



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

**PRACTICAL GUIDE ON  
ADMISSIBILITY CRITERIA**

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## 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 130,000 were pending as at 31 August 2010). 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 in future 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.

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 is a copious document which is aimed principally at legal practitioners and in particular at lawyers who may be called upon to represent applicants before the Court. A second, more lightweight document drafted in less technical terms will serve as a learning tool for a wider and less well-informed readership.

All the admissibility criteria set forth in Article 34 (individual applications) and Article 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. As to the new admissibility criterion, in view of the fact that Protocol No. 14 came into force only very recently, it is too early to present an accurate picture of the Court's case-law in this regard. 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. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

#### *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 (*Loizidou v. Turkey* (preliminary objections), § 70, and *Mamