldova*, no. 7481/06, 20 July 2010

[5] The relevant Explanatory Decision of the Supreme Court no. 8 of 24 December 2012 explains the applicable law and procedure by which a person could claim compensation for such a breach of the Convention. It provides references to the relevant case law of the Court in cases against Moldova, and in particular to all cases referred by the Government

remedy, in particular what concerns the inhuman conditions of detention. Most interesting, the Supreme Court has given clear guidance how to calculate the amounts for compensations in line with the European Court's jurisprudence. I would note in this sense, that there has been a judicial reluctance to award higher amounts as compensations due to the authorities' resistance. Also, the key factor was, again, our formal civil system where the judge is unable to make law. The issues concerning granting certain amounts for compensations were covered neither by the legal provisions nor by judicial practice. Therefore, the way of granting compensations should have been explained separately to the judges, similarly with the practice under Article 41 of the Convention in the way as the European Court grants just satisfaction[6].

Resuming all above, the most opportune way in implementing the judicial and compensatory remedy was to follow the below considerations:

- Finding a way to bring in force the **principle of subsidiarity** and **direct application of the Convention** in situation when the domestic legislation is silent or it is not clear enough. This was the question of law and it did not require serious efforts, but rather a question of principle, i.e. an unconditional acceptance of the European Court's power to deliver the law and to assume the similar power as a lawmaker by the domestic courts;
- Finding certain **general principles** and **pieces of the domestic legislation** that would allow the judges to **extend their interpretation** of the domestic law and to incorporate the principles deriving from the European Court's case-law into the domestic legal system;
- Finding a **balance between the competitive interests** of
    - the Legislature that is pursuing social oriented policy,
    - the Government's interests as executive branch which preserves the financial security and availability of public funds, and
    - the Judiciary that has the scope of securing respect for human rights and human dignity;
- When it comes to the issue of securing appropriate conditions of detention, **the role of judiciary should go beyond the sole compensation**. By setting up its own judicial remedy and awarding compensations, the judiciary **should give a clear message** to the legislative and executive branches that the issue of conditions of detention requires their particular attention. Otherwise, the judiciary can proceed as the European Court usually does, when the amounts awarded by the courts serve not only as **individual just satisfaction** but also as a **penalty for the authorities**' inaction or lack of due diligence in dealing with human rights.
- The domestic courts should also be able to find **a balance within its own legal system**. Here the differences between the criminal and civil aspects of the case, jurisdictions and material competence should not be an issue. Legal qualifications or misunderstandings between different branches of law and the diverse jurisdictions of the domestic courts should not pose an excessive burden to the applicant seeking a relief of his or her Convention rights. The domestic courts and, specifically, the Supreme jurisdictions should act as **courts of human rights law** and not as courts of civil, criminal, administrative law or whatever it can be called.

Concluding my presentation allow me to recall that **the judiciary is the immune system of the State**. Its principal role is not only reparation and remedy but also protection and prevention. The judiciary cannot act only *post-factum* and resume its role to deliver individual justice only. It cannot act in vain and should take *en ensemble* approach, being a leading party of the entire state system guarantying respect for human rights and their reparation and remedy. The judiciary should be able to adapt itself to newer and changing conditions and to be able filling the gaps of legal regulations. The domestic courts should not forget their principal role as the most important state institution that has the power, the burden and the duty to step in when there is a need for prevention and reparation of human rights violations.

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in the present submissions. The Explanatory Decision also covers issues on the authorities' failures to provide required medical assistance. Decision can be added the Supreme Court's Recommendation no. 6 of 01 November 2012. The Recommendation noted on the direct application of the Convention and the Court's case law while applying the compensatory remedy introduced after *Olaru* pilot judgment. In its relevant part the Recommendation gives guidance to the domestic courts in part of awarding just satisfaction in amount at least comparable with amounts awarded by the Court in similar cases, inclusively those cases that concern violations of Article 3 of the Convention. The Recommendation sets an average amounts of money applicable for breaches within the meaning of the Court's case law.

[6] A number of domestic seminars, round tables and conferences concerning this particular topic were organised between 2010 and 2013, within National Institute of Justice.