COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

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

organised in the framework of the Human Rights Trust Fund (HRTF)

Council of Europe,
Strasbourg, 8-9 July 2014

Presentation by Ms Natalia Kobylarz-Lerner, the Registry of the European Court of Human Rights

Effective Remedies in Conditions of Detention Cases – the ECHR Requirements

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

1. General rules

Under Article 35 § 1 of the Convention, the Court may only deal with the matter after all domestic remedies have been exhausted. That means that the complaint which is being brought before the Court, must have been first made at least in substance to the appropriate domestic body and in compliance with the formal requirements and time limits laid down in domestic law. The purpose of this provision is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the ECHR. This, in turn, is derived from the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights.

Article 35 has close affinity with Article 13 of the Convention and the exhaustion of domestic remedies requirement is based on the assumption that there is an effective domestic remedy available in respect of the alleged breach.

Article 13 requires that a domestic remedy be put in place to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief (sufficient redress). The remedy required by Article 13 must be effective in practice and in law. The existence and the availability of such remedy must be sufficiently certain, both in theory and in practice. The remedy must also be adequate.

The "effectiveness" of a remedy does not depend on the certainty of a favourable outcome for the applicant. Mere doubts as to the prospects of success of national proceedings do not absolve the applicant from the obligation to exhaust the remedies. On the other hand the applicants are not obliged to pursue the remedies which are uncertain or are doomed to failure (for example, in view of the lack of well-established domestic case-law) or which clearly offer no prospects of success (i.e. Polish cassation appeals in civil cases, which are rarely entertained as they are strictly limited to important questions of law). Yet, in some cases, especially if the domestic practice reveals a dispute, the Court has relied on the rule that it is incumbent on the aggrieved individual to allow the domestic courts the opportunity to develop existing, even if uncertain, remedies by way of interpretation. This approach is not just confined to common law systems.

The assessment of whether domestic remedies are effective and whether they have been exhausted is normally carried out with reference to the date of the introduction of the complaint to the Court.[1] However, this rule is subject to exceptions which might be justified by the specific circumstances of each case. As discussed below, repetitive cases, stemming from a systemic problem, may be one such exception and the effectiveness of a remedy may be then assessed at the date of the Court's examination of the application and, not the date of its introduction.[2]

Lastly, the "authority" referred to in Article 13 of the Convention does not necessarily have to be a judicial one. Where numerous remedies exist which are likely to be adequate and effective, it is enough that the applicant had a recourse to one of them (normal use of the remedy). When a remedy has been attempted, use of another remedy which has essentially the same objective, is not required. On the other hand, if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so.

2. Conditions of detention

2.1 Pilot procedure

Under Article 3 of the Convention, the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured. This rule was first spelled out in 2000 in the judgment in the case of *Kudła v. Poland* [GC], no. 30210/96, §94, ECHR 2000-XI, in the context of the lack of adequate psychiatric treatment secured to the applicant with history of suicide attempts and suffering from depression during his detention in a general prison wing.

1. The question whether the applicant has exhausted domestic remedies may be examined by reference to the time of the Court's decision on the admissibility of the application (see *Ringeisen v. Austria*, 16 July 1971, § 91, Series A no. 13).
2. In the *Orchowski* and *Ananyev* judgments, the Court examined the effectiveness of the remedies both at the time when the applicants first brought their applications to the Court and at the date of the examination of the cases by the Chamber.

Since then the Court has delivered judgments in nearly 500 cases concerning overcrowding, other elements of living conditions or medical care in various types of detention facilities. About five years ago the Court started looking into detention conditions as a systemic problem and issued the following pilot and quasi-pilot judgments: *Orchowski v. Poland*, no. 17885/04, 22 October 2009 followed by the leading inadmissibility decision in *Łatak v. Poland* (dec.) no. 52070/08 12 October 2010; *Mandić and Jović v. Slovenia*, nos. 5774/10 and 5985/10, 20 October 2011; *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, 10 January 2012; *Iacov Stanciu v. Romania*, no. 35972/05, 24 July 2012; and *Torreggiani and Others v. Italy*, nos. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 and 37818/10, 8 January 2013. *Neshkov and Others v. Bulgaria* (nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13) is the Court's latest pilot application concerning conditions of detention, communicated in March 2014.

