

EUROPEAN COURT OF HUMAN RIGHTS  
COUR EUROPÉENNE DES DROITS DE L'HOMME

**PRACTICAL GUIDE ON  
ADMISSIBILITY CRITERIA**

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

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## FOREWORD

The right of individual petition is rightly considered as the hallmark and greatest achievement of the European Convention on Human Rights. Individuals who consider that their human rights have been violated have the possibility of lodging a complaint before the European Court of Human Rights. There are however important admissibility requirements set out in the Convention that must be satisfied before a case can be examined. For example, applicants must have exhausted their domestic remedies and must have brought their complaints within a period of six months from the date of the final domestic decision.

As of 1 November 2014, about 78,000 applications were pending before a judicial formation of the Court. Although the Court's docket has been reduced by nearly 50% over the last three years, this still represents a very significant number of cases to be brought before an international tribunal and continues to threaten the effectiveness of the right of petition enshrined in the Convention. We know from experience that the vast majority of cases (92% of those decided in 2013) will be rejected by the Court on one of the grounds of inadmissibility. Such cases must be looked at by lawyers and judges before they are rejected. They thus clog up the Court's docket and obstruct the examination of more deserving cases where the admissibility requirements have been satisfied and which may concern serious allegations of human-rights violations.

It is clear from both experience and the statistics mentioned above that most individual applicants lack sufficient knowledge of the admissibility requirements. It would seem that this is also the case with many legal advisers or practitioners. At the Interlaken Conference on the reform of the Court the member States of the Council of Europe rightly identified this problem and called upon the "States Parties and the Court to ensure that comprehensive and objective information is provided to potential applicants on the Convention and the Court's case-law, in particular on the application procedures and admissibility criteria" (point 6 of the Interlaken Declaration of 19 February 2010).

The Court's response to the call was to prepare a Practical Guide on Admissibility Criteria which clearly sets out the rules and case-law concerning admissibility. It seeks to enable lawyers to properly advise their clients on their chances of bringing an admissible case to the Court and to reduce the number of obviously inadmissible cases being lodged. The previous editions of this Guide were translated into more than twenty languages and made available online both at national level and on the Court's website. I would like to thank all governments and other partners who made this possible and also encourage them to translate and disseminate this third edition.

The new Rule 47 of the Rules of Court, which introduced stricter conditions for applying to the Court, came into force on 1 January 2014. This amendment to the Rules, accompanied by a new Practice Direction, introduced two major changes which will determine whether an application is rejected or allocated to a judicial formation. These concern, firstly, the new simplified application form which must be completed in full and accompanied by copies of all relevant supporting documents on pain of not being examined. Secondly, if the application form or the case file is completed only after the six-month period has expired, the case will normally be rejected as having been lodged out of time.\*

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\*. The six-month period for lodging an application will be reduced to four months once Protocol No. 15 to the Convention enters into force.

In order to make potential applicants and/or their representatives aware of the new conditions for lodging an application, the Court has expanded its range of information materials in all official languages of the States Parties to the Convention. The materials include an interactive checklist and videos explaining the admissibility criteria and how to fill in the application form correctly. In addition, web pages providing helpful information for anyone wishing to apply to the Court are now fully available in the languages of all States Parties. I should also mention the Questions & Answers guide recently published by the Council of Bars and Law Societies in Europe (CCBE).

Last but not least, as a result of the translations programme which the Court launched in 2012 over 12,000 case-law translations in nearly thirty languages (other than English and French) have now been made available in the HUDOC database. Some of the cases which are now available in translated form contain important Court reasoning on points of admissibility. The cases can be searched in HUDOC using the keywords related to one or more admissibility criteria.

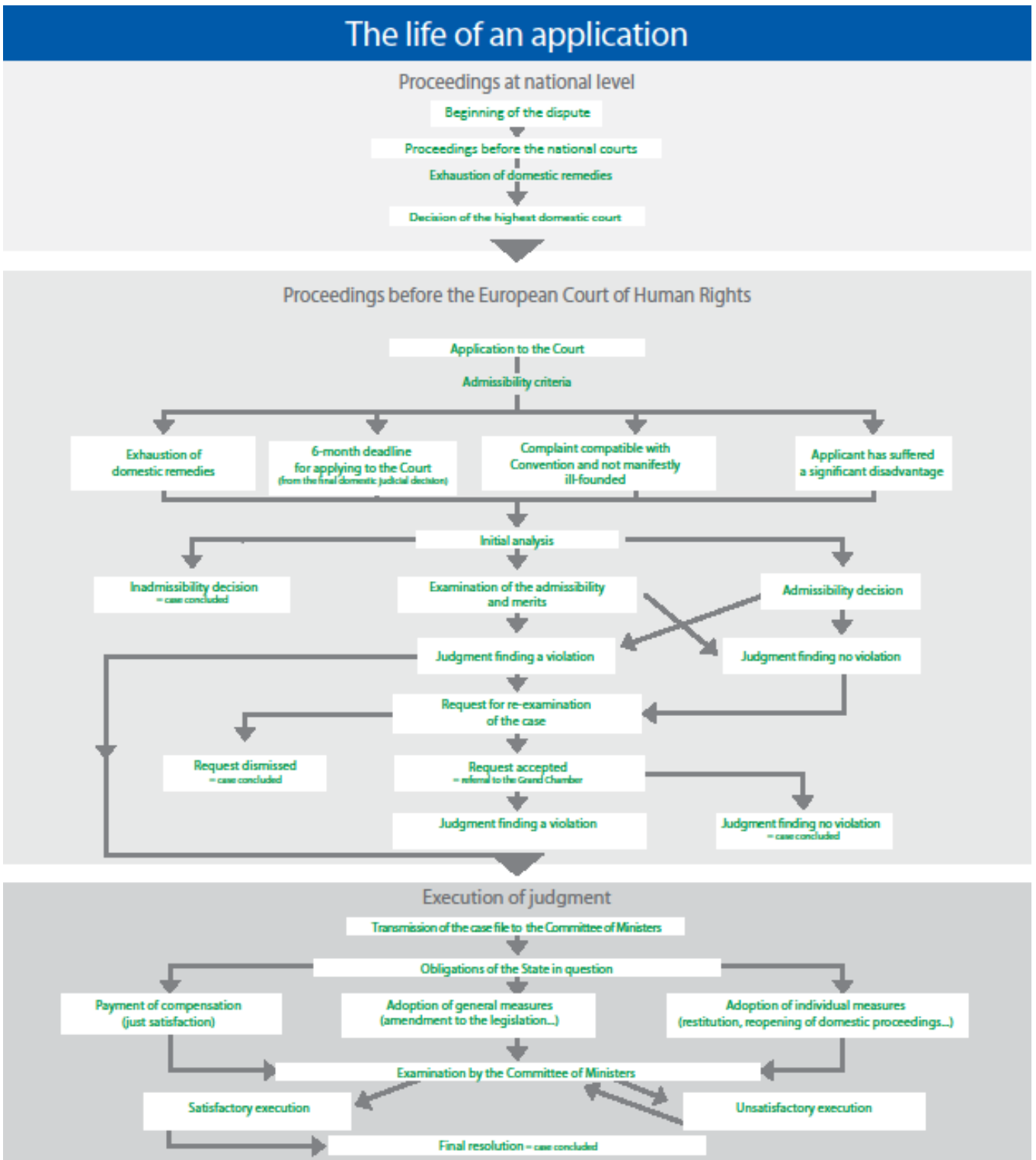
Lawyers and advisers, among others, have a responsibility to ensure that the pathways to the Court are open to all individuals whose cases satisfy the admissibility criteria set out in the Convention as well as the aforementioned procedural conditions. In spite of the important reduction in the number of pending cases over the last years, the Court still receives far too many applications that should never have been brought as they fail to meet these various requirements. Practitioners should study this Practical Guide carefully before deciding to bring a case. By so doing they will make an important contribution to the effectiveness of the European Convention on Human Rights.

I would like to record my thanks to Wolf Legal Publishers for producing a third print edition of this Guide in both English and French and in such an attractive format. I have no doubt that there will be many future editions of this Guide as the law continues to develop and its usefulness is recognised.

Strasbourg, November 2014

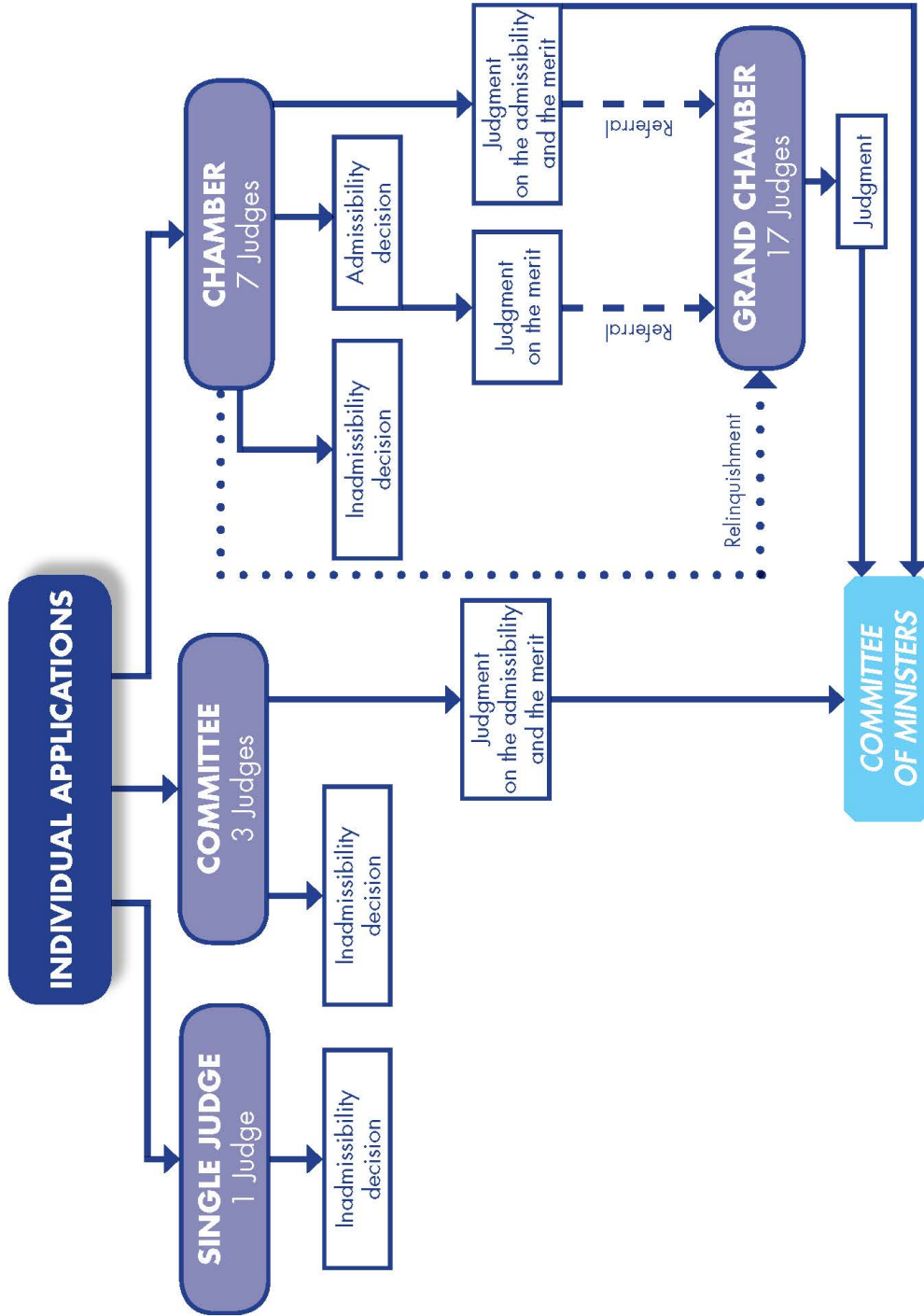
*Dean Spielmann, President of the European Court of Human Rights*





This table provides a schematic view of the procedure only and does not purport to cover all situations (e.g. relinquishment of jurisdiction by a Chamber to the Grand Chamber; rule that Chamber judgment becomes automatically final after three months unless a request is made for referral to the Grand Chamber).

**Simplified case-processing flow chart by judicial formation**



## INTRODUCTION

1. The system of protection of fundamental rights and freedoms established by the European Convention on Human Rights (“the Convention”) is based on the principle of subsidiarity. The task of ensuring its application falls primarily to the States Parties to the Convention; the European Court of Human Rights (“the Court”) should intervene only where States have failed in their obligations.

Supervision by Strasbourg is triggered mainly by individual applications, which may be lodged with the Court by any individual or legal entity located within the jurisdiction of a State Party to the Convention. The pool of potential applicants is therefore vast: in addition to the eight hundred million inhabitants of greater Europe and the nationals of third countries living there or in transit, there are millions of associations, foundations, political parties, companies and so forth (not to mention those persons who, as a result of extraterritorial acts committed by the States Parties to the Convention outside their respective territories, fall within their jurisdiction).

For a number of years now, and owing to a variety of factors, the Court has been submerged by individual applications (over 99,900 were pending as of 31 December 2013). The overwhelming majority of these applications (more than 95%) are, however, rejected without being examined on the merits for failure to satisfy one of the admissibility criteria laid down by the Convention. This situation is frustrating on two counts. Firstly, as the Court is required to respond to each application, it is prevented from dealing within reasonable time-limits with those cases which warrant examination on the merits, without the public deriving any real benefit. Secondly, tens of thousands of applicants inevitably have their claims rejected, often after years of waiting.

2. The States Parties to the Convention, and also the Court and its Registry, have constantly sought ways to tackle this problem and ensure effective administration of justice. One of the most visible measures has been the adoption of [Protocol No. 14](#) to the Convention. This provides, among other things, for applications which are clearly inadmissible to be dealt with by a single judge assisted by non-judicial rapporteurs, rather than by a three-judge committee. Protocol No. 14, which came into force on 1 June 2010, also introduced a new admissibility criterion relating to the degree of disadvantage suffered by the applicant, aimed at discouraging applications from persons who have not suffered significant disadvantage.

On 19 February 2010, representatives of the forty-seven member States of the Council of Europe, all of which are bound by the Convention, met in Interlaken in Switzerland to discuss the future of the Court and, in particular, the backlog of cases resulting from the large number of inadmissible applications. In a [solemn declaration](#), they reaffirmed the Court’s central role in the European system for the protection of fundamental rights and freedoms, and undertook to increase its effectiveness while preserving the principle of individual application.

The need to ensure the viability of the Convention mechanism in the short, medium and long term was further stressed in the declarations adopted at follow-up conferences in [Izmir](#) and [Brighton](#) held in 2011 and 2012, respectively.

3. The idea of providing potential applicants with comprehensive and objective information on the application procedure and admissibility criteria is expressly articulated in point C-6(a) and (b) of the Interlaken Declaration. This practical guide to the conditions of admissibility of individual applications is to be seen in the same context. It is designed to present a clearer and more detailed picture of the conditions of admissibility with a view, firstly, to reducing as far as possible the number of applications which have no prospect of resulting in a ruling on the merits and, secondly, to ensuring that those applications which warrant examination on the merits pass the admissibility test. At present, in most cases which

pass that test, the admissibility and merits are examined at the same time, which simplifies and speeds up the procedure.

This document is aimed principally at legal practitioners and in particular at lawyers who may be called upon to represent applicants before the Court.

All the admissibility criteria set forth in Articles 34 (individual applications) and 35 (admissibility criteria) of the Convention have been examined in the light of the Court's case-law. Naturally, some concepts, such as the six-month time-limit and, to a lesser extent, the exhaustion of domestic remedies, are more easily defined than others such as the concept of "manifestly ill-founded", which can be broken down almost *ad infinitum*, or the Court's jurisdiction *ratione materiae* or *ratione personae*. Furthermore, some Articles are relied on much more frequently than others by applicants, and some States have not ratified all the additional Protocols to the Convention, while others have issued reservations with regard to the scope of certain provisions. The rare instances of inter-State applications have not been taken into account as they call for a very different kind of approach. This guide does not therefore claim to be exhaustive and will concentrate on the most commonly occurring scenarios.

4. The guide was prepared by the Department of the Jurisconsult of the Court, and its interpretation of the admissibility criteria is in no way binding on the Court. It will be updated regularly. It was drafted in French and in English and will be translated into some other languages, with priority being given to the official languages of the high case-count countries.

5. After defining the notions of individual application and victim status, the guide will look at procedural grounds for inadmissibility (I), grounds relating to the Court's jurisdiction (II) and those relating to the merits of the case (III).

## A. Individual application

### Article 34 – Individual applications

"The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. ..."

#### 1. Purpose of the provision

6. Article 34, which guarantees the right of individual application, gives individuals a genuine right to take legal action at international level. It is also one of the fundamental guarantees of the effectiveness of the Convention system – one of the "key components of the machinery" for the protection of human rights (*Mamatkulov and Askarov v. Turkey* [GC],<sup>1</sup> §§ 100 and 122; *Loizidou v. Turkey* (preliminary objections), § 70).

7. As a living instrument, the Convention must be interpreted in the light of present-day conditions. The well-established case-law to this effect also applies to the procedural provisions, such as Article 34 (*ibid.*, § 71).

1. The hyperlinks to the cases cited in the electronic version of the Guide refer to the original text in English or French (the two official languages of the Court) of the judgment or decision delivered by the Court and to the decisions or reports of the European Commission of Human Rights. Unless otherwise indicated, all references are to a judgment on the merits delivered by a Chamber of the Court. The abbreviation "(dec.)" indicates that the citation is of a decision of the Court and "[GC]" that the case was heard by the Grand Chamber.

8. In order to rely on Article 34 of the Convention, an applicant must meet two conditions: he or she must fall into one of the categories of petitioners mentioned in Article 34 and must be able to make out a case that he or she is the victim of a violation of the Convention (*Vallianatos and Others v. Greece* [GC], § 47).

## 2. Categories of petitioners

### (a) Physical persons

9. Any person may rely on the protection of the Convention against a State Party when the alleged violation took place within the jurisdiction of the State concerned, in accordance with Article 1 of the Convention (*Van der Tang v. Spain*, § 53), regardless of nationality, place of residence, civil status, situation or legal capacity. For a mother deprived of parental rights, see *Scozzari and Giunta v. Italy* [GC], § 138; for a minor, see *A. v. the United Kingdom*; for a person lacking legal capacity, without the consent of her guardian, see *Zehentner v. Austria*, §§ 39 et seq.

10. Applications can be brought only by living persons or on their behalf; a deceased person cannot lodge an application (*Aizpurua Ortiz and Others v. Spain*, § 30; *Dvořáček and Dvořáčková v. Slovakia*, § 41), even through a representative (*Kaya and Polat v. Turkey* (dec.); *Ciobanu v. Romania* (dec.)).

### (b) Legal persons

11. A legal entity claiming to be the victim of a violation by a member State of the rights set forth in the Convention and the Protocols has standing before the Court only if it is a “non-governmental organisation” within the meaning of Article 34 of the Convention.

12. The term “governmental organisations”, as opposed to “non-governmental organisations” within the meaning of Article 34, applies not only to the central organs of the State, but also to decentralised authorities that exercise “public functions”, regardless of their autonomy *vis-à-vis* the central organs; likewise it applies to local and regional authorities (*Radio France and Others v. France* (dec.), § 26), a municipality (*Ayuntamiento de Mula v. Spain* (dec.)), or part of a municipality which participates in the exercise of public authority (*Municipal Section of Antilly v. France* (dec.)), none of which are entitled to make an application on the basis of Article 34 (see also *Döşemealtı Belediyesi v. Turkey* (dec.)).

13. The category of “governmental organisation” includes legal entities which participate in the exercise of governmental powers or run a public service under government control. In order to determine whether any given legal person other than a territorial authority falls within that category, account must be taken of its legal status and, where appropriate, the rights that status gives it, the nature of the activity it carries out and the context in which it is carried out, and the degree of its independence from the political authorities (*Radio France and Others v. France* (dec.), § 26; *Kotov v. Russia* [GC], § 93). For public-law entities which do not exercise any governmental powers, see *The Holy Monasteries v. Greece*, § 49; *Radio France and Others v. France* (dec.), §§ 24-26; *Österreichischer Rundfunk v. Austria* (dec.). For State-owned companies, which enjoy sufficient institutional and operational independence from the State, see *Islamic Republic of Iran Shipping Lines v. Turkey*, §§ 80-81; *Ukraine-Tyumen v. Ukraine*, §§ 25-28; *Unédic v. France*, §§ 48-59; and, by contrast, *Zastava It Turs v. Serbia* (dec.); *State Holding Company Luganskvugillya v. Ukraine* (dec.); see also *Transpetrol, a.s., v. Slovakia* (dec.).

**(c) Any group of individuals**

14. An application can be brought by a group of individuals. However, local authorities or any other government bodies cannot lodge applications through the individuals who make up them or represent them, relating to acts punishable by the State to which they are attached and on behalf of which they exercise public authority (*Demirbaş and Others v. Turkey* (dec.)).

**3. Victim status****(a) Notion of “victim”**

15. The word “victim”, in the context of Article 34 of the Convention, denotes the person or persons directly or indirectly affected by the alleged violation. Hence, Article 34 concerns not just the direct victim or victims of the alleged violation, but also any indirect victims to whom the violation would cause harm or who would have a valid and personal interest in seeing it brought to an end (*Vallianatos and Others v. Greece* [GC], §§ 47). The notion of “victim” is interpreted autonomously and irrespective of domestic rules such as those concerning interest in or capacity to take action (*Gorraiz Lizarraga and Others v. Spain*, § 35), even though the Court should have regard to the fact that an applicant was a party to the domestic proceedings (*Aksu v. Turkey* [GC], § 52; *Micallef v. Malta* [GC], § 48). It does not imply the existence of prejudice (*Brumărescu v. Romania* [GC], § 50), and an act that has only temporary legal effects may suffice (*Monnat v. Switzerland*, § 33).

16. The interpretation of the term “victim” is liable to evolve in the light of conditions in contemporary society and it must be applied without excessive formalism (*ibid.*, §§ 30-33; *Gorraiz Lizarraga and Others v. Spain*, § 38; *Stukus and Others v. Poland*, § 35; *Ziętal v. Poland*, §§ 54-59). The Court has held that the issue of victim status may be linked to the merits of the case (*Siliadin v. France*, § 63; *Hirsi Jamaa and Others v. Italy* [GC], § 111).

**(b) Direct victim**

17. In order to be able to lodge an application in accordance with Article 34, an applicant must be able to show that he or she was “directly affected” by the measure complained of (*Tănase v. Moldova* [GC], § 104; *Burden v. the United Kingdom* [GC], § 33). This is indispensable for putting the protection mechanism of the Convention into motion (*Hristozov and Others v. Bulgaria*, § 73), although this criterion is not to be applied in a rigid, mechanical and inflexible way throughout the proceedings (*Micallef v. Malta* [GC], § 45; *Karner v. Austria*, § 25; *Aksu v. Turkey* [GC], § 51).

**(c) Indirect victim**

18. If the alleged victim of a violation has died before the introduction of the application, it may be possible for the person with requisite legal interest as next-of-kin to introduce an application raising complaints related to the death or disappearance (*Varnava and Others v. Turkey* [GC], § 112). This is because of the particular situation governed by the nature of the violation alleged and considerations of the effective implementation of one of the most fundamental provisions in the Convention system (*Fairfield v. the United Kingdom* (dec.)).

19. In such cases, the Court has accepted that close family members, such as parents, of a person whose death or disappearance is alleged to engage the responsibility of the State can themselves claim to be indirect victims of the alleged violation of Article 2, the question of whether they were legal heirs of the deceased not being relevant (*Van Colle v. the United Kingdom*, § 86).

20. The next-of-kin can also bring other complaints, such as under Articles 3 and 5 of the Convention on behalf of deceased or disappeared relatives, provided that the alleged violation is closely linked to the death or disappearance giving rise to issues under Article 2.

21. For married partners, see *McCann and Others v. the United Kingdom* [GC], *Salman v. Turkey* [GC]; for unmarried partners, see *Velikova v. Bulgaria* (dec.); for parents, see *Ramsahai and Others v. the Netherlands* [GC], *Giuliani and Gaggio v. Italy* [GC]; for siblings, see *Andronicou and Constantinou v. Cyprus*; for children, see *McKerr v. the United Kingdom*; for nephews, see *Yaşa v. Turkey*.

22. In cases where the alleged violation of the Convention was not closely linked to the death or disappearance of the direct victim, the Court has generally declined to grant standing to any other person unless that person could, exceptionally, demonstrate an interest of their own (*Nassau Verzekering Maatschappij N.V. v. the Netherlands* (dec.), § 20). See, for example, *Sanles Sanles v. Spain* (dec.), which concerned the prohibition of assisted suicide in alleged breach of Articles 2, 3, 5, 8, 9 and 14 and where the Court held that the rights claimed by the applicant, who was the deceased's sister-in-law and legal heir, belonged to the category of non-transferable rights and that therefore she could not claim to be the victim of a violation on behalf of her late brother-in-law; see also *Bic and Others v. Turkey* (dec.) and *Fairfield v. the United Kingdom* (dec.).

23. In those cases where victim status was granted to close relatives, allowing them to submit an application in respect of complaints under, for example, Articles 5, 6 or 8, the Court took into account whether they have shown a moral interest in having the late victim exonerated of any finding of guilt (*Nölkenbockhoff v. Germany*, § 33; *Grădinar v. Moldova*, §§ 95 and 97-98) or in protecting their own reputation and that of their family (*Brudnicka and Others v. Poland*, §§ 27-31; *Armonienė v. Lithuania*, § 29; *Polanco Torres and Movilla Polanco v. Spain*, §§ 31-33), or whether they have shown a material interest on the basis of the direct effect on their pecuniary rights (*Nölkenbockhoff v. Germany*, § 33; *Grădinar v. Moldova*, § 97; *Micallef v. Malta* [GC], § 48). The existence of a general interest which necessitated proceeding with the consideration of the complaints has also been taken into consideration (*ibid.*, §§ 46 and 50; see also *Bic and Others v. Turkey* (dec.), §§ 22-23).

24. The applicant's participation in the domestic proceedings has been found to be only one of several relevant criteria (*Nölkenbockhoff v. Germany*, § 33; *Micallef v. Malta* [GC], §§ 48-49; *Polanco Torres and Movilla Polanco v. Spain*, § 31; *Grădinar v. Moldova*, §§ 98-99; see also *Kaburov v. Bulgaria* (dec.), §§ 57-58, where the Court found that, in a case concerning the transferability of Article 3 of the Convention, the applicant, in the absence of a moral interest in the outcome of proceedings or other compelling reason, could not be considered a victim merely because the domestic law allowed him to intervene in the tort proceedings as the late Mr Kaburov's heir; see also *Nassau Verzekering Maatschappij N.V. v. the Netherlands* (dec.) where the applicant company's claim to have victim status on account of having acquired a Convention claim by a deed of assignment was rejected by the Court).

25. As regards complaints pertaining to companies, the Court has considered that a person cannot complain of a violation of his or her rights in proceedings to which he or she was not a party, even if he or she was a shareholder and/or director of a company which was party to the proceedings. While in certain circumstances the sole owner of a company can claim to be a "victim" within the meaning of Article 34 of the Convention where the impugned measures were taken in respect of his or her company, when that is not the case the disregarding of a company's legal personality can be justified only in exceptional circumstances, in particular where it is clearly established that it is impossible for the company to apply to the Convention institutions through the organs set up under its articles of incorporation or – in the event of liquidation – through its liquidators (*Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], § 92).

**(d) Potential victims and *actio popularis***

26. In certain specific situations, the Court has accepted that an applicant may be a potential victim. For example, where he was not able to establish that the legislation he complained of had actually been applied to him on account of the secret nature of the measures it authorised (*Klass and Others v. Germany*) or where an alien's removal had been ordered, but not enforced, and where enforcement would have exposed him in the receiving country to treatment contrary to Article 3 of the Convention or to an infringement of his rights under Article 8 of the Convention (*Soering v. the United Kingdom*).

27. However, in order to be able to claim to be a victim in such a situation, an applicant must produce reasonable and convincing evidence of the likelihood that a violation affecting him or her personally will occur; mere suspicion or conjecture is insufficient (*Senator Lines GmbH v. fifteen member States of the European Union* (dec.) [GC]). For the absence of a formal expulsion order, see *Vijayanathan and Pusparajah v. France*, § 46; for alleged consequences of a parliamentary report, see *Fédération chrétienne des témoins de Jéhovah de France v. France* (dec.); for alleged consequences of a judicial ruling concerning a third party in a coma, see *Rossi and Others v. Italy* (dec.).

28. An applicant cannot claim to be a victim in a case where he or she is partly responsible for the alleged violation (*Paşa and Erkan Erol v. Turkey*).

29. The Court has also underlined that the Convention does not envisage the bringing of an *actio popularis* for the interpretation of the rights it contains or permit individuals to complain about a provision of a domestic law simply because they consider, without having been directly affected by it, that it may contravene the Convention (*Aksu v. Turkey* [GC], § 50; *Burden v. the United Kingdom* [GC], § 33).

30. However, it is open to a person to contend that a law violates his or her rights, in the absence of an individual measure of implementation, if he or she is required either to modify his or her conduct or risks being prosecuted or if he or she is a member of a class of people who risk being directly affected by the legislation (*ibid.*, § 34; *Tănase v. Moldova* [GC], § 104; *Michaud v. France*, §§ 51-52; *Sejdić and Finci v. Bosnia and Herzegovina* [GC], § 28.).

**(e) Loss of victim status**

31. It falls first to the national authorities to redress any alleged violation of the Convention. Hence, the question whether an applicant can claim to be a victim of the violation alleged is relevant at all stages of the proceedings before the Court (*Scordino v. Italy (no. 1)* [GC], § 179). In this regard, the applicant must be able to justify his or her status as a victim throughout the proceedings (*Burdov v. Russia*, § 30; *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], § 80).

32. The issue as to whether a person may still claim to be the victim of an alleged violation of the Convention essentially entails on the part of the Court an *ex post facto* examination of his or her situation (*ibid.*, § 82).

33. A decision or measure favourable to the applicant is not, in principle, sufficient to deprive him or her of his or her status as a “victim” for the purposes of Article 34 of the Convention unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for the breach of the Convention (*Scordino v. Italy (no. 1)* [GC], § 180; *Gäfgen v. Germany* [GC], § 115; *Nada v. Switzerland* [GC], § 128). Only when these conditions are satisfied does the subsidiary nature of the protective mechanism of the Convention preclude examination of an application (*Jensen and Rasmussen v. Denmark* (dec.); *Albayrak v. Turkey*, § 32).



34. The applicant would remain a victim if the authorities have failed to acknowledge either expressly or in substance that there has been a violation of the applicant's rights (*ibid.*, § 33; *Jensen v. Denmark* (dec.)) even if the latter received some compensation (*Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], § 88).

35. Moreover, the redress afforded must be appropriate and sufficient. This will depend on all the circumstances of the case, with particular regard to the nature of the Convention violation in issue (*Gäfgen v. Germany* [GC], § 116).

36. For example, a person may not claim to be a victim of a violation of his right to a fair trial under Article 6 of the Convention which, according to him, took place in the course of proceedings in which he was acquitted or which were discontinued (*Oleksy v. Poland* (dec.); *Koç and Tambaş v. Turkey* (dec.); *Bouglame v. Belgium* (dec.)), except for the complaint pertaining to the length of the proceedings in question (*Osmanov and Husseinov v. Bulgaria* (dec.)).

37. In some other cases whether an individual remains a victim may also depend on the amount of compensation awarded by the domestic courts and the effectiveness (including the promptness) of the remedy affording the award (*Normann v. Denmark* (dec.); *Scordino v. Italy (no. 1)* [GC], § 202; see also *Jensen and Rasmussen v. Denmark* (dec.)).

38. For other specific situations, see *Arat v. Turkey*, § 47 (Article 6); *Constantinescu v. Romania*, §§ 40-44 (Articles 6 and 10); *Guisset v. France*, §§ 66-70 (Article 6); *Chevrol v. France*, §§ 30 et seq. (Article 6); *Moskovets v. Russia*, § 50 (Article 5); *Moon v. France*, §§ 29 et seq. (Article 1 of Protocol No. 1); *D.J. and A.-K.R. v. Romania* (dec.), §§ 77 et seq. (Article 2 of Protocol No. 4); and *Sergey Zolotukhin v. Russia* [GC], § 115 (Article 4 of Protocol No. 7); *Dalban v. Romania* [GC], § 44 (Article 10); *Giüneş v. Turkey* (dec.) (Article 10).

39. A case may be struck out of the list because the applicant ceases to have victim status/*locus standi*. Regarding resolution of the case at domestic level after the admissibility decision, see *Ohlen v. Denmark* (striking out); for an agreement transferring rights which were the subject of an application being examined by the Court, see *Dimitrescu v. Romania*, §§ 33-34.

