Legal issues arising out of the meetings with stakeholders in connection with Transitional Justice

1. *The European Union Delegation*

a. *Introduction*

i. The EU Delegation in Moldova has been present in the capital Chisinau since October 2005, and its website cites a rapid increase in funding initiatives to the Republic of Moldova from €40 million in 2007 to €131 million in 2014.[1]

ii. The Moldova-EU Association Agreement, as part of the Deep and Comprehensive Free Trade Area, was signed on 27 June 2014 and provisionally applied from 1 September 2014, with full application of the same awaiting unanimous ratification by all Member States of the EU.[2]

iii. The projects funded by the EU in Moldova include support of initiatives designed to assist and build confidence in the relationship between Chisinau and Tiraspol, with the goal of conflict prevention.[3]

b. *Engagement*

i. Notwithstanding the decade long engagement with the Republic of Moldova, there appeared to be a palpable feeling of frustration and resignation as regards conflict resolution between Chisinau and Tiraspol, with the First Secretary of the Delegation commenting on the rigidity of the stance which Chisinau takes in its approach to Tiraspol and the self-appointed authorities in Transnistria.

[1] Delegation of the European Union to Moldova, *Moldova & the EU* (available http://eeas.europa.eu/delegations/moldova/eu_moldova/index_en.htm, last accessed 7 March 2016).
[2] European Commission, *Countries and regions: Moldova* (available http://ec.europa.eu/trade/policy/countries-and-regions/countries/moldova/, last accessed 7 March 2016).
[3] EU delegation (*supra* note 1)

ii. The First Secretary further explained that while Tiraspol will not recognise legitimacy in Moldovan law, authorities on the Right Bank of the Dniester will in turn conduct criminal investigations of Transnistrian officials which are seen as being politically motivated and serve to inflame tensions.

iii. Regarding the level of knowledge among authorities on either Bank of the Dniester, the First Secretary dismissed completely the idea of the existence of such knowledge, or any willingness to avail of the same. She did however state that any initiatives developed with or at the behest of the UK Embassy would be welcome, so long as they complement the existing work of the EU in this field.

iv. As to the nature of the work of the EU in the field of conflict resolution in Moldova, the First Secretary alluded to the efforts of the Delegation towards the creation of a framework agreement for negotiations between authorities on either Bank of the Dniester, and particularly with the focus of protection of these authorities from politically motivated prosecutions. The First Secretary at times spoke of the envisioned binding nature of this framework agreement, and at other times, stated that the agreement may not have legal force. How the former is possible in the absence of the latter remained unclarified or unaddressed.

v. When asked about any possible conflict of the envisioned agreement with Moldova's obligations under the European Convention on Human Rights (ECHR),[4] the First Secretary appeared to be largely uninformed regarding these obligations, and it is not clear how far, if at all, the Delegation has considered the issue.

c. *Issues arising*

[4] The Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) 1950 (as amended).

i. By virtue of signing and ratifying the Association Agreement, the Republic of Moldova has agreed to recognise the jurisdiction of the Court of Justice of the European Union at Luxembourg (CJEU) in respect of specific competencies under the Agreement, as well as "*disputes concerning the interpretation and application of a provision of this Agreement […] which otherwise imposes upon a Party an obligation defined by reference to a provision of Union law*".[5]

ii. The above provision, when read in conjunction with Article 217 of the Treaty on the Functioning of the European Union (TFEU), has been interpreted by the CJEU as necessarily empowering the EU to guarantee commitments towards a third country in respect of all competencies as contained in the TFEU.[6] This broad reading of Article 217, together with the explicit mention of Title V of TFEU in the Agreement,[7] has the potential to directly engage human rights protections and considerations in the operation of the Agreement, as well as all other projects of the Delegation in Moldova, including those concerning relations between Chisinau and Tiraspol.

iii. The human rights framework governing the EU, though predicated on the Charter of Fundamental Rights (CFR), is explicitly interpreted parallel to the ECHR, particularly as the CFR preamble declares that the CFR "*reaffirms […] the rights as they result, in particular, from […] the European Convention for the Protection of Human Rights and Fundamental Freedoms*".[8]

iv. Further, and more directly, the Republic of Moldova ratified the ECHR in 1997, and Article 1 ECHR requires that "*the rights and freedoms*

[5] Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part (30 August 2014), *Official Journal of the European Union* L 260/4, Art. 403(1).
[6] Case 12/86 *Demirel v Stadt Schwäbisch Gmünd* [1986] ECR 3719, 3751 (para 9).
[7] Agreement (*supra* note 5), Title III.
[8] Charter of Fundamental Rights of the European Union (26 October 2012) *Official Journal of the European Union* C 326/02. This provision is further buttressed by the Article 52(3) requirement that the "meaning and scope" of CFR rights, where they correspond to rights in the ECHR, must be the same as the ECHR.

contained [in] this Convention" be secured by Member States "*to everyone within their jurisdiction*", for which Moldova has already been found liable before the European Court of Human Rights at Strasbourg (ECtHR).[9]

v. As a result, it is concerning that the First Secretary seemed unaware of the Moldovan obligations arising directly under the ECHR, and arguably also under the CFR.

vi. As stated above, it remains unclear whether, or to what degree, the Delegation as a whole has considered that any legal framework seeking to protect negotiators from either Bank of the Dniester against politically-motivated prosecutions must, as a matter of international law, be compliant with the ECHR. This is not an obligation which only arises in respect of Moldova, as any EU actions which contravene the CFR can be invalidated by the CJEU.[10]

d. *Recommendations*

i. Having met with only the First Secretary, and no legal member of the Delegation, specific recommendations would be inappropriate.

ii. As a general matter, the Delegation should publicly commit to compliance with the ECHR and the CFR in respect of all their actions in Moldova, including recommendations for conflict settlement in relation to Transnistria, as well as ensure knowledge of CFR practices and guidance among all Moldovan officials, law enforcement and civil society with whom the Delegation engage.

iii. In furtherance of the above, it would be well-advised for the Delegation to conduct workshops and seminars with the aforementioned stakeholders in order to develop CFR best-practice

[9] See *inter alia Ilaşcu v Moldova and Russia* (2005) 40 E.H.R.R. 46.
[10] Treaty on European Union (9 May 2008) *Official Journal of the European Union* C 115/13 Art 19(3)(b).

among Moldovan authorities. Not only will this aid the conflict settlement process, in that it will benefit from a guarantee of EU human rights compliance, it will also be of longer term benefit as Moldova seeks full membership within the EU.

2. *The impact of Mozer v Moldova and Russia*

a. Before analysing any of the Moldovan legal stakeholders, a short note on the recent ECtHR ruling in *Mozer v Moldova and Russia*[11] would be appropriate, as *Mozer* and its implications appeared to dominate the legal interests of stakeholders such as the General Prosecutor's Office, the Supreme Court of Justice, the Superior Council of Prosecutors, the Superior Council of Magistracy and the Constitutional Court of Moldova.

b. The facts of *Mozer* are irrelevant in assessing the systemic impact of the judgment on the capacity of the legal and juridical infrastructure of Moldova to develop transitional justice approaches and initiatives. Rather, the true impact of *Mozer* lies in the general principles as observed by the ECtHR.

c. The principal points in the *Mozer* ruling which affect the position of the Republic of Moldova concern its *de jure* jurisdiction over Transnistria and individuals who reside in that region, the positive obligations inherent on Moldova as regards these individuals and finally, the capacity of Moldovan authorities to provide ECHR compliant remedies in respect of any violations of the residents' ECHR rights.

d. Regarding jurisdiction, the Grand Chamber in *Mozer* found that, *de jure*, Moldova would be held to exercise territorial jurisdiction within the meaning of Article 1 ECHR.[12] Territorial jurisdiction notwithstanding, the Grand Chamber concluded that the Russian Federation exercised *de facto* extraterritorial jurisdiction over Transnistria.[13]

[11] ECtHR (Application no. 11138/10), Judgment of 23 February 2016 (GC).
[12] *Ibid* para 100, commensurate with the ECtHR's original findings in *Ilaşcu* (*supra* note 9).
[13] *Ibid* para 111, commensurate with the ECtHR's original findings in *Catan and Others v Moldova* (2013) 57 E.H.R.R. 4.

e. In light of the foregoing differences in jurisdiction, the corresponding positive obligations which arise in respect of Moldova differ from those which arise in respect of Russia. Regarding Moldova, the Grand Chamber in *Mozer* reiterated the limited obligations first elucidated in *Ilaşcu*, namely that the "*State in question must endeavour, with all the legal and diplomatic means available to it vis-à-vis foreign States and international organisations, to continue to guarantee the enjoyment of the rights and freedoms defined in the Convention*"[14]. It should be noted that, in *Mozer*, Moldova was held to have discharged its obligations in full.[15]

f. Finally, in keeping with the above observations on the circumstantial limitations of Moldovan authority on the Left Bank of the Dniester, the ECtHR in *Mozer* found that, through appropriate diplomatic and legal avenues, Moldova had not violated its obligations to remedy the violations of ECHR rights in respect of residents of the Left Bank.[16]

g. In many respects, *Mozer* was not a landmark judgment. The Grand Chamber simply followed its own precedents, *inter alia*, *Ilaşcu* and *Catan* (*supra*). However, the realities which confronted the Grand Chamber in *Mozer*, namely a separatist region within a Member State which recognises neither the authority of the Member State nor its legitimacy, but is significantly dependant on another Member State which exercises *de facto* extraterritorial jurisdiction over the region, should not be taken to have effectively absolved Moldova of its ECHR obligations in respect of Transnistrian residents.

h. Legal and judicial stakeholders would be well-advised to remember that *Mozer* involved an applicant whose ECHR rights had been violated in Transnistria, by Transnistrian authorities, as a result of which liability for such violations transferred to the Member State which exercised *de facto* jurisdiction over such authorities, namely Russia. Any action taken against Transnistrian residents by Moldovan authorities, particularly any such action

[14] *Ilaşcu* (*supra* note 5), para 333.
[15] *Mozer* (*supra* note 11), para 155.
[16] *Ibid* para 216.

on the Right Bank of the Dniester, would undoubtedly invoke positive obligations of a wholly different character.

i. In the course of the engagement with various legal and judicial stakeholders, expanded in greater detail below, much emphasis was placed on the notion that, in *Mozer*, the ECtHR had declared Transnistrian law to be unrecognised under the ECHR. This is an unfortunately misleading view and must be clarified.

j. Recognition of States at the international level is a matter which comes under the purview of international relations between States, and is a potent exercise of sovereign power by a State. Thus, it is wholly inappropriate for any court or tribunal to form an opinion on the *actual recognition* of another State, and attempt to substitute such opinion for that formed by the appropriate State government.

k. As such, in *Mozer*, the ECtHR expressed no view as to whether Transnistria is, or is not, *recognisable* as a State. Any allusion to the status of Transnistria as an "unrecognised entity"[17] should therefore be properly understood as stating a fact: Transnistria is not recognised as a sovereign entity by the vast majority of States, and the ECtHR merely restated this fact in *Mozer*.

l. Further, the ECtHR engaged in a substantive analysis of the legal and juridical infrastructure of Transnistria to ascertain whether or not such infrastructure was compatible with the ECHR, finding no basis to assume that it was so compatible.[18] This does not necessarily imply that the ECtHR refuses to recognise the legitimacy of Transnistrian law, which, for a transnational court with a limited supervisory jurisdiction by political consent, would be an unpardonable transgression of its jurisdictional remit, but rather, that, the ECtHR failed to find any evidence to substantiate the *compliance* of Transnistrian law with the requirements of the ECHR. No finding was made regarding the legitimacy of Transnistrian law by the ECtHR, and the observations in *Mozer* should not be understood as such.

[17] *Ibid* para 135.
[18] *Ibid* para 148.