The idea behind the pilot procedure is to allow for the speediest possible redress to be granted at the domestic level to a large number of people suffering from a particular structural problem, whether they are the applicants in pending or future cases before the Court. Following a pilot or quasi-pilot judgment, the Court may decide under Rule 61 § 6 of the Rules of Court to adjourn all or some follow-up cases until the State complies with the general measures as indicated under Article 46 and/or ordered in the operative part of the judgment.[3] The examples of *Orchowski*, *Ananyev* and *Torreggiani* show that the use of the adjournment measure is not automatic and will depend on the scale of the problem (the number of applications pending before the Court and the number of people potentially affected by the structural problem) and the response of the State concerned (whether any measures have already been undertaken to combat the problem).[4]

If a new remedy has been put in place by the State, the Court will then examine whether that remedy is effective in a leading case.

If the remedy is found to be effective, the Court will hold that the applicants in pending applications in similar cases are required to exhaust the new remedy, provided they are not time-barred from doing so. If, in the circumstances of a particular case, the applicant can access the new remedy, his application will be declared inadmissible.

Poland is a good example of such practice in the context of detention conditions. The Court showed its readiness to accept the emerging civil remedy in future similar cases already in the pilot judgment of *Orchowski.* Then, in the *Łatak* leading decision, the Court validated the effectiveness of the tort action against the State Treasury, specifying that the applicants who were no longer aggrieved by overcrowding (who had been transferred to Article 3-compliant conditions or released altogether), in respect of whom the statutory limitation period had not yet expired and who, on the date of the adoption of the decision, still had adequate time to prepare and bring a civil action for the infringement of personal rights, could reasonably be required to make use of it (§§ 79- 85). The cases of those applicants were then declared inadmissible for non-exhaustion of domestic remedies,[5] whereas the cases of the applicants to whom the civil remedy was not available because the statutory time-limit had elapsed, were completed by means of friendly settlements or unilateral declarations.[6]

2.1 Ineffectiveness of a remedy

In the alternative, the Court may find that the remedy is ineffective.

3. For example: *Ananyev* §§ 179 - 234 and operative provision no. 7; *Torrieggiani*, §§ 87 - 99 and operative provision no. 4.
4. *Orchowsk*i, informal adjournment of communicated and non-communicated applications; *Ananyev* §§ 235 - 240; § 236. Having regard to the fundamental nature of the right protected by Article 3 of the Convention and the importance and urgency of complaints about inhuman or degrading treatment, the Court does not consider it appropriate to adjourn the examination of similar cases. On the contrary, the Court observes that continuing to process all conditions-of-detention cases in a diligent manner will remind the respondent State on a regular basis of its obligations under the Convention and in particular those resulting from this judgment. *Torreggiani* § 101. A cet égard, la Cour décide qu'en attendant que les autorités internes adoptent les mesures nécessaires sur le plan national, l'examen des requêtes non communiquées ayant pour unique objet le surpeuplement carcéral en Italie sera ajourné pendant une période d'un an à compter de la date à laquelle le présent arrêt sera devenu définitif. Réserve est faite de la faculté pour la Cour, à tout moment, de déclarer irrecevable une affaire de ce type ou de la rayer de son rôle à la suite d'un accord amiable entre les parties ou d'un règlement du litige par d'autres moyens, conformément aux articles 37 et 39 de la Convention. En revanche, pour ce qui est des requêtes déjà communiquées au gouvernement défendeur, la Cour pourra poursuivre leur examen par la voie de la procédure normale.
5. For example: *Stępniewicz v. Poland* (dec.), no. 20993/04, 14 December 2010.
6. For example: *Biernacki v. Poland* (dec.), no. 37853/03, 25 January 2011