40. The Court also examines whether the case should be struck out of its list on one or more of the grounds set forth in Article 37 of the Convention, in the light of events occurring subsequent to the lodging of the application, notwithstanding the fact that the applicant can still claim to be a "victim" (*Pisano v. Italy* (striking out) [GC], § 39), or even irrespective of whether or not he or she can continue to claim victim status. For developments occurring after a decision to relinquish jurisdiction in favour of the Grand Chamber, see *El Majjaoui and Stichting Touba Moskee v. the Netherlands* (striking out) [GC], §§ 28-35; after the application had been declared admissible, see *Shevanova v. Latvia* (striking out) [GC], §§ 44 et seq.; and after the Chamber judgment, see *Sisojeva and Others v. Latvia* (striking out) [GC], § 96.

#### (f) Death of the victim

41. In principle, an application lodged by the original applicant before his or her death may be continued by heirs or close family members expressing the wish to pursue the proceedings, provided that he or she has sufficient interest in the case (*Hristozov and Others v. Bulgaria*, § 71; *Malhous v. the Czech Republic* (dec.) [GC]).

42. However, where the applicant has died in the course of the proceedings and either no one has come forward with a wish to pursue the application or the persons who have expressed such a wish are not heirs or sufficiently close relatives of the applicant, and cannot demonstrate that they have any other legitimate interest in pursuing the application, the Court will strike the application out of its list (*Léger v. France* (striking out) [GC], § 50; *Hirsi Jamaa and Others v. Italy* [GC], § 57) save for in very exceptional cases where the Court

finds that respect for human rights as defined in the Convention and the Protocols thereto requires a continuation of the examination of the case (*Karner v. Austria*, §§ 25 et seq.).

43. See, for example, *Raimondo v. Italy*, § 2, and *Stojkovic v. the former Yugoslav Republic of Macedonia*, § 25 (widow and children); *X v. France*, § 26 (parents); *Malhous v. the Czech Republic* (dec.) [GC] (nephew and potential heir); *Velikova v. Bulgaria* (dec.) (unmarried or *de facto* partner); contrast with *Thévenon v. France* (dec.) (universal legatee not related to the deceased); *Léger v. France* (striking out) [GC], §§ 50-51 (niece).

#### 4. Representation

44. Where applicants choose to be represented under Rule 36 § 1 of the Rules of Court, rather than lodging the application themselves, Rule 45 § 3 requires them to produce a written authority to act, duly signed. It is essential for representatives to demonstrate that they have received specific and explicit instructions from the alleged victim within the meaning of Article 34 on whose behalf they purport to act before the Court (*Post v. the Netherlands* (dec.)). On the validity of an authority to act, see *Aliev v. Georgia*, §§ 44-49; on the authenticity of an application, see *Velikova v. Bulgaria*, §§ 48-52.

45. However, special considerations may arise in the case of victims of alleged breaches of Articles 2, 3 and 8 of the Convention at the hands of the national authorities, having regard to the victims' vulnerability on account of their age, sex or disability, which rendered them unable to lodge a complaint on the matter with the Court, due regard also being paid to the connections between the person lodging the application and the victim. In such cases, applications lodged by individuals on behalf of the victim(s), even though no valid form of authority was presented, have thus been declared admissible. See, for example, *Ilhan v. Turkey* [GC], § 55, where the complaints were brought by the applicant on behalf of his brother, who had been ill-treated; *Y.F. v. Turkey*, § 29, where a husband complained that his wife had been compelled to undergo a gynaecological examination; *S.P., D.P. and A.T. v. the United Kingdom*, Commission décision, where a complaint was brought by a solicitor on behalf of children he had represented in domestic proceedings, in which he had been appointed by the guardian *ad litem*; and, by contrast, *Nencheva and Others v. Bulgaria*, § 93, where the Court did not accept the victim status of the applicant association acting on behalf of the direct victims, noting that it had not pursued the case before the domestic courts and also that the facts complained of did not have any impact on its activities, since the association was able to continue working in pursuance of its goals.

## B. Freedom to exercise the right of individual application

### Article 34 – Individual applications

“... The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.”

46. The right to apply to the Court is absolute and admits of no hindrance. This principle implies freedom to communicate with the Convention institutions (for correspondence in detention, see *Peers v. Greece*, § 84; *Kornakovs v. Latvia*, §§ 157 et seq.). See also, in this connection, the 1996 European Agreement relating to persons participating in proceedings of the European Court of Human Rights (CETS No. 161).

47. The domestic authorities must refrain from putting any form of pressure on applicants to withdraw or modify their complaints. According to the Court, pressure may take the form

of direct coercion and flagrant acts of intimidation in respect of applicants or potential applicants, their families or their legal representatives, but also improper indirect acts or contacts (*Mamatkulov and Askarov v. Turkey* [GC], § 102).

The Court examines the dissuasive effect on the exercise of the right of individual application (*Colibaba v. Moldova*, § 68). In some circumstances, it can, of its own motion, raise the issue whether the applicant had been subjected to intimidation which had amounted to a hindrance to the effective exercise of his right of individual petition (*Lopata v. Russia*, § 147).

Consideration must be given to the vulnerability of the applicant and the risk that the authorities may influence him or her (*Iambor v. Romania (no. 1)*, § 212). Applicants may be particularly vulnerable when they are in pre-trial detention and restrictions have been placed on contact with their family or the outside world (*Cotlet v. Romania*, § 71).

48. Some noteworthy examples:

- as regards interrogation by the authorities concerning the application: *Akdivar and Others v. Turkey*, § 105; *Tanrikulu v. Turkey* [GC], § 131;
- threats of criminal proceedings against the applicant's lawyer: *Kurt v. Turkey*, §§ 159-65; complaint by the authorities against the lawyer in the domestic proceedings: *McShane v. the United Kingdom*, § 151; disciplinary and other measures against the applicant's lawyers: *Khodorkovskiy and Lebedev v. Russia*, §§ 929-33;
- police questioning of the applicant's lawyer and translator concerning the claim for just satisfaction: *Fedotova v. Russia*, §§ 49-51; regarding an inquiry ordered by the government's representative: *Ryabov v. Russia*, §§ 53-65;
- inability of the applicant's lawyer and doctor to meet: *Boicenco v. Moldova*, §§ 158-59;
- failure to respect the confidentiality of lawyer-applicant discussions in a meeting room: *Oferta Plus SRL v. Moldova*, § 156;
- threats by the prison authorities: *Petra v. Romania*, § 44;
- refusal by the prison authorities to forward an application to the Court on the ground of non-exhaustion of domestic remedies: *Nurmagomedov v. Russia*, § 61;
- pressure put on a witness in a case before the Court concerning conditions of detention: *Novinskiy v. Russia*, §§ 119 et seq.;
- dissuasive remarks by the prison authorities combined with unjustified omissions and delays in providing the prisoner with writing materials for his correspondence and with the documents necessary for his application to the Court: *Gagiu v. Romania*, §§ 94 et seq.;
- the authorities' refusal to provide an imprisoned applicant with copies of documents required for his application to the Court: *Naydyon v. Ukraine*, § 68; *Vasiliy Ivashchenko v. Ukraine*, §§ 107-10;
- loss by prison authorities of irreplaceable papers relating to prisoner's application to the Court: *Buldakov v. Russia*, §§ 48-50;
- intimidation and pressuring of an applicant by the authorities in connection with the case before the Court: *Lopata v. Russia*, §§ 154-60.

49. The circumstances of the case may make the alleged interference with the right of individual application less serious (*Sisojeva and Others v. Latvia* (striking out) [GC], §§ 118 et seq.). See also *Holland v. Sweden* (dec.), where the Court found that the destruction of tape recordings from a court hearing in accordance with Swedish law before the expiry of the six-month time-limit for lodging an application with the Court did not hinder the applicant from effectively exercising his right of petition; *Farcaş v. Romania* (dec.), where the Court considered that the alleged inability of the physically disabled applicant to exhaust domestic

remedies, owing to lack of special facilities providing access to public services, did not hinder him from effectively exercising his right of petition; *Yepishin v. Russia*, §§ 73-77, where the Court considered that the prison administration's refusal to pay postage for dispatch of prisoner's letters to the Court did not hinder the applicant from effectively exercising his right of petition.

### 1. Obligations of the respondent State

#### (a) Rule 39 of the Rules of Court

50. Under Rule 39 of the Rules of Court, the Court may indicate interim measures (*Mamatkulov and Askarov v. Turkey* [GC], §§ 99-129). Article 34 will be breached if the authorities of a Contracting State fail to take all steps which could reasonably have been taken in order to comply with the measure indicated by the Court (*Paladi v. Moldova* [GC], §§ 87-92).

51. The government must demonstrate to the Court that the interim measure was complied with or, in an exceptional case, that there was an objective impediment which prevented compliance and that the government took all reasonable steps to remove the impediment and to keep the Court informed about the situation (see, for example, *A.N.H. v. Finland* (dec.), § 27).

52. Some recent examples:

- failure to secure a timely meeting between an asylum-seeker in detention and a lawyer despite the interim measure indicated under Rule 39 in this respect: *D.B. v. Turkey*, § 67;
- transfer of detainees to Iraqi authorities in contravention of interim measure: *Al-Saadoon and Mufdhi v. the United Kingdom*, §§ 162-65;
- expulsion of the first applicant in contravention of interim measure: *Kamaliyevy v. Russia*, §§ 75-79;
- inadvertent but not irremediable failure to comply with interim measure indicated in respect of Article 8: *Hamidovic v. Italy* (dec.);
- failure to comply with interim measure requiring prisoner's placement in specialised medical institution: *Makharadze and Sikharulidze v. Georgia*, §§ 100-05;
- failure to comply with interim measure indicated by the Court on account of real risk of torture if extradited: *Mannai v. Italy*, §§ 54-57; *Labsi v. Slovakia*, §§ 149-51;
- secret transfer of person at risk of ill-treatment in Uzbekistan and in respect of whom an interim measure was in force: *Abdulkhakov v. Russia*, §§ 226-31;
- forcible transfer of person to Tajikistan with real risk of ill-treatment and circumvention of interim measures: *Savridin Dzhurayev v. Russia*, §§ 218-19; see also failure by Russian authorities to protect Tajik national in their custody from forcible repatriation to Tajikistan in breach of interim measure: *Nizomkhon Dzhurayev v. Russia*, §§ 157-59.

53. It is for the Court to verify compliance with the interim measure, while a State which considers that it is in possession of materials capable of convincing the Court to annul the interim measure should inform the Court accordingly (*Paladi v. Moldova* [GC], §§ 90-92; *Olaechea Cahuas v. Spain*, § 70; *Groni v. Albania*, §§ 181 et seq.).

The mere fact that a request has been made for application of Rule 39 is not sufficient to oblige the State to stay execution of an extradition decision (*Al-Moayad v. Germany* (dec.), §§ 122 et seq.; see also the obligation of the respondent State to cooperate with the Court in good faith).

**(b) Establishment of the facts**

54. Whereas the Court is responsible for establishing the facts, it is up to the parties to provide active assistance by supplying it with all the relevant information. Their conduct may be taken into account when evidence is sought (*Ireland v. the United Kingdom*, § 161).

55. The Court has held that proceedings in certain types of applications do not in all cases lend themselves to a rigorous application of the principle whereby a person who alleges something must prove that allegation, and that it is of the utmost importance for the effective operation of the system of individual petition instituted under Article 34 of the Convention that States should furnish all necessary facilities to make possible a proper and effective examination of applications (*Bazorkina v. Russia*, § 170; *Tahsin Acar v. Turkey* [GC], § 253). This obligation requires the Contracting States to furnish all necessary facilities to the Court, whether it is conducting a fact-finding investigation or performing its general duties as regards the examination of applications. A failure on a government's part to submit such information which is in their hands without a satisfactory explanation may not only give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations, but may also reflect negatively on the level of compliance by a respondent State with its obligations under Article 38 of the Convention (*ibid.*, § 254; *Imakayeva v. Russia*, § 200; *Janowiec and Others v. Russia* [GC], § 202).

56. The obligation to furnish the evidence requested by the Court is binding on the respondent government from the moment such a request has been formulated, whether it be on initial communication of an application to the government or at a subsequent stage in the proceedings (*ibid.*, § 203; *Enukidze and Girgvliani v. Georgia*, § 295; *Bekirski v. Bulgaria*, §§ 111-13). It is a fundamental requirement that the requested material be submitted in its entirety, if the Court has so directed, and that any missing elements be properly accounted for (*Janowiec and Others v. Russia* [GC], § 203). In addition, any material requested must be produced promptly and, in any event, within the time-limit fixed by the Court, for a substantial and unexplained delay may lead the Court to find the respondent State's explanations unconvincing (*ibid.*).

57. The Court has previously found that the respondent government failed to comply with the requirements of Article 38 in cases where they did not provide any explanation for the refusal to submit documents that had been requested (see, for example, *Maslova and Nalbandov v. Russia*, §§ 128-29) or submitted an incomplete or distorted copy while refusing to produce the original document for the Court's inspection (see, for example, *Trubnikov v. Russia*, §§ 50-57).

58. If the government advances confidentiality or security considerations as the reason for their failure to produce the material requested, the Court has to satisfy itself that there exist reasonable and solid grounds for treating the documents in question as secret or confidential (*Janowiec and Others v. Russia* [GC], § 205). As regards failure to disclose a classified report to the Court: *ibid.*, §§ 207 et seq.; *Nolan and K. v. Russia*, §§ 56 et seq.

Regarding the relationship between Articles 34 and 38, see *Bazorkina v. Russia*, §§ 170 et seq. and § 175. Article 34, being designed to ensure the effective operation of the right of individual application, is a sort of *lex generalis*, while Article 38 specifically requires States to cooperate with the Court.

**(c) Investigations**

59. The respondent State is also expected to assist with investigations (Article 38), for it is up to the State to furnish the "necessary facilities" for the effective examination of applications (*Çakıcı v. Turkey* [GC], § 76). Obstructing a fact-finding visit constitutes a breach of Article 38 (*Shamayev and Others v. Georgia and Russia*, § 504).

## I. PROCEDURAL GROUNDS FOR INADMISSIBILITY

### A. Non-exhaustion of domestic remedies

#### Article 35 § 1 – Admissibility criteria

“1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law ...”

60. As the text of Article 35 itself indicates, this requirement is based on the generally recognised rules of international law. The obligation to exhaust domestic remedies forms part of customary international law, recognised as such in the case-law of the International Court of Justice (for example, see the case of *Interhandel (Switzerland v. the United States)*, judgment of 21 March 1959). It is also to be found in other international human-rights treaties: the International Covenant on Civil and Political Rights (Article 41(1)(c)) and the Optional Protocol thereto (Articles 2 and 5(2)(b)); the American Convention on Human Rights (Article 46); and the African Charter on Human and Peoples’ Rights (Articles 50 and 56(5)). The European Court of Human Rights observed in *De Wilde, Ooms and Versyp v. Belgium* that the State may waive the benefit of the rule of exhaustion of domestic remedies, there being a long-established international practice on this point (§ 55).

61. The Court is intended to be subsidiary to the national systems safeguarding human rights and it is appropriate that the national courts should initially have the opportunity to determine questions regarding the compatibility of domestic law with the Convention (*A, B and C v. Ireland* [GC], § 142). If an application is nonetheless subsequently brought to Strasbourg, the Court should have the benefit of the views of the national courts, as being in direct and continuous contact with the vital forces of their countries (*Burden v. the United Kingdom* [GC], § 42).

62. Article 35 § 1 concerns only *domestic* remedies; it does not require the exhaustion of remedies within the framework of international organisations. On the contrary, if the applicant submits the case to another procedure of international investigation or settlement, the application may be rejected under Article 35 § 2 (b) of the Convention (see point I.E.). It is for the Court to determine whether a particular body is domestic or international in character having regard to all relevant factors including the legal character, its founding instrument, its competence, its place (if any) in an existing legal system and its funding (*Jeličić v. Bosnia and Herzegovina* (dec.); *Peraldi v. France* (dec.)) (see point I.E.).

#### 1. Purpose of the rule

63. The rationale for the exhaustion rule is to afford the national authorities, primarily the courts, the opportunity to prevent or put right the alleged violations of the Convention. It is based on the assumption, reflected in Article 13, that the domestic legal order will provide an effective remedy for violations of Convention rights. This is an important aspect of the subsidiary nature of the Convention machinery (*Selmouni v. France* [GC], § 74; *Kudła v. Poland* [GC], § 152; *Andrášik and Others v. Slovakia* (dec.)). It applies regardless of whether the provisions of the Convention have been incorporated into national law (*Eberhard and M. v. Slovenia*). The Court recently reiterated that the rule of exhaustion of domestic remedies is an indispensable part of the functioning of the protection system under the Convention and that this is a basic principle (*Demopoulos and Others v. Turkey* (dec.) [GC], §§ 69 and 97).

## 2. Application of the rule

### (a) Flexibility

64. The exhaustion rule may be described as one that is golden rather than cast in stone. The Commission and the Court have frequently underlined the need to apply the rule with some degree of flexibility and without excessive formalism, given the context of protecting human rights (*Ringeisen v. Austria*, § 89; *Lehtinen v. Finland* (dec.)). The rule of exhaustion is neither absolute nor capable of being applied automatically (*Kozacioğlu v. Turkey* [GC], § 40). For example, the Court decided that it would be unduly formalistic to require the applicants to avail themselves of a remedy which even the highest court of the country had not obliged them to use (*D.H. and Others v. the Czech Republic* [GC], §§ 116-18). The Court took into consideration in one case the tight deadlines set for the applicants' response by emphasising the "haste" with which they had had to file their submissions (*Financial Times Ltd and Others v. the United Kingdom*, §§ 43-44). However, making use of the available remedies in accordance with domestic procedure and complying with the formalities laid down in national law are especially important where considerations of legal clarity and certainty are at stake (*Saghinadze and Others v. Georgia*, §§ 83-84).

### (b) Compliance with domestic rules and limits

65. Applicants must comply with the applicable rules and procedures of domestic law, failing which their application is likely to fall foul of the condition laid down in Article 35 (*Ben Salah Adraqui and Dhaima v. Spain* (dec.); *Merger and Cros v. France* (dec.); *MPP Golub v. Ukraine* (dec.); *Agbovi v. Germany* (dec.)). Article 35 § 1 has not been complied with when an appeal is not accepted for examination because of a procedural mistake by the applicant (*Gäfgen v. Germany* [GC], § 143).

However, it should be noted that where an appellate court examines the merits of a claim even though it considers it inadmissible, Article 35 § 1 will be complied with (*Voggenreiter v. Germany*). This is also the case regarding applicants who have failed to observe the forms prescribed by domestic law, if the competent authority has nevertheless examined the substance of the claim (*Vladimir Romanov v. Russia*, § 52). The same applies to claims worded in a very cursory fashion barely satisfying the legal requirements, where the court has ruled on the merits of the case albeit briefly (*Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], §§ 43-45).

### (c) Existence of several remedies

66. If more than one potentially effective remedy is available, the applicant is only required to have used one of them (*Moreira Barbosa v. Portugal* (dec.); *Jeličić v. Bosnia and Herzegovina* (dec.); *Karakó v. Hungary*, § 14; *Aquilina v. Malta* [GC], § 39). Indeed, when one remedy has been attempted, use of another remedy which has essentially the same purpose is not required (*Riad and Idiab v. Belgium*, § 84; *Kozacioğlu v. Turkey* [GC], §§ 40 et seq.; *Micallef v. Malta* [GC], § 58). It is for the applicant to select the remedy that is most appropriate in his or her case. To sum up, if domestic law provides for several parallel remedies in different fields of law, an applicant who has sought to obtain redress for an alleged breach of the Convention through one of these remedies is not necessarily required to use others which have essentially the same objective (*Jasinskis v. Latvia*, §§ 50 and 53-54).

### (d) Complaint raised in substance

67. It is not necessary for the Convention right to be explicitly raised in domestic proceedings provided that the complaint is raised "at least in substance" (*Castells v. Spain*,

§ 32; *Ahmet Sadik v. Greece*, § 33; *Fressoz and Roire v. France*, § 38; *Azinas v. Cyprus* [GC], §§ 40-41). This means that if the applicant has not relied on the provisions of the Convention, he or she must have raised arguments to the same or like effect on the basis of domestic law, in order to have given the national courts the opportunity to redress the alleged breach in the first place (*Gäfgen v. Germany* [GC], §§ 142, 144 and 146; *Karapanagiotou and Others v. Greece*, § 29; and, in relation to a complaint that was not raised, even implicitly, at the final level of jurisdiction, *Association Les témoins de Jéhovah v. France* (dec.)).

**(e) Existence and appropriateness**

68. Applicants are only obliged to exhaust domestic remedies which are available in theory and in practice at the relevant time and which they can directly institute themselves – that is to say, remedies that are accessible, capable of providing redress in respect of their complaints and offering reasonable prospects of success (*Sejdovic v. Italy* [GC], § 46; *Paksas v. Lithuania* [GC], § 75).

69. Discretionary or extraordinary remedies need not be used, for example requesting a court to review its decision (*Çinar v. Turkey* (dec.); *Prystavka v. Ukraine* (dec.)), or requesting the reopening of proceedings, except in special circumstances where, for example, it is established under domestic law that such a request does in fact constitute an effective remedy (*K.S. and K.S. AG v. Switzerland*, Commission decision), or where the quashing of a judgment that has acquired legal force is the only means by which the respondent State can put matters right through its own legal system (*Kiiskinen v. Finland* (dec.); *Nikula v. Finland* (dec.)). Similarly, an appeal to a higher authority does not constitute an effective remedy (*Horvat v. Croatia*, § 47; *Hartman v. the Czech Republic*, § 66); nor does a remedy that is not directly accessible to the applicant but is dependent on the exercise of discretion by an intermediary (*Tănase v. Moldova* [GC], § 122). Regarding the effectiveness in the case in question of an appeal that does not in principle have to be used (Ombudsman), see the reasoning in the *Egmez v. Cyprus* judgment, §§ 66-73. Lastly, a domestic remedy which is not subject to any precise time-limit and thus creates uncertainty cannot be regarded as effective (*Williams v. the United Kingdom* (dec.) and the references cited therein).

70. Whether an individual application to the Constitutional Court is required by Article 35 § 1 of the Convention will depend largely on the particular features of the respondent State's legal system and the scope of its Constitutional Court's jurisdiction. Thus, in a State where this jurisdiction is limited to reviewing the constitutionality of legal provisions and their compatibility with provisions of superior legal force, applicants will be required to avail themselves of a complaint to the Constitutional Court only if they are challenging a provision of a statute or regulation as being in itself contrary to the Convention (*Grišankova and Grišankovs v. Latvia* (dec.); *Liepājnieks v. Latvia* (dec.)). However, this will not be an effective remedy where the applicant is merely complaining of the erroneous application or interpretation of statutes or regulations which are not unconstitutional *per se* (*Smirnov v. Russia* (dec.); *Szott-Medyńska v. Poland* (dec.)).

71. Where an applicant has tried a remedy which the Court considers inappropriate, the time taken to do so will not stop the six-month period from running, which may lead to the application being rejected as out of time (*Rezgui v. France* (dec.); *Prystavska v. Ukraine* (dec.)).

**(f) Availability and effectiveness**

72. The existence of remedies must be sufficiently certain not only in theory but also in practice. In determining whether any particular remedy meets the criteria of availability and effectiveness, regard must be had to the particular circumstances of the individual case (see



point 4 below). The position taken by the domestic courts must be sufficiently consolidated in the national legal order. Thus, the Court has held that recourse to a higher court ceases to be “effective” on account of divergences in that court’s case-law, as long as these divergences continue to exist (*Ferreira Alves v. Portugal (no. 6)*, §§ 28-29).

73. For example, the Court has held that where an applicant complains about conditions of detention after the detention has already ended, a compensatory remedy that is available and sufficient – that is to say, one which offers reasonable prospects of success – is a remedy that has to be used for the purposes of Article 35 § 1 of the Convention (*Lienhardt v. France* (dec.); *Rhazali and Others v. France* (dec.); *Ignats v. Latvia* (dec.)).

74. The Court must take realistic account not only of formal remedies available in the domestic legal system, but also of the general legal and political context in which they operate as well as the personal circumstances of the applicant (*Akdivar and Others v. Turkey*, §§ 68-69; *Khashiyev and Akayeva v. Russia*, §§ 116-17). It must examine whether, in all the circumstances of the case, the applicant did everything that could reasonably be expected of him or her to exhaust domestic remedies (*D.H. and Others v. the Czech Republic* [GC], §§ 116-22).

It should be noted that borders, factual or legal, are not an obstacle *per se* to the exhaustion of domestic remedies; as a general rule applicants living outside the jurisdiction of a Contracting State are not exempted from exhausting domestic remedies within that State, practical inconveniences or understandable personal reluctance notwithstanding (*Demopoulos and Others v. Turkey* (dec.) [GC], §§ 98 and 101, concerning applicants who had not voluntarily submitted to the jurisdiction of the respondent State).

### 3. Limits on the application of the rule

75. According to the “generally recognised rules of international law”, there may be special circumstances dispensing the applicant from the obligation to avail him or herself of the domestic remedies available (*Sejdovic v. Italy* [GC], § 55) (and see point 4 below).

The rule is also inapplicable where an administrative practice consisting of a repetition of acts incompatible with the Convention and official tolerance by the State authorities has been shown to exist, and is of such a nature as to make proceedings futile or ineffective (*Aksoy v. Turkey*, § 52).

In cases where requiring the applicant to use a particular remedy would be unreasonable in practice and would constitute a disproportionate obstacle to the effective exercise of the right of individual application under Article 34 of the Convention, the Court concludes that the applicant is dispensed from that requirement (*Veriter v. France*, § 27; *Gaglione and Others v. Italy*, § 22).

Imposing a fine based on the outcome of an appeal when no abuse of process is alleged excludes the remedy from those that have to be exhausted (*Prencipe v. Monaco*, §§ 95-97).

### 4. Distribution of the burden of proof

76. Where the government claims non-exhaustion of domestic remedies, it bears the burden of proving that the applicant has not used a remedy that was both effective and available (*Dalia v. France*, § 38; *McFarlane v. Ireland* [GC], § 107). The availability of any such remedy must be sufficiently certain in law and in practice (*Vernillo v. France*). The remedy’s basis in domestic law must therefore be clear (*Scavuzzo-Hager and Others v. Switzerland* (dec.); *Norbert Sikorski v. Poland*, § 117; *Sürmeli v. Germany* [GC], §§ 110-12). The remedy must be capable of providing redress in respect of the applicant’s complaints and of offering reasonable prospects of success (*Scoppola v. Italy (no. 2)* [GC], § 71). The

development and availability of a remedy said to exist, including its scope and application, must be clearly set out and confirmed or complemented by practice or case-law (*Mikolajová v. Slovakia*, § 34). This applies even in the context of a common law-inspired system with a written constitution implicitly providing for the right relied on by the applicant (*McFarlane v. Ireland* [GC], § 117, concerning a remedy that had been available in theory for almost twenty-five years but had never been used).

The government's arguments will clearly carry more weight if examples from national case-law are supplied (*Doran v. Ireland*; *Andrášik and Others v. Slovakia* (dec.); *Di Sante v. Italy* (dec.); *Giummarra and Others v. France* (dec.); *Paulino Tomás v. Portugal* (dec.); *Johtti Sappmelaccat Ry and Others v. Finland* (dec.)). The decisions cited should in principle have been delivered before the application was lodged (*Norbert Sikorski v. Poland*, § 115), and be relevant to the case at hand (*Sakhnovskiy v. Russia* [GC], §§ 43-44); see, however, the principles (referred to below) concerning the creation of a new remedy while the proceedings are pending before the Court.

77. Where the government argues that the applicant could have relied directly on the Convention before the national courts, the degree of certainty of such a remedy will need to be demonstrated by concrete examples (*Slavgorodski v. Estonia* (dec.)). The same applies to a purported remedy directly based on certain general provisions of the national Constitution (*Kornakovs v. Latvia*, § 84).

78. The Court has been more receptive to these arguments where the national legislature has introduced a specific remedy to deal with excessive length of judicial proceedings (*Brusco v. Italy* (dec.); *Slaviček v. Croatia* (dec.)). See also *Scordino v. Italy (no. 1)* [GC], §§ 136-48. Contrast with *Merit v. Ukraine*, § 65.

79. Once the government has discharged its burden of proving that there was an appropriate and effective remedy available to the applicant, it is for the latter to show that:

- the remedy was in fact used (*Grässer v. Germany* (dec.)); or
- the remedy was for some reason inadequate and ineffective in the particular circumstances of the case (*Selmouni v. France* [GC], § 76) – for example, in the case of excessive delays in the conduct of an inquiry (*Radio France and Others v. France* (dec.), § 34), or a remedy which is normally available, such as an appeal on points of law, but which, in the light of the approach taken in similar cases, was ineffective in the circumstances of the case (*Scordino v. Italy* (dec.); *Pressos Compania Naviera S.A. and Others v. Belgium*, §§ 26-27), even if the decisions in question were recent (*Gas and Dubois v. France* (dec.)). This is also the case if the applicant was unable to apply directly to the court concerned (*Tănase v. Moldova* [GC], § 122). In certain specific circumstances, there may be applicants in similar situations, some of whom have not applied to the court referred to by the government but are dispensed from doing so because the domestic remedy used by others has proved ineffective in practice and would have been in their case too (*Vasilkoski and Others v. the former Yugoslav Republic of Macedonia*, §§ 45-46; *Laska and Lika v. Albania*, §§ 45-48). However, this applies in very specific cases (compare *Saghinadze and Others v. Georgia*, §§ 81-83); or
- there existed special circumstances absolving the applicant from the requirement (*Akdivar and Others v. Turkey*, §§ 68-75; *Sejdovic v. Italy* [GC], § 55; *Veriter v. France*, § 60).

80. One such factor may be constituted by the national authorities remaining totally passive in the face of serious allegations of misconduct or infliction of harm by State agents, for example where they have failed to undertake investigations or offer assistance. In such circumstances it can be said that the burden of proof shifts once again, so that it becomes incumbent on the respondent government to show what it has done in response to the scale

and seriousness of the matters complained of (*Demopoulos and Others v. Turkey* (dec.) [GC], § 70).

81. Mere doubts on the part of the applicant regarding the effectiveness of a particular remedy will not absolve him or her from the obligation to try it (*Epözdemir v. Turkey* (dec.); *Milošević v. the Netherlands* (dec.); *Pellegriti v. Italy* (dec.); *MPP Golub v. Ukraine* (dec.)). On the contrary, it is in the applicant's interests to apply to the appropriate court to give it the opportunity to develop existing rights through its power of interpretation (*Ciupercescu v. Romania*, § 169). In a legal system providing constitutional protection for fundamental rights, it is incumbent on the aggrieved individual to test the extent of that protection and, in a common-law system, to allow the domestic courts to develop those rights by way of interpretation (*A, B and C v. Ireland* [GC], § 142). But where a suggested remedy did not in fact offer reasonable prospects of success, for example in the light of settled domestic case-law, the fact that the applicant did not use it is no bar to admissibility (*Pressos Compania Naviera S.A. and Others v. Belgium*, § 27; *Carson and Others v. the United Kingdom* [GC], § 58).

### 5. Procedural aspects

82. The requirement for the applicant to exhaust domestic remedies is normally determined with reference to the date on which the application was lodged with the Court (*Baumann v. France*, § 47), subject to exceptions which may be justified by the particular circumstances of the case (see point 6 below). Nevertheless, the Court accepts that the last stage of such remedies may be reached shortly after the lodging of the application but before it determines the issue of admissibility (*Karoussiotis v. Portugal*, § 57).

83. Where the government intends to lodge a non-exhaustion plea, it must do so, in so far as the character of the plea and the circumstances permit, in its observations prior to adoption of the admissibility decision, though there may be exceptional circumstances dispensing it from that obligation (*Mooren v. Germany* [GC], § 57 and the references cited therein, §§ 58-59).

It is not uncommon for an objection on grounds of non-exhaustion to be joined to the merits, particularly in cases concerning procedural obligations or guarantees, for example applications relating to the procedural limb of Article 2 (*Dink v. Turkey*, §§ 56-58) or that of Article 3; with regard to Article 6, see *Scoppola v. Italy (no. 2)* [GC], § 126; Article 8, see *A, B and C v. Ireland* [GC], § 155; and Article 13, see *Süirmeli v. Germany* [GC], § 78; and *M.S.S. v. Belgium and Greece* [GC], § 336.

### 6. Creation of new remedies

84. The assessment of whether domestic remedies have been exhausted is normally carried out with reference to the state of the proceedings on the date on which the application was lodged with the Court. This rule is, however, subject to exceptions following the creation of new remedies (*İçyer v. Turkey* (dec.), §§ 72 et seq.). The Court has departed from this rule in particular in cases concerning the length of proceedings (*Predil Anstalt v. Italy* (dec.); *Bottaro v. Italy* (dec.); *Andrášik and Others v. Slovakia* (dec.); *Nogolica v. Croatia* (dec.); *Brusco v. Italy* (dec.); *Korenjak v. Slovenia* (dec.), §§ 66-71; *Techniki Olympiaki A.E. v. Greece* (dec.)) or concerning a new compensatory remedy in respect of interferences with property rights (*Charzyński v. Poland* (dec.); *Michalak v. Poland* (dec.); *Demopoulos and Others v. Turkey* (dec.) [GC]); or failure to execute domestic judgments (*Nagovitsyn and Nalgiyev v. Russia* (dec.), §§ 36-40; *Balan v. Moldova* (dec.)); or prison overcrowding (*Łatak v. Poland* (dec.)).