3. *The legal stakeholders*

a. *Introduction*

i. The legal stakeholders included the Office of the Prosecutor General, the Superior Council of Prosecutors, the National Institute of Justice, the Superior Council of Magistracy and academics, namely the Dean of the Faculty of Law at the Moldovan State University.

ii. The recent enactment of the Law on the Public Prosecutor's Service of the Republic of Moldova[19] has brought significant systemic changes in the operational remit of and appointment to the Office of the Prosecutor General of the Republic of Moldova (OPG).

iii. Chief among these changes was the transfer of the process of appointment of the Prosecutor General to the newly constituted Superior Council of Prosecutors (SCP), which includes among its members, regional and special prosecutors, the Minister of Justice, legal academics and the Chairperson of the Superior Council of Magistracy. In addition to vetting candidates for the OPG and making proposals for appointments to the same, the SCP is also a regulatory body, overseeing prosecutorial conduct.

iv. The National Institute of Justice (NIJ), inaugurated on 9 November 2007, is a statutory creation[20] intended to train judges and prosecutors, as well as conduct research and continuing professional development.[21]

v. The Superior Council of Magistracy (SCM) is a statutory body[22] similar both in composition to the SCP as well as in competencies,

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[19] *Monitorul Oficial nr. 55-56 art. 155 of 17 March 2009* (Law No. 294-XVI of 25 December 2008).
[20] Law on the National Institute of Justice (Law No. 152-XVI of 8 June 2006).
[21] National Institute of Justice *Short History* (available http://www.inj.md/node/134 last accessed 8 March 2016).
[22] Law on the Superior Council of Magistracy (Law No. 947-XIII of 19 August 1996) *Monitorul Oficial nr. 64/641 of 3 October 1996*.

acting as both a vetting body for candidates to judicial office as well as exercising supervision over judicial conduct.

b. Engagement

i. The OPG, SCP and SCM all appeared to be cognisant of the need for transitional justice initiatives in relation to their work with respect to Transnistrian matters. However, there was no evidence of an appropriate understanding of what transitional justice would entail.

ii. All three bodies explained the difficulties in their work in respect of Transnistria, with a significant theme being the utter lack of any framework of reciprocity in respect of the enforcement of prosecutorial or judicial decisions between Tiraspol and Chisinau. In particular, the Chairpersons of the SCP and the SCM expressed their frustrations at the inability to have judgments delivered by Moldovan courts enforced on the Left Bank of the Dniester on any level, and whether criminal or civil.

iii. When asked about the possibility of enforcing Transnistrian rulings on the Right Bank of the Dniester, however, both bodies admitted the impossibility of such an endeavour given the current legal system in Moldova, which does not recognise the legitimacy of Transnistrian law.

iv. A significant problem which permeates the relationship between Chisinau and Tiraspol is the prosecution of Transnistrian officials and negotiators once they cross the Dniester, for having failed to comply with Moldovan law, which these officials and negotiators in turn decry as illegitimate.

v. The prosecutions are viewed with significant suspicion by Tiraspol as being politically motivated, and serve to only exacerbate existing tensions.

vi. When asked about the degree of prosecutorial discretion concerning the decision to prosecute, the Acting Prosecutor General responded by stating that there was no real discretion under Moldovan law. While the OPG may exercise discretion in recommending sentences under certain restricted circumstances, it may not actively enter a direction of *nolle prosequi* (unwilling to pursue—a direction of no prosecution) or equivalent, nor apply for any such direction during the trial.

vii. The OPG admitted that the level of knowledge of transitional justice concepts and initiatives among prosecutors was in the region of five per cent, and that the knowledge base needed to be enlarged for any initiatives to properly function.

viii. The OPG also stressed the need for transitional justice initiatives to operate within existing Moldovan law, without which the OPG would be exceeding its competencies.

ix. Current proposals in transitional justice include proposals on amnesty from prosecution, currently being drafted by the Ministry of Justice, in which the OPG has been engaged. It was stressed that the OPG would be interested in including other transitional justice initiatives in such draft legislation.

x. The SCP highlighted that all State actors and laws must be ECHR compliant, pursuant to Article 4 of the Constitution of Moldova, which, in the event of conflict between domestic Moldovan law and international law, accords primacy to the latter.[23]

xi. The SCP further echoed the sentiments expressed by the OPG that any transitional justice initiatives would have to be adopted within existing laws, and cannot exceed them.

xii. The SCM stated that many Transnistrian legal and judicial actors had studied at the same institutions as their Moldovan counterparts, and as