PROOF AND THEORETICAL AND ILLUSORY REMEDY

It may be so if in a communicated case, the Government claiming non-exhaustion does not satisfy the Court, by submitting sufficient evidence of relevant domestic law and practice, that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success.[7]

The case of *Lăutaru v. Romania*, no. 13099/04, 18 October 2011, is one such example. The Court noted that five domestic decisions submitted by the Government in support of its plea of non-exhaustion, of which only four were final, related to specific rights of prisoners, such as the right to medical assistance or the right to receive visits, did not relate to structural issues, such as overcrowding. Moreover, the Government did not submit any domestic court judgments supporting their argument that a general tort action seeking to establish the prison authorities' liability for the difficult conditions of detention would have been effective. The Court therefore concluded that the judgments submitted by the Government did not indicate how the legal actions proposed by them could have afforded the applicant immediate and effective redress for the purposes of his complaint (§§ 83-84).

The Court may also conclude, in the light of the domestic case-law submitted by the parties, that a remedy has indeed come to exist but it is not yet established well-enough to give solid prospects of success and, therefore, to be considered effective.[8]

ADEQUACY OF RELIEF

In cases concerning detention conditions, two types of relief are possible: (1) an improvement in the material conditions of detention (preventive remedy, usually in the form of a complaint to the prison governor or prison supervisors; to a prosecutor or inspectorate of the prison service) and (2) compensation for the damage or loss sustained on account of such conditions (compensatory remedy, usually, in the form of a tort action).

If an applicant is being held in conditions which are in breach of Article 3, the first type of remedy, the one capable of putting an end to the ongoing violation of his right not to be subjected to inhuman or degrading treatment, is the adequate one.

Once, however, the applicant has left the facility in which he endured inadequate conditions, he should have an enforceable right to compensation for the violation that has already occurred and cannot be retroactively undone.

Preventive remedies may put an end to the applicant's grievance but cannot offer compensation for the harm which had already been inflicted. Compensatory remedies may offer such redress but, in most situations, they do not provide for injunctions by which a domestic court could order a timely and practical relief to the aggrieved applicant. Compensation as a single form of remedy cannot be

---

7. Under Article 35 of the Convention and Rule 47 of the Rules of the Court, an applicant lodging his application with the Court must provide information to show that either he has availed himself of an effective remedy or that no such remedy existed. In the latter scenario, the Court will examine the matter on its own motion and will either reject the application for non-exhaustion of domestic remedies or communicate the case.
When the case is communicated, the burden of proof shifts to the Government. Once this burden has been satisfied it falls to the applicant to establish that the remedy advanced by the Government had in fact been used or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement.

8. *Orchowski*, §§ With regard to the remedies provided by the civil law, the Court observes that the judgments of domestic courts referred to by the Government clearly illustrate that prior to the judgments: of the Supreme Court of 28 February 2007 and of the Constitutional Court of 26 May 2008 the domestic courts have consistently interpreted Article 24 § 1 of the Civil Code as being conditional on two elements, one of them being that the infringement alleged must have resulted from an unlawful act or omission. The analysis of the relevant Polish case-law shows that at the time the applicant lodged his application with the Court the policy of reducing the space for each individual in detention establishments was considered to be in accordance with domestic law. The Court acknowledges that developments in the domestic jurisprudence have indeed occurred since the delivery of the above‑mentioned judgments. The sporadic decisions delivered in late-2007 became more consolidated in 2008. It appears that the domestic civil courts have become more inclined to find an infringement of a prisoner's personal rights and to award him compensation when the latter proved that he had been detained for a considerable amount of time in inadequate living and sanitary conditions in a cell in which the minimum statutory standard of 3 m² per person was not respected.; *Łatak* (dec.) §§ 80 and 81.

accepted by the Court as this would legitimise severe suffering in breach of a core provision of the Convention. This is why, it is required that the situation which is giving rise to the applicant's suffering contrary to Article 3 be stopped before any compensatory remedy can even be considered.