The Court takes into account the effectiveness and accessibility of supervening remedies (*Demopoulos and Others v. Turkey* (dec.) [GC], § 88). For a case where the new remedy is not effective in the case in question, see *Parizov v. the former Yugoslav Republic of Macedonia*, §§ 41-47; for a case where a new constitutional remedy is effective, see *Cvetković v. Serbia*, § 41.

As regards the date from which it is fair to require the applicant to use a remedy newly incorporated into the judicial system of a State following a change in case-law, the Court has held that it would not be fair to require exhaustion of such a new remedy without giving individuals reasonable time to familiarise themselves with the judicial decision (*Broca and Texier-Micault v. France*, § 20). The extent of a “reasonable time” depends on the circumstances of each case, but generally the Court has found it to be about six months (*ibid.*; *Depauw v. Belgium* (dec.)). For, example, in *Leandro Da Silva v. Luxembourg*, § 50, the period was eight months from the adoption of the domestic decision in question and three and a half months from its publication. See also *McFarlane v. Ireland* [GC], § 117; for a remedy newly introduced after a pilot judgment, see *Fakhretdinov and Others v. Russia* (dec.), §§ 36-44; regarding a departure from domestic case-law, see *Scordino v. Italy (no. 1)* [GC], § 147.

The Court gave indications in *Scordino v. Italy (no. 1)* [GC] and *Cocchiarella v. Italy* [GC] as to the characteristics that domestic remedies must have in order to be effective in length-of-proceedings cases (see also, more recently, *Vassilios Athanasiou and Others v. Greece*, §§ 54-56). As a rule, a remedy without preventive or compensatory effect in respect of the length of proceedings does not need to be used (*Puchstein v. Austria*, § 31). A remedy in respect of the length of proceedings must, in particular, operate without excessive delays and provide an appropriate level of redress (*Scordino v. Italy (no. 1)* [GC], §§ 195 and 204-07).

85. Where the Court has found structural or general defects in the domestic law or practice, it may ask the State to examine the situation and, if necessary, to take effective measures to prevent cases of the same nature being brought before the Court (*Lukenda v. Slovenia*, § 98). It may conclude that the State should either amend the existing range of remedies or add new ones so as to secure genuinely effective redress for violations of Convention rights (see, for example, the pilot judgments in *Xenides-Arestis v. Turkey*, § 40; and *Burdov v. Russia (no. 2)*, §§ 42 and 129 et seq., and § 140). Special attention should be devoted to the need to ensure effective domestic remedies (see the pilot judgment in *Vassilios Athanasiou and Others v. Greece*, § 41).

Where the respondent State has introduced a new remedy, the Court has ascertained whether that remedy is effective (see, for example, *Robert Lesjak v. Slovenia*, §§ 34-55; *Demopoulos and Others v. Turkey* (dec.) [GC], § 87). It does so by examining the circumstances of each case; its finding as to whether or not the new legislative framework is effective must be based on its practical application (*Nogolica v. Croatia* (dec.)). However, neither the fact that no judicial or administrative practice has yet emerged as regards the application of the framework nor the risk that the proceedings might take a considerable time can in themselves render the new remedy ineffective (*Nagovitsyn and Nalgiyev v. Russia* (dec.), § 30).

86. If the Court finds that the new remedy is effective, this means that other applicants in similar cases are required to have used the new remedy, provided that they were not time-barred from doing so. It has declared these applications inadmissible under Article 35 § 1, even if they had been lodged prior to the creation of the new remedy (*Grzinčič v. Slovenia*, §§ 102-10; *İçyer v. Turkey* (dec.), §§ 74 et seq.).

This concerns domestic remedies that became available after the applications were lodged. The assessment of whether there were exceptional circumstances compelling applicants to avail themselves of such a remedy will take into account, in particular, the nature of the new domestic regulations and the context in which they were introduced (*Fakhretdinov and Others*

*v. Russia* (dec.), § 30). In this case, the Court held that the effective domestic remedy, introduced following a pilot judgment in which it had ordered the introduction of such a remedy, should be used before applicants were able to apply to the Court.

The Court has also specified the conditions for the application of Article 35 § 1 according to the date of the application (*ibid.*, §§ 31-33; see also *Nagovitsyn and Nalgiyev v. Russia* (dec.), §§ 29 et seq. and § 42).

## B. Non-compliance with the six-month time-limit

### Article 35 § 1 – Admissibility criteria

“1. The Court may only deal with the matter ... within a period of six months from the date on which the final decision was taken.”

#### 1. Purpose of the rule

87. The primary purpose of the six-month rule is to maintain legal certainty by ensuring that cases raising issues under the Convention are examined within a reasonable time, and to prevent the authorities and other persons concerned from being kept in a state of uncertainty for a long period of time. It also affords the prospective applicant time to consider whether to lodge an application and, if so, to decide on the specific complaints and arguments to be raised and facilitates the establishment of facts in a case, since with the passage of time, any fair examination of the issues raised is rendered problematic (*Sabri Günes v. Turkey* [GC], § 39).

88. That rule marks out the temporal limit of the supervision exercised by the Court and signals, both to individuals and State authorities, the period beyond which such supervision is no longer possible. It reflects the wish of the High Contracting Parties to prevent past judgments being constantly called into question and constitutes a legitimate concern for order, stability and peace (*Idalov v. Russia* [GC], § 128; *Sabri Günes v. Turkey* [GC], § 40).

89. The six-month rule is a public policy rule and the Court has jurisdiction to apply of its own motion, even if the government have not raised that objection (*ibid.*, § 29).

90. The six-month rule cannot require an applicant to lodge his or her complaint with the Court before his or her position in connection with the matter has been finally settled at the domestic level (*Varnava and Others v. Turkey* [GC], § 157; *Chapman v. Belgium* (dec.), § 34).

#### 2. Starting date for the running of the six-month period

##### (a) Final decision

91. The six-month period runs from the final decision in the process of exhaustion of domestic remedies (*Paul and Audrey Edwards v. the United Kingdom* (dec.)). The applicant must have made normal use of domestic remedies which are likely to be effective and sufficient (*Moreira Barbosa v. Portugal* (dec.)).

92. Only remedies which are normal and effective can be taken into account as an applicant cannot extend the strict time-limit imposed by the Convention by seeking to make inappropriate or misconceived applications to bodies or institutions which have no power or competence to offer effective redress for the complaint in issue under the Convention (*Fernie v. the United Kingdom* (dec.)).

93. Account cannot be taken of remedies the use of which depends on the discretionary powers of public officials and which are, as a consequence, not directly accessible to the applicant. Similarly, remedies which have no precise time-limits create uncertainty and render nugatory the six-month rule contained in Article 35 § 1 (*Williams v. the United Kingdom* (dec.)).

94. As a rule Article 35 § 1 does not require applicants to have applied for the reopening of proceedings or to have used similar extraordinary remedies and does not allow the six-month time-limit to be extended on the grounds that such remedies have been used (*Berdzenishvili v. Russia* (dec.); *Tucka v. the United Kingdom (no. 1)* (dec.)). However, if an extraordinary remedy is the only judicial remedy available to the applicant, the six-month time-limit may be calculated from the date of the decision given regarding that remedy (*Ahtinen v. Finland* (dec.)).

An application in which an applicant submits his or her complaints within six months of the decision dismissing his or her request for reopening of the proceedings is inadmissible because the decision is not a “final decision” (*Sapeyan v. Armenia*, § 23).

In cases where proceedings are reopened or a final decision is reviewed, the running of the six-month period in respect of the initial set of proceedings or the final decision will be interrupted only in relation to those Convention issues which served as a ground for such a review or reopening and were the subject of examination before the extraordinary appeal body (*ibid.*, § 24).

#### (b) Starting point

95. The six-month rule is autonomous and must be construed and applied to the facts of each individual case, so as to ensure the effective exercise of the right to individual petition. While taking account of domestic law and practice is an important aspect, it is not decisive in determining the starting point of the six-month period (*Sabri Günes v. Turkey* [GC], §§ 52 and 55).

##### (i) Knowledge of the decision

96. The six-month period starts running from the date on which the applicant and/or his or her representative has sufficient knowledge of the final domestic decision (*Koç and Tosun v. Turkey* (dec.)).

97. It is for the State which relies on the failure to comply with the six-month time-limit to establish the date when the applicant became aware of the final domestic decision (*Şahmo v. Turkey* (dec.)).

##### (ii) Service of the decision

98. Service on the applicant: Where an applicant is entitled to be served automatically with a copy of the final domestic decision, the object and purpose of Article 35 § 1 of the Convention are best served by counting the six-month period as running from the date of service of the copy of the decision (*Worm v. Austria*, § 33).

99. Service on the lawyer: The six-month period runs from the date on which the applicant’s lawyer became aware of the decision completing the exhaustion of the domestic remedies, notwithstanding the fact that the applicant only became aware of the decision later (*Çelik v. Turkey* (dec.)).

*(iii) No service of the decision*

100. Where the domestic law does not provide for service, it is appropriate to take the date the decision was finalised as the starting-point, that being when the parties were definitely able to find out its content (*Papachelas v. Greece* [GC], § 30). The applicant or his or her lawyer must show due diligence in obtaining a copy of the decision deposited with the court's registry (*Ölmez v. Turkey* (dec.)).

*(iv) No remedy available*

101. Where it is clear from the outset that the applicant has no effective remedy, the six-month period runs from the date on which the act complained of took place or the date on which the applicant was directly affected by or became aware of such an act or had knowledge of its adverse effects (*Dennis and Others v. the United Kingdom* (dec.); *Varnava and Others v. Turkey* [GC], § 157).

102. Where an applicant avails himself or herself of an apparently existing remedy and only subsequently becomes aware of circumstances which render the remedy ineffective, it may be appropriate to take the start of the six-month period from the date when the applicant first became or ought to have become aware of those circumstances (*ibid.*, § 158).

*(v) Continuing situation*

103. The concept of a “continuing situation” refers to a state of affairs which operates by continuous activities by or on the part of the State to render the applicants victims. The fact that an event has significant consequences over time does not mean that the event has produced a “continuing situation” (*Iordache v. Romania*, § 49).

104. Where the alleged violation constitutes a continuing situation against which no domestic remedy is available, it is only when the situation ends that the six-month period starts to run (*Sabri Güneş v. Turkey* [GC], § 54; *Varnava and Others v. Turkey* [GC], § 159; *Ülke v. Turkey* (dec.)). As long as the situation continues, the six-month rule is not applicable (*Iordache v. Romania*, § 50).

*3. Expiry of the six-month period*

105. Time starts to run on the day following the date on which the final decision has been pronounced in public, or on which the applicant or his/her representative was informed of it, and expires six calendar months later, regardless of the actual duration of those calendar months (*Otto v. Germany* (dec.)).

106. Compliance with the six-month deadline is determined using criteria specific to the Convention, not those of each respondent State's domestic legislation (*Benet Praha, spol. s r.o., v. the Czech Republic* (dec.); *Poslu and Others v. Turkey*, § 10). Application by the Court of its own criteria in calculating time-limits, independently of domestic rules, tends to ensure legal certainty, proper administration of justice and thus, the practical and effective functioning of the Convention mechanism (*Sabri Güneş v. Turkey* [GC], § 56).

107. The fact that the last day of the six-month period falls on a Saturday, a Sunday or an official holiday and that in such a situation, under domestic law, time-limits are extended to the following working day, does not affect the determination of the *dies ad quem* (*ibid.*, §§ 43 and 61).

108. It is open to the Court to determine a date for the expiry of the six-month period which is at variance with that identified by the respondent State (*İpek v. Turkey* (dec.)).

#### 4. Date of introduction of an application

##### (a) Completed application form

109. According to [Rule 47](#) of the Rules of Court, which entered into force on 1 January 2014, the date of introduction of an application for the purposes of Article 35 § 1 of the Convention is the date on which an application form satisfying the requirements of that Rule is sent to the Court. An application must contain all of the information requested in the relevant parts of the application form and be accompanied by copies of the relevant supporting documents. Except as provided otherwise by Rule 47, only a completed application form will interrupt the running of the six-month time-limit ([Practice Direction on Institution of Proceedings](#), § 1).

##### (b) Letter of authority

110. When an applicant chooses to have his or her application lodged by a representative, the Court must be provided with the original of the power of attorney or form of authority signed by the applicant (Rule 47 § 3.1 (d) of the Rules of Court; see also [Kaur v. the Netherlands](#) (dec.), § 11 *in fine*). In the absence of such authority, the application cannot be considered valid and would be rejected by the Court for want of a “victim” or even as an abuse of the right of application ([Kokhreidze and Ramishvili v. Georgia](#) (dec.), § 16).

111. A duly completed authority form constitutes an integral part of an application within the meaning of Rules 45 and 47 of the Rules of Court, and failure to supply this form may have direct consequences for the date of the lodging of the application (*ibid.*, § 17).

##### (c) Date of dispatch

112. The date of introduction of the application is the date of the postmark when the applicant dispatched a duly completed application form to the Court (Rule 47 § 6 (a) of the Rules of Court; see also [Abdulrahman v. the Netherlands](#) (dec.); [Brežec v. Croatia](#), § 29).

113. Only special circumstances – such as an impossibility to establish when the application has been posted – could justify a different approach: for example, taking the date of the application form or, in its absence, the date of its receipt at the Court’s Registry as the introduction date ([Bulinwar OOD and Hrusanov v. Bulgaria](#), §§ 30-32).

114. Applicants cannot be held responsible for any delays that may affect their correspondence with the Court in transit ([Anchugov and Gladkov v. Russia](#), § 70).

##### (d) Dispatch by fax

115. Applications sent by fax will not interrupt the running of the six-month time-limit. Applicants must also dispatch the signed original by post within the same six-month time-limit ([Practice Direction on Institution of Proceedings](#), § 3).

##### (e) Characterisation of a complaint

116. A complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on ([Scoppola v. Italy \(no. 2\)](#) [GC], § 54).

##### (f) Subsequent complaints

117. As regards complaints not included in the initial application, the running of the six-month time-limit is not interrupted until the date when the complaint is first submitted to a Convention organ ([Allan v. the United Kingdom](#) (dec.)).



118. Complaints raised after the expiry of the six-month time-limit can only be examined if they are particular aspects of the initial complaints raised within the time-limit (*Sâmbata Bihor Greco-Catholic Parish v. Romania* (dec.)).

119. The mere fact that the applicant has relied on Article 6 in his or her application is not sufficient to constitute introduction of all subsequent complaints made under that provision where no indication has initially been given of the factual basis of the complaint and the nature of the alleged violation (*Allan v. the United Kingdom* (dec.); *Adam and Others v. Germany* (dec.)).

120. The provision of documents from the domestic proceedings is not sufficient to constitute an introduction of all subsequent complaints based on those proceedings. Some, albeit summary, indication of the nature of the alleged violation under the Convention is required to introduce a complaint and thereby interrupt the running of the six-month time-limit (*Božinovski v. the former Yugoslav Republic of Macedonia* (dec.)).

## 5. Special situations

### (a) Applicability of time constraints to continuing situations concerning the right to life, home and property

121. Although there is no precise point in time on which the six-month period would start running, the Court has imposed a duty of diligence and initiative on applicants wishing to complain about the continued failure to investigate disappearances in life-threatening situations. In such cases, applicants cannot wait indefinitely before coming to Strasbourg. They must introduce their complaints without undue delay (*Varnava and Others v. Turkey* [GC], §§ 161-66).

122. Similarly, where alleged continuing violations of the right to property or home in the context of a long-standing conflict are at stake, the time may come when an applicant should introduce his or her case, as remaining passive in the face of an unchanging situation would no longer be justified. Once an applicant has become aware or should have been aware that there is no realistic hope of regaining access to his or her property and home in the foreseeable future, unexplained or excessive delay in lodging the application may lead to the application being rejected as out of time. In a complex post-conflict situation the time-frames must be generous in order to allow for the situation to settle and to permit applicants to collect comprehensive information of obtaining a solution at the domestic level (*Sargsyan v. Azerbaijan* (dec.) [GC], §§ 140-41; *Chiragov and Others v. Armenia* (dec.) [GC], §§ 141-42).

### (b) Conditions of application of the six-month rule in cases of multiple periods of detention under Article 5 § 3 of the Convention

123. Multiple, consecutive detention periods should be regarded as a whole, and the six-month period should only start to run from the end of the last period of detention (*Solmaz v. Turkey*, § 36).

124. Where an accused person's pre-trial detention is broken into several non-consecutive periods, those periods should not be assessed as a whole, but separately. Therefore, once at liberty, an applicant is obliged to bring any complaint which he or she may have concerning pre-trial detention within six months of the date of actual release. However, where such periods form part of the same set of criminal proceedings against an applicant, the Court, when assessing the overall reasonableness of detention for the purposes of Article 5 § 3, can take into consideration the fact that an applicant has previously spent time in custody pending trial (*Idalov v. Russia* [GC], §§ 129-30).

## C. Anonymous application

### Article 35 § 2 (a) – Admissibility criteria

“2. The Court shall not deal with any application submitted under Article 34 that (a) is anonymous; ...”<sup>2</sup>

125. The applicant must be duly identified in the application form (Rule 47 § 1 (a) of the Rules of Court). The Court may decide that the applicant’s identity should not be disclosed to the public (Rule 47 § 4); in that case, the applicant will be designated by his or her initials or simply by a letter.

126. The Court alone is competent to determine whether an application is anonymous within the meaning of Article 35 § 2 (a) (*Sindicatul Păstorul cel Bun v. Romania* [GC], § 69). If the respondent government have doubts as to the authenticity of an application, they must inform the Court in good time (*ibid.*).

#### 1. Anonymous application

127. An application to the Court is regarded as anonymous where the case file does not indicate any element enabling the Court to identify the applicant (“*Blondje v. the Netherlands* (dec.)). None of the forms or documents submitted contains a mention of the name, but only a reference and aliases, and the power of attorney is signed “X”: the identity of the applicant is not disclosed.

128. An application introduced by an association on behalf of unidentified persons, the association not claiming to be itself the victim but complaining of a violation of the right to respect for private life on behalf of unidentified individuals, who had thus become the applicants whom they declared that they were representing, was considered anonymous (*Federation of French Medical Trade Unions and National Federation of Nurses v. France*, Commission decision).

#### 2. Non-anonymous application

129. Article 35 § 2 (a) of the Convention is not applicable where applicants have submitted factual and legal information enabling the Court to identify them and establish their links with the facts in issue and the complaint raised (*Sindicatul Păstorul cel Bun v. Romania* [GC], § 71).

130. Applications lodged under fictitious names: Individuals using pseudonyms and explaining to the Court that the context of an armed conflict obliged them not to disclose their real names in order to protect their family members and friends. Finding that “behind the tactics concealing their real identities for understandable reasons were real people identifiable from a sufficient number of indications, other than their names” and “the existence of a sufficiently close link between the applicants and the events in question”, the Court did not consider that the application was anonymous (*Shamayev and Others v. Georgia and Russia* (dec.)); see also the judgment in *Shamayev and Others*, § 275.

2. An “anonymous” application within the meaning of Article 35 § 2 (a) of the Convention is to be distinguished from the question of non-disclosure to the public of the identity of an applicant by way of derogation from the normal rule of public access to information in proceedings before the Court, and from the question of confidentiality before the Court (see Rule 33 and Rule 47 § 4 of the Rules of Court and the Practice directions annexed thereto).

131. Applications lodged by a church body or an association with religious and philosophical objects the identity of whose members is not disclosed have not been rejected as being anonymous (Articles 9, 10 and 11 of the Convention): see *Omkarananda and Divine Light Zentrum v. Switzerland*, Commission decision.

## D. Substantially the same

### Article 35 § 2 (b) – Admissibility criteria

“2. The Court shall not deal with any application submitted under Article 34 that

...

(b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.”

132. An application will be rejected pursuant to Article 35 § 2 (b) of the Convention where it is substantially the same as a matter which has already been examined by the Court or by another procedure of international investigation or settlement and contains no relevant new information.

### 1. Substantially the same as a matter that has been examined by the Court

133. The purpose of the first limb of Article 35 § 2 (b) is to ensure the finality of the Court’s decisions and to prevent applicants from seeking, through the lodging of a fresh application, to appeal previous judgments or decisions of the Court (*Kafkaris v. Cyprus* (dec.), § 67; *Lowe v. the United Kingdom* (dec.)).

134. An application or a complaint is declared inadmissible if it “is substantially the same as a matter that has already been examined by the Court ... and contains no relevant new information”. This includes cases where the Court has struck the previous application out of its list of cases on the basis of a friendly settlement procedure (*Kezer and Others v. Turkey* (dec.)). However, if a previous application has never formed the subject of a formal decision, the Court is not precluded from examining the recent application (*Sürmeli v. Germany* (dec.)).

135. The Court examines whether the two applications brought before it by the applicants relate essentially to the same persons, the same facts and the same complaints (*Vojnović v. Croatia* (dec.), § 28; *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], § 63).

136. An inter-State application does not deprive individual applications of the possibility of introducing, or pursuing their own claims (*Varnava and Others v. Turkey* [GC], § 118).

137. An application will generally fall foul of this Article where it has the same factual basis as a previous application. It is insufficient for an applicant to allege relevant new information where he has merely sought to support his past complaints with new legal arguments (*I.J.L. v. the United Kingdom* (dec.); *Mann v. the United Kingdom and Portugal* (dec.)) or provided supplementary information on domestic law incapable of altering the reasons for the dismissal of his/her previous application (*X. v. the United Kingdom*, Commission decision of 10 July 1981). In order for the Court to consider an application which relates to the same facts as a previous application, the applicant must genuinely advance a new complaint or submit new information which has not been previously considered by the Court (*Kafkaris v. Cyprus* (dec.), § 68).

138. The Court has found that the application or a complaint was not essentially the same as a previous application in *Massuero v. Italy* (dec.); *Riener v. Bulgaria*, § 103; *Chappex v. Switzerland* (dec.); *Yurttas v. Turkey*, §§ 36-37; *Sadak v. Turkey*, §§ 32-33; *Patera v. the Czech Republic* (dec.) (complaints concerning facts alleged before another international body are inadmissible, but new information relating to facts occurring subsequently is admissible). On the contrary, it has found the application or a complaint was essentially the same in *Moldovan and Others v. Romania* (dec.); *Hokkanen v. Finland* (dec.); *Adesina v. France* (dec.); *Bernardet v. France* (dec.); *Gennari v. Italy* (dec.); and *Manuel v. Portugal* (dec.).

2. *Substantially the same as a matter submitted to another procedure of international investigation or settlement*

139. The purpose of the second limb of Article 35 § 2 (b) is to avoid the situation where several international bodies would be simultaneously dealing with applications which are substantially the same. A situation of this type would be incompatible with the spirit and the letter of the Convention, which seeks to avoid a plurality of international proceedings relating to the same cases (*AO Neftyanaya Kompaniya Yukos v. Russia*, § 520; *Eğitim ve Bilim Emekçileri Sendikası v. Turkey*, § 37). For this reason, it is necessary for the Court to examine this matter of its own motion (*POA and Others v. the United Kingdom* (dec.), § 27).

140. In determining whether its jurisdiction is excluded by virtue of this Convention provision the Court would have to decide whether the case before it is substantially the same as a matter that has already been submitted to a parallel set of proceedings and, if that is so, whether the simultaneous proceedings may be seen as “another procedure of international investigation or settlement” within the meaning of Article 35 § 2 (b) of the Convention (*AO Neftyanaya Kompaniya Yukos v. Russia*, § 520).

141. The Court has underlined that it is not the date of submission to a parallel set of proceedings that is decisive, but whether a decision on the merits has already been taken in those proceedings by the time it examines the case (*Peraldi v. France* (dec.)).

(a) **The assessment of similarity of cases**

142. The assessment of similarity of the cases would usually involve the comparison of the parties in the respective proceedings, the relevant legal provisions relied on by them, the scope of their claims and the types of the redress sought (*AO Neftyanaya Kompaniya Yukos v. Russia*, § 521; *Greek Federation of Bank Employee Unions v. Greece* (dec.), § 39).

143. The Court therefore verifies, like it is the case with the first limb of Article 35 § 2 (b) mentioned above, whether the applications to the different international institutions concern substantially the same persons, facts and complaints (*Karoussiotis v. Portugal*, § 63; *Pauger v. Austria*, Commisison decision).

144. For example, if the complainants before the two institutions are not identical the “application” to the Court cannot be considered as being “substantially the same as a matter that has ... been submitted to another procedure of international investigation or settlement” (*Folgerø and Others v. Norway* (dec.)). Thus, the Court found that it was not precluded from examining the application before it when the other international procedure was initiated by a non-governmental organisation (*Celniku v. Greece*, §§ 39-41; *Illi and Others v. Belgium* (dec.)) or by a Confederation of Unions which it was affiliated to (*Eğitim ve Bilim Emekçileri Sendikası v. Turkey*, § 38) and not by the applicants themselves.

145. However, the Court has recently reaffirmed that an application introduced with the Court which is virtually identical with an application submitted previously to another international body (ILO) but is brought by individual applicants who were not, and could not be, parties to that previous application, as the procedure was collective in nature with standing

confined to trade unions and employer organisations, is substantially the same as the one submitted to that body. This is because these individual applicants must be seen as being closely associated with the proceedings and the complaints before that body by virtue of their status as officials of the trade union in question. Allowing them to maintain their action before the Court would therefore have been tantamount to circumventing Article 35 § 2 (b) of the Convention (*POA and Others v. the United Kingdom* (dec.), §§ 30-32).

**(b) The concept of “another procedure of international investigation or settlement”**

146. In its assessment under Article 35 § 2 (b), the Court has to determine whether the parallel proceedings in question constitutes another international procedure for the purposes of this admissibility criterion (*ibid.*, § 28).

147. The Court’s examination in this respect is not limited to a formal verification but would extend, where appropriate, to ascertaining whether the nature of the supervisory body, the procedure it follows and the effect of its decisions are such that the Court’s jurisdiction is excluded by Article 35 § 2 (b) (*OAO Neftyanaya Kompaniya Yukos v. Russia*, § 522; *Karoussiotis v. Portugal*, § 62; *Greek Federation of Bank Employee Unions v. Greece* (dec.), § 33).

## E. Abuse of the right of application

### Article 35 § 3 (a) – Admissibility criteria

“3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:

(a) the application is ... an abuse of the right of individual application; ...”

#### 1. General definition

148. The concept of “abuse” within the meaning of Article 35 § 3 (a) must be understood in its ordinary sense according to general legal theory – namely, the harmful exercise of a right for purposes other than those for which it is designed. Accordingly, any conduct of an applicant that is manifestly contrary to the purpose of the right of individual application as provided for in the Convention and impedes the proper functioning of the Court or the proper conduct of the proceedings before it constitutes an abuse of the right of application (*Miroļubovs and Others v. Latvia*, §§ 62 and 65).

149. From a technical point of view, it is clear from the wording of Article 35 § 3 (a) that an application lodged in abuse of the right of application must be declared inadmissible rather than struck out of the list of cases. Indeed, the Court has stressed that rejection of an application on grounds of abuse of the right of application is an exceptional measure (*ibid.*, § 62). The cases in which the Court has found an abuse of the right of application can be grouped into five typical categories: misleading information; use of offensive language; violation of the obligation to keep friendly-settlement proceedings confidential; application manifestly vexatious or devoid of any real purpose; and all other cases that cannot be listed exhaustively.

#### 2. Misleading the Court

150. An application is an abuse of the right of application if it is knowingly based on untrue facts with a view to deceiving the Court (*Varbanov v. Bulgaria*, § 36). The most

serious and blatant examples of such abuses are, firstly, the submission of an application under a false identity (*Drijfhout v. the Netherlands* (dec.), §§ 27-29), and, secondly, the falsification of documents sent to the Court (*Jian v. Romania* (dec.); *Bagheri and Maliki v. the Netherlands* (dec.); *Poznanski and Others v. Germany* (dec.)). This type of abuse may also be committed by omission, where the applicant fails to inform the Court at the outset of a factor essential for the examination of the case (*Al-Nashif v. Bulgaria*, § 89; *Kerechashvili v. Georgia* (dec.)). Likewise, if new, important developments occur during the proceedings before the Court and if – despite the express obligation on him or her under the Rules of Court – the applicant fails to disclose that information to the Court, thereby preventing it from ruling on the case in full knowledge of the facts, his or her application may be rejected as being an abuse of application (*Hadrabová and Others v. the Czech Republic* (dec.); *Predescu v. Romania*, §§ 25-27).

151. Furthermore, the applicant is entirely responsible for the conduct of his or her lawyer or any other person representing him or her before the Court. Any omissions on the representative's part are in principle attributable to the applicant himself or herself and may lead to the application being rejected as an abuse of the right of application (*Bekauri v. Georgia* (preliminary objections), §§ 22-25; *Migliore and Others v. Italy* (dec.)).

152. An intention to mislead the Court must always be established with sufficient certainty (*Melnik v. Ukraine*, §§ 58-60; *Nold v. Germany*, § 87; *Miszczynski v. Poland* (dec.)).

153. Even where the Court's judgment on the merits has already become final and it subsequently transpires that the applicant had concealed a fact that would have been relevant to the examination of the application, the Court is able to reconsider its judgment by means of the revision procedure (laid down in Rule 80 of the Rules of Court) and to reject the application as an abuse of the right of application (*Gardean and S.C. Grup 95 SA v. Romania* (revision), §§ 12-22). Revision of a judgment is possible only if the respondent government could not reasonably have known of the fact in question at the time of the Court's examination of the case, and if they submit the request for revision within a period of six months after acquiring knowledge of the fact, in accordance with Rule 80 § 1 (*Grossi and Others v. Italy* (revision), §§ 17-24).

### 3. *Offensive language*

154. There will be an abuse of the right of application where the applicant, in his or her correspondence with the Court, uses particularly vexatious, insulting, threatening or provocative language – whether this be against the respondent government, its Agent, the authorities of the respondent State, the Court itself, its judges, its Registry or members thereof (*Řehák v. the Czech Republic* (dec.); *Duringer and Grunge v. France* (dec.); *Stamoulakatos v. the United Kingdom*, Commission decision).

155. It is not sufficient for the applicant's language to be merely cutting, polemical or sarcastic; it must exceed "the bounds of normal, civil and legitimate criticism" in order to be regarded as abusive (*Di Salvo v. Italy* (dec.), *Apinis v. Latvia* (dec.); for a contrary example, see *Aleksanyan v. Russia*, §§ 116-18). If, during the proceedings, the applicant ceases using offensive remarks after a formal warning from the Court, expressly withdraws them or, better still, offers an apology, the application will no longer be rejected as an abuse of application (*Chernitsyn v. Russia*, §§ 25-28).

### 4. *Breach of the principle of confidentiality of friendly-settlement proceedings*

156. An intentional breach, by an applicant, of the duty of confidentiality of friendly-settlement negotiations, imposed on the parties under Article 39 § 2 of the Convention and

Rule 62 § 2 of the Rules of Court, may be considered as an abuse of the right of application and result in the application being rejected (*Hadrabová and Others v. the Czech Republic* (dec.); *Popov v. Moldova*, § 48; *Miroļubovs and Others v. Latvia*, § 66).

157. In order to determine whether the applicant has breached the duty of confidentiality, the limits on that duty must first be defined. It must always be interpreted in the light of its general purpose, namely, facilitating a friendly settlement by protecting the parties and the Court against possible pressure. Accordingly, whereas the communication to a third party of the content of documents relating to a friendly settlement can, in theory, amount to an abuse of the right of application within the meaning of Article 35 § 3 (a) of the Convention, it does not mean that there is an absolute and unconditional prohibition on showing or talking about such documents to any third party. Such a wide and rigorous interpretation would risk undermining the protection of the applicant's legitimate interests – for example, where he or she seeks informed advice on a one-off basis in a case in which he or she is authorised to represent him or herself before the Court. Moreover, it would be too difficult, if not impossible, for the Court to monitor compliance with such a prohibition. What Article 39 § 2 of the Convention and Rule 62 § 2 of the Rules of Court prohibit the parties from doing is publicising the information in question, for instance through the media, in correspondence liable to be read by a large number of people, or in any other way (*ibid.*, § 68). It is thus this type of conduct, where a degree of seriousness is involved, that is an abuse of the right of application.

158. In order to be regarded as an abuse of application, the disclosure of confidential information must be intentional. The direct responsibility of the applicant in the disclosure must always be established with sufficient certainty; a mere suspicion will not suffice (*ibid.*, § 66 *in fine*). Concrete examples of the application of this principle: for an example where the application was rejected, see *Hadrabová and Others v. the Czech Republic* (dec.), in which the applicants had expressly cited the proposals of the friendly settlement formulated by the Court Registry in their correspondence with the Ministry of Justice of their country, which led to their application being rejected as an abuse of application; for an example where the application was found admissible, see *Miroļubovs and Others v. Latvia*, in which it was not established with certainty that all three applicants had been responsible for the disclosure of confidential information, with the result that the Court rejected the government's preliminary objection.