[23] Constitution of the Republic of Moldova (as amended) Title I, Art. 4(2).

such, members of the Moldovan legal and judicial fraternities would count many among the Left Bank of the Dniester as being their colleagues in legal study. As a result, there appears to be a tacit understanding that, from the perspective of the legal profession, the frustrations arising from the current political stalemate are felt across the Dniester. It was suggested by the SCM that cross-Dniester links between members of the respective legal professions may be forged with greater ease and willingness by either side than may be apparent.

xiii. The NIJ appeared to possess by far the least knowledge or awareness of transitional justice concepts or initiatives among the legal stakeholders. While explaining its remit as an institution dedicated to training, continued professional development and research for the legal and judicial professions, the NIJ queried whether transitional justice was not merely another kind of law reform, in which case the institute would respond to such law reform with corresponding and commensurate reform in training practices. Any active interest in transitional justice concepts, however, was not apparent during the engagement.

xiv. The Dean of the Faculty of Law at the Moldovan State University spoke at length of the significant links between Moldovan legal academia and its counterparts in Germany, and spoke of study and teaching visits by German legal academics. The Dean also discussed the direction of recent Moldovan legal reform as predicated on adopting best-practice from a range of EU Member States, most notably Germany.

c. Issues arising

i. The total lack of any legal framework of reciprocity for the enforcement of judicial decisions and other legal actions by authorities of one Bank of the Dniester on the opposite Bank is indicative of the lack of implementation of transitional justice initiatives, as well as a

significant obstacle to implementation of the same. Transitional justice requires shared spaces, and it is incumbent on judicial and other legal actors to engage in the creation, protection and sustenance of such spaces.

ii. The near-absolute obligation on the OPG to prosecute itself presents a problem as a matter of generality. This is especially so considering the influence that German law has recently had on Moldovan law reform (as above). The current German Code of Criminal Procedure allows for varying degrees of prosecutorial discretion in respect of misdemeanours, and permits its prosecutors to dispense with criminal charges should such dispensation be commensurate with the public interest,[24] a provision, which, according to the SCP, is virtually absent in Moldovan law.

iii. The degree of stringency in the obligation to prosecute, however, remains unclear, considering that Article 52(1) of the Code of Criminal Procedure of the Republic of Moldova[25] enumerates one of the responsibilities of the prosecutor as the refusal of the initiation of criminal prosecutions. It is entirely possible that the SCP, when stating that there is virtually no prosecutorial discretion under Moldovan law, spoke of the *de facto* position, and one which is subject to political pressure.

iv. Whatever the *de facto* position of the obligation to prosecute, it would be a matter of significant concern if the obligation were onerously stringent, given that, absent a measurable degree of latitude in the initiation of criminal proceedings against Transnistrian authorities, especially in respect of, for example, traffic misdemeanours, the *bona fides* necessary for transitional justice initiatives would be very difficult to establish.

[24] Code of Criminal Procedure (7 April 1987, as amended), *Bundesgesetzblatt* Part I, 1074, s. 153a.
[25] Law No. 122-XV of 14 March 2003.

v. The allusion to proposals for amnesty from criminal prosecutions, on the other hand, presents concerns of equal significance, though of a different nature. An amnesty is generally incompatible with ECHR obligations to investigate and potentially prosecute acts which constitute human rights violations, for example, of the calibre of those which the ECtHR held in *Mozer*.[26] The only exception to this which the ECtHR has been willing to consider, albeit hypothetically, is in circumstances where there is a reconciliation process with or without a form of compensation for victims.[27] Proposals for amnesty, therefore, raise concerns of Moldova being held to be in breach of its obligations pursuant to the ECHR.

d. Recommendations

i. The suggestion from the SCM concerning the forging of cross-Dniester links between the respective legal professions, made potentially easier by a commonality in legal study, heritage and training, is a potent one and one which should be encouraged as a short-term and longer-term measure. The exclusivity of the legal profession in any country, and its inherent tribalism, criticised on the one hand for its lack of openness, can, under the circumstances which prevail in Chisinau-Tiraspol relations, be utilised to mutual benefit.

ii. If legal and judicial actors from both Banks of the Dniester are willing to cooperate in the name of legal efficacy and commitment to the rule of law, then the professions can be a powerful influence on their respective political actors for effecting the manner of change required to enact frameworks of legal reciprocity, and enable the decisions and actions of authorities on one Bank to be enforced in the other Bank, leading to the creation of shared spaces which are vital for transitional justice.