MULTIPLE REMEDIES

In view of these considerations, the Court has indicated that if an applicant complains of inadequate detention conditions, comprising overcrowding and other elements of material conditions (ventilation; lighting; sanitation etc.), the preventive and compensatory remedies have to be c o m p l e m e n t a r y in order to be considered effective (*Ananyev*, § 98). If such remedies exist side by side addressing all the elements of the complaint with different objectives, the Court, in principle, will require that the applicant use both of them before lodging such Article 3 complaint.[9] If, however, each of the remedies available has the same objective, the Court, in principle, will not require under Article 35 the use of any additional remedy even in light of the failure of the remedy which the applicant had chosen to use. The existence of this additional effective remedy, will nevertheless be taken into consideration for the purpose of the examination whether the State complied with its obligations under Article 13.[10]

However, in the event, a State offers a range of remedies which separately address each element of the applicant prisoner's Article 3 complaint, the Court, in principle, will not require that all of these remedies be used under the following principles. (1) When assessing conditions of detention, account has to be taken of the cumulative effects of these conditions, as well as of specific allegations made by the applicant.[11] And, (2) applicants should not always be expected or required to act with the utmost scrupulousness in availing themselves of all the remedies available. The Court's conclusion in this respect will therefore depend above all, on the nature of the Article 3 complaint and also, on whether or not any of the elements comprising this complaint stems from a systemic problem.

For example, when the applicant prisoner suffering from a chronic health condition or handicap, submitted a two-fold complaint about his on-going detention in overcrowded cells and inadequate medical care (not a medical malpractice incident), the Court held, in a series of cases against Poland, that only a remedy capable of redressing the applicant's complaint in its entirety, and not merely its selected aspects, could realistically redress his situation.[12]

REQUIREMENTS FOR PREVENTIVE REMEDIES

The Court has indicated that the preventive remedies existing in the countries which were first affected by the systemic problem of prison overcrowding did not comply with the Convention requirements for the following reasons.

(1) Prison authorities do not have a sufficiently independent standpoint - in deciding on a complaint concerning conditions of detention for which they are responsible, they would in reality be judges in their own cause (*Ananyev*); (2) They address allegations of illegal acts committed against prisoners by prison staff, i.e. violations of criminal or disciplinary provisions and not the lack of "luxurious life conditions in prison" or more general complaints relating to the administration, maintenance or enlargement of prisons (*Peers v. Greece*, no. 28524/95, ECHR 2001-III); (3) Prisoners do not have direct access to the remedy (*Mandic*)[13]; (4) finding that the overcrowding was, at the relevant time, of a structural nature undermined the effectiveness of any domestic remedies available, making them all theoretical and illusory and incapable of providing redress in respect of the applicant's complaint (*Orchowski*).[14]

---

9. Among many other cases, *Siedlecki v. Poland* (dec.), no. 5246/03, 14 December 2010.
10. *Canali v. France*, no. 40119/09, §§ 39 and 57, 25 April 2013.
11. The extreme lack of space in a prison cell weighs heavily as an aspect to be taken into account for the purpose of establishing whether the impugned detention conditions were "degrading" from the point of view of Article 3. By contrast, in cases where the overcrowding was not so severe as to raise in itself an issue under Article 3 of the Convention, the Court noted other aspects of physical conditions of detention as being relevant for its assessment of compliance with that provision. Such elements included, in particular, the availability of ventilation, access to natural light or air, adequacy of heating arrangements, compliance with basic sanitary requirements and the possibility of using the toilet in private.
12. *Grzywaczewski v. Poland*, no. 18364/06, 31 May 2012; *Musiałek and Baczyński v. Poland*, no. 32798/02, 26 July 2011; *D.G. v. Poland*, no. 45705/07, 12 February 2013 and *Olszewski v. Poland*, no. 21880/03, 2 April 2013; compare with *Nocha v. Poland* (dec.), no. 21116/09, 27 September 2011.
13. The request for the transfer of a prisoner could only have been made by the prison governor. This remedy was therefore not directly accessible to the applicants and could not be considered effective (*Mandic*).
14. The Government had not demonstrated what redress could have been afforded to the applicant by a prosecutor, a court, or another State agency, bearing in mind that the problems arising from the conditions of the applicant's detention were apparently of a structural nature and did not concern the applicant's personal situation alone (*Ananyev*).