##### 5. Application manifestly vexatious or devoid of any real purpose

159. An applicant abuses the right of application where he or she repeatedly lodges vexatious and manifestly ill-founded applications with the Court that are similar to an application that he or she has lodged in the past that has already been declared inadmissible (*M. v. the United Kingdom* and *Philis v. Greece*, both Commission decisions). It cannot be the task of the Court to deal with a succession of ill-founded and querulous complaints or with otherwise manifestly abusive conduct of applicants or their authorised representatives, which creates gratuitous work for the Court, incompatible with its real functions under the Convention (*Bekauri v. Georgia* (preliminary objections), § 21; see also *Migliore and Others v. Italy* (dec.) and *Simitzi-Papachristou and Others v. Greece* (dec.)).

160. The Court may also find that there has been an abuse of the right of application where the application manifestly lacks any real purpose, concerns a petty sum of money or, generally speaking, has no bearing on the objective legitimate interests of the applicant (*ibid. Bock v. Germany* (dec.)). Since the entry into force of Protocol No. 14 on 1 June 2010, applications of this kind are more readily dealt with under Article 35 § 3 (b) of the Convention (no significant disadvantage).

### 6. *Other cases*

161. Sometimes judgments and decisions of the Court, and cases still pending before it, are used for the purposes of a political speech at national level in the Contracting States. An application inspired by a desire for publicity or propaganda is not for this reason alone an abuse of the right of application (*McFeeley and Others v. the United Kingdom*, Commission decision, and also *Khadzhiyev and Others v. Russia*, §§ 66-67). However, there may be an abuse if the applicant, motivated by political interests, gives interviews to the press or television in which he or she expresses an irresponsible and frivolous attitude towards proceedings pending before the Court (*Georgian Labour Party v. Georgia*).

### 7. *Approach to be adopted by the respondent government*

162. If the respondent government considers that the applicant has abused the right of application, it must inform the Court accordingly and bring to its attention the relevant information in its possession so that the Court can draw the appropriate conclusions. It is for the Court itself and not the respondent government to monitor compliance with the procedural obligations imposed by the Convention and by its Rules on the applicant party. However, threats on the part of the government and its bodies to bring criminal or disciplinary proceedings against an applicant for an alleged breach of their procedural obligations before the Court could raise a problem under Article 34 *in fine* of the Convention, which prohibits any interference with the effective exercise of the right of individual application (*Miroļubovs and Others v. Latvia*, § 70).



## II. GROUNDS FOR INADMISSIBILITY RELATING TO THE COURT'S JURISDICTION

### A. Incompatibility *ratione personae*

#### Article 35 § 3 (a) – Admissibility criteria

“3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:

(a) the application is incompatible with the provisions of the Convention or the Protocols thereto ...”

#### Article 32 – Jurisdiction of the Court

“1. The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47.

2. In the event of dispute as to whether the Court has jurisdiction, the Court shall decide.”

#### 1. Principles

163. Compatibility *ratione personae* requires the alleged violation of the Convention to have been committed by a Contracting State or to be in some way attributable to it.

164. Even where the respondent State has not raised any objections as to the Court's jurisdiction *ratione personae*, this issue calls for consideration by the Court of its own motion (*Sejdić and Finci v. Bosnia and Herzegovina* [GC], § 27).

165. Fundamental rights protected by international human rights treaties should be secured to individuals living in the territory of the State Party concerned, notwithstanding its subsequent dissolution or succession (*Bijelić v. Montenegro and Serbia*, § 69).

166. A State-owned company must enjoy sufficient institutional and operational independence from the State for the latter to be absolved of responsibility under the Convention for its acts and omissions (*Mykhaylenko and Others v. Ukraine*, §§ 43-45; *Cooperativa Agricola Slobozia-Hanesei v. Moldova*, § 19).

167. Applications will be declared incompatible *ratione personae* with the Convention on the following grounds:

- if the applicant lacks standing as regards Article 34 of the Convention (*Municipal Section of Antilly v. France* (dec.); *Döşemealtı Belediyesi v. Turkey* (dec.); *Moretti and Benedetti v. Italy*);
- if the applicant is unable to show that he or she is a victim of the alleged violation;
- if the application is brought against an individual (*X. v. the United Kingdom*, Commission decision of 10 December 1976; *Durini v. Italy*, Commission decision);
- if the application is brought against a State that has not ratified the Convention (*E.S. v. Germany*, Commission decision), or directly against an international organisation which has not acceded to the Convention (*Stephens v. Cyprus, Turkey and the United Nations* (dec.), last paragraph);
- if the complaint involves a Protocol to the Convention which the respondent State has not ratified (*Horsham v. the United Kingdom*, Commission decision; *De Saedeleer v. Belgium*, § 68).

## 2. Jurisdiction

168. A finding of lack of jurisdiction *ratione loci* will not dispense the Court from examining whether the applicants come under the jurisdiction of one or more Contracting States within the meaning of Article 1 of the Convention (*Drozd and Janousek v. France and Spain*, § 90). Therefore, objections that the applicants are not within the jurisdiction of a respondent State will more normally be raised as claims that the application is incompatible *ratione personae* with the Convention (see submissions of the respondent governments in *Banković and Others v. Belgium and Others* (dec.) [GC], § 35; *Ilaşcu and Others v. Moldova and Russia* [GC], § 300; *Weber and Saravia v. Germany* (dec.)).

169. Compatibility *ratione personae* with the Convention additionally requires the alleged violation to be imputable to a Contracting State (*Gentilhomme, Schaff-Benhadj and Zerouki v. France*, § 20). However, recent cases have considered questions of imputability/responsibility without explicitly referring to compatibility *ratione personae* (*Assanidze v. Georgia* [GC], §§ 144 et seq.; *Hussein v. Albania and 20 Other Contracting States* (dec.); *Isaak and Others v. Turkey* (dec.); *Stephens v. Malta (no. 1)*, § 45).

## 3. Responsibility and imputability

170. States may be held responsible for acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory (*Drozd and Janousek v. France and Spain*, § 91; *Soering v. the United Kingdom*, §§ 86 and 91; *Loizidou v. Turkey* (preliminary objections), § 62). However, this will occur only exceptionally (*Banković and Others v. Belgium and Others* (dec.) [GC], § 71; *Ilaşcu and Others v. Moldova and Russia* [GC], § 314), namely where a Contracting State is in effective control over an area or has at the very least a decisive influence over it (*ibid.*, §§ 314-16 and 392; *Catan and Others v. Moldova and Russia* [GC], §§ 106-07; *Al-Skeini v. the United Kingdom* [GC], §§ 138-40; *Medvedyev and Others v. France* [GC], §§ 63-64). For the concept of “overall control”, see *Ilaşcu and Others v. Moldova and Russia* [GC], §§ 315-16; see also *Banković and Others v. Belgium and Others* [GC] (dec.), §§ 67 et seq. and §§ 79-82; *Cyprus v. Turkey* [GC], §§ 75-81; *Loizidou v. Turkey* (preliminary objections), § 52; *Markovic and Others v. Italy* [GC], § 54; for the concept of effective control exercised not directly but through a subordinate local administration that survives thanks to that State’s support, see *Catan and Others v. Moldova and Russia* [GC], § 122.

171. A State may be held accountable for violations of the Convention rights of persons who are in the territory of another State but who are found to be under the former State’s authority and control through its agents operating – whether lawfully or unlawfully – in the latter State (*Issa and Others v. Turkey*, § 71; *Sánchez Ramirez v. France*, Commission decision; *Öcalan v. Turkey* [GC], § 91; *Medvedyev and Others v. France* [GC], §§ 66-67; for military operations abroad, see *Al-Skeini v. the United Kingdom* [GC], § 149).

With regard to acts committed by troops of the United Nations Multinational Forces and attributability of those acts to the State’s responsibility when the international organisation has no effective control nor ultimate authority over that conduct, see *Al-Jedda v. the United Kingdom* [GC], §§ 84-85. With regard to acts taking place in a United Nations buffer zone, see *Isaak and Others v. Turkey* (dec.).

172. For territories which are legally within the jurisdiction of a Contracting State but not under the effective authority/control of that State, applications may be considered incompatible with the provisions of the Convention (*An and Others v. Cyprus*, Commission decision), but regard must be had to the State’s positive obligations under the Convention (*Ilaşcu and Others v. Moldova and Russia* [GC], §§ 312-13 and §§ 333 et seq.; see also *Stephens v. Cyprus, Turkey and the United Nations* (dec.); *Azemi v. Serbia* (dec.); *Ivanțoc and*

*Others v. Moldova and Russia*, §§ 105-06; *Catan and Others v. the Republic of Moldova and Russia* [GC], §§ 109-10).

173. There are exceptions to the principle that an individual's physical presence in the territory of one of the Contracting Parties has the effect of placing that individual under the jurisdiction of the State concerned, for example where a State hosts the headquarters of an international organisation against which the applicant's complaints are directed. The mere fact that an international criminal tribunal has its seat and premises in the Netherlands is not a sufficient ground for attributing to that State any alleged acts or omissions on the part of the international tribunal in connection with the applicant's conviction (*Galić v. the Netherlands* (dec.); *Blagojević v. the Netherlands* (dec.); *Djokaba Lambi Longa v. the Netherlands* (dec.)). For an application against the respondent State as the permanent seat of an international organisation, see *Lopez Cifuentes v. Spain* (dec.), §§ 25-26. For the acceptance of an international civil administration in the respondent State's territory, see *Berić and Others v. Bosnia and Herzegovina* (dec.), § 30.

174. The mere participation of a State in proceedings brought against it in another State does not in itself amount to an exercise of extraterritorial jurisdiction (*McElhinney v. Ireland and the United Kingdom* (dec.) [GC]; *Treska v. Albania and Italy* (dec.); *Manoilescu and Dobrescu v. Romania and Russia* (dec.), §§ 99-111).

175. The liability of Contracting States for the acts of private persons, while traditionally considered under the heading of compatibility *ratione personae*, may also depend on the terms of the individual rights in the Convention and the extent of the positive obligations attached to those rights (see, for example, *Söderman v. Sweden* [GC], § 78; *Aksu v. Turkey* [GC], § 59; *Siliadin v. France*, §§ 77-81; *Beganović v. Croatia*, §§ 69-71). The State's responsibility may be engaged under the Convention as a result of its authorities' acquiescence or connivance in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction (*Ilaşcu and Others v. Moldova and Russia* [GC], § 318) or even when those acts are performed by foreign officials on its territory (*El-Masri v. the former Yugoslav Republic of Macedonia* [GC], § 206).

176. The Court has also laid down principles governing extraterritorial responsibility for arrest and detention in the context of an extradition procedure (*Stephens v. Malta (no. 1)*, § 52).

#### 4. Questions concerning the possible responsibility of States Parties to the Convention on account of acts or omissions linked to their membership of an international organisation

177. The Convention cannot be interpreted in a manner which would subject to the Court's scrutiny acts and omissions of Contracting Parties which are covered by United Nations Security Council Resolutions and occur prior to or in the course of United Nations missions to secure international peace and security. To do so would be to interfere with the fulfilment of a key United Nations mission (*Behrami v. France and Saramati v. France, Germany and Norway* (dec.) [GC], §§ 146-52). However, the Court adopts a different approach in respect of the national acts implementing the United Nations Security Council Resolutions, which are not directly attributable to the United Nations and may therefore engage the State's responsibility (*Nada v. Switzerland* [GC], §§ 120-22).

178. As regards decisions of international courts, the Court has by extension ruled that it had no jurisdiction *ratione personae* to deal with applications concerning actual proceedings before the International Criminal Tribunal for the former Yugoslavia, which was set up by virtue of a United Nations Security Council resolution (*Galić v. the Netherlands* (dec.); *Blagojević v. the Netherlands* (dec.)). For the dismissal of public officials by decision of the

High Representative for Bosnia and Herzegovina, whose authority derives from United Nations Security Council resolutions, see *Berić and Others v. Bosnia and Herzegovina* (dec.), §§ 26 et seq.

179. An alleged violation of the Convention cannot be attributed to a Contracting State on account of a decision or measure emanating from a body of an international organisation of which that State is a member, where it has not been established or even alleged that the protection of fundamental rights generally afforded by the international organisation in question is not “equivalent” to that ensured by the Convention and where the State concerned was not directly or indirectly involved in carrying out the impugned act (*Gasparini v. Italy and Belgium* (dec.)).

180. Thus, the Court has held that it had no jurisdiction *ratione personae* to deal with complaints directed against individual decisions given by the competent body of an international organisation in the context of a labour dispute falling entirely within the internal legal order of such an organisation with a legal personality separate from that of its member States, where those States at no time intervened directly or indirectly in the dispute and no act or omission on their part engaged their responsibility under the Convention (individual labour dispute with Eurocontrol: *Boivin v. 34 Member States of the Council of Europe* (dec.); disciplinary proceedings within the International Olive Council: *Lopez Cifuentes v. Spain* (dec.), §§ 28-29; disciplinary proceedings within the Council of Europe: *Beygo v. 46 Member States of the Council of Europe* (dec.)). For alleged violations of the Convention resulting from the dismissal of a European Commission official and the appeal procedure before the Court of First Instance and the Court of Justice of the European Union, see *Connolly v. 15 Member States of the European Union* (dec.). For proceedings before the European Patent Office, see *Rambus Inc. v. Germany* (dec.).

It is instructive to compare those findings with the Court’s examination of allegations of a structural deficiency in an internal mechanism of an international organisation to which the States Parties concerned had transferred part of their sovereign powers, where it was argued that the organisation’s protection of fundamental rights was not “equivalent” to that ensured by the Convention (*Gasparini v. Italy and Belgium* (dec.)).

181. The Court adopts a different approach to cases involving direct or indirect intervention in the dispute in issue by the respondent State, whose international responsibility is thus engaged: see *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], § 153; *Michaud v. France*, §§ 102-04; *Nada v. Switzerland* [GC], §§ 120-22; compare with *Behrami v. France and Saramati v. France, Germany and Norway* (dec.) [GC], § 151. See also the following examples:

- decision not to register the applicant as a voter on the basis of a treaty drawn up within the European Union (*Matthews v. the United Kingdom* [GC]);
- enforcement against the applicant of a French law implementing a European Union Directive (*Cantoni v. France* [GC]);
- denial of access to the German courts (*Beer and Regan v. Germany* [GC]; *Waite and Kennedy v. Germany* [GC]);
- impounding in the respondent State’s territory by its authorities by order of a minister, in accordance with its legal obligations under European law (*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC] – a European Union Regulation which was itself issued following a United Nations Security Council resolution – see §§ 153-54);
- application by a domestic court to the Court of Justice of the European Union (*Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v. the Netherlands* (dec.)).

182. Thus, as regards the European Union, applications against individual member States concerning their application of Community law will not necessarily be inadmissible on this ground (*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], § 137; *Matthews v. the United Kingdom* [GC], §§ 26-35).

183. As regards applications brought directly against institutions of the European Union, which is not a Party to the Convention, there is some older authority for declaring them inadmissible *ratione personae* (*Confédération française démocratique du travail v. the European Communities*, Commission decision, alternatively: their member States (a) jointly and (b) severally; see also the other references cited in *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], § 152; for a recent authority, see *Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v. the Netherlands* (dec.)).

This position has also been adopted for the European Patent Office (*Lenzing AG v. Germany* (dec.)).

184. As to whether a State's responsibility may be engaged on account of its Constitution, which is an annex to an international treaty, see *Sejdić and Finci v. Bosnia and Herzegovina* [GC], § 30.

## B. Incompatibility *ratione loci*

### Article 35 § 3 (a) – Admissibility criteria

“3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:

(a) the application is incompatible with the provisions of the Convention or the Protocols thereto ...”

### Article 32 – Jurisdiction of the Court

“1. The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47.

2. In the event of dispute as to whether the Court has jurisdiction, the Court shall decide.”

#### 1. Principles

185. Compatibility *ratione loci* requires the alleged violation of the Convention to have taken place within the jurisdiction of the respondent State or in territory effectively controlled by it (*Cyprus v. Turkey* [GC], §§ 75-81; *Drozd and Janousek v. France and Spain*, §§ 84-90).

186. Where applications are based on events in a territory outside the Contracting State and there is no link between those events and any authority within the jurisdiction of the Contracting State, they will be dismissed as incompatible *ratione loci* with the Convention.

187. Where complaints concern actions that have taken place outside the territory of a Contracting State, the government may raise a preliminary objection that the application is incompatible *ratione loci* with the provisions of the Convention (*Loizidou v. Turkey* (preliminary objections), § 55; *Rantsev v. Cyprus and Russia*, § 203). Such an objection will be examined under Article 1 of the Convention (for the scope of the concept of “jurisdiction” under this Article, see *Banković and Others v. Belgium and Others* (dec.) [GC], § 75).

188. Objections are sometimes raised by the respondent government that an application is inadmissible as being incompatible *ratione loci* with the provisions of the Convention on the ground that, during the proceedings, the applicant was resident in another Contracting State but instituted proceedings in the respondent State because the regulations were more

favourable. The Court will also examine such applications from the standpoint of Article 1 (*Haas v. Switzerland* (dec.)).

189. It is clear, however, that a State will be responsible for acts of its diplomatic and consular representatives abroad and that no issue of incompatibility *ratione loci* may arise in relation to diplomatic missions (*X. v. Germany*, Commission decision of 25 September 1965; *Al-Skeini v. the United Kingdom* [GC], § 134; *M. v. Denmark*, Commission decision, § 1 and the references cited therein) or to acts carried out on board aircraft and vessels registered in, or flying the flag of, that State (*Banković and Others v. Belgium and Others* (dec.) [GC], § 73; *Hirsi Jamaa and Others v. Italy* [GC], §§ 77 and 81).

190. Lastly, a finding of lack of jurisdiction *ratione loci* will not dispense the Court from examining whether the applicants come under the jurisdiction of one or more Contracting States for the purposes of Article 1 of the Convention (*Drozd and Janousek v. France and Spain*, § 90).

Therefore, objections that the applicants are not within the jurisdiction of a respondent State will more normally be raised as claims that the application is incompatible *ratione personae* with the Convention (see submissions of the respondent governments in *Banković and Others v. Belgium and Others* (dec.) [GC], § 35; *Ilaşcu and Others v. Moldova and Russia* [GC], § 300; *Weber and Saravia v. Germany* (dec.)).

## 2. Specific cases

191. As regards applications concerning dependent territories, if the Contracting State has not made a declaration under Article 56 extending the application of the Convention to the territory in question, the application will be incompatible *ratione loci* (*Gillow v. the United Kingdom*, §§ 60-62; *Bui Van Thanh and Others v. the United Kingdom*, Commission decision; *Yonghong v. Portugal* (dec.); *Chagos Islanders v. the United Kingdom* (dec.), §§ 60-76). By extension, this also applies to the Protocols to the Convention (*Quark Fishing Limited v. the United Kingdom* (dec.)).

Where the Contracting State has made such a declaration under Article 56, no such incompatibility issue will arise (*Tyrer v. the United Kingdom*, § 23).

192. If the dependent territory becomes independent, the declaration automatically lapses. Subsequent applications against the metropolitan State will be declared incompatible *ratione personae* (*Church of X. v. the United Kingdom*, Commission decision).

193. When the dependent territory becomes part of the metropolitan territory of a Contracting State, the Convention automatically applies to the former dependent territory (*Hingitaq 53 and Others v. Denmark* (dec.)).

## C. Incompatibility *ratione temporis*

### Article 35 § 3 (a) – Admissibility criteria

“3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:

(a) the application is incompatible with the provisions of the Convention or the Protocols thereto ...”

### Article 32 – Jurisdiction of the Court

“1. The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47.

2. In the event of dispute as to whether the Court has jurisdiction, the Court shall decide.”

### 1. General principles

194. In accordance with the general rules of international law (principle of non-retroactivity of treaties), the provisions of the Convention do not bind a Contracting Party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the Convention in respect of that Party (*Blečić v. Croatia* [GC], § 70; *Šilih v. Slovenia* [GC], § 140; *Varnava and Others v. Turkey* [GC], § 130).

195. Jurisdiction *ratione temporis* covers only the period after the ratification of the Convention or the Protocols thereto by the respondent State. However, the Convention imposes no specific obligation on Contracting States to provide redress for wrongs or damage caused prior to that date (*Kopecký v. Slovakia* [GC], § 38).

196. From the ratification date onwards, all the State's alleged acts and omissions must conform to the Convention or its Protocols, and subsequent facts fall within the Court's jurisdiction even where they are merely extensions of an already existing situation (*Almeida Garrett, Mascarenhas Falcão and Others v. Portugal*, § 43). The Court may, however, have regard to facts prior to ratification inasmuch as they could be considered to have created a situation extending beyond that date or may be relevant for the understanding of facts occurring after that date (*Hutten-Czapska v. Poland* [GC], §§ 147-53; *Kurić and Others v. Slovenia* [GC], §§ 240-41).

197. The Court is obliged to examine its competence *ratione temporis* of its own motion and at any stage of the proceedings, since this is a matter which goes to the Court's jurisdiction rather than a question of admissibility in the narrow sense of the term (*Blečić v. Croatia* [GC], § 67).

### 2. Application of these principles

#### (a) Critical date in relation to the ratification of the Convention or acceptance of the jurisdiction of the Convention institutions

198. In principle, the critical date for the purposes of determining the Court's temporal jurisdiction is the date of the entry into force of the Convention and Protocols in respect of the Party concerned (for an example, see *Šilih v. Slovenia* [GC], § 164).

199. However, the 1950 Convention made the competence of the Commission to examine individual applications (Article 25) and the jurisdiction of the Court (Article 46) dependent on specific declarations by the Contracting States to that effect. These declarations could be subject to limitations, in particular temporal limitations. As regards the countries which drafted such declarations after the date of their ratification of the Convention, the Commission and the Court have accepted temporal limitations of their jurisdiction with respect to facts falling within the period between the entry into force of the Convention and the relevant declaration (*X. v. Italy*, Commission decision; *Stamoulakatos v. Greece (no. 1)*, § 32).

200. Where there is no such temporal limitation in the government's declaration (see France's declaration of 2 October 1981), the Convention institutions have recognised the retrospective effect of the acceptance of their jurisdiction (*X. v. France*, Commission decision).

The temporal restrictions included in these declarations remain valid for the determination of the Court's jurisdiction to receive individual applications under the current Article 34 of the Convention by virtue of Article 6 of Protocol No. 11 (*Blečić v. Croatia* [GC], § 72). The Court, taking into account the previous system as a whole, has considered that it had jurisdiction as from the first declaration recognising the right of individual petition to the Commission, notwithstanding the lapse of time between the declaration and the recognition of

the Court's jurisdiction (*Cankoçak v. Turkey*, § 26; *Yorgiyadis v. Turkey*, § 24; *Varnava and Others v. Turkey* [GC], § 133).

**(b) Instantaneous facts prior or subsequent to entry into force or declaration**

201. The Court's temporal jurisdiction must be determined in relation to the facts constituting the alleged interference. To that end it is essential to identify, in each specific case, the exact time of the alleged interference. In doing so the Court must take into account both the facts of which the applicant complains and the scope of the Convention right alleged to have been violated (*Blečić v. Croatia* [GC], § 82; *Varnava and Others v. Turkey* [GC], § 131).

202. When applying this test to different judicial decisions prior and subsequent to the critical date, the Court has regard to the final judgment which was by itself capable of violating the applicant's rights (the Supreme Court's judgment terminating the applicant's tenancy in *Blečić v. Croatia* [GC], § 85; or the County Court's judgment in *Mrkić v. Croatia* (dec.)), despite the existence of subsequent remedies which only resulted in allowing the interference to subsist (the subsequent Constitutional Court decision upholding the Supreme Court's judgment in *Blečić v. Croatia* [GC], § 85; or both decisions by the Supreme Court and the Constitutional Court in *Mrkić v. Croatia* (dec.)).

The subsequent failure of remedies aimed at redressing that interference cannot bring it within the Court's temporal jurisdiction (*Blečić v. Croatia* [GC], §§ 77-79). The Court has reiterated that domestic courts are not compelled to apply the Convention retroactively to interferences that occurred before the critical date (*Varnava and Others v. Turkey* [GC], § 130).

203. Examples of cases include:

- interferences occurring prior to the critical date and final court decisions delivered after that date (*Meltex Ltd v. Armenia* (dec.));
- interferences occurring after the critical date (*Lepojić v. Serbia*, § 45; *Filipović v. Serbia*, § 33);
- use of evidence obtained as a result of ill-treatment occurring prior to the critical date in judicial decisions delivered after that date (*Harutyunyan v. Armenia*, § 50);
- action for the annulment of title to property instituted prior to the critical date but concluded afterwards (*Turgut and Others v. Turkey*, § 73);
- date of final annulment of title to property (*Fener Rum Patrikliği (Ecumenical Patriarchy) v. Turkey* (dec.)).

204. See also:

- conviction of the applicant *in absentia* by the Greek courts prior to Greece's declaration under Article 25, despite the ultimately unsuccessful appeals lodged against the conviction after that date (*Stamoulakatos v. Greece (no. 1)*, § 33);
- implicit decision of the Central Electoral Commission, prior to ratification, refusing the applicant's request to sign a petition without having a stamp affixed to his passport, whereas the proceedings instituted on that account were conducted after that date (*Kadiķis v. Latvia* (dec.));
- dismissal of the applicant from his job and civil action brought by him prior to ratification, followed by the Constitutional Court's decision after that date (*Jovanović v. Croatia* (dec.));
- ministerial order transferring the management of the applicants' company to a board appointed by the Minister for the Economy, thus depriving them of their right of access to



- a court, whereas the Supreme Court’s judgment dismissing the applicants’ appeal was given after the critical date (*Kefalas and Others v. Greece*, § 45);
- conviction of the applicant after the relevant declaration under Article 46 on account of statements made to journalists before that date (*Zana v. Turkey*, § 42);
  - search of the applicant’s company’s premises and seizure of documents, although the subsequent proceedings took place after ratification (*Veeber v. Estonia (no. 1)*, § 55; see also *Kikots and Kikota v. Latvia* (dec.)).

205. However, if the applicant makes a separate complaint as to the compatibility of the subsequent proceedings with an Article of the Convention, the Court may declare that it has jurisdiction *ratione temporis* with regard to the remedies in question (cassation appeal to the Supreme Court against the first-instance court’s order to terminate the production and distribution of a newspaper in *Kerimov v. Azerbaijan* (dec.); unlawful distribution of bank assets occurred prior to the critical date and tort claim lodged after that date in *Kotov v. Russia* [GC], §§ 68-69).

206. The test and criteria established in *Blečić v. Croatia* [GC] are of a general character; the special nature of certain rights, such as those laid down in Articles 2 and 3 of the Convention, must be taken into consideration when applying those criteria (*Šilih v. Slovenia* [GC], § 147).

### 3. Specific situations

#### (a) Continuing violations

207. The Convention institutions have accepted the extension of their jurisdiction *ratione temporis* to situations involving a continuing violation which originated before the entry into force of the Convention but persists after that date (*De Becker v. Belgium*, Commission decision).

208. The Court has followed this approach in several cases concerning the right of property:

- continuing unlawful occupation by the navy of land belonging to the applicants, without compensation (*Papamichalopoulos and Others v. Greece*, § 40);
- denial of access to the applicant’s property in Northern Cyprus (*Loizidou v. Turkey* (preliminary objections), §§ 46-47);
- failure to pay final compensation for nationalised property (*Almeida Garrett, Mascarenhas Falcão and Others v. Portugal*, § 43);
- continued impossibility for the applicant to regain possession of her property and to receive an adequate level of rent for the lease of her house, stemming from laws which were in force before and after ratification of Protocol No. 1 by Poland (*Hutten-Czapaska v. Poland* [GC], §§ 152-53).

209. Limits: The mere deprivation of an individual’s home or property is in principle an “instantaneous act” and does not produce a continuing situation of “deprivation” in respect of the rights concerned (*Blečić v. Croatia* [GC], § 86 and the references cited therein). In the specific case of post-1945 deprivation of possessions under a former regime, see the references cited in *Preussische Treuhand GmbH & Co. KG a.A. v. Poland* (dec.), §§ 55-62.

210. The continuing nature of a violation can also be established in relation to any other Article of the Convention (for Article 2 and the death sentence imposed on the applicants

before the critical date, see *Ilaşcu and Others v. Moldova and Russia* [GC], §§ 406-08; for Article 8 and the failure to regulate the residence of persons who had been “erased” from the Register of Permanent Residents before the critical date, see *Kurić and Others v. Slovenia* [GC], §§ 240-41).

**(b) “Continuing” procedural obligation to investigate disappearances that occurred prior to the critical date**

211. A disappearance is not an “instantaneous” act or event. On the contrary, the Court considers a disappearance a distinct phenomenon, characterised by an ongoing situation of uncertainty and unaccountability in which there is a lack of information or even a deliberate concealment and obfuscation of what has occurred. Furthermore, the subsequent failure to account for the whereabouts and fate of the missing person gives rise to a continuing situation. Thus, the procedural obligation to investigate will potentially persist as long as the fate of the person is unaccounted for; the ongoing failure to provide the requisite investigation will be regarded as a continuing violation, even where death may, eventually, be presumed (*Varnava and Others v. Turkey* [GC], §§ 148-49). For an application of the *Varnava* case-law, see *Palić v. Bosnia and Herzegovina*, § 46.

**(c) Procedural obligation under Article 2 to investigate a death: proceedings relating to facts outside the Court’s temporal jurisdiction**

212. The Court makes a distinction between the obligation to investigate a suspicious death or homicide and the obligation to investigate a suspicious disappearance.

Thus, it considers that the positive obligation to carry out an effective investigation under Article 2 of the Convention constitutes a detachable obligation capable of binding the State even when the death took place before the critical date (*Šilih v. Slovenia* [GC], § 159 – the case concerns a death which occurred before the critical date, whereas the shortcomings or omissions in the conduct of the investigation occurred after that date). Its temporal jurisdiction to review compliance with such obligations is exercised within certain limits it has established, having regard to the principle of legal certainty (*ibid.*, §§ 161-63). Firstly, only procedural acts and/or omissions occurring after the critical date can fall within the Court’s temporal jurisdiction (*ibid.*, § 162). Secondly, the Court emphasises that in order for the procedural obligations to come into effect there must be a genuine connection between the death and the entry into force of the Convention in respect of the respondent State. Thus, for such connection to be established, two criteria must be met: firstly, the lapse of time between the death and the entry into force of the Convention must have been reasonably short (not exceeding ten years) and, secondly, it must be established that a significant proportion of the procedural steps – including not only an effective investigation into the death of the person concerned but also the institution of appropriate proceedings for the purpose of determining the cause of the death and holding those responsible to account – were or ought to have been carried out after the ratification of the Convention by the State concerned (*Janowiec and Others v. Russia* [GC], §§ 145-48). However, the Court would not rule out that in certain circumstances the connection might also be based on the need to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner ((*Šilih v. Slovenia* [GC], § 163). For a subsequent application of the “genuine connection” test, see, for example, *Şandru and Others v. Romania*, § 57. For an application of the *Šilih* judgment, see *Çakir and Others v. Cyprus* (dec.).

213. In *Tuna v. Turkey*, concerning a death as a result of torture, the Court for the first time applied the principles established in the *Šilih* judgment by examining the applicants’ procedural complaints under Articles 2 and 3 taken together. The Court reiterated the

principles regarding the “detachability” of procedural obligations, in particular the two criteria applicable in determining its jurisdiction *ratione temporis* where the facts concerning the substantive aspect of Articles 2 and 3 occurred, as in this case, outside the period covered by its jurisdiction, whereas the facts concerning the procedural aspect – that is, the subsequent procedure – occurred, at least in part, within that period.

For a subsequent application to procedural complaints under Article 3, see, for example, *Yatsenko v. Ukraine* and *Jenița Mocanu and Others v. Romania*.

214. However, the Court would not rule out that in certain extraordinary circumstances, which do not satisfy the “genuine connection” standard, the connection might also be based on the need to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner (*Šilih v. Slovenia* [GC], § 163). This “Convention values” test, which operates as an exception to the general rule thus allowing a further extension of the Court’s jurisdiction into the past, may be applied only if the triggering event has a larger dimension which amounts to a negation of the very foundations of the Convention (such as in cases of serious crimes under international law), but only to events which occurred after the adoption of the Convention, on 4 November 1950. Hence a Contracting Party cannot be held responsible under the Convention for not investigating even the most serious crimes under international law if they predated the Convention (*Janowiec and Others v. Russia* [GC], §§ 149-51, the case concerning the investigations into the massacres of Katyn in 1940, which accordingly fell outside the Court’s jurisdiction *ratione temporis*).

**(d) Consideration of prior facts**

215. The Court takes the view that it may “have regard to the facts prior to ratification inasmuch as they could be considered to have created a situation extending beyond that date or may be relevant for the understanding of facts occurring after that date” (*Broniowski v. Poland* (dec.) [GC], § 74).

**(e) Pending proceedings or detention**

216. A special situation results from complaints concerning the length of judicial proceedings (Article 6 § 1 of the Convention) which were brought prior to ratification but continue after that date. Although its jurisdiction is limited to the period subsequent to the critical date, the Court has frequently taken into account the state of the proceedings by that date for guidance (for example, *Humen v. Poland* [GC], §§ 58-59; *Foti and Others v. Italy*, § 53).