[26] See, *inter alia Ould Dah v France* (2013) 56 E.H.R.R. SE17, para 48.
[27] *Marguš v Croatia* (Application no. 4455/10, Judgment of 27 May 2014, unreported) para 139.

iii. The precise degree of prosecutorial discretion remains unanswered, given the apparent discrepancy between the text of the Code of Criminal Procedure and the admissions of the SCP. In these circumstances, it would be well-advised to encourage Moldovan prosecutors, legislators and judges to visit jurisdictions with strong traditions of prosecutorial discretion amid transitional justice, such as Northern Ireland. In this regard, Germany is not the most appropriate jurisdiction from which to draw inspiration for Moldovan prosecutors or legislators who enact criminal laws and laws concerning prosecutorial duties, as German prosecutors exercise discretion which is considerably more circumscribed in law than their Northern Ireland counterparts.[28] Similarly, engagement with the Crown Office and Procurator Fiscal Service of Scotland would be invaluable, as Scottish procurators fiscal enjoy similar levels of prosecutorial discretion to their Northern Ireland counterparts,[29] while also operating within the Scottish hybrid system of civil law, with significant parallels to the legal system in Moldova (also largely a civil law system).

iv. Allowing for prosecutorial discretion in Moldovan law which is subject to a public interest test, similar to the German approach, though perhaps with the expansiveness of the discretion under Northern Ireland or Scottish law, would also resolve the concerns surrounding the amnesty proposals which were alluded to by the SCP. As a general principle, prosecutorial discretion, exercised lawfully, independently and impartially, represents the middle path between a rigid duty to prosecute and a blanket amnesty, and would further enjoy the *imprimatur* of the ECHR.

4. The judicial stakeholders

[28] For example, German prosecutors are empowered to refuse to undertake prosecutions of misdemeanours should such refusal be in the public interest pursuant to Art 153a of the German Code of Criminal Procedure, whereas the Director of Public Prosecutions in Northern Ireland is empowered under s. 37(3) of the Justice (Northern Ireland) Act 2002 to prepare a code on the circumstances in which to refuse or discontinue prosecutions, leaving the determination and manner of such a discretion entirely on the Director.

[29] Crown Office and Procurator Fiscal Service *Prosecution Code* (May 2001), 9 (available http://www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Prosecution20Code20_Final20180412__1.pdf, last accessed 10 March 2016).

a. *Introduction*

i. The judicial stakeholders include the Supreme Court of Justice and the Constitutional Court.

ii. While the Supreme Court of Justice (SCJ) is the highest appellate tribunal in Moldova, the Constitutional Court (CC) has exclusive jurisdiction to *inter alia* determine constitutionality of laws, presidential decrees and government ordinances and confirm results of elections and referenda.

b. *Engagement*

i. The majority of the engagement with both the SCJ and the CC was permeated by the ECtHR ruling in *Mozer*, analysed above.

ii. The frustration of the members of the higher judiciary in Moldova with the refusal by Transnistrian authorities to recognise the legitimacy of Moldovan law and courts was evident, with examples proffered by the SCJ of rulings made to invalidate those delivered by Transnistrian courts, which are *de facto* unenforced in that region.

iii. While there is evidence to suggest that the knowledge of transitional justice concepts and initiatives among the higher Moldovan judiciary is considerable, judges remain wedded to the legal framework as it currently exists in Moldova, and there is very little by way of any residual discretion to disapply rigidities of the law in favour of the flexibility required to bring transitional justice to fruition.

iv. While judges of the SCJ, including its President, seemingly view the *Mozer* ruling as vindication of their position vis-à-vis the legitimacy of Transnistrian law and courts, with their focus on Russian interference in Transnistria, for reasons examined above, the ECtHR cannot properly be construed to have delivered a ruling as sweeping as contended by the SCJ.