If the States practice transfers of prisoners throughout the country in order to avoid their placement in an overcrowded facility, the Court may scrutinise such cases under Articles 3 or 8 of the Convention.

In *Orchowski*, the Court has noted that moving a person too frequently under the system of rotating transfers of detainees may create a problem under the Convention. By using this system, the authorities provide an urgent but short-term and superficial relief to the individuals concerned and to the facilities in which the rate of overcrowding is particularly high. As shown by the example of the applicant, however, in the light of massive overcrowding the system does not provide a real improvement of a detainee's situation. On the contrary, such frequent transfers may, in the Court's opinion, increase the feelings of distress experienced by a person deprived of liberty and who is held in conditions which fall short of the Convention. This grievance did not give rise to a violation of Article 3 on its own but was considered as a factor which aggravated the overcrowding and inadequate material conditions of the applicant's detention. This approach was later taken in *Radu Pop v. Romania*, no. 14337/04, 17 July 2012 (see also transfers for general security reasons in *Khider v. France*; no. 39364/05; §§110 and 111).

In *Khodorkovskiy and Lebedev v. Russia*, nos. 11082/06 and 13772/05, §§ 822 - 851, 25 July 2013, the applicants were sent to serve their prison terms in very remote colonies situated thousands of kilometres from their homes, among other reasons, in order to avoid prison overcrowding which existed in Russia's central regions. The Court found a violation but only because, in the circumstances of the two applicants, the measure was disproportionate to its aims in that it had seriously hindered their contacts with the outside world, and, in particular, with their families and their lawyers. Other than that, the Court considered it evident that the measure had a legitimate aim of avoiding general overcrowding.

REQUIREMENTS FOR COMPENSATORY REMEDIES

Compensatory remedies have been considered ineffective because of (1) the lack of a well-established practice of civil courts rendering the remedy theoretical and illusory[15] and (2) the lack of timely relief in view of absent or insufficient injunction procedure (preliminary or permanent injunctions);[16]

The Court has never been called to examine the effectiveness of a procedure, such as the administrative one which has been recently put in place in France,[17] capable of granting an injunction of a general character, comprising both an order to cease the impugned situation of a group of prisoners and their pecuniary redress.

It can only be repeated that, in the context of prison conditions, the Court does not require that a single remedy have both preventive and compensatory objective. Other than in exceptional cases applicants raising two-fold complaints about overcrowding and medical care in prison, the requirements of Article 13 may be perfectly satisfied by an aggregate of complementary remedies as long as they are all effective.[18] Moreover, under Article 46 of the Convention, as interpreted in the light of Article 1, a respondent State is under a legal obligation to implement, under the supervision of the Committee of Ministers, appropriate general and/or individual measures to secure the right of the applicant which the Court found to be breached. Such measures must also be taken in respect of other persons in the applicant's position, notably by solving the problems that have led to the Court's findings. Article 13, however, is concerned with individual remedies only. In other words, an adequate and effective remedy must be able to provide relief and redress to an aggrieved individual but there is no requirement that, having been triggered by such individual, the remedy must offer a possibility of improving the general situation of other people suffering from a similar harm (for example, an injunction ordering the State authorities to build or renovate prisons or to reform the penitentiary system).