The same applies to cases concerning pre-trial detention under Article 5 § 3 (*Klyakhin v. Russia*, §§ 58-59) or conditions of detention under Article 3 (*Kalashnikov v. Russia*, § 36).

217. As regards the fairness of proceedings, the Court may examine whether the deficiencies at the trial stage can be compensated for by procedural safeguards in an investigation conducted before the critical date (*Barberà, Messegué and Jabardo v. Spain*, §§ 61 and 84). In doing so the Strasbourg judges consider the proceedings as a whole (see also *Kerojärvi v. Finland*, § 41).

218. A procedural complaint under Article 5 § 5 cannot fall within the Court’s temporal jurisdiction where the deprivation of liberty occurred before the Convention’s entry into force (*Korizno v. Latvia* (dec.)).

**(f) Right to compensation for wrongful conviction**

219. The Court has declared that it has jurisdiction to examine a complaint under Article 3 of Protocol No. 7 where a person was convicted prior to the critical date but the conviction was quashed after that date (*Matveyev v. Russia*, § 38).

**D. Incompatibility *ratione materiae*****Article 35 § 3 (a) – Admissibility criteria**

“3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that

(a) the application is incompatible with the provisions of the Convention or the Protocols thereto ...”

**Article 32 – Jurisdiction of the Court**

“1. The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47.

2. In the event of dispute as to whether the Court has jurisdiction, the Court shall decide.”

220. The compatibility *ratione materiae* with the Convention of an application or complaint derives from the Court’s substantive jurisdiction. For a complaint to be compatible *ratione materiae* with the Convention, the right relied on by the applicant must be protected by the Convention and the Protocols thereto that have come into force. For example, applications are inadmissible where they concern the right to be issued with a driving licence (*X. v. Germany*, Commission decision of 7 March 1977), the right to self-determination (*X. v. the Netherlands*, Commission decision), and the right of foreign nationals to enter and reside in a Contracting State (*Peñaftiel Salgado v. Spain* (dec.)), since those rights do not, as such, feature among the rights and freedoms guaranteed by the Convention.

221. Although the Court is not competent to examine alleged violations of rights protected by other international instruments, when defining the meaning of terms and notions in the text of the Convention it can and must take into account elements of international law other than the Convention (*Demir and Baykara v. Turkey* [GC], § 85).

222. The Court is obliged to examine whether it has jurisdiction *ratione materiae* at every stage of the proceedings, irrespective of whether or not the government is estopped from raising such an objection (*Tănase v. Moldova* [GC], § 131).

223. Applications concerning a provision of the Convention in respect of which the respondent State has made a reservation are declared incompatible *ratione materiae* with the Convention (see, for example, *Kozlova and Smirnova v. Latvia* (dec.)), provided that the reservation is deemed valid by the Court for the purposes of Article 57 of the Convention (for an interpretative declaration deemed invalid, see *Belilos v. Switzerland*).

224. In addition, the Court has no jurisdiction *ratione materiae* to examine whether a Contracting Party has complied with the obligations imposed on it by one of the Court’s judgments. It cannot entertain complaints of this nature without encroaching on the powers of the Committee of Ministers of the Council of Europe, which supervises the execution of judgments by virtue of Article 46 § 2 of the Convention. However, the Committee of Ministers’ role in this sphere does not mean that measures taken by a respondent State to remedy a violation found by the Court cannot raise a new issue undecided by the judgment and, as such, form the subject of a new application that may be dealt with by the Court (*Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], § 62). In other words,

the Court may entertain a complaint that the reopening of proceedings at domestic level by way of implementation of one of its judgments gave rise to a new breach of the Convention (*ibid.*; *Lyons v. the United Kingdom* (dec.)).

225. However, the vast majority of decisions declaring applications inadmissible on the ground of incompatibility *ratione materiae* pertain to the limits of the scope of the Articles of the Convention or its Protocols, in particular Article 6 (right to a fair hearing), Article 8 (right to respect for private and family life, home and correspondence), and Article 1 of Protocol No. 1 (protection of property).

### 1. The concept of “civil rights and obligations”

#### Article 6 § 1 – Right to a fair trial

“1. In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...”

##### (a) General requirements for applicability of Article 6 § 1

226. The concept of “civil rights and obligations” cannot be interpreted solely by reference to the respondent State’s domestic law; it is an “autonomous concept” deriving from the Convention. Article 6 § 1 of the Convention applies irrespective of the parties’ status, the character of the legislation which governs how the dispute is to be determined, and the character of the authority which has jurisdiction in the matter (*Georgiadis v. Greece*, § 34).

227. However, the principle that the autonomous concepts contained in the Convention must be interpreted in the light of present-day conditions does not give the Court power to interpret Article 6 § 1 as though the adjective “civil” (with the restrictions which the adjective necessarily places on the category of “rights and obligations” to which that Article applies) were not present in the text (*Ferrazzini v. Italy* [GC], § 30).

228. The applicability of Article 6 § 1 in civil matters firstly depends on the existence of a dispute. Secondly the dispute must relate to “rights and obligations” which, arguably at least, can be said to be recognised under domestic law. Lastly these “rights and obligations” must be “civil” ones within the meaning of the Convention, although Article 6 does not itself assign any specific content to them in the Contracting States’ legal systems (*James and Others v. the United Kingdom*, § 81).

##### (b) The term “dispute”

229. The word “dispute” (in French, “*contestation*”) must be given a substantive meaning rather than a formal one (*Le Compte, Van Leuven and De Meyere v. Belgium*, § 40). It is necessary to look beyond the appearances and the language used and concentrate on the realities of the situation according to the circumstances of each case (*ibid.*; *Gorou v. Greece* (no. 2) [GC], §§ 27 and 29). Article 6 does not apply to a non-contentious and unilateral procedure which does not involve opposing parties and is available only where there is no dispute over rights (*Alaverdyan v. Armenia* (dec.), § 33).

230. The “dispute” must be genuine and of a serious nature (*Sporrong and Lönnroth v. Sweden*, § 81). This rules out, for example, civil proceedings taken against prison authorities on account of the mere presence in the prison of HIV-infected prisoners (*Skorobogatikh v. Russia* (dec.)). For example, the Court held a “dispute” to be real in a case concerning the request to the public prosecutor to lodge an appeal on points of law, as it

formed an integral part of the whole of the proceedings that the applicant had joined as a civil party with a view to obtaining compensation (*Gorou v. Greece (no. 2)* [GC], § 35).

231. It may relate not only to the actual existence of a right but also to its scope or the manner in which it is to be exercised (*Benthem v. the Netherlands*, § 32). The dispute may also concern matters of fact.

232. The result of the proceedings must be directly decisive for the right in question (for example, *Ulyanov v. Ukraine* (dec.)). Consequently a tenuous connection or remote consequences are not enough to bring Article 6 § 1 into play. For example, the Court found that proceedings challenging the legality of extending a nuclear power station's operating licence did not fall within the scope of Article 6 § 1 because the connection between the extension decision and the right to protection of life, physical integrity and property was "too tenuous and remote", the applicants having failed to show that they personally were exposed to a danger that was not only specific but above all imminent (*Balmer-Schafroth and Others v. Switzerland*, § 40; *Athanassoglou and Others v. Switzerland* [GC], §§ 46-55; see, most recently, *Sdružení Jihočeské Matky v. the Czech Republic* (dec.); for a case concerning limited noise pollution at a factory, see *Zapletal v. the Czech Republic* (dec.); for the hypothetical environmental impact of a plant for treatment of mining waste, see *Ivan Atanasov v. Bulgaria*, §§ 90-95). Similarly, proceedings which two public-sector employees brought to challenge one of their colleagues' appointment to a post could have only remote effects on their civil rights – specifically, their own right to appointment (*Revel and Mora v. France* (dec.)).

233. In contrast, a case concerning the building of a dam which would have flooded the applicants' village (*Gorraiz Lizarraga and Others v. Spain*, § 46) and a case about the operating permit for a gold mine using cyanidation leaching near the applicants' villages (*Taşkın and Others v. Turkey*, § 133; see also *Zander v. Sweden*, §§ 24-25) came under Article 6 § 1. More recently, in a case regarding the appeal submitted by a local environmental-protection association for judicial review of a planning permission, the Court found that there was a sufficient link between the dispute and the right claimed by the legal entity, in particular in view of the status of the association and its founders, and the fact that the aim it pursued was limited in space and in substance (*L'Érablière A.S.B.L. v. Belgium*, §§ 28-30). In addition, proceedings for restoration of a person's legal capacity are directly decisive for the determination of the person's civil rights and obligations (*Stanev v. Bulgaria* [GC], § 233).

### (c) Existence of an arguable right in domestic law

234. The applicant must be able to claim a right that could arguably be said to be recognised under national law (*Masson and Van Zon v. the Netherlands*, § 48; *Gutfreund v. France*, § 41; *Boulois v. Luxembourg* [GC], §§ 90-94; see also *Beaumartin v. France*, § 28, in relation to an international agreement). Article 6 § 1 does not guarantee any particular content for a "right" in the substantive law of the Contracting States, and in principle the Court must refer to domestic law in order to establish the existence of such a right.

235. Whether or not the authorities enjoyed discretion in deciding whether to grant the measure requested by an applicant may be taken into consideration and may even be decisive. However, the mere fact that the wording of a legal provision affords an element of discretion does not in itself rule out the existence of a right. Other criteria which may be taken into consideration by the Court include the recognition of the alleged right in similar circumstances by the domestic courts or the fact that the latter examined the merits of the applicant's request (*Boulois v. Luxembourg* [GC], §§ 91-101).

236. The Court may decide that rights such as the right to life, to health, to a healthy environment and to respect for property are recognised in domestic law (*Athanassoglou and Others v. Switzerland* [GC], § 44).

237. The right in question has to have a legal basis in domestic law (*Szücs v. Austria*, § 33).

238. However, it must be pointed out that whether a person has an actionable domestic claim may depend not only on the actual content of the relevant civil right as defined in national law, but also on the existence of procedural bars preventing or limiting the possibilities of bringing possible claims to court (*Fayed v. the United Kingdom*, § 65). In the latter category of cases, Article 6 § 1 of the Convention may apply (*Al-Adsani v. the United Kingdom* [GC], §§ 46-47; *Fogarty v. the United Kingdom* [GC], § 25). In principle, though, it cannot have any application to substantive limitations on a right existing under domestic law (*Roche v. the United Kingdom* [GC], § 119), since the Convention enforcement bodies may not create by way of interpretation of Article 6 § 1 a substantive civil right which has no legal basis in the State concerned (*ibid.*, § 117).

239. In deciding whether there is a civil “right” and whether to classify a restriction as substantive or procedural, regard must first be had to the relevant provisions of national law and how the domestic courts interpret them (*Masson and Van Zon v. the Netherlands*, § 49). It is necessary to look beyond the appearances, examine how domestic law classifies the particular restriction and concentrate on the realities (*Van Droogenbroeck v. Belgium*, § 38). Lastly, a final court decision does not necessarily retrospectively deprive applicants’ complaints of their arguability (*Le Calvez v. France*, § 56). For instance, the limited scope of the judicial review of an act of foreign policy (NATO air strikes on Serbia) cannot make the applicants’ claims against the State retrospectively unarguable, since the domestic courts were called upon to decide for the first time on this issue (*Markovic and Others v. Italy* [GC], §§ 100-02).

240. Applying the distinction between substantive limitations and procedural bars in the light of these criteria, the Court has, for example, recognised as falling under Article 6 § 1 civil actions for negligence against the police (*Osman v. the United Kingdom*) or against local authorities (*Z. and Others v. the United Kingdom* [GC]) and has considered whether a particular limitation (exemption from prosecution or non-liability) was proportionate from the standpoint of Article 6 § 1. On the other hand it held that the Crown’s exemption from civil liability to members of the armed forces derived from a substantive restriction and that domestic law consequently did not recognise a “right” within the meaning of Article 6 § 1 of the Convention (*Roche v. the United Kingdom* [GC], § 124; see also *Hotter v. Austria* (dec.); *Andronikashvili v. Georgia* (dec.)).

241. The Court has also specified that where the public authorities tolerate illegal acts, subject to certain conditions, this does not amount to a licence granted in accordance with the law and to a “right” recognised by domestic law (*De Bruin v. the Netherlands* (dec.), § 57).

242. The Court has accepted that associations may also qualify for protection under Article 6 § 1 if they seek to defend the specific rights and interests of their members (*Gorraiz Lizarraga and Others v. Spain*, § 45) or even particular rights they themselves may claim as legal entities – such as the right of the “public” to information and to take part in decisions regarding the environment (*Collectif national d’information et d’opposition à l’usine Melox – Collectif Stop Melox et Mox v. France* (dec.)), or when the association’s action cannot be regarded as an *actio popularis* (*L’Érablière A.S.B.L. v. Belgium*).

243. Where legislation lays down conditions for admission to an occupation or profession, a candidate who satisfies them has a right to be admitted to that occupation or profession (*De Moor v. Belgium*, § 43). For example, if the applicant has an arguable case that he or she meets the legal requirements for registration as a doctor, Article 6 applies (*Chevol v. France*, § 55; see, conversely, *Bouilloc v. France* (dec.)). At all events, when the legality of proceedings concerning a civil right is challengeable by a judicial remedy of which the applicant has made use, it has to be concluded that there was a “dispute” concerning a “civil

right” even if the domestic authorities’ eventual finding was that the applicant did not meet the legal requirements (see, for example, *Kök v. Turkey*, § 37, for the right to continue practising the medical specialisation which the applicant had taken up abroad). It must therefore be ascertained whether the applicant’s arguments were sufficiently tenable (*Neves e Silva v. Portugal*, § 37; *Éditions Périscope v. France*, § 38).

**(d) “Civil” nature of the right**

244. Whether or not a right is to be regarded as civil in the light of the Convention must be determined by reference to the substantive content and effects of the right – and not its legal classification – under the domestic law of the State concerned. In the exercise of its supervisory functions, the Court must also take into account the Convention’s object and purpose and the national legal systems of the other Contracting States (*König v. Germany*, § 89).

245. In principle, the applicability of Article 6 § 1 to disputes between private individuals which are classified as civil in domestic law is uncontested before the Court (for a judicial-separation case, see *Airey v. Ireland*, § 21).

**(e) Private nature of a right: the pecuniary dimension**

246. The Court regards as falling within the scope of Article 6 § 1 proceedings which, in domestic law, come under “public law” and whose result is decisive for private rights and obligations. Such proceedings may, *inter alia*, have to do with permission to sell land (*Ringeisen v. Austria*, § 94), running a private clinic (*König v. Germany*, §§ 94-95), building permission (see, *inter alia*, *Sporrong and Lönnroth v. Sweden*, § 79), the ownership and use of a religious building (*Sâmbata Bihor Greco-Catholic Parish v. Romania*, § 65), administrative permission in connection with requirements for carrying on an occupation (*Bentham v. the Netherlands*, § 36), a licence for serving alcoholic beverages (*Tre Traktörer Aktiebolag v. Sweden*, § 43), or a dispute concerning the payment of compensation for a work-related illness or accident (*Chaudet v. France*, § 30).

On the same basis Article 6 is applicable to disciplinary proceedings before professional bodies where the right to practise the profession is at stake (*Le Compte, Van Leuven and De Meyere v. Belgium*; *Philis v. Greece (no. 2)*, § 45), bearing in mind that the right to practise one’s profession freely and to continue to practise it constitutes a civil right (*Voggenreiter v. Germany*, § 44); a negligence claim against the State (*X v. France*), an action for cancellation of an administrative decision harming the applicant’s rights (*De Geouffre de la Pradelle v. France*), administrative proceedings concerning a ban on fishing in the applicants’ waters (*Alatulkkila and Others v. Finland*, § 49) and proceedings for awarding a tender in which a civil right – such as the right not to be discriminated against on grounds of religious belief or political opinion when bidding for public-works contracts – is at stake (*Tinnelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom*, § 61; contrast with *I.T.C. Ltd v. Malta* (dec.)).

247. Article 6 § 1 is applicable to a civil-party complaint in criminal proceedings (*Perez v. France* [GC], §§ 70-71), except in the case of a civil action brought purely to obtain private vengeance or for punitive purposes (*Sigalas v. Greece*, § 29; *Mihova v. Italy* (dec.)). The Convention does not confer any right, as such, to have third parties prosecuted or sentenced for a criminal offence. To fall within the scope of the Convention, such right must be indissociable from the victim’s exercise of a right to bring civil proceedings in domestic law, even if only to secure symbolic reparation or to protect a civil right such as the right to a “good reputation” (*Perez v. France* [GC], § 70; see also, regarding a symbolic award, *Gorou v. Greece (no. 2)* [GC], § 24). Therefore, Article 6 applies to proceedings involving civil-



party complaints from the moment the complainant is joined as a civil party, unless he or she has waived the right to reparation in an unequivocal manner.

248. Article 6 § 1 is also applicable to a civil action seeking compensation for ill-treatment allegedly committed by agents of the State (*Aksoy v. Turkey*, § 92).

**(f) Extension to other types of dispute**

249. The Court has held that Article 6 § 1 is applicable to disputes concerning social matters, including proceedings relating to an employee's dismissal by a private firm (*Buchholz v. Germany*), proceedings concerning social security benefits (*Feldbrugge v. the Netherlands*), even on a non-contributory basis (*Salesi v. Italy*), and also proceedings concerning compulsory social security contributions (*Schouten and Meldrum v. the Netherlands*). In these cases, the Court took the view that the private-law aspects predominated over the public-law ones. In addition, it has held that there were similarities between entitlement to welfare allowance and entitlement to receive compensation for Nazi persecution from a private-law foundation (*Woś v. Poland*, § 76).

250. Disputes concerning public servants fall in principle within the scope of Article 6 § 1. In *Pellegrin v. France* [GC], §§ 64-71, the Court had adopted a "functional" criterion. The Court has decided to adopt a new approach in its judgment in *Vilho Eskelinen and Others v. Finland* [GC], §§ 50-62. The principle is now that there will be a presumption that Article 6 applies, and it will be for the respondent government to demonstrate, firstly, that a civil-servant applicant does not have a right of access to a court under national law and, secondly, that the exclusion of the rights under Article 6 for the civil servant is justified. If the applicant had access to a court under national law, Article 6 applies (even to active military officers and their claims before military courts, see *Pridatchenko and Others v. Russia*, § 47). With regard to the second criterion, the exclusion must be justified on "objective grounds in the State's interest", which obliges the State to show that the subject matter of the dispute in issue is related to the exercise of State power or that it has called into question the special bond between the civil servant and the State. Thus, there can in principle be no justification for the exclusion from the guarantees of Article 6 of ordinary labour disputes, such as those relating to salaries, allowances or similar entitlements, on the basis of the special nature of relationship between the particular civil servant and the State in question (see for instance a dispute regarding police personnel's entitlement to a special allowance in *Vilho Eskelinen and Others v. Finland* [GC]). Recently, in the light of the criteria laid down in the *Vilho Eskelinen* judgment, the Court declared Article 6 § 1 to be applicable to proceedings for unfair dismissal instituted by an embassy employee (*Cudak v. Lithuania* [GC], §§ 44-47, for a secretary and switchboard operator in the Polish embassy), a senior police officer (*Šikić v. Croatia*, §§ 18-20) or an army officer in the military courts (*Vasilchenko v. Russia*, §§ 34-36), to proceedings regarding the right to obtain the post of parliamentary assistant (*Savino and Others v. Italy*), to disciplinary proceedings against a judge (*Olujić v. Croatia*), to an appeal by a prosecutor against a presidential decree ordering his transfer (*Zalli v. Albania* (dec.) and the references cited therein), and to proceedings concerning the professional career of a customs officer (*Fiume v. Italy*, §§ 33-36, for the right to apply for an internal promotion). Thus, the applicability of Article 6 § 1 cannot be ruled out simply on the basis of the applicant's status (*Di Giovanni v. Italy*, § 37).

251. Constitutional disputes may also come within the ambit of Article 6 if the constitutional proceedings have a decisive bearing on the outcome of the dispute (about a "civil" right) in the ordinary courts (*Ruiz-Mateos v. Spain*). This does not apply in the case of disputes relating to a presidential decree granting citizenship to an individual as an exceptional measure, or to the determination of whether the President has breached his constitutional oath, since such proceedings do not concern civil rights and obligations (

*v. Lithuania* [GC], §§ 65-66). For the application of Article 6 § 1 to an interim measure taken by the Constitutional Court, see *Kübler v. Germany*, §§ 47-48.

252. Lastly, Article 6 is also applicable to other not strictly pecuniary matters such as the environment, where disputes may arise involving the right to life, to health or to a healthy environment (*Taşkın and Others v. Turkey*); fostering of children (*McMichael v. the United Kingdom*); children's schooling arrangements (*Ellès and Others v. Switzerland*, §§ 21-23); the right to have paternity established (*Alaverdyan v. Armenia* (dec.), § 33); the right to liberty (*Laidin v. France (no. 2)*); prisoners' detention arrangements (for instance, disputes concerning the restrictions to which prisoners are subjected as a result of being placed in a high-security unit: *Enea v. Italy* [GC], §§ 97-107; or in a high-security cell: *Stegarescu and Bahrin v. Portugal*; or disciplinary proceedings resulting in restrictions on family visits to prison: *Gülmez v. Turkey*, § 30); the right to a good reputation (*Helmers v. Sweden*, § 27); the right of access to administrative documents (*Loiseau v. France* (dec.)), or an appeal against an entry in a police file affecting the right to a reputation, the right to protection of property and the possibility of finding employment and hence earning a living (*Pocius v. Lithuania*, §§ 38-46; *Užukauskas v. Lithuania*, §§ 32-40); the right to be a member of an association (*Sakellaropoulos v. Greece* (dec.) – similarly, proceedings concerning the registration of an association concern the association's civil rights, even if under domestic legislation the question of freedom of association belongs to the field of public law (*APEH Üldözötteinek Szövetsége and Others v. Hungary*, §§ 34-35); and, lastly, the right to continue higher education studies (*Emine Araç v. Turkey*, §§ 18-25), a position which applies *a fortiori* in the context of primary education (*Oršuš and Others v. Croatia* [GC], § 104). This extension allows the Court to view the civil head of Article 6 as covering not just pecuniary rights but also individual rights of a personal nature.

#### (g) Excluded matters

253. Merely showing that a dispute is pecuniary in nature is not in itself sufficient to attract the applicability of Article 6 § 1 under its civil head (*Ferrazzini v. Italy* [GC], § 25).

254. Matters outside the scope of Article 6 include tax proceedings: tax matters still form part of the hard core of public-authority prerogatives, with the public nature of the relationship between the taxpayer and the community remaining predominant (*ibid.*, § 29). Similarly excluded are summary injunction proceedings concerning customs duties or charges (*Emesa Sugar N.V. v. the Netherlands* (dec.)).

255. The same applies, in the immigration field, to the entry, residence and removal of aliens, in relation to proceedings concerning the granting of political asylum or deportation (application for an order quashing a deportation order: *Maaouia v. France* [GC], § 38; extradition: *Peñafiel Salgado v. Spain* (dec.) and *Mamatkulov and Askarov v. Turkey* [GC], §§ 81-83; action in damages by an asylum-seeker on account of the refusal to grant asylum: *Panjeheighalehei v. Denmark* (dec.)), despite the possibly serious implications for private or family life or employment prospects. This inapplicability extends to the inclusion of an alien in the Schengen Information System (*Dalea v. France* (dec.)). The right to hold a passport and the right to nationality are not civil rights for the purposes of Article 6 (*Smirnov v. Russia* (dec.)). However, a foreigner's right to apply for a work permit may come under Article 6, both for the employer and the employee, even if, under domestic law, the employee has no *locus standi* to apply for it, provided that what is involved is simply a procedural bar that does not affect the substance of the right (*Juriscic and Collegium Mehrerau v. Austria*, §§ 54-62).

256. According to *Vilho Eskelinen and Others v. Finland* [GC], disputes relating to public servants do not fall within the scope of Article 6 when the two criteria established are met (see paragraph 234 above). This is the case of a soldier discharged from service on disciplinary grounds who is unable to challenge the decision before the tribunals, since the

special bond between the applicant and the State was being challenged (*Suküt v. Turkey* (dec.)). The same applies to a dispute regarding a judge's reintegration in office after resignation (*Apay v. Turkey* (dec.)).

257. Lastly, political rights such as the right to stand for election and retain one's seat (*Pierre-Bloch v. France*, § 50, for an electoral dispute), the right to a pension as a former member of parliament (*Papon v. France* (dec.)), or a political party's right to carry on its political activities (*Refah Partisi (The Welfare Party) and Others v. Turkey* (dec.) for a case concerning the dissolution of a party) cannot be regarded as civil rights within the meaning of Article 6 § 1 of the Convention. Similarly, proceedings in which a non-governmental organisation conducting parliamentary-election observations was refused access to documents of an electoral commission concerning the performance of its public function as an election observer fell outside the scope of Article 6 § 1 (*Geraguyun Khorhurd Patgamavorakan Akumb v. Armenia* (dec.)).

In addition, the Court has reaffirmed that the right to report matters stated in open court is not a civil right (*Mackay and BBC Scotland v. the United Kingdom*, §§ 20-22).

#### (h) Applicability of Article 6 to proceedings other than main proceedings

258. Preliminary proceedings, like those concerned with the grant of an interim measure such as an injunction, were not normally considered to “determine” civil rights and obligations and did not therefore normally fall within the protection of Article 6 (see, *inter alia*, *Verlagsgruppe News GmbH v. Austria* (dec.); and *Libert v. Belgium* (dec.)). However, the Court has recently departed from its previous case-law and taken a new approach. In *Micallef v. Malta* [GC], §§ 83-86, the Court established that the applicability of Article 6 to interim measures will depend on whether certain conditions are fulfilled. Firstly, the right at stake in both the main and the injunction proceedings should be “civil” within the meaning of the Convention. Secondly, the nature of the interim measure, its object and purpose as well as its effects on the right in question should be scrutinised. Whenever an interim measure can be considered effectively to determine the civil right or obligation at stake, notwithstanding the length of time it is in force, Article 6 will be applicable.

Article 6 is applicable to interim proceedings which pursue the same purpose as the pending main proceedings, where the interim injunction is immediately enforceable and entails a ruling on the same right (*RTBF v. Belgium*, §§ 64-65).

259. As concerns consecutive criminal and civil proceedings, if a State's domestic law provides for proceedings consisting of two stages – the first where the court rules on whether there is entitlement to damages and the second where it fixes the amount – it is reasonable, for the purposes of Article 6 § 1 of the Convention, to regard the civil right as not having been determined until the precise amount has been decided: determining a right entails ruling not only on the right's existence, but also on its scope or the manner in which it may be exercised, which of course includes assessing the damages (*Torri v. Italy*, § 19).

260. With regard to execution of court decisions, Article 6 § 1 of the Convention applies to all stages of legal proceedings for the “determination of ... civil rights and obligations”, not excluding stages subsequent to judgment on the merits. Execution of a judgment given by any court must therefore be regarded as an integral part of the “trial” for the purposes of Article 6 (*Hornsby v. Greece*, § 40; *Romańczyk v. France*, § 53, concerning the execution of a judgment authorising the recovery of maintenance debts). Regardless of whether Article 6 is applicable to the initial proceedings, an enforcement title determining civil rights does not necessarily have to result from proceedings to which Article 6 is applicable (*Buj v. Croatia*, § 19). The *exequatur* of a foreign court's forfeiture order falls within the ambit of Article 6, under its civil head only (*Saccoccia v. Austria* (dec.)).

261. In the case of applications to have proceedings reopened, Article 6 is not applicable to proceedings concerning an application for the reopening of civil proceedings which have been terminated by a final decision (*Sablon v. Belgium*, § 86 – to be distinguished from a specific case: *San Leonard Band Club v. Malta*, § 41). This reasoning also applies to an application to reopen proceedings after the Court has found a violation of the Convention (*Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], § 24).

If the proceedings are reopened, the proceedings after the request for reopening or review has been granted may concern “civil rights and obligations” (*Rizi v. Albania* (dec.), § 47).

## 2. The notion of “criminal charge”

### Article 6 – Right to a fair trial

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights ...”

#### (a) General principles

262. The concept of a “criminal charge” has an “autonomous” meaning, independent of the categorisations employed by the national legal systems of the member States (*Adolf v. Austria*, § 30).

263. The concept of “charge” has to be understood within the meaning of the Convention. It may thus be defined as “the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence”, a definition that also corresponds to the test whether “the situation of the [suspect] has been substantially affected” (see, for example, *Deweere v. Belgium*, §§ 42 and 46; *Eckle v. Germany*, § 73). Thus, for example, admissions made by a suspect during a roadside spot check “substantially affected” his situation although he was not formally accused of any criminal offence (*Aleksandr Zaichenko v. Russia*, § 43). The Court has also held that a person in police custody who was required to swear an oath before being questioned as a witness was already the subject of a “criminal charge” and had the right to remain silent (*Brusco v. France*, §§ 46-50). The Court considers a person to acquire the status of a suspect calling for the application of the Article 6 safeguards when the domestic authorities have plausible reasons for suspecting that person’s involvement in a criminal offence (*ibid.*, § 47; *Bandaletov v. Ukraine*, § 56 and 61, where the applicant made a confession during the interview as a witness, and it was only after that confession that the police considered him a suspect).

264. As regards the autonomous notion of “criminal”, the Convention is not opposed to the moves towards “decriminalisation” among the Contracting States. However, offences classified as “regulatory” following decriminalisation may come under the autonomous notion of a “criminal” offence. Leaving States the discretion to exclude these offences might lead to results incompatible with the object and purpose of the Convention (*Öztürk v. Germany*, § 49).

265. The starting-point for the assessment of the applicability of the criminal aspect of Article 6 of the Convention is based on the criteria outlined in *Engel and Others v. the Netherlands* (§§ 82-83): (1) classification in domestic law; (2) nature of the offence; and (3) severity of the penalty that the person concerned risks incurring.

266. The first criterion is of relative weight and serves only as a starting-point. If domestic law classifies an offence as criminal, then this will be decisive. Otherwise the Court will look behind the national classification and examine the substantive reality of the procedure in question.

267. In evaluating the second criterion, which is considered more important (*Jussila v. Finland* [GC], § 38), the following factors can be taken into consideration:

- whether the legal rule in question is directed solely at a specific group or is of a generally binding character (*Bendenoun v. France*, § 47);
- whether the legal rule has a punitive or deterrent purpose (*ibid.*; *Öztürk v. Germany*, § 53);
- whether the proceedings are instituted by a public body with statutory powers of enforcement (*Benham v. the United Kingdom* [GC], § 56);
- whether the imposition of any penalty is dependent upon a finding of guilt (*ibid.*);
- how comparable procedures are classified in other Council of Europe member States (*Öztürk v. Germany*, § 53).

268. The third criterion is determined by reference to the maximum potential penalty for which the relevant law provides (*Campbell and Fell v. the United Kingdom*, § 72; *Demicoli v. Malta*, § 34).

269. The second and third criteria laid down in *Engel and Others v. the Netherlands* are alternative and not necessarily cumulative; for Article 6 to be held to be applicable, it suffices that the offence in question should by its nature be regarded as “criminal” from the point of view of the Convention, or that the offence rendered the person liable to a sanction which, by its nature and degree of severity, belongs in general to the “criminal” sphere (*Lutz v. Germany*, § 55; *Öztürk v. Germany*, § 54). The fact that an offence is not punishable by imprisonment is not in itself decisive, since the relative lack of seriousness of the penalty at stake cannot divest an offence of its inherently criminal character (*ibid.*; *Nicoleta Gheorghe v. Romania*, § 26).

A cumulative approach may, however, be adopted where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge (*Bendenoun v. France*, § 47).

270. In using the terms “criminal charge” and “charged with a criminal offence”, the three paragraphs of Article 6 refer to identical situations. Therefore, the test of applicability of Article 6 under its criminal head will be the same for the three paragraphs. For instance, to evaluate any complaint under Article 6 § 2 arising in the context of judicial proceedings, it is first of all necessary to ascertain whether the impugned proceedings involved the determination of a “criminal charge”, within the meaning of the Court’s case-law (*Allen v. the United Kingdom* [GC], § 95).

## (b) Application of the general principles

### (i) Disciplinary proceedings

271. Offences against military discipline, carrying a penalty of committal to a disciplinary unit for a period of several months, fall within the ambit of the criminal head of Article 6 of the Convention (*Engel and Others v. the Netherlands*, § 85). On the contrary, strict arrest for two days has been held to be of too short a duration to belong to the “criminal law” sphere (*ibid.*).

272. With regard to professional disciplinary proceedings, the Court has often considered it unnecessary to give a ruling on the applicability of Article 6 under its criminal head, having concluded that the proceedings fell within its civil head (*Albert and Le Compte v. Belgium*,

§ 30; *Harabin v. Slovakia*, § 124). However, in the case of disciplinary proceedings resulting in the compulsory retirement of a civil servant, the Court has found that such proceedings were not “criminal” within the meaning of Article 6, inasmuch as the domestic authorities managed to keep their decision within a purely administrative sphere (*Moulet v. France* (dec.)). It has also excluded from the criminal head of Article 6 a dispute concerning the discharge of an army officer for breaches of discipline (*Suküt v. Turkey* (dec.)), disciplinary proceedings against a police investigator resulting in her dismissal (*Nikolova and Vandova v. Bulgaria*, § 59) and disciplinary proceedings for professional misconduct against a judge of the Supreme Court resulting in his dismissal (*Oleksandr Volkov v. Ukraine*, §§ 92-95).