v. The Legal Directorate of the CC, by contrast, placed great emphasis on the principle of subsidiarity under the ECHR, which, the Directorate contended, needs to be observed more rigorously by the ECtHR. Precisely how the ECtHR has failed to have due regard of subsidiarity in respect of Moldova remains unclear. It is possible that the Directorate implied that in *Mozer*, as in all other Transnistria-related ECtHR rulings, Moldova should not have been found liable at all for Transnistria or its residents pursuant to Article 1 ECHR.

vi. It was queried whether, in their capacity to interpret the laws of Moldova against the requirements of constitutionality and ECHR compliance, the judges of the SCJ or CC may, in the absence of a clear and consistent line of authority from the ECtHR, be willing to go beyond the minimum requirements of the ECHR and establish human rights protections which are uniquely Moldovan, but are also compliant with the ECHR, as the courts in the United Kingdom are entitled to do pursuant to case law.[30] The query was answered in the negative, with the SCJ stating that the task of a member of the Moldovan higher judiciary was simply to apply the ECHR and the rulings of the ECtHR as they exist.

c. Issues arising

i. The preoccupation of the judicial stakeholders with the *Mozer* ruling is understandable given its incredibly recent vintage. However, for reasons already highlighted, *Mozer* merely restated existing ECtHR principles regarding Moldovan jurisdiction over Transnistria, its obligations pursuant to Article 1 ECHR, and finally, its obligations to provide effective remedies pursuant to Article 13 ECHR, for violations of ECHR rights in Transnistria. That Moldova was not held to have been in breach of its obligations should not be taken to imply a soft

[30] See *inter alia*, *Re G (Adoption: Unmarried Couple)* [2008] UKHL 38, [2009] 1 A.C. 173, at 187 D-F (paras 29-30), *per* Lord Hoffmann.

approach on the part of the ECtHR as regards Moldovan obligations towards residents of Transnistria.

ii. If there is any criticism of the ECtHR having Moldova liable at all under Article 1 ECHR for incidents of ECHR violations in Transnistria, such criticism is unfortunate and unhelpful. Transnistria remains a region recognised *de jure* as being Moldovan territory, and Moldova has not renounced such jurisdiction. As such, this jurisdiction automatically invokes the jurisdictional obligations which inhere in Article 1 ECHR in respect of Moldova. Further, these obligations were held in *Mozer*, as in other cases, to be just short of a *de minimis* character, with the requirement that Moldova engage in diplomatic and other legal avenues available in order to discharge its obligations under the ECHR. The ECtHR cannot be expected to require action below this threshold, as any such action would render the ECHR rights of individuals residing in Transnistria wholly illusory, thereby defeating the very purpose of the ECHR.[31]

iii. The judicial approach to the applicability of the ECHR and ECtHR rulings in domestic law is indicative of a literalist approach to laws in general. It should be remembered that the ECtHR itself has never required that the ECHR be *literally* incorporated into the domestic legal orders of any Member State, instead requiring the "substance of the rights and freedoms" of the ECHR be secured.[32] Thus, it is the *purpose* of the ECHR, rather than its actual text, which forms the crux of its applicability. This purposive approach to judicial interpretation of laws is vital to transitional justice initiatives in that it offers a degree of flexibility when confronted with initiatives which may be extra-legal, or which may not adhere to the letter of ECHR law.

d. Recommendations

[31] See *inter alia Airey v Ireland* (1979-80) 2 E.H.R.R. 305, para 24.
[32] *James and Others v United Kingdom* (1986) 8 E.H.R.R. 123, para 84.

i. If transitional justice initiatives are to succeed, and benefit from sustainability, then an engaged judiciary which is cognisant of transitional justice issues as well as their necessity in conflict-societies is a vital component of any peace settlement.

ii. In this connection, judges of the higher judiciary in Moldova would perhaps benefit from engaging with senior judges both in Belfast and in London, with a view to inculcating transitional justice and human rights best-practice.

iii. Further, the recommended engagement should also concern the merits of a purposive interpretation of laws over a literal interpretation, as a foundation on which to build strong transitional justice initiatives.