---

15. *Orchowski* §§ 108-109.

16. *A.B. v. the Netherlands*, no. 37328/97, 29 January 2002; The Court notes that the civil remedy under section 179 of the Civil Code is merely of a compensatory nature and no domestic court has so far imposed an injunction in order to change the situation which had given rise to the infringement of a prisoner's personal rights. Consequently, noting that the applicants were detained at the time they lodged their applications, the Court finds that the institution of civil proceedings could not have remedied their situation (*Mandic* § 116 and *Orchowski* § 108).

17. Le Contrôle général des lieux de privation de liberté (CGLPL) and administrative *procédure d'urgence*.

18. *Canali v. France*, no. 40119/09, §§ 39 and 57, 25 April 2013; See also Art 2 positive obligations requirements, *Mastromatteo v. Italy* [GC], no. 37703/97, § 90, ECHR 2002-VIII and *Eugenia Lazăr v. Romania*, no. 32146/05, §90-92 16 February 2010.

As for the mitigation of a criminal sentence as compensation for inadequate detention conditions, the Court has recently indicated that such measures may under certain conditions be a form of compensation afforded to defendants in cases concerning unreasonably lengthy proceedings under Article 6 § 1 of the Convention and for a violation of Article 5 § 3 on account of the lack of special diligence in proceedings concerning the applicant's pre-trial detention.[19]

The Court has not yet had an opportunity to decide on a case in which the applicant's sentence has been mitigated in redress for a prior violation of Article 3 of the Convention. It may soon be required to do so, now that the Italian authorities adopted a remedy providing for reduction in sentences as a compensation for detention in poor conditions.

3. Conclusion

While the pilot-judgment procedure can be instrumental in helping Contracting States to comply with their obligations under the Convention, the Court does not have the capacity, nor is it appropriate to its function as an international court, to involve itself in reforms of the policy and infrastructure in parallel with the Committee of Ministers or to order a specific general measure to be adopted in that process by the respondent State.

In view of the above, the Court may only indicate various general substantive measures which the States ought to take to effectively eradicate the structural problem of overcrowding and resulting inadequate conditions of detention and, more adamantly, order creation of effective domestic remedies.

Because a core Convention right is at stake, timely substantive measures aiming at the improvement of the material conditions of detention must be of the primary importance for the States concerned. An integrated approach to finding solutions to the problem of overcrowding in detention facilities in a particular country may necessitate reforms of the legal framework (enacting a statutory minimum standard of living surface per detainee in compliance with the CPT's recommendations) and criminal policy (reducing recourse to pre-trial detention; electronic surveillance of convicted persons), changes to practices and attitudes (putting an end to the practice of mixing smoking and non-smoking detainees or of slopping out) and, simply, erecting new or renovating the existing prison buildings (making provisional and long-term arrangements for alleviating the existing and for preventing the future overcrowding).

Looking from a general perspective, it may appear that the reforms of preventive and compensatory remedies may come second since the existence of a massive structural overcrowding will inevitably undermine the practical impact and thus, effectiveness of any such remedy. However, because even the most widespread and enrooted problem comes before the Court in the form of a series of individual applications and in view of the principle of subsidiarity underlying the Convention, the remedies should nevertheless be put in place at the early stage of the implementation of a pilot judgment and in parallel to the substantive programmes, making it possible for an individual prisoner to try to have his grievance properly examined and, if need be, to have the situation giving rise to such grievance, put to an end and then, adequately redressed domestically.

19. *Finger v. Bulgaria*, no. 37346/05, § 128, 10 May 2011; *Morby v. Luxembourg* (dec.), no. 27156/02, 13 November 2003; *Beck v. Norway*, no. 26390/95, §§ 27-28, 26 June 2001, and *Laurens v. Netherlands*, no. 32366/96, Commission decision of 1 July 1998 and *Dzelili v. Germany*, no. 65745/01, § 83, 10 November 2005.