273. While making “due allowance” for the prison context and for a special prison disciplinary regime, Article 6 may apply to offences against prison discipline, on account of the nature of the charges and the nature and severity of the penalties (charges of threatening to kill a probation officer and assaulting a prison officer, resulting in forty and seven additional days’ custody respectively in *Ezeh and Connors v. the United Kingdom* [GC], § 82; conversely, see *Štitić v. Croatia*, §§ 51-63). However, proceedings concerning the prison system as such do not in principle fall within the ambit of the criminal head of Article 6 (*Boulois v. Luxembourg* [GC], § 85). Thus, for example, a prisoner’s placement in a high-supervision unit does not concern a criminal charge; access to a court to challenge such a measure and the restrictions liable to accompany it should be examined under the civil head of Article 6 § 1 (*Enea v. Italy* [GC], § 98).

274. Measures ordered by a court under rules concerning disorderly conduct in proceedings before it (contempt of court) are considered to fall outside the ambit of Article 6 because they are akin to the exercise of disciplinary powers (*Ravnsborg v. Sweden*, § 34; *Putz v. Austria*, §§ 33-37). However, the nature and severity of the penalty can make Article 6 applicable to a conviction for contempt of court classified in domestic law as a criminal offence (*Kyprianou v. Cyprus* [GC], §§ 61-64, concerning a penalty of five days’ imprisonment) or a regulatory offence (*Zaicevs v. Latvia*, §§ 31-36, concerning a penalty of three days’ administrative detention).

275. As regards breach of confidentiality of a judicial investigation, a distinction must be made between, on the one hand, persons who above all others are bound by the confidentiality of an investigation, such as judges, lawyers and all those closely associated with the functioning of the courts, and, on the other hand, the parties, who do not come within the disciplinary sphere of the judicial system (*Weber v. Switzerland*, §§ 33-34).

276. With regard to contempt of Parliament, the Court distinguishes between the powers of a legislature to regulate its own proceedings for breach of privilege applying to its members, on the one hand, and an extended jurisdiction to punish non-members for acts occurring elsewhere, on the other hand. The former might be considered disciplinary in nature, whereas the Court regards the latter as criminal, taking into account the general application and the severity of the potential penalty which could have been imposed (imprisonment for up to sixty days and a fine in *Demicoli v. Malta*, § 32).

**(ii) Administrative, tax, customs and competition-law proceedings**

277. The following administrative offences may fall within the ambit of the criminal head of Article 6:

- road-traffic offences punishable by fines or driving restrictions, such as penalty points or disqualifications (*Lutz v. Germany*, § 182; *Schmautzer v. Austria*; *Malige v. France*);
- minor offences of causing a nuisance or a breach of the peace (*Lauko v. Slovakia*; *Nicoleta Gheorghe v. Romania*, §§ 25-26);

- offences against social security legislation (failure to declare employment, despite the modest nature of the fine imposed: see *Hüseyin Turan v. Turkey*, §§ 18-21);
- an administrative offence of promoting and distributing material promoting ethnic hatred, punishable by an administrative warning and the confiscation of the publication in question (*Balsytė-Lideikienė v. Lithuania*, § 61).

278. Article 6 has been held to apply to tax-surcharges proceedings, on the basis of the following elements: (1) that the law setting out the penalties covered all citizens in their capacity as taxpayers; (2) that the surcharge was not intended as pecuniary compensation for damage but essentially as a punishment to deter reoffending; (3) that it was imposed under a general rule with both a deterrent and a punitive purpose; and (4) that the surcharge was substantial (*Bendenoun v. France*).

The criminal nature of the offence may suffice to render Article 6 applicable, notwithstanding the low amount of the tax surcharge (10% of the reassessed tax liability in *Jussila v. Finland* [GC], § 38). Tax surcharges applicable to a restricted group of persons who pursue a specific economic activity may also qualify as “criminal” in the autonomous sense of Article 6 § 1, inasmuch as they are aimed at adapting the general obligation of paying taxes and other contributions due as a result of economic activities to specific circumstances (*Steininger v. Austria*, §§ 33-38).

279. However, Article 6 does not extend either to “pure” tax-assessment proceedings or to proceedings relating to interest for late payment, inasmuch as they are intended essentially to afford pecuniary compensation for damage to the tax authorities rather than to deter reoffending (*Mieg de Boofzheim v. France* (dec.)).

280. Article 6 under its criminal head has been held to apply to customs law (*Salabiaku v. France*, § 24), to penalties imposed by a court with jurisdiction in budgetary and financial matters (*Guisset v. France*, § 59), and to certain administrative authorities with powers in the spheres of economic, financial and competition law (*Lilly France S.A. v. France* (dec.); *Dubus S.A. v. France*, §§ 35-38; *A. Menarini Diagnostics S.r.l. v. Italy*, §§ 38-44).

### (iii) Political issues

281. Article 6 has been held not to apply in its criminal aspect to proceedings concerning electoral sanctions (*Pierre-Bloch v. France*, §§ 53-60); the dissolution of political parties (*Refah Partisi (the Welfare Party) and Others v. Turkey* (dec.)); parliamentary commissions of inquiry (*Montera v. Italy* (dec.)); and to impeachment proceedings against a country’s President for a gross violation of the Constitution (*Paksas v. Lithuania* [GC], §§ 66-67).

282. With regard to lustration proceedings, the Court has held that the predominance of aspects with criminal connotations (nature of the offence – untrue lustration declaration – and nature and severity of the penalty – prohibition on practising certain professions for a lengthy period) could bring those proceedings within the ambit of the criminal head of Article 6 of the Convention (*Matyjek v. Poland* (dec.)); conversely, see *Sidabras and Džiautas v. Lithuania* (dec.)).

### (iv) Expulsion and extradition

283. Procedures for the expulsion of aliens do not fall under the criminal head of Article 6, notwithstanding the fact that they may be brought in the context of criminal proceedings (*Maaouia v. France* [GC], § 39). The same exclusive approach applies to extradition proceedings (*Peñañiel Salgado v. Spain* (dec.)) or proceedings relating to the European arrest warrant (*Monedero Angora v. Spain* (dec.)).

284. Conversely, however, the replacement of a prison sentence by deportation and exclusion from national territory for ten years may be treated as a penalty on the same basis as the one imposed at the time of the initial conviction (*Gurguchiani v. Spain*, §§ 40 and 47-48).

(v) *Different stages of criminal proceedings, ancillary proceedings and subsequent remedies*

285. Measures adopted for the prevention of disorder or crime are not covered by the guarantees in Article 6 (special supervision by the police: *Raimondo v. Italy*, § 43; or a warning given by the police to a juvenile who had committed indecent assaults on girls from his school: *R. v. the United Kingdom* (dec.)).

286. The criminal limb of Article 6 § 1 does not, in principle, come into play in proceedings concerning applications for legal aid (*Gutfreund v. France*, §§ 36-37).

287. As regards the pre-trial stage (inquiry, investigation), the Court considers criminal proceedings as a whole. Therefore, some requirements of Article 6, such as the reasonable-time requirement or the right of defence, may also be relevant at this stage of proceedings in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with them (*Imbrioscia v. Switzerland*, § 36). For instance, Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right (*Salduz v. Turkey*, § 55; see also *Dayanan v. Turkey*, §§ 31-32).

288. Although investigating judges do not determine a “criminal charge”, the steps taken by them have a direct influence on the conduct and fairness of the subsequent proceedings, including the actual trial. Accordingly, Article 6 § 1 may be held to be applicable to the investigation procedure conducted by an investigating judge, although some of the procedural safeguards envisaged by Article 6 § 1 might not apply (*Vera Fernández-Huidobro v. Spain*, §§ 108-14, concerning the applicability of the impartiality requirement to an investigating judge).

289. Article 6 § 1 is applicable throughout the entirety of proceedings for the determination of any “criminal charge”, including the sentencing process (for instance, confiscation proceedings enabling the national courts to assess the amount at which a confiscation order should be set: *Phillips v. the United Kingdom*, § 39). Article 6 may also be applicable under its criminal limb to proceedings resulting in the demolition of a house built without planning permission as the demolition could be considered a “penalty” (*Hamer v. Belgium*, § 60). However, it is not applicable to proceedings for bringing an initial sentence into conformity with the more favourable provisions of the new Criminal Code (*Nurmagomedov v. Russia*, § 50).

290. Proceedings concerning the execution of sentences, such as proceedings for the application of an amnesty (*Montcornet de Caumont v. France* (dec.)), parole proceedings (*Aldrian v. Austria*, Commission decision; see also *Macedo da Costa v. Luxembourg* (dec.)), transfer proceedings under the Convention on the Transfer of Sentenced Persons (*Szabó v. Sweden* (dec.)); but see, for a converse finding, *Buijen v. Germany*, §§ 40-45, in view of the particular circumstances of the case), or *exequatur* proceedings relating to the enforcement of a forfeiture order made by a foreign court (*Saccoccia v. Austria* (dec.)), do not fall within the ambit of the criminal head of Article 6.

291. In principle, forfeiture measures adversely affecting the property rights of third parties in the absence of any threat of criminal proceedings against them do not amount to the “determination of a criminal charge” (seizure of an aircraft in *Air Canada v. the United Kingdom*, § 54; forfeiture of gold coins in *AGOSI v. the United Kingdom*, §§ 65-66). Such measures instead fall under the civil head of Article 6 (*Silickienė v. Lithuania*, §§ 45-46).



292. The Article 6 guarantees apply in principle to appeals on points of law (*Meftah and Others v. France* [GC], § 40) and to constitutional proceedings (*Gast and Popp v. Germany*, §§ 65-66; *Caldas Ramirez de Arrellano v. Spain* (dec.)) when such proceedings are a further stage of the relevant criminal proceedings and their results may be decisive for the convicted persons.

293. Article 6 does not apply to proceedings for the reopening of a case because a person whose sentence has become final and who applies for his or her case to be reopened is not “charged with a criminal offence” within the meaning of that Article (*Fischer v. Austria* (dec.)). Only the new proceedings, after the request for reopening has been granted, can be regarded as concerning the determination of a criminal charge (*Löffler v. Austria*, §§ 18-19). Similarly, Article 6 does not apply to a request for the reopening of criminal proceedings following the Court’s finding of a violation (*Öcalan v. Turkey* (dec.)). However, supervisory-review proceedings resulting in the amendment of a final judgment do fall under the criminal head of Article 6 (*Vanyan v. Russia*, § 58).

294. Lastly, Article 6 § 2 of the Convention (presumption of innocence) may apply to subsequent proceedings following the conclusion of criminal proceedings. Where there has been a criminal charge and criminal proceedings have ended in an acquittal, the person who was the subject of the criminal proceedings is innocent in the eyes of the law and must be treated in a manner consistent with that innocence. To this extent, therefore, the presumption of innocence will remain after the conclusion of criminal proceedings in order to ensure that, as regards any charge which was not proven, the innocence of the person in question is respected (*Allen v. the United Kingdom* [GC], § 103). However, in order to establish the applicability of Article 6 § 2 to the subsequent proceedings, the applicant must demonstrate the existence of a link between the concluded criminal proceedings and the subsequent proceedings (*ibid.*, § 104). Such a link is likely to be present, for example, where the subsequent proceedings require examination of the outcome of the prior criminal proceedings and, in particular, where they oblige the court to analyse the criminal judgment; to engage in a review or evaluation of the evidence in the criminal file; to assess the applicant’s participation in some or all of the events leading to the criminal charge; or to comment on the subsisting indications of the applicant’s possible guilt (*ibid.*). Following this approach, the Court held that Article 6 § 2 was applicable to compensation proceedings for a miscarriage of justice (*ibid.*, §§ 106-08; see also § 98 for other examples where the Court examined the issue of the applicability of Article 6 § 2).

### (c) Relationship with other Articles of the Convention or its Protocols

295. Sub-paragraph (c) of Article 5 § 1 permits deprivation of liberty only in connection with criminal proceedings. This is apparent from its wording, which must be read in conjunction both with sub-paragraph (a) and with paragraph 3, which forms a whole with it (*Ciulla v. Italy*, § 38). Therefore, the notion of “criminal charge” is also relevant for the applicability of the guarantees of Article 5 §§ 1(a) and (c) and 3 (see, for example, *Steel and Others v. the United Kingdom*, § 49). It follows that proceedings relating to detention solely on one of the grounds listed in the other sub-paragraphs of Article 5 § 1, such as the detention of a person of unsound mind (sub-paragraph (e)), do not fall within the ambit of Article 6 under its criminal head (*Aerts v. Belgium*, § 59).

296. Although there is a close link between Article 5 § 4 and Article 6 § 1 in the sphere of criminal proceedings, it must be borne in mind that the two Articles pursue different purposes and consequently the criminal head of Article 6 does not apply to proceedings for the review of the lawfulness of detention falling within the scope of Article 5 § 4, which is the *lex specialis* in relation to Article 6 (*Reinprecht v. Austria*, §§ 36, 39, 48 and 55).

297. The notion of a “penalty” under Article 7 of the Convention is also an autonomous concept (*Welch v. the United Kingdom*, § 27; *Del Río Prada v. Spain* [GC], §§ 81-90). The Court takes as its starting-point in any assessment of the existence of a “penalty” the question whether the measure in issue was imposed following conviction for a “criminal offence”. In this regard, the threefold test set out in the *Engel and Others* case must be adopted (*Brown v. the United Kingdom* (dec.)).

298. Lastly, the notions of “criminal offence” and “penalty” are also relevant for the applicability of Articles 2 and 4 of Protocol No. 7 (*Greco v. Romania*, § 81; *Sergey Zolotukhin v. Russia* [GC], §§ 52-57).

### 3. The concepts of “private life” and “family life”

#### Article 8 – Right to respect for private and family life

“1. Everyone has the right to respect for his private and family life ...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

#### (a) Scope of Article 8

299. While Article 8 seeks to protect four areas of personal autonomy – private life, family life, the home and one’s own correspondence – these areas are not mutually exclusive and a measure can simultaneously interfere with both private and family life (*Menteş and Others v. Turkey*, § 73; *Stjerna v. Finland*, § 37; *López Ostra v. Spain*, § 51; *Burghartz v. Switzerland*, § 24; *Płoski v. Poland*, § 32).

#### (b) The sphere of “private life”

300. There is no exhaustive definition of the notion of private life (*Niemietz v. Germany*, § 29), but this is a broad term (*Peck v. the United Kingdom*, § 57; *Pretty v. the United Kingdom*, § 61) and cases falling under the notion of private life may be grouped into three categories: (i) a person’s physical, psychological or moral integrity, (ii) his privacy and (iii) his identity. Examples are given in each category:

##### (i) Physical, psychological or moral integrity

301. This may encompass the following areas:

- a person’s physical, psychological or moral integrity (*X and Y v. the Netherlands*, § 22), including medical treatment and psychiatric examinations (*Glass v. the United Kingdom*, §§ 70-72; *X v. Finland*, § 214; *Y.F. v. Turkey*, § 33, concerning a forced gynaecological examination; *Matter v. Slovakia*, § 64; *Worwa v. Poland*, § 80) and forced sterilisation (*V.C. v. Slovakia*, § 154), which is also looked at under family life;
- mental health (*Bensaid v. the United Kingdom*, § 47);
- treatment which does not reach the Article 3 threshold of severity, where there are sufficiently adverse effects on physical and moral integrity (*Costello-Roberts v. the United Kingdom*, § 36). As regards the conditions of detention which do not attain the level of severity required by Article 3, see *Raninen v. Finland*, § 63; and for the inability

- to watch television programmes while in detention, which might have a bearing on private life, see *Laduna v. Slovakia*, § 54;
- the physical integrity of pregnant women, in relation to abortion (*Tysięc v. Poland*, §§ 107 and 110; *A, B and C v. Ireland* [GC], §§ 244-46); *R.R. v. Poland*, § 181); and in relation to home birth (*Ternovszky v. Hungary*, § 22); as well as pre-implantation diagnosis when artificial procreation and termination of pregnancy on medical grounds are allowed (*Costa and Pavan v. Italy*);
  - the prohibition of abortion where sought on grounds of health and/or well-being, although Article 8 cannot be interpreted as conferring a right to abortion (*A, B and C v. Ireland* [GC], §§ 214 and 216); see also *P. and S. v. Poland*, §§ 96, 99 and 111-112 (where medical authorities’ failed to provide timely and unhindered access to a lawful abortion to a minor who had become pregnant as a result of rape, and disclosed information about the minor);
  - the physical and psychological integrity of victims of domestic violence (*Hajduová v. Slovakia*, § 46);
  - the physical integrity of a person who was attacked by a pack of stray dogs (*Georgel and Georgeta Stoicescu v. Romania*, § 62);
  - the State’s positive obligation under Article 8 to safeguard the individual’s physical integrity may extend to questions relating to the effectiveness of a criminal investigation (*C.A.S. and C.S. v. Romania*, § 72);
  - the physical integrity of child who is a victim of violence at school might fall under Article 8; however the allegations of violence must be specific and detailed as to the place, time and nature of the acts complained of (*Durđević v. Croatia*, § 118);
  - gender identity (*B. v. France*, §§ 43-63), including the right to legal recognition of post-operative transsexuals (*Christine Goodwin v. the United Kingdom* [GC], § 77);
  - sexual orientation (*Dudgeon v. the United Kingdom*, § 41);
  - sexual life (*ibid.*; *Laskey, Jaggard and Brown v. the United Kingdom*, § 36; *A.D.T. v. the United Kingdom*, §§ 21-26; *Mosley v. the United Kingdom*, § 71);
  - the right to respect for the choice to become or not to become a parent, in the genetic sense (*Evans v. the United Kingdom* [GC], § 71), including the right to choose the circumstances in which to become a parent (*Ternovszky v. Hungary*, § 22, concerning home birth). However, the Court has left open the question whether the right to adopt should or should not fall within the scope of Article 8 taken alone, while recognising that the right of single persons to apply for authorisation to adopt in accordance with national legislation falls “within the ambit” of Article 8 (*E.B. v. France* [GC], §§ 46 and 49; see also, regarding the procedure for securing access to adoption, *Schwizgebel v. Switzerland*, § 73). The Convention does not guarantee the right for a person who has adopted a child to end the adoption (*Goția v. Romania* (dec.));
  - activities of a professional or business nature (*Niemietz v. Germany*, § 29; *Halford v. the United Kingdom*, § 44; *Özpınar v. Turkey*, § 46; *Oleksandr Volkov v. Ukraine*, §§ 165-67; *Michaud v. France*, § 91; as well as *Gillberg v. Sweden* [GC], § 74, where the Grand Chamber found that the applicant’s criminal conviction for misuse of office, on account of having disregarded his duties as a public official, did not fall within the scope of Article 8);
  - restrictions on access to certain professions or to employment (*Sidabras and Džiautas v. Lithuania*, §§ 47-50; *Bigaeva v. Greece*, §§ 22-25);

- certain rights of people with disabilities: Article 8 has been held to be applicable to the requirement for a person to pay the military-service exemption tax despite having been declared unfit for service (*Glor v. Switzerland*, § 54), but not to the right of a person with disabilities to gain access to the beach and the sea during his holidays (*Botta v. Italy*, § 35). See also *Zehnalová and Zehnal v. the Czech Republic* (dec.), concerning lack of disabled access to public buildings where there was insufficient proof of serious detriment to personal development or ability to enter into relations with others; and *Mólka v. Poland* (dec.), where the Court did not exclude that lack of facilities could engage Article 8;
- matters concerning the burial of family members, where Article 8 is also applicable, sometimes without clarification by the Court as to whether the interference relates to the concept of private life or family life: excessive delay by the authorities in returning a child’s body following an autopsy (*Pannullo and Forte v. France*, § 36); refusal to allow the transfer of an urn containing the applicant’s husband’s ashes (*Elli Poluhas Dödsbo v. Sweden*, § 24); entitlement of a mother to attend the burial of her stillborn child, possibly accompanied by a ceremony, and to have the child’s body transported in an appropriate vehicle (*Hadri-Vionnet v. Switzerland*, § 52); and the decision not to return the bodies to the deceased’s family members (*Maskhadova and Others v. Russia*, §§ 208-12; *Sabanchiyeva and Others v. Russia*);
- the lack of clear statutory provisions criminalising the act of covertly filming a naked child where the state has positive obligations to ensure that efficient criminal law provisions are in place (*Söderman v. Sweden* [GC], § 117);
- the obligation to ensure that the applicants received essential information enabling them to assess the risks to their health and lives (*Vilnes and Others v. Norway*).

**(ii) Privacy**

302. This may encompass the following areas:

- the right to one’s image and photographs of an individual (*Von Hannover v. Germany*, §§ 50-53; *Sciacca v. Italy*, § 29; *Reklos and Davourlis v. Greece*, § 40; *Von Hannover v. Germany (no. 2)* [GC], §§ 95-99);
- an individual’s reputation (*Chauvy and Others v. France*, § 70; *Pfeifer v. Austria*, § 35; *Petrina v. Romania*, § 28; *Polanco Torres and Movilla Polanco v. Spain*, § 40) and honour (*A. v. Norway*, § 64). See *Putistin v. Ukraine*, where the Court considered that the reputation of a deceased member of a person’s family could, in certain circumstances, affect that person’s private life and identity, provided that there was a sufficiently close link between the person affected and the general reputation of his or her family. Although Article 8 cannot be relied on in order to complain of a loss of reputation which is the foreseeable consequence of one’s own actions (see, *inter alia*, *Sidabras and Džiautas v. Lithuania*, § 49; *Mikolajová v. Slovakia*, § 57; *Gillberg v. Sweden* [GC], § 67);
- files or data of a personal or public nature (for example, information about a person’s political activities) collected and stored by security services or other State authorities (*Rotaru v. Romania* [GC], §§ 43-44; *Amann v. Switzerland* [GC], §§ 65-67; *Leander v. Sweden*, § 48). As regards DNA profiles, cell samples and fingerprints, see *S. and Marper v. the United Kingdom* [GC], §§ 68-86, although this does not necessarily extend to the taking and retention of DNA profiles of convicted criminals for use in possible future criminal proceedings (*Peruzzo and Martens v. Germany* (dec.), §§ 42 and 49). As regards entry in a national sex-offenders database, see *Gardel v. France*, § 58; as regards

the absence of safeguards for the collection, preservation and deletion of fingerprint records of persons suspected but not convicted of criminal offences, see *M.K. v. France*, § 26;

- information about a person’s health (for example, information about infection with HIV: *Z v. Finland*, § 71; *C.C. v. Spain*, § 33; or reproductive abilities: *K.H. and Others v. Slovakia*, § 44), and information on risks to one’s health (*McGinley and Egan v. the United Kingdom*, § 97; *Guerra and Others v. Italy*, § 60);
- surveillance of communications and telephone conversations (*Halford v. the United Kingdom*, § 44; *Weber and Saravia v. Germany* (dec.), §§ 76-79), though not necessarily the use of undercover agents (*Lüdi v. Switzerland*, § 40); retention of information obtained through undercover surveillance: violation (*Association 21 December 1989 and Others v. Romania*, § 115);
- video surveillance of public places where the visual data are recorded, stored and disclosed to the public (*Peck v. the United Kingdom*, §§ 57-63);
- GPS surveillance of a person and the processing and use of the data thus obtained (*Uzun v. Germany*, § 52);
- video surveillance of an employee by the employer (*Köpke v. Germany* (dec.), concerning a supermarket cashier suspected of theft);
- police listing and surveillance of an individual on account of membership of a human rights organisation (*Shimovolos v. Russia*, § 66).

**(iii) Identity and personal autonomy**

303. This may encompass the following areas:

- the right to personal development and personal autonomy (*Pretty v. the United Kingdom*, §§ 61 and 67, concerning a person’s choice to avoid what she considered would be an undignified and distressing end to her life), although this does not cover every public activity a person might seek to engage in with other human beings (for example, the hunting of wild mammals with hounds in *Friend and Others v. the United Kingdom* (dec.), §§ 40-43). While Article 8 secures to individuals a sphere within which they can freely pursue the development and fulfilment of their personality (*Brüggemann and Scheuten v. Germany*, Commission decision), it is not confined to measures affecting persons in their home or private premises: there is a zone of interaction between a person and others, even in a public context, which may fall within the scope of private life (*P.G. and J.H. v. the United Kingdom*, §§ 56-57);
- an individual’s right to decide how and when his or her life should end, provided that he or she is in a position to form his or her own free will in that respect and to act accordingly (*Haas v. Switzerland*, § 51; *Koch v. Germany*, § 54, where Article 8 of the Convention also may encompass a right to judicial review even in a case in which the substantive right in question had yet to be established);
- the applicants’ grievance that there is a regulatory limitation on their capacity to choose, in consultation with their doctors, the way in which they should be medically treated with a view to possibly prolonging their lives (*Hristozov and Others v. Bulgaria*, § 116);
- the right to obtain information in order to discover one’s origins and the identity of one’s parents (*Mikulić v. Croatia*, § 53; *Odièvre v. France* [GC], § 29); as concerns the seizure of documents needed to prove one’s identity, see *Smirnova v. Russia*, §§ 95-97;

- the inability of a child abandoned at birth to gain access to non-identifying information concerning his or her origins or the disclosure of the mother’s identity (*Godelli v. Italy*, § 58);
- a person’s marital status as an integral part of his or her personal and social identity (*Dadouch v. Malta*, § 48);
- determination of the legal provisions governing a father’s relations with his putative child (for example, in proceedings to contest paternity, see *Rasmussen v. Denmark*, § 33; *Yildirim v. Austria* (dec.); *Krušković v. Croatia*, § 20; *Ahrens v. Germany*, § 60);
- ethnic identity (*S. and Marper v. the United Kingdom* [GC], § 66; *Ciubotaru v. Moldova*, § 53) and the right of members of a national minority to maintain their identity and to lead a private and family life in accordance with that tradition (*Chapman v. the United Kingdom* [GC], § 73); in particular, any negative stereotyping of a group, when it reaches a certain level, is capable of impacting on the group’s sense of identity and the feelings of self-worth and self-confidence of members of the group. It is in this sense that it can be seen as affecting the private life of members of the group (*Aksu v. Turkey* [GC], §§ 58-61);
- information about personal religious and philosophical convictions (*Folgerø and Others v. Norway* [GC], § 98);
- the right to establish and develop relationships with other human beings and the outside world (*Niemietz v. Germany*, § 29);
- stopping and searching of a person in a public place (*Gillan and Quinton v. the United Kingdom*, §§ 61-65);
- searches and seizures (*McLeod v. the United Kingdom*, § 36; *Funke v. France*, § 48);
- social ties between settled migrants and the community in which they are living, regardless of the existence or otherwise of a “family life” (*Üner v. the Netherlands* [GC], § 59; *A.A. v. the United Kingdom*, § 49);
- ban on entering or transiting through Switzerland, which had been imposed on the applicant as a result of the addition of his name to the list annexed to the Federal Taliban Ordinance (*Nada v. Switzerland* [GC], §§ 163-66);
- severe environmental pollution potentially affecting individuals’ well-being and preventing them from enjoying their homes, thus adversely affecting their private and family life (*López Ostra v. Spain*, § 51; *Tătar v. Romania*, § 97), including offensive smells from a refuse tip near a prison that reached a prisoner’s cell, regarded as the only “living space” available to him for several years (*Brândușe v. Romania*, §§ 64-67), the prolonged failure by authorities to ensure the collection, treatment and disposal of rubbish (*Di Sarno and Others v. Italy*, § 112); and noise pollution (*Deés v. Hungary*, §§ 21-24, concerning noise generated by road traffic; *Mileva and Others v. Bulgaria*, § 97, concerning nuisance caused by a computer club in a block of flats);
- the arbitrary refusal of citizenship in certain circumstances, although the right to acquire a particular nationality is not guaranteed as such by the Convention (*Karashev v. Finland* (dec.)), and the failure to regulate the residence of persons who had been “erased” from the permanent residents register following Slovenian independence (*Kurić and Others v. Slovenia* [GC], § 339);
- an individual’s first name and surname (*Mentzen v. Latvia* (dec.); *Burghartz v. Switzerland*, § 24; *Guillot v. France*, §§ 21-22; *Güzel Erdagöz v. Turkey*, § 43; *Losonci Rose and Rose v. Switzerland*, § 26; *Garnaga v. Ukraine*, § 36).

**(c) The sphere of “family life”**

304. The notion of family life is an autonomous concept (*Marckx v. Belgium*, commission report, § 69). Consequently, whether or not “family life” exists is essentially a question of fact depending upon the real existence in practice of close personal ties (*K. v. the United Kingdom*, Commission decision). The Court will therefore look at *de facto* family ties, such as applicants living together, in the absence of any legal recognition of family life (*Johnston and Others v. Ireland*, § 56). Other factors will include the length of the relationship and, in the case of couples, whether they have demonstrated their commitment to each other by having children together (*X, Y and Z v. the United Kingdom* [GC], § 36). In *Ahrens v. Germany*, § 59, the Court found no *de facto* family life where the relationship between the mother and the applicant had ended approximately one year before the child was conceived and the ensuing relations were of a sexual nature only.

305. Again, while there is no exhaustive definition of the scope of family life, from the Court’s case-law it covers the following:

**(i) Right to become a parent**

306. Like the notion of “private life”, the notion of “family life” incorporates the right to respect for decisions to become genetic parents (*Dickson v. the United Kingdom* [GC], § 66). Accordingly, the right of a couple to make use of medically assisted procreation comes within the ambit of Article 8, as an expression of private and family life (*S.H. and Others v. Austria*, § 60). However, the provisions of Article 8 taken alone do not guarantee either the right to found a family or the right to adopt (*E.B. v. France* [GC]).

**(ii) As regards children**

307. The mutual enjoyment by parent and child of each other’s company constitutes a fundamental element of “family life” within the meaning of Article 8 of the Convention (see, among many other authorities, *Kutzner v. Germany*, § 58; *Monory v. Romania and Hungary*, § 70; *Zorica Jovanović v. Serbia*, § 68).

308. As concerns the natural tie between a mother and her child, see *Marckx v. Belgium*, § 31; *Kearns v. France*, § 72.

309. A child born of a marital union is *ipso jure* part of that relationship; hence from the moment of the child’s birth and by that very fact, there exists between the child and the parents a bond amounting to family life which subsequent events cannot break save in exceptional circumstances (*Ahmut v. the Netherlands*, § 60; *Gül v. Switzerland*, § 32; *Berrehab v. the Netherlands*, § 21; *Hokkanen v. Finland*, § 54).

310. For a natural father and his child born outside marriage, relevant factors may include cohabitation, the nature of the relationship between the parents and his interest in the child (*Keegan v. Ireland*, §§ 42-45; *M.B. v. the United Kingdom*, Commission decision; *Nylund v. Finland* (dec.); *L. v. the Netherlands*, §§ 37-40; *Chavdarov v. Bulgaria*, § 40).

311. The notion of “family life” under Article 8 of the Convention is not confined to marriage-based relationships and may encompass other *de facto* “family” ties where the parties are living together out of wedlock. The Court has further considered that intended family life may, exceptionally, fall within the ambit of Article 8, notably in cases where the fact that family life has not yet fully been established is not attributable to the applicant (compare *Pini and Others v. Romania*, §§ 143 and 146). In particular, where the circumstances warrant it, “family life” must extend to the potential relationship which may develop between a child born out of wedlock and the biological father. Relevant factors which may determine the real existence in practice of close personal ties in these cases include the nature of the relationship between the natural parents and a demonstrable interest in and

commitment by the father to the child both before and after the birth (*Nylund v. Finland* (dec.); *Nekvedavicius v. Germany* (dec.); *L. v. the Netherlands*, § 36; *Anayo v. Germany*, § 57).

312. In general, however, cohabitation is not a *sine qua non* of family life between parents and children (*Berrehab v. the Netherlands*, § 21).

313. As concerns adopted children and their adoptive parents, see *X. v. France*, Commission decision; *X. v. Belgium and the Netherlands*, Commission decision; *Pini and Others v. Romania*, §§ 139-40 and 143-48. A lawful and genuine adoption may constitute “family life”, even in the absence of cohabitation or any real ties between an adopted child and the adoptive parents (*ibid.*, §§ 143-48; *Topčić-Rosenberg v. Croatia*, § 38).

314. The Court may recognise the existence of *de facto* “family life” between foster parents and a child placed with them, having regard to the time spent together, the quality of the relationship and the role played by the adult *vis-à-vis* the child (*Moretti and Benedetti v. Italy*, §§ 48-52).

315. Family life does not end when a child is taken into care (*Johansen v. Norway*, § 52) or the parents divorce (*Mustafa and Armağan Akin v. Turkey*, § 19).

316. In immigration cases, there will be no family life between parents and adult children unless they can demonstrate additional elements of dependence other than normal emotional ties (*Kwakyie-Nti and Dufie v. the Netherlands* (dec.); *Slivenko v. Latvia* [GC], § 97). However, such ties may be taken into account under the head of “private life” (*ibid.*). The Court has accepted in a number of cases concerning young adults who have not yet founded a family of their own that their relationship with their parents and other close family members also constitutes “family life” (*Maslov v. Austria* [GC], § 62).

317. Matters concerning the revocation of parental rights or adoption in cases where a parent’s right to be presumed innocent of suspected child abuse was violated (*B.B. and F.B. v. Germany*, §§ 49-52; *Ageyevy v. Russia*).

318. Parental leave and parental allowances come within the scope of Article 8 of the Convention (*Konstantin Markin v. Russia* [GC], § 130).

### (iii) As regards couples

319. The notion of “family” in Article 8 is not confined solely to marriage-based relationships and may encompass other *de facto* “family ties” where the parties are living together outside marriage (*Johnston and Others v. Ireland*, § 56; and, more recently, *Van der Heijden v. the Netherlands* [GC], § 50, which dealt with the attempt to compel the applicant to give evidence in criminal proceedings against her long term co-habiting partner).

320. Even in the absence of cohabitation there may still be sufficient ties for family life (*Kroon and Others v. the Netherlands*, § 30).

321. Marriages which are not in accordance with national law are not a bar to family life (*Abdulaziz, Cabales and Balkandali v. the United Kingdom*, § 63). A couple who entered into a purely religious marriage not recognised by domestic law may come within the scope of “family life” within the meaning of Article 8. However, Article 8 cannot be interpreted as imposing an obligation on the State to recognise religious marriage, for example in relation to inheritance rights and survivors’ pensions (*Şerife Yiğit v. Turkey* [GC], §§ 97-98 and 102).

322. Engagement does not in itself create family life (*Wakefield v. the United Kingdom*, Commission decision).

323. A same-sex couple living in a stable relationship falls within the notion of “family life”, in the same way as the relationship of a different-sex couple (*Schalk and Kopf v. Austria*, §§ 92-94; *P.B. and J.S. v. Austria*, § 30; *X and Others v. Austria* [GC], § 95). Furthermore, the Court found in its admissibility decision in *Gas and Dubois v. France* that the relationship between two women who were living together and had entered into a civil



partnership, and the child conceived by one of them by means of assisted reproduction but being brought up by both of them, constituted “family life” within the meaning of Article 8 of the Convention.

324. A same-sex couple applying for registered partnership status also falls within the definition of “family life” (*Vallianatos and Others v. Greece* [GC], §§ 73-74).

(iv) *As regards other relationships*

325. Family life can also exist between siblings (*Moustaquim v. Belgium*, § 36; *Mustafa and Armağan Akin v. Turkey*, § 19) and aunts/uncles and nieces/nephews (*Boyle v. the United Kingdom*, §§ 41-47). However, the traditional approach is that close relationships short of “family life” generally fall within the scope of “private life” (*Znamenskaya v. Russia*, § 27 and the references cited therein).

326. As concerns ties between a child and close relatives such as grandparents and grandchildren (since such relatives may play a considerable part in family life), see *Price v. the United Kingdom*, Commission decision; and *Bronda v. Italy*, § 51.

327. It is an essential part of a prisoner’s right to respect for family life that the prison authorities assist him or her in maintaining contact with his or her close family (*Messina v. Italy (no. 2)*, § 61; *Piechowicz v. Poland*, § 212). Limitations on contacts with other prisoners and with family members, imposed by prison rules, have been regarded by the Court as an “interference” with the rights protected by Article 8 of the Convention (*Van der Ven v. the Netherlands*, § 69). The imprisonment of prisoners in penal colonies thousands of kilometres from prisoners’ homes (*Khodorkovskiy and Lebedev v. Russia*).

(v) *Material interests*

328. “Family life” does not include only social, moral or cultural relations; it also comprises interests of a material kind, as is shown by, among other things, maintenance obligations and the position occupied in the domestic legal systems of the majority of the Contracting States by the institution of the reserved portion of an estate (in French, “*réserve héréditaire*”). The Court has thus accepted that the right of succession between children and parents, and between grandchildren and grandparents, is so closely related to family life that it comes within the ambit of Article 8 (*Marckx v. Belgium*, § 52; *Pla and Puncernau v. Andorra*, § 26). Article 8 does not, however, require that a child should be entitled to be recognised as the heir of a deceased person for inheritance purposes (*Haas v. the Netherlands*, § 43).

329. The Court has held that the granting of family allowance enables States to “demonstrate their respect for family life” within the meaning of Article 8 of the Convention; the allowance therefore comes within the scope of that provision (*Fawsie v. Greece*, § 28).

330. The concept of “family life” is not applicable to a claim for damages against a third party following the death of the applicant’s fiancée (*Hofmann v. Germany* (dec.)).

#### 4. The concepts of “home” and “correspondence”

##### Article 8 – Right to respect for private and family life

“1. Everyone has the right to respect for ... his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

**(a) Scope of Article 8**

331. While Article 8 seeks to protect four areas of personal autonomy – private life, family life, the home and one’s correspondence – these areas are not mutually exclusive and a measure can simultaneously interfere with the right to respect for both private and family life and the home or correspondence (*Menteş and Others v. Turkey*, § 73; *Klass and Others v. Germany*, § 41; *López Ostra v. Spain*, § 51; *Margareta and Roger Andersson v. Sweden*, § 72).

**(b) Scope of the concept of “home”**

332. Home is an autonomous concept, and so whether or not a particular habitation constitutes a “home” protected by Article 8 § 1 will depend on the factual circumstances, notably the existence of sufficient and continuous links with a specific place (*Prokopovich v. Russia*, § 36; *Gillow v. the United Kingdom*, § 46; *McKay-Kopecka v. Poland* (dec.)). Moreover, the term “home” in the English version of Article 8 is not to be interpreted narrowly, seeing that the French equivalent “*domicile*” has a broader connotation (*Niemietz v. Germany*, § 30). The concept:

- will cover occupation of a house belonging to another person if this is for significant periods on an annual basis (*Menteş and Others v. Turkey*, § 73). An applicant does not need to be the owner of the “home” for the purposes of Article 8;
- is not limited to residences which are lawfully established (*Buckley v. the United Kingdom*, § 54) and may be invoked by a person living in a flat for which the lease is in the name of another tenant (*Prokopovich v. Russia*, § 36);
- may therefore be applicable to social housing occupied by the applicant as a tenant, even though the right of occupation under domestic law has come to an end (*McCann v. the United Kingdom*, § 46), or to the occupation of a flat for thirty-nine years without any legal basis (*Brežec v. Croatia*);
- is not limited to traditional residences and so will include, for example, caravans and other non-fixed abodes (*Buckley v. the United Kingdom*, § 54; *Chapman v. the United Kingdom* [GC], §§ 71-74), including cabins and bungalows occupying land, regardless of whether such occupation is lawful under domestic law (*Winterstein and Others v. France*, § 141; *Yordanova and Others v. Bulgaria*, § 103);
- may also cover second homes or holiday homes (*Demades v. Turkey*, §§ 32-34);
- may apply to business premises in the absence of a clear distinction between a person’s office and private residence or between private and business activities (*Niemietz v. Germany*, §§ 29-31);
- will also apply to a company’s registered office, branches or other business premises (*Société Colas Est and Others v. France*, § 41), and to the business premises of a limited liability company owned and managed by a private individual (*Buck v. Germany*, § 32);
- does not extend to the intention to build a home on a plot of land, or to the fact of having one’s roots in a particular area (*Loizidou v. Turkey*, § 66);
- does not apply to a laundry room belonging jointly to the co-owners of a block of flats and designed for occasional use (*Chelu v. Romania*, § 45), an artist’s dressing room (*Hartung v. France* (dec.)) or land on which the owners practise or permit a sport (for example, hunting: *Friend and Others v. the United Kingdom* (dec.), § 45), or industrial buildings and facilities (for example, a mill, bakery and storage facility, used for purely professional purposes: *Khamidov v. Russia*, § 131).

333. However, where “home” is claimed in respect of property in which there has never, or hardly ever, been any occupation by the applicant or where there has been no occupation for some considerable time, it may be that the links to that property are so attenuated as to cease to raise any, or any separate, issue under Article 8 (see, for example, *Andreou Papi v. Turkey*, § 54). The possibility of inheriting such property does not constitute a sufficiently concrete tie for it to be treated as a “home” (*Demopoulos and Others v. Turkey* (dec.) [GC], §§ 136-37).

334. While there may be a significant overlap between the concept of “home” and that of “property” under Article 1 of Protocol No. 1, the existence of a “home” is not subject to the existence of a right or interest in real property (*Surugiu v. Romania*, § 63). An individual may have a property right in respect of a building or land for the purposes of Article 1 of Protocol No. 1, without having sufficient ties with it for it to constitute a “home” within the meaning of Article 8 (*Khamidov v. Russia*, § 128).

**(c) Situations coming under the concept of “home”**

335. Possible interferences with the right to respect for one’s home include:

- deliberate destruction of the home (*Selçuk and Asker v. Turkey*, § 86);
- refusal to allow displaced persons to return to their homes (*Cyprus v. Turkey* [GC], §§ 165-77);
- eviction (*Orlić v. Croatia*, § 56 and the references cited therein), including an eviction order which has not yet been enforced (*Gladysheva v. Russia*, § 91);
- searches (*Murray v. the United Kingdom*, § 88; *Chappell v. the United Kingdom*, §§ 50-51; *Funke v. France*, § 48) and other entries by the police (*Evcen v. the Netherlands*, Commission decision; *Kanthak v. Germany*, Commission decision); cooperation with the police does not preclude “interference” (*Saint-Paul Luxembourg S.A. v. Luxembourg*, § 38); the fact that the offence giving rise to the search was committed by a third party is immaterial (*Buck v. Germany*);
- planning decisions (*Buckley v. the United Kingdom*, § 60) and compulsory-purchase orders (*Howard v. the United Kingdom*, Commission decision);
- the requirement for companies to let tax auditors enter their premises to copy data stored on their servers (*Bernh Larsen Holding AS and Others v. Norway*, § 106).

336. Article 8 may also be applicable to severe environmental pollution with a direct impact on the home (*López Ostra v. Spain*, § 51; *Powell and Rayner v. the United Kingdom*, § 40; *Fadeyeva v. Russia*, §§ 68-69; *Deés v. Hungary*, §§ 21-24). This may involve noise, odours or other forms of pollution whose adverse effects make enjoyment of one’s home impossible (for examples, see *Moreno Gómez v. Spain*, § 53; *Martínez Martínez and Pino Manzano v. Spain*, §§ 41 and 45) – as opposed to general environmental deterioration and the kinds of nuisance inherent in modern society. The nuisance suffered must therefore attain a certain level of severity (*Leon and Agnieszka Kania v. Poland*, § 100). Such interference may be caused by private or public entities.

Article 8 may also apply to risks which have not yet materialised but which could have a direct impact on the home (*Hardy and Maile v. the United Kingdom*, §§ 190-92).

337. Some measures touching on enjoyment of the home should, however, be examined under Article 1 of Protocol No. 1. These may include:

- standard expropriation cases (*Mehmet Salih and Abdülsamet Çakmak v. Turkey*, § 22; *Mutlu v. Turkey*, § 23);
- certain aspects of leases such as rent levels (*Langborger v. Sweden*, § 39).

338. In the same way, some measures that amount to a violation of Article 8 will not necessarily lead to a finding of a violation of Article 1 of Protocol No. 1 (*Surugiu v. Romania*) and vice versa (*Öneryıldız v. Turkey* [GC], § 160).

339. In the context of dangerous activities, Article 2 of the Convention may also be applicable (*ibid.*; *Kolyadenko and Others v. Russia*, §§ 212-213 and 216).

340. Respect for the home may entail the adoption by the public authorities of measures to secure that right (positive obligations) even in the sphere of relations between individuals, such as preventing their entry into and any interference with the home going beyond the normal inconvenience associated with neighbourhood living (*Surugiu v. Romania*, § 59 and the references cited therein; *Novoseletskiy v. Ukraine*, § 68).

However, this obligation cannot be such as to impose an impossible or disproportionate burden on the national authorities (*ibid.*, § 70).

341. In the context of hazardous activities in particular, States have an obligation to set in place regulations geared to the special features of the activity in question, particularly with regard to the level of risk potentially involved. Such regulations must ensure the effective protection of citizens whose lives might be at risk (*Di Sarno and Others v. Italy*, § 106). The fact that management of a public service has been delegated to private entities does not relieve the State of its duty of care (*ibid.*).

342. The State must take reasonable and appropriate measures to protect the right to respect for the home. The Court has criticised the following:

- the protracted inability, for several months, to ensure the proper functioning of the waste collection and disposal service (*ibid.*);
- the negligence of the appropriate authorities in failing to ensure that homes in an area downstream from a reservoir were protected from flooding (*Kolyadenko and Others v. Russia*, § 216).

The procedural obligations stemming from Article 8 also require the public to have access to information enabling them to assess the danger to which they are exposed (*Giacomelli v. Italy*, § 83).

#### (d) Scope of the concept of “correspondence”

343. The right to respect for one’s “correspondence” within the meaning of Article 8 § 1 aims to protect the confidentiality of private communications in the following areas:

- letters between individuals, of a private or professional nature (*Niemietz v. Germany*, § 32 *in fine*), even where the sender or recipient is a prisoner (*Silver and Others v. the United Kingdom*, § 84; *Mehmet Nuri Özen and Others v. Turkey*, § 41), including packages seized by customs officials (*X. v. the United Kingdom*, Commission decision of 12 October 1978);
- telephone conversations (*Klass and Others v. Germany*, §§ 21 and 41; *Malone v. the United Kingdom*, § 64; *Margareta and Roger Andersson v. Sweden*, § 72), from private or business premises (*Halford v. the United Kingdom*, §§ 44-46; *Copland v. the United Kingdom*, § 41), including information relating to them, such as their date and duration and the numbers dialled (*P.G. and J.H. v. the United Kingdom*, § 42);
- pager messages (*Taylor-Sabori v. the United Kingdom*);

- older forms of electronic communication such as telexes (*Christie v. the United Kingdom*, Commission decision);
- electronic messages (e-mails) and personal Internet use, including in the workplace (*Copland v. the United Kingdom*, §§ 41-42); and also the sending of e-mails to a prisoner via the prison mailbox (*Helander v. Finland* (dec.), § 48);
- private radio (*X. and Y. v. Belgium*, Commission decision), but not when it is on a public wavelength and is thus accessible to others (*B.C. v. Switzerland*, Commission decision);
- correspondence intercepted in the course of business activities or from business premises (*Kopp v. Switzerland*, § 50; *Halford v. the United Kingdom*, §§ 44-46);
- electronic data seized during a search of a law office (*Wieser and Bicos Beteiligungen GmbH v. Austria*, § 45),
- companies' electronic data on a server (*Bernh Larsen Holding AS and Others v. Norway*, § 106).

344. The content of the correspondence is irrelevant to the question of interference (*A. v France*, §§ 35-37; *Frérot v. France*, § 54).

345. There is no *de minimis* principle for interference to occur: opening one letter is enough (*Narinen v. Finland*, § 32; *Idalov v. Russia* [GC], § 197).

346. To date, the Court has found the following positive obligations specifically in relation to correspondence:

- the obligation to prevent disclosure into the public domain of private conversations (*Craxi v. Italy (no. 2)*, §§ 68-76);
- the obligation to help prisoners write by providing the necessary materials (*Cotlet v. Romania*, §§ 60-65; *Gagiu v. Romania*, § 91);
- the obligation to execute a Constitutional Court judgment ordering the destruction of audio cassettes containing recordings of telephone conversations between a lawyer and his client (*Chadimová v. the Czech Republic*, § 146).

#### (e) Examples of interference

347. Interference with the right to respect for correspondence may include the following acts attributable to the public authorities:

- screening of correspondence (*Campbell v. the United Kingdom*, § 33);
- interception by various means and recording of personal or business-related conversations (*Amann v. Switzerland* [GC], § 45); for example, telephone tapping (*Malone v. the United Kingdom*, § 64), even when carried out on the line of a third party (*Lambert v. France*, § 21);
- storage of intercepted data concerning telephone, e-mail and Internet use (*Copland v. the United Kingdom*, § 44). The mere fact that such data may be obtained legitimately, for example from telephone bills, is no bar to finding an “interference”. The fact that the information has not been disclosed to third parties or used in disciplinary or other proceedings against the person concerned is likewise immaterial (*ibid.*, § 43);
- forwarding of mail to a third party (*Luordo v. Italy*, § 94);
- copying of electronic files, including files belonging to companies (*Bernh Larsen Holding AS and Others v. Norway*, § 106);
- systematic recording by the prison authorities of conversations between a prisoner and his relatives in a prison visiting room (*Wisse v. France*, § 29);

- refusal by the prison authorities to forward a letter from a prisoner to the addressee (*Mehmet Nuri Özen and Others v. Turkey*, § 42);
- secret surveillance measures in certain cases (*Kennedy v. the United Kingdom*, §§ 122-24 and the references cited therein).

348. A “crucial contribution” by the authorities to a recording made by a private individual amounts to interference “by a public authority” (*Van Vondel v. the Netherlands*, § 49).

349. The situation complained of may fall within the scope of Article 8 § 1 both from the standpoint of respect for correspondence and from that of the other spheres protected by Article 8 (for example, *Chadimová v. the Czech Republic*, § 143 and the references cited therein).

### 5. The concept of “possessions”

#### Article 1 of Protocol No. 1 – Protection of property

“1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. ...”

##### (a) Protected possessions

350. An applicant can allege a violation of Article 1 of Protocol No. 1 only in so far as the impugned decisions related to his “possessions” within the meaning of this provision. “Possessions” can be either “existing possessions” or assets, including claims, in respect of which the applicant can argue that he or she has at least a “legitimate expectation” of obtaining effective enjoyment of a property right (*J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. the United Kingdom* [GC], § 61; *Maltzan and Others v. Germany* (dec.) [GC], § 74 (c); *Kopecký v. Slovakia* [GC], § 35 (c)).

An “expectation” is “legitimate” if it is based either on a legislative provision or a legal act bearing on the property interest in question (*Saghinadze and Others v. Georgia*, § 103).

##### (b) Autonomous meaning

351. The concept of “possessions” in the first part of Article 1 of Protocol No. 1 has an autonomous meaning which is not limited to the ownership of physical goods and is independent from the formal classification in domestic law: certain other rights and interests constituting assets can also be regarded as “property rights”, and thus as “possessions” for the purposes of this provision. The issue that needs to be examined in each case is whether the circumstances of the case, considered as a whole, conferred on the applicant title to a substantive interest protected by Article 1 of Protocol No. 1 (*Depalle v. France* [GC], § 62; *Anheuser-Busch Inc. v. Portugal* [GC], § 63; *Öneryıldız v. Turkey* [GC], § 124; *Broniowski v. Poland* [GC], § 129; *Beyeler v. Italy* [GC], § 100; *Iatridis v. Greece* [GC], § 54; *Fabris v. France* [GC], § 51; *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], § 171).

In the case of non-physical assets, the Court has taken into consideration, in particular, whether the legal position in question gave rise to financial rights and interests and thus had an economic value (*Paeffgen GmbH v. Germany* (dec.)).

**(c) Existing possessions**

352. Article 1 of Protocol No. 1 applies only to a person's existing possessions (*Marckx v. Belgium*, § 50; *Anheuser-Busch Inc. v. Portugal* [GC], § 64). It does not guarantee the right to acquire property (*Slivenko and Others v. Latvia* (dec.) [GC], § 121; *Kopecký v. Slovakia* [GC], § 35 (b)).

353. A person who complains of a violation of his or her right to property must firstly show that such a right existed (*Pištárová v. the Czech Republic*, § 38; *Des Fours Walderode v. the Czech Republic* (dec.); *Zhigalev v. Russia*, § 131).

354. Where there is a dispute as to whether an applicant has a property interest which is eligible for protection under Article 1 of Protocol No. 1, the Court is required to determine the legal position of the applicant (*J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. the United Kingdom* [GC], § 61).

**(d) Claims and debts**

355. Where the proprietary interest is in the nature of a claim it may be regarded as an “asset” only where it has a sufficient basis in national law, for example where there is settled case-law of the domestic courts confirming it (*Plechanow v. Poland*, § 83; *Vilho Eskelinen and Others v. Finland* [GC], § 94; *Anheuser-Busch Inc. v. Portugal* [GC], § 65; *Kopecký v. Slovakia* [GC], § 52; *Draon v. France* [GC], § 68).

356. A judgment debt which is sufficiently established to be enforceable constitutes a “possession” (*Stran Greek Refineries and Stratis Andreadis v. Greece*, § 59; *Burdov v. Russia*, § 40; *Kotov v. Russia* [GC], § 90).

357. The Court's case-law does not contemplate the existence of a “genuine dispute” or an “arguable claim” as a criterion for determining whether there is a “legitimate expectation” protected by Article 1 of Protocol No. 1 (*Kopecký v. Slovakia* [GC], § 52; *Vilho Eskelinen and Others v. Finland* [GC], § 94).

358. No legitimate expectation can be said to arise where there is a dispute as to the correct interpretation and application of domestic law and the applicant's submissions are subsequently rejected by the national courts (*Anheuser-Busch Inc. v. Portugal* [GC], § 65; *Kopecký v. Slovakia* [GC], § 50; *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], § 173).

359. The concept of “possessions” may be extended to a particular benefit of which the persons concerned have been deprived due to a discriminatory condition of entitlement (for a differentiation between men and women in respect of a claim to a non-contributory welfare benefit, see *Stec and Others v. the United Kingdom* (dec.) [GC], § 55; for a distinction on the basis of nationality between those in receipt of retirement pensions, see *Andrejeva v. Latvia* [GC], § 79; for succession rights denied to illegitimate children, see *Fabris v. France* [GC], § 50).

**(e) Restitution of property**

360. Article 1 of Protocol No. 1 cannot be interpreted as imposing any general obligation on the Contracting States to return property which was transferred to them before they ratified the Convention. Nor does Article 1 of Protocol No. 1 impose any restrictions on the Contracting States' freedom to determine the scope of property restitution and to choose the conditions under which they agree to restore property rights of former owners.

361. In particular, the Contracting States enjoy a wide margin of appreciation with regard to the exclusion of certain categories of former owners from such entitlement. Where categories of owners are excluded in this way, their claims for restitution cannot provide the basis for a “legitimate expectation” attracting the protection of Article 1 of Protocol No. 1.

362. On the other hand, once a Contracting State, having ratified the Convention including Protocol No. 1, enacts legislation providing for the full or partial restoration of property confiscated under a previous regime, such legislation may be regarded as generating a new property right protected by Article 1 of Protocol No. 1 for persons satisfying the requirements for entitlement. The same may apply in respect of arrangements for restitution or compensation established under pre-ratification legislation, if such legislation remained in force after the Contracting State's ratification of Protocol No. 1 (*Maltzan and Others v. Germany* (dec.) [GC], § 74 (d); *Kopecný v. Slovakia* [GC], § 35 (d)).

363. The hope of recognition of a property right which it has been impossible to exercise effectively cannot be considered a "possession" within the meaning of Article 1 of Protocol No. 1, nor can a conditional claim which lapses as a result of the non-fulfilment of the condition (*Malhous v. the Czech Republic* (dec.) [GC]; *Kopecný v. Slovakia* [GC], § 35 (c)).

364. The belief that a law previously in force would be changed to an applicant's advantage cannot be regarded as a form of legitimate expectation for the purposes of Article 1 of Protocol No. 1. There is a difference between a mere hope of restitution, however understandable that hope may be, and a legitimate expectation, which must be of a nature more concrete than a mere hope and be based on a legal provision or a legal act such as a judicial decision (*Gratzinger and Gratzingerova v. the Czech Republic* (dec.) [GC], § 73; *Maltzan and Others v. Germany* (dec.) [GC], § 112).

**(f) Future income**

365. Future income constitutes a "possession" only if the income has been earned or where an enforceable claim to it exists (*Ian Edgar (Liverpool) Ltd v. the United Kingdom* (dec.); *Wendenburg v. Germany* (dec.); *Levänen and Others v. Finland* (dec.); *Anheuser-Busch Inc. v. Portugal* [GC], § 64; *N.K.M. v. Hungary*, § 36).

**(g) Professional clientele**

366. The applicability of Article 1 of Protocol No. 1 extends to professional practices and their clientele, as these are entities of a certain worth that have in many respects the nature of a private right and thus constitute assets and therefore possessions within the meaning of the first sentence of Article 1 (*Lederer v. Germany* (dec.); *Buzescu v. Romania*, § 81; *Wendenburg and Others v. Germany* (dec.); *Olbertz v. Germany* (dec.); *Döring v. Germany* (dec.); *Van Marle and Others v. the Netherlands*, § 41).

**(h) Business licences**

367. A licence to run a business constitutes a possession; its revocation is an interference with the right guaranteed by Article 1 of Protocol No. 1 (*Megadat.com SRL v. Moldova*, §§ 62-63; *Bimer S.A. v. Moldova*, § 49; *Rosenzweig and Bonded Warehouses Ltd v. Poland*, § 49; *Capital Bank AD v. Bulgaria*, § 130; *Tre Traktörer Aktiebolag v. Sweden*, § 53).

368. The interests associated with exploiting the licence constitute property interests attracting the protection of Article 1 of Protocol No. 1 and without the allocation of broadcasting frequencies, the licence is deprived of its substance (*Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], §§ 177-78).

**(i) Inflation**

369. Article 1 of Protocol No. 1 does not impose any general obligation on States to maintain the purchasing power of sums deposited with financial institutions by way of a



systematic indexation of savings (*Rudzińska v. Poland* (dec.); *Gayduk and Others v. Ukraine* (dec.); *Ryabykh v. Russia*, § 63). The same applies *a fortiori* to sums deposited with other non-financial institutions (*Flores Cardoso v. Portugal*, §§ 54-55).

Nor does it oblige States to maintain the value of claims or apply an inflation-compatible default interest rate to private claims (*Todorov v. Bulgaria* (dec.)).

**(j) Intellectual property**

370. Article 1 of Protocol No. 1 applies to intellectual property as such (*Anheuser-Busch Inc. v. Portugal* [GC], § 72).

371. It is applicable to application for registration of a trade mark (*ibid.*, § 78).

**(k) Company shares**

372. A company share with an economic value can be considered a possession (*Olczak v. Poland* (dec.), § 60; *Sovtransavto Holding v. Ukraine*, § 91).

**(l) Social security benefits**

373. There is no ground to draw a distinction between contributory and non-contributory benefits for the purposes of the applicability of Article 1 of Protocol No. 1.

374. Although Article 1 of Protocol No. 1 does not include the right to receive a social security payment of any kind, if a Contracting State has in force legislation providing for the payment as of right of a welfare benefit – whether conditional or not on the prior payment of contributions – that legislation must be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 for persons satisfying its requirements (*Stec and Others v. the United Kingdom* (dec.) [GC], §§ 53-55; *Andrejeva v. Latvia* [GC], § 77; *Moskal v. Poland*, § 38).

### III. INADMISSIBILITY BASED ON THE MERITS

#### A. Manifestly ill-founded

##### Article 35 § 3 (a) – Admissibility criteria

“3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:

(a) the application is ... manifestly ill-founded ...”

##### 1. General introduction

375. Even where an application is compatible with the Convention and all the formal admissibility conditions have been met, the Court may nevertheless declare it inadmissible for reasons relating to the examination on the merits. By far the most common reason is that the application is considered to be manifestly ill-founded. It is true that the use of the term “manifestly” in Article 35 § 3 (a) may cause confusion: if taken literally, it might be understood to mean that an application will only be declared inadmissible on this ground if it is immediately obvious to the average reader that it is far-fetched and lacks foundation. However, it is clear from the settled and abundant case-law of the Convention institutions (that is, the Court and, before 1 November 1998, the European Commission of Human Rights) that the expression is to be construed more broadly, in terms of the final outcome of the case. In fact, any application will be considered “manifestly ill-founded” if a preliminary examination of its substance does not disclose any appearance of a violation of the rights guaranteed by the Convention, with the result that it can be declared inadmissible at the outset without proceeding to a formal examination on the merits (which would normally result in a judgment).

376. The fact that the Court, in order to conclude that an application is manifestly ill-founded, sometimes needs to invite observations from the parties and enter into lengthy and detailed reasoning in its decision does nothing to alter the “manifestly” ill-founded nature of the application (*Mentzen v. Latvia* (dec.)).

377. The majority of manifestly ill-founded applications are declared inadmissible *de plano* by a single judge or a three-judge committee (Articles 27 and 28 of the Convention). However, some applications of this type are examined by a Chamber or even – in exceptional cases – by the Grand Chamber (*Gratzinger and Gratzingerova v. the Czech Republic* (dec.) [GC]; *Demopoulos and Others v. Turkey* (dec.) [GC]).

378. The term “manifestly ill-founded” may apply to the application as a whole or to a particular complaint within the broader context of a case. Hence, in some cases, part of the application may be rejected as being of a “fourth-instance” nature, whereas the remainder is declared admissible and may even result in a finding of a violation of the Convention. It is therefore more accurate to refer to “manifestly ill-founded complaints”.

379. In order to understand the meaning and scope of the notion of “manifestly ill-founded”, it is important to remember that one of the fundamental principles underpinning the whole Convention system is the principle of subsidiarity. In the particular context of the European Court of Human Rights, this means that the task of securing respect for implementing and enforcing the rights enshrined in the Convention falls first to the authorities of the Contracting States rather than to the Court. Only where the domestic authorities fail in their obligations may the Court intervene (*Scordino v. Italy (no. 1)* [GC], § 140). It is therefore best for the facts of the case to be investigated and the issues examined in so far as possible at the domestic level, so that the domestic authorities, who by reason of their direct

and continuous contact with the vital forces of their countries are best placed to do so, can act to put right any alleged breaches of the Convention (*Varnava and Others v. Turkey* [GC], § 164).

380. Manifestly ill-founded complaints can be divided into four categories: “fourth-instance” complaints, complaints where there has clearly or apparently been no violation, unsubstantiated complaints and, finally, confused or far-fetched complaints.

## 2. “Fourth instance”

381. One particular category of complaints submitted to the Court comprises what are commonly referred to as “fourth-instance” complaints. This term – which does not feature in the text of the Convention and has become established through the case-law of the Convention institutions (*Kemmache v. France (no. 3)*, § 44) – is somewhat paradoxical, as it places the emphasis on what the Court is not: it is not a court of appeal or a court which can quash rulings given by the courts in the States Parties to the Convention or retry cases heard by them, nor can it re-examine cases in the same way as a Supreme Court. Fourth-instance applications therefore stem from a misapprehension on the part of the applicants as to the Court’s role and the nature of the judicial machinery established by the Convention.

382. Despite its distinctive features, the Convention remains an international treaty which obeys the same rules as other inter-State treaties, in particular those laid down in the Vienna Convention on the Law of Treaties (*Demir and Baykara v. Turkey* [GC], § 65). The Court cannot therefore overstep the boundaries of the general powers which the Contracting States, of their sovereign will, have delegated to it. These limits are defined by Article 19 of the Convention, which provides:

“To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights ...”

383. Accordingly, the Court’s powers are limited to verifying the Contracting States’ compliance with the human rights engagements they undertook in acceding to the Convention (and the Protocols thereto). Furthermore, in the absence of powers to intervene directly in the legal systems of the Contracting States, the Court must respect the autonomy of those legal systems. That means that it is not its task to deal with errors of fact or law allegedly committed by a national court unless and in so far as such errors may have infringed rights and freedoms protected by the Convention. It may not itself assess the facts which have led a national court to adopt one decision rather than another. If it were otherwise, the Court would be acting as a court of third or fourth instance, which would be to disregard the limits imposed on its action (*García Ruiz v. Spain* [GC], § 28; *Perlala v. Greece*, § 25).

384. In the light of the above considerations, the Court may not, as a general rule, question the findings and conclusions of the domestic courts as regards:

- the establishment of the facts of the case;
- the interpretation and application of domestic law;
- the admissibility and assessment of evidence at the trial;
- the substantive fairness of the outcome of a civil dispute;
- the guilt or innocence of the accused in criminal proceedings.

385. The only circumstance in which the Court may, as an exception to this rule, question the findings and conclusions in question is where the latter are flagrantly and manifestly

arbitrary, in a manner which flies in the face of justice and common sense and gives rise in itself to a violation of the Convention (*Sisojeva and Others v. Latvia* (striking out) [GC], § 89).

386. Fourth-instance complaints may be lodged under any substantive provision of the Convention and irrespective of the legal sphere to which the proceedings belong at domestic level. The fourth-instance doctrine is applied, for instance, in the following cases:

- civil cases (*García Ruiz v. Spain* [GC], § 28; *Pla and Puncernau v. Andorra*, § 26);
- criminal cases (*Perlala v. Greece*, § 25; *Khan v. the United Kingdom*, § 34);
- taxation cases (*Dukmedjian v. France*, § 71);
- cases concerning social issues (*Marion v. France*, § 22);
- administrative cases (*Agathos and Others v. Greece*, § 26);
- cases concerning voting rights (*Ādamsons v. Latvia*, § 118);
- cases concerning the entry, residence and removal of non-nationals (*Sisojeva and Others v. Latvia* (striking out) [GC]).

387. However, most fourth-instance complaints are made under Article 6 § 1 of the Convention concerning the right to a “fair hearing” in civil and criminal proceedings. It should be borne in mind – since this is a very common source of misunderstandings on the part of applicants – that the “fairness” required by Article 6 § 1 is not “substantive” fairness (a concept which is part-legal, part-ethical and can only be applied by the trial judge), but “procedural” fairness. This translates in practical terms into adversarial proceedings in which submissions are heard from the parties and they are placed on an equal footing before the court (*Star Cate – Epilekta Gevmata and Others v. Greece* (dec.)).

388. Accordingly, a fourth-instance complaint under Article 6 § 1 of the Convention will be rejected by the Court on the grounds that the applicant had the benefit of adversarial proceedings; that he was able, at the various stages of those proceedings, to adduce the arguments and evidence he considered relevant to his case; that he had the opportunity of challenging effectively the arguments and evidence adduced by the opposing party; that all his arguments which, viewed objectively, were relevant to the resolution of the case were duly heard and examined by the courts; that the factual and legal reasons for the impugned decision were set out at length; and that, accordingly, the proceedings taken as a whole were fair (*García Ruiz v. Spain* [GC]; *Khan v. the United Kingdom*).

### 3. Clear or apparent absence of a violation

389. An applicant’s complaint will also be declared manifestly ill-founded if, despite fulfilling all the formal conditions of admissibility, being compatible with the Convention and not constituting a fourth-instance complaint, it does not disclose any appearance of a violation of the rights guaranteed by the Convention. In such cases, the Court’s approach will consist in examining the merits of the complaint, concluding that there is no appearance of a violation and declaring the complaint inadmissible without having to proceed further. A distinction can be made between three types of complaint which call for such an approach.

#### (a) No appearance of arbitrariness or unfairness

390. In accordance with the principle of subsidiarity, it is in the first place for the domestic authorities to ensure observance of the fundamental rights enshrined in the Convention. As a general rule, therefore, the establishment of the facts of the case and the interpretation of the

domestic law are a matter solely for the domestic courts and other authorities, whose findings and conclusions in this regard are binding on the Court. However, the principle of the effectiveness of rights, inherent in the entire Convention system, means that the Court can and should satisfy itself that the decision-making process resulting in the act complained of by the applicant was fair and was not arbitrary (the process in question may be administrative or judicial, or both, depending on the case).

391. Consequently, the Court may declare manifestly ill-founded a complaint which was examined in substance by the competent national courts in the course of proceedings which fulfilled, *a priori*, the following conditions (in the absence of evidence to the contrary):

- the proceedings were conducted before bodies empowered for that purpose by the provisions of domestic law;
- the proceedings were conducted in accordance with the procedural requirements of domestic law;
- the interested party had the opportunity of adducing his or her arguments and evidence, which were duly heard by the authority in question;
- the competent bodies examined and took into consideration all the factual and legal elements which, viewed objectively, were relevant to the fair resolution of the case;
- the proceedings resulted in a decision for which sufficient reasons were given.

**(b) No appearance of a lack of proportionality between the aims and the means**

392. Where the Convention right relied on is not absolute and is subject to limitations which are either explicit (expressly enshrined in the Convention) or implicit (defined by the Court's case-law), the Court is frequently called upon to assess whether the interference complained of was proportionate.

393. Within the group of provisions which set forth explicitly the restrictions authorised, a particular sub-group of four Articles can be identified: Article 8 (right to respect for private and family life), Article 9 (freedom of thought, conscience and religion), Article 10 (freedom of expression) and Article 11 (freedom of assembly and association). All these Articles have the same structure: the first paragraph sets out the fundamental right in question, while the second paragraph defines the circumstances in which the State may restrict the exercise of that right. The wording of the second paragraph is not wholly identical in each case, but the structure is the same. For example, in relation to the right to respect for private and family life, Article 8 § 2 provides:

“There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

Article 2 of Protocol No. 4 (freedom of movement) also belongs to this category, as its third paragraph follows the same model.

394. When the Court is called upon to examine interference by the public authorities with the exercise of one of the above-mentioned rights, it always analyses the issue in three stages. If there has indeed been “interference” by the State (and this is a separate issue which must be addressed first, as the answer is not always obvious), the Court seeks to answer three questions in turn:

- Was the interference in accordance with a “law” that was sufficiently accessible and foreseeable?
- If so, did it pursue at least one of the “legitimate aims” which are exhaustively enumerated (the list of which varies slightly depending on the Article)?
- If that is the case, was the interference “necessary in a democratic society” in order to achieve that aim? In other words, was there a relationship of proportionality between the aim and the restrictions in issue?

395. Only if the answer to each of these three questions is in the affirmative is the interference deemed to be compatible with the Convention. If this is not the case, a violation will be found. In examining the third question, the Court must take into account the State’s margin of appreciation, the scope of which will vary considerably depending on the circumstances, the nature of the right protected and the nature of the interference (*Stoll v. Switzerland* [GC], § 105; *Demir and Baykara v. Turkey* [GC], § 119; *S. and Marper v. the United Kingdom* [GC], § 102; *Mentzen v. Latvia* (dec.)).

396. The same principle applies not just to the Articles mentioned above, but also to most other provisions of the Convention – and to implicit limitations not spelled out in the Article in question. For instance, the right of access to a court secured by Article 6 § 1 of the Convention is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention’s requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation of the right of access to a court will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (*Cudak v. Lithuania* [GC], § 55).

397. If, following a preliminary examination of the application, the Court is satisfied that the conditions referred to above have been met and that, in view of all the relevant circumstances of the case, there is no clear lack of proportion between the aims pursued by the State’s interference and the means employed, it will declare the complaint in question inadmissible as being manifestly ill-founded. The reasons given for the inadmissibility decision in such a case will be identical or similar to those which the Court would adopt in a judgment on the merits concluding that there had been no violation (*Mentzen v. Latvia* (dec.)).

### (c) Other relatively straightforward substantive issues

398. In addition to the situations described above, the Court will declare a complaint manifestly ill-founded if it is satisfied that, for reasons pertaining to the merits, there is no appearance of a violation of the Convention provision relied on. There are two sets of circumstances in particular in which this occurs:

- where there is settled and abundant case-law of the Court in identical or similar cases, on the basis of which it can conclude that there has been no violation of the Convention in the case before it (*Galev and Others v. Bulgaria* (dec.));
- where, although there are no previous rulings dealing directly and specifically with the issue, the Court can conclude on the basis of the existing case-law that there is no appearance of a violation of the Convention (*Hartung v. France* (dec.)).

399. In either set of circumstances, the Court may be called upon to examine the facts of the case and all the other relevant factual elements at length and in detail (*Collins and Akaziebie v. Sweden* (dec.)).

*4. Unsubstantiated complaints: lack of evidence*

400. The proceedings before the Court are adversarial in nature. It is therefore for the parties – that is, the applicant and the respondent government – to substantiate their factual arguments (by providing the Court with the necessary factual evidence) and also their legal arguments (explaining why, in their view, the Convention provision relied on has or has not been breached).

401. The relevant parts of Rule 47 of the Rules of Court, which governs the content of individual applications, provide as follows:

“1. An application under Article 34 of the Convention shall be made on the application form provided by the Registry, unless the Court decides otherwise. It shall contain all of the information requested in the relevant parts of the application form and set out

...

(d) a concise and legible statement of the facts;

(e) a concise and legible statement of the alleged violation(s) of the Convention and the relevant arguments; and

...

2. (a) All of the information referred to in paragraph 1 (d) to (f) above that is set out in the relevant part of the application form should be sufficient to enable the Court to determine the nature and scope of the application without recourse to any other document.

...

3.1 The application form shall be signed by the applicant or the applicant’s representative and shall be accompanied by

(a) copies of documents relating to the decisions or measures complained of, judicial or otherwise;

(b) copies of documents and decisions showing that the applicant has complied with the exhaustion of domestic remedies requirement and the time-limit contained in Article 35 § 1 of the Convention;

...

5.1 Failure to comply with the requirements set out in paragraphs 1 to 3 of this Rule will result in the application not being examined by the Court, unless

(a) the applicant has provided an adequate explanation for the failure to comply;

...

(c) the Court otherwise directs of its own motion or at the request of an applicant.

...”

402. In addition, under Rule 44C § 1 of the Rules of Court:

“Where a party fails to adduce evidence or provide information requested by the Court or to divulge relevant information of its own motion or otherwise fails to participate effectively in the proceedings, the Court may draw such inferences as it deems appropriate.”

403. Where the above-mentioned conditions are not met, the Court will declare the application inadmissible as being manifestly ill-founded. There are two sets of circumstances in particular where this may occur:

- where the applicant simply cites one or more provisions of the Convention without explaining in what way they have been breached, unless this is obvious from the facts of the case (*Trofimchuk v. Ukraine* (dec.); *Baillard v. France* (dec.));
- where the applicant omits or refuses to produce documentary evidence in support of his allegations (in particular, decisions of the courts or other domestic authorities), unless there are exceptional circumstances beyond his control which prevent him from doing so (for instance, if the prison authorities refuse to forward documents from a prisoner’s case file to the Court) or unless the Court itself directs otherwise.

#### 5. *Confused or far-fetched complaints*

404. The Court will reject as manifestly ill-founded complaints which are so confused that it is objectively impossible for it to make sense of the facts complained of by the applicant and the grievances he or she wishes to submit to the Court. The same applies to far-fetched complaints, that is, complaints concerning facts which are objectively impossible, have clearly been invented or are manifestly contrary to common sense. In such cases, the fact that there is no appearance of a violation of the Convention will be obvious to the average observer, even one without any legal training.

## B. No significant disadvantage

### Article 35 § 3 (b) – Admissibility criteria

“3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:

...

(b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.”

#### 1. *Background to the new criterion*

405. A new admissibility criterion was added to the criteria laid down in Article 35 with the entry into force of Protocol No. 14 on 1 June 2010. In accordance with Article 20 of the Protocol, the new provision will apply to all applications pending before the Court, except those declared admissible. Accordingly, in *Vistiņš and Perepjolkins v. Latvia* [GC], § 66, the government’s preliminary objection raising no significant disadvantage was dismissed because the application was declared admissible in 2006, before the entry into force of Protocol No. 14.

The introduction of this criterion was considered necessary in view of the ever-increasing caseload of the Court. It provides the Court with an additional tool which should assist it in concentrating on cases which warrant an examination on the merits. In other words, it enables the Court to reject cases considered as “minor” pursuant to the principle whereby judges should not deal with such cases (“*de minimis non curat praetor*”).



406. The “*de minimis*” notion, while not formally being part of the European Convention on Human Rights until 1 June 2010, nevertheless has been evoked in several dissenting opinions of members of the Commission (see Commission reports in *Eyoum-Priso v. France*; *H.F. K.-F. v. Germany*; *Lechesne v. France*) and of judges of the Court (see, for example, *Dudgeon v. the United Kingdom*; *O’Halloran and Francis v. the United Kingdom* [GC]; *Micallef v. Malta* [GC]), and also by governments in their observations to the Court (see, for example, *Koumoutsea and Others v. Greece* (dec.)).

## 2. Scope

407. Article 35 § 3 (b) is composed of three distinct elements. Firstly, the admissibility criterion itself: the Court may declare inadmissible any individual application where the applicant has suffered no significant disadvantage. Next come two safeguard clauses. Firstly, the Court may not declare such an application inadmissible where respect for human rights requires an examination of the application on the merits. Secondly, no case may be rejected under this new criterion which has not been duly considered by a domestic authority. It should be mentioned here that according to Article 5 of Protocol No. 15 amending the Convention, which is currently not yet in force, the second safeguard clause is to be removed.<sup>3</sup> Where the three conditions of the inadmissibility criterion are satisfied, the Court declares the complaint inadmissible under Article 35 §§ 3 (b) and 4 of the Convention.

408. In *Shefer v. Russia* (dec.), the Court noted that while no formal hierarchy exists between the three elements of Article 35 § 3 (b), the question of “significant disadvantage” is at the core of the new criterion. In most of the cases, a hierarchical approach is taken, where each element of the new criterion is dealt with in turn.

409. The Court alone is competent to interpret this admissibility requirement and decide on its application. During the first two years following entry into force, application of the criterion was reserved to Chambers and the Grand Chamber (Article 20 § 2 of Protocol No. 14). From 1 June 2012 the criterion has been used by all of the Court’s judicial formations.

410. The Court may raise the new admissibility criterion of its own motion (*Ionescu v. Romania* (dec.)) or in response to an objection raised by the government (*Gaglione and Others v. Italy*). In some cases, the Court looks at the new criterion before the other admissibility requirements (*Korolev v. Russia* (dec.); *Rinck v. France* (dec.); *Gaftoniuc v. Romania*; *Burov v. Moldova* (dec.); *Shefer v. Russia* (dec.)). In other cases, it moves on to addressing the new criterion only after having excluded others (*Ionescu v. Romania* (dec.); *Holub v. the Czech Republic* (dec.)).

## 3. Whether the applicant has suffered a significant disadvantage

411. The main element contained in the criterion is the question of whether the applicant has suffered a “significant disadvantage”. “Significant disadvantage” hinges on the idea that a violation of a right, however real from a purely legal point of view, should attain a minimum level of severity to warrant consideration by an international court. Violations which are purely technical and insignificant outside a formalistic framework do not merit European supervision (*Shefer v. Russia* (dec.)). The assessment of this minimum level is relative and depends on all the circumstances of the case. The severity of a violation should be assessed by taking into account both the applicant’s subjective perception and what is objectively at stake in a particular case (*Korolev v. Russia* (dec.)). However, the applicant’s subjective perception

3. In Article 35, paragraph 3, sub-paragraph b, of the Convention, the words “and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal” shall be deleted.

cannot alone suffice to conclude that he or she suffered a significant disadvantage. The subjective perception must be justified on objective grounds (*Ladygin v. Russia* (dec.)). A violation of the Convention may concern important questions of principle and thus cause a significant disadvantage regardless of pecuniary interest (*Korolev v. Russia* (dec.)). In *Giuran v. Romania*, §§ 17-25, the Court found that the applicant had suffered a significant disadvantage because the proceedings concerned a question of principle for him, namely his right to respect for his possessions and for his home. This was despite the fact that the domestic proceedings which were the subject of the complaint were aimed at the recovery of stolen goods worth 350 euros (EUR) from the applicant's own apartment.

412. Moreover, in evaluating the subjective significance of the issue for the applicant, the Court can take into account the applicant's conduct, for example in being inactive in court proceedings during a certain period which demonstrated that in this case the proceedings could not have been significant to her (*Shefer v. Russia* (dec.)). In *Giusti v. Italy*, §§ 22-36, the Court introduced certain new elements to take into account when determining the minimum threshold of seriousness to justify examination by an international court, namely the nature of the right allegedly violated, the seriousness of the claimed violation and/or the potential consequences of the violation on the personal situation of the applicant. In evaluating these consequences, the Court will examine, in particular, what is at stake or the outcome of the national proceedings.

**(a) Lack of significant financial disadvantage**

413. In a number of cases, the level of severity attained is assessed in light of the financial impact of the matter in dispute and the importance of the case for the applicant. The financial impact is not assessed merely in light of the non-pecuniary damages claimed by the applicant. In *Kioui v. Greece* (dec.), the Court held that the amount of non-pecuniary damages sought, namely EUR 1,000, was not relevant for calculating what was really at issue for the applicant. This was because non-pecuniary damages are often calculated by applicants themselves on the basis of their own speculation as to the value of the litigation.

414. As far as insignificant financial impact is concerned, the Court has thus far found a lack of "significant disadvantage" in the following cases where the amount in question was equal or inferior to roughly EUR 500:

- in a case concerning proceedings in which the amount in dispute was EUR 90 (*Ionescu v. Romania* (dec.));
- in a case concerning a failure by the authorities to pay to the applicant a sum equivalent to less than one euro (*Korolev v. Russia* (dec.));
- in a case concerning a failure by the authorities to pay to the applicant a sum roughly equal to EUR 12 (*Vasilchenko v. Russia*, § 49);
- in a case concerning a traffic fine of EUR 150 and the endorsement of the applicant's driving licence with one penalty point (*Rinck v. France* (dec.));
- delayed payment of EUR 25 (*Gaftoniuc v. Romania*);
- failure to reimburse EUR 125 (*Stefanescu v. Romania* (dec.));
- failure by the State authorities to pay the applicant EUR 12 (*Fedotov v. Moldova* (dec.));
- failure by the State authorities to pay the applicant EUR 107 plus costs and expenses of 121, totalling EUR 228 (*Burov v. Moldova* (dec.));
- in a case concerning a fine of EUR 135, EUR 22 of costs and one penalty point on the applicant's driving licence (*Fernandez v. France* (dec.));

- in a case where the Court noted that the amount of pecuniary damages at issue was EUR 504 (*Kiouisi v. Greece* (dec.));
- in a case where the initial claim of EUR 99 made by the applicant against his lawyer was considered in addition to the fact that he was awarded the equivalent of EUR 1,515 for the length of the proceedings on the merits (*Havelka v. the Czech Republic* (dec.));
- in the case of salary arrears of a sum equivalent to approximately EUR 200 (*Guruyan v. Armenia* (dec.));
- in a case concerning EUR 227 in expenses (*Šumbera v. the Czech Republic* (dec.));
- in the case concerning enforcement of a judgment for EUR 34 (*Shefer v. Russia* (dec.));
- in a case concerning non-pecuniary damages of EUR 445 for cutting off an electricity supply (*Bazelyuk v. Ukraine* (dec.));
- in a case concerning administrative fines of EUR 50 (*Boelens and Others v. Belgium* (dec.));
- where claims related to remuneration of between EUR 98 and 137, plus default interest (*Hudecová and Others v. Slovakia* (dec.)).

415. In *Havelka v. the Czech Republic* (dec.), the Court took into consideration the fact that while the award of EUR 1,515 could not strictly speaking be considered to provide adequate and sufficient redress under the Court’s case-law, the sum did not differ from the appropriate just satisfaction to such an extent as to cause the applicant a significant disadvantage.

416. Finally, the Court is conscious that the impact of a pecuniary loss must not be measured in abstract terms; even modest pecuniary damage may be significant in the light of the person’s specific condition and the economic situation of the country or region in which he or she lives. Thus, the Court looks at the effect of the financial loss taking into account the individual’s situation. In *Fernandez v. France* (dec.), the fact that the applicant was a judge at the administrative appeal court in Marseilles was relevant for the court finding that the fine of EUR 135 was not a significant amount for her.

**(b) Significant financial disadvantage**

417. Conversely, where the Court considers that the applicant has suffered significant financial disadvantage, then the criterion may be rejected. This has been so in the following examples of cases:

- in a case where delays were found of between nine and forty-nine months in enforcing judgments awarding compensation for length of proceedings where the sums involved ranged from EUR 200 to 13,749.99 (*Gaglione and Others v. Italy*);
- in a case concerning delays in the payment of compensation for expropriated property and amounts running to tens of thousands of euros (*Sancho Cruz and Others v. Portugal*, §§ 32-35);
- in a case concerning disputed employment rights with the claim being approximately EUR 1,800 (*Živić v. Serbia*);
- in a case concerning length of civil proceedings of fifteen years and five months and the absence of any remedy with the claim being “an important amount” (*Giusti v. Italy*, §§ 22-36);
- in a case concerning length of civil proceedings where the sum in question concerned disability allowances which were not insignificant (*De Ieso v. Italy*);

- in a case where the applicant was required to pay court fees which exceeded, by 20 per cent, her monthly income (*Piętka v. Poland*, §§ 33-41).

**(c) Lack of significant non-financial disadvantage**

418. However, the Court is not exclusively concerned with cases of insignificant financial sums, when applying the no significant disadvantage criterion. The actual outcome of a case at national level might have repercussions other than financial ones. In *Holub v. the Czech Republic* (dec.), *Bratři Zátkové, A.S., v. the Czech Republic* (dec.), *Matoušek v. the Czech Republic* (dec.), *Čavajda v. the Czech Republic* (dec.), *Jirsák v. the Czech Republic* (dec.), and *Hanzl and Špadrna v. the Czech Republic* (dec.), the Court based its decisions on the fact that the non-communicated observations of the other parties had not contained anything new or relevant to the case and the decision of the Constitutional Court in each case had not been based on them. In *Liga Portuguesa de Futebol Profissional v. Portugal* (dec.), the Court followed the same reasoning as that set out in *Holub v. the Czech Republic* (dec.). The prejudice in question was the fact that the applicant had not been sent the prosecutor's opinion, and not the sum of 19 million euros which the company could have been forced to pay. The Court found that the applicant company had not been prejudiced by the non-communication of the opinion in question.

419. Similarly, in *Jančev v. the former Yugoslav Republic of Macedonia* (dec.), the complaint concerned the non-pronouncement in public of a first-instance court decision. The Court concluded that the applicant had not suffered any significant disadvantage since he was not the aggrieved party. The Court also took into account that the obligation to demolish the wall and remove the bricks, which was a result of the applicant's unlawful behaviour, did not impose a significant financial burden on him. Another case in which no financial sum was directly invoked by the applicant was *Savu v. Romania* (dec.). In that case, the applicant complained of the non-enforcement of certain judgments in his favour, including the obligation to issue a certificate.

420. In *Gagliano Giorgi v. Italy*, the Court for the first time dealt with a complaint concerning the length of *criminal* proceedings. Looking at the fact that the applicant's sentence was reduced as a result of the length of the proceedings, the Court concluded that this reduction compensated the applicant or particularly reduced any prejudice which he would encounter as a result of the lengthy proceedings. Accordingly, the Court held that he had not suffered any significant disadvantage. In *Galović v. Croatia* (dec.), the Court found that the applicant had actually benefited from the excessive length of *civil* proceedings because she remained in her property for another six years and two months. Two further Dutch cases have also dealt with the length of criminal proceedings and the lack of an effective remedy, namely *Çelik v. the Netherlands* (dec.) and *Van der Putten v. the Netherlands* (dec.). The applicants' complaints concerned solely the length of the proceedings before the Supreme Court as a consequence of the time taken by the Court of Appeal to complete the case file. However, in both, the applicants lodged an appeal on points of law to the Supreme Court without submitting any ground of appeal. Finding that no complaint was made about the judgment of the Court of Appeal or about any aspect of the prior criminal proceedings, the Court considered in both cases that the applicants suffered no significant disadvantage.

421. In *Zwinkels v. the Netherlands* (dec.), the only interference with the right to respect to home under Article 8 concerned the unauthorised entry of labour inspectors into a garage, and accordingly the Court dismissed such a complaint as having "no more than a minimal impact" on the applicant's right to home or private life.

**(d) Significant non-financial disadvantage**

422. Turning to the cases where the Court has rejected the new criterion, in *3A.CZ s.r.o. v. the Czech Republic*, § 34, the Court found that the non-communicated observations could have contained some new information of which the applicant company was not aware. Distinguishing the *Holub v. the Czech Republic* (dec.) line of cases, the Court could not conclude that the company had not suffered a significant disadvantage. The same reasoning was used in *BENet Praha, spol. s r.o., v. the Czech Republic*, § 135; and *Joos v. Switzerland*, § 20.

423. In *Luchaninova v. Ukraine*, §§ 46-50, the Court observed that the outcome of the proceedings, which the applicant claimed had been unlawful and conducted in an unfair manner, had a particularly negative effect on her professional life. In particular, the applicant's conviction was taken as a basis for her dismissal from work. Therefore, the applicant had suffered a significant disadvantage. In *Diacenco v. Romania*, § 46, the question of principle for the applicant was his right to be presumed innocent under Article 6 § 2.

424. In *Van Velden v. the Netherlands*, §§ 33-39, the applicant complained under Article 5 § 4 of the Convention. The government argued that the applicant had not suffered any significant disadvantage since the entire period of pre-trial detention had been deducted from his prison sentence. However, the Court found that it was a feature of the criminal procedure of many contracting Parties to set periods of detention prior to final conviction and sentencing off against the eventual sentence; for the Court to hold generally that any harm resulting from pre-trial detention was thereby *ipso facto* nugatory for Convention purposes would remove a large proportion of potential complaints under Article 5 from the scope of its scrutiny. The government's objection under the no significant disadvantage criterion was therefore rejected. Another Article 5 case in which the government's objection under the present criterion was rejected was *Bannikov v. Latvia*, §§ 54-60. In that case, the period of pre-trial detention was one year, eleven months and eighteen days.

425. In three interesting cases involving complaints under Articles 9, 10 and 11, the government's objections on the basis of no significant disadvantage were also rejected. In *Vartic v. Romania (no. 2)*, §§ 37-41, the applicant complained that by refusing to provide him with the vegetarian diet required by his Buddhist convictions, the prison authorities had infringed his right to manifest his religion under Article 9. The Court concluded that the subject matter of the complaint gave rise to an important matter of principle. In *Eon v. France*, § 34, the complaint under Article 10, turned on whether insulting the head of State should remain a criminal offence. Rejecting the government's objection, the Court concluded that the issue was subjectively important to the applicant and objectively a matter of public interest. In *Berladir and Others v. Russia*, § 34, the Court did not find it appropriate to dismiss the complaints under Articles 10 and 11 with reference to Article 35 § 3 (b) of the Convention, given that they arguably concerned a matter of principle.

**4. Two safeguard clauses**

426. Once the Court has determined, in line with the outlined approach, that no significant disadvantage has been caused, it should proceed to check whether one of the two safeguard clauses contained in Article 35 § 3 (b) would nevertheless oblige it to consider the complaint on the merits.

**(a) Whether respect for human rights requires an examination of the case on the merits**

427. The second element is a safeguard clause (see the [Explanatory Report](#) to Protocol No. 14, § 81) to the effect that the application will not be declared inadmissible if respect for

human rights as defined in the Convention or the Protocols thereto requires an examination on the merits. The wording of this element is drawn from the second sentence of Article 37 § 1 of the Convention where it fulfils a similar function in the context of decisions to strike applications out of the Court's list of cases. The same wording is used in Article 39 § 1 as a basis for securing a friendly settlement between the parties.

428. The Convention organs have consistently interpreted those provisions as compelling them to continue the examination of a case, notwithstanding its settlement by the parties or the existence of any other ground for striking the case out of its list. A further examination of a case was thus found to be necessary when it raised questions of a general character affecting the observance of the Convention (*Tyrer v. the United Kingdom*, §§ 24-27).

429. Such questions of a general character would arise, for example, where there is a need to clarify the States' obligations under the Convention or to induce the respondent State to resolve a structural deficiency affecting other persons in the same position as the applicant.

430. Precisely this approach was taken in *Finger v. Bulgaria*, §§ 67-77, where the Court considered it unnecessary to determine whether the applicant had suffered a significant disadvantage because respect for human rights required an examination of the case on the merits (concerning a potential systemic problem of unreasonable length of civil proceedings and the alleged lack of an effective remedy).

431. In *Zivic v. Serbia*, §§ 36-42, the Court also found that even assuming that the applicant had not suffered a significant disadvantage the case raised issues of general interest which required examination. This was due to the inconsistent case-law of the District Court in Belgrade as regards the right to fair wages and equal pay for equal work, that is, payment of the same salary increase granted to a certain category of police officers.

432. Similarly, in *Nicoleta Gheorghe v. Romania*, the Court rejected the new criterion despite the insignificant financial award at stake (EUR 17), because a decision of principle on the issue was needed for the national jurisdiction (the case concerned a question of presumption of innocence and equality of arms in criminal proceedings and was the first judgment after the change of national law). In *Juhas Đurić v. Serbia* (revision), the applicant complained of the payment of fees to police-appointed defence counsel in the course of a preliminary criminal investigation. The Court concluded that the issues complained of could not be considered trivial, or, consequently, something that did not deserve an examination on the merits, since they related to the functioning of the criminal justice system. Hence, the government's objection based on the new admissibility criterion was rejected because respect for human rights required examination on the merits.

433. As noted in paragraph 39 of the Explanatory Report, the application of the admissibility requirement should ensure avoiding the rejection of cases which, notwithstanding their trivial nature, raise serious questions affecting the application or the interpretation of the Convention or important questions concerning national law.

434. The Court has already held that respect for human rights does not require it to continue the examination of an application when, for example, the relevant law has changed and similar issues have been resolved in other cases before it (*Léger v. France* (striking out) [GC], § 51; *Rinck v. France* (dec.); *Fedotova v. Russia*). Nor where the relevant law has been repealed and the complaint before the Court is of historical interest only (*Ionescu v. Romania* (dec.)). Similarly, respect for human rights does not require the Court to examine an application where the Court and the Committee of Ministers have addressed the issue as a systemic problem, for example non-enforcement of domestic judgments in the Russian Federation (*Vasilchenko v. Russia*) or Romania (*Gaftoniuc v. Romania* (dec.)); *Savu v. Romania* (dec.) or indeed the Republic of Moldova (*Burov v. Moldova* (dec.)) or Armenia (*Guruyan v. Armenia* (dec.)). Moreover, where the issue involves length of proceedings cases in Greece (*Kiousi v. Greece* (dec.)) or the Czech Republic (*Havelka v. the Czech Republic*

(dec.)), the Court has had numerous opportunities to address the issue in previous judgments. This applies equally with respect to the public pronouncement of judgments (*Janev v. the former Yugoslav Republic of Macedonia* (dec.)) or the opportunity to have knowledge of and to comment on observations filed or evidence adduced by the other party (*Bazelyuk v. Ukraine* (dec.)).

**(b) Whether the case has been duly considered by a domestic tribunal**

435. Lastly, Article 35 § 3 (b) does not allow the rejection of an application under the admissibility requirement if the case has not been duly considered by a domestic tribunal. The purpose of that rule, qualified by the drafters as a “second safeguard clause” is to ensure that every case receives a judicial examination, either at the national or at the European level. As mentioned above, the second safeguard of Article 35 § 3 (b) is to be deleted upon the coming into force of Protocol No. 15 amending the Convention.

436. The purpose of the second safeguard clause is thus to avoid a denial of justice for the applicant (*Korolev v. Russia* (dec.); *Gaftoniuc v. Romania* (dec.); *Fedotov v. Moldova* (dec.)). The applicant should have had the opportunity of submitting his arguments in adversarial proceedings before at least one level of domestic jurisdiction (*Ionescu v. Romania* (dec.); *Stefanescu v. Romania* (dec.)).

437. The second safeguard clause is also consonant with the principle of subsidiarity, as reflected notably in Article 13 of the Convention, which requires that an effective remedy against violations be available at the national level. According to the Court, the word “case” should not be equated with the word “application”, in other words the complaint brought to the Strasbourg Court. Otherwise, it would be impossible to declare inadmissible an application concerning violations allegedly caused by final instance authorities, as their acts by definition are not subjected to further national examination (*Holub v. the Czech Republic* (dec.)). “Case” is therefore understood as the action, complaint or claim the applicant has lodged with the national courts.

438. In *Dudek v. Germany* (dec.) the complaint for excessive length of civil proceedings under German law had not been duly considered by a domestic tribunal because there was no effective remedy yet enacted. Hence, the criterion could not be used in this case. In *Finger v. Bulgaria*, §§ 67-77, the Court found that the chief point raised by the case was precisely whether the applicant’s grievance concerning the alleged unreasonable length of the proceedings could be duly considered at the domestic level. Therefore, the case could not be regarded as complying with the second safeguard clause. The same approach was adopted in *Flisar v. Slovenia*, § 28. The Court noted that the applicant complained precisely about not having his case properly examined by the domestic courts. It also noted that the Constitutional Court did not deal with the applicant’s complaints concerning an alleged breach of the guarantees of Article 6 of the Convention. Accordingly, the Court rejected the government’s objection under the criterion. In *Fomin v. Moldova*, the applicant complained under Article 6 that the courts had not given sufficient reasons for their decisions convicting her of an administrative offence. The Court in this case joined the issue of whether her complaint had been duly considered by a domestic tribunal to the merits of the complaints, ultimately rejecting the application of the criterion and finding a violation of Article 6 together.

439. As for the interpretation of “duly”, the present criterion is not to be interpreted as strictly as the requirements of a fair hearing under Article 6 (*Ionescu v. Romania* (dec.); *Liga Portuguesa de Futebol Profissional v. Portugal* (dec.)). Although, as clarified in *Šumbera v. the Czech Republic*, some failures in the fairness of the proceedings could, by reason of their nature and intensity, impact on whether the case has been “duly” considered (hence the Court finding that the new criterion did not apply in the case of *Fomin v. Moldova*).

440. Moreover, the notion “duly examined” does not require the State to examine the merits of any claim brought before the national courts, however frivolous it may be. In *Ladygin v. Russia* (dec.), the Court held that where an applicant attempts to bring a claim which clearly has no basis in national law, the last criterion under Article 35 § 3 (b) is nonetheless satisfied.

441. Where the case involves an alleged violation committed at the final instance of the domestic legal system, the Court may dispense with the requirement of due consideration. To construe otherwise would prevent the Court from rejecting any claim, however insignificant, if the violation alleged occurred at the final national level of jurisdiction (*Çelik v. the Netherlands* (dec.)).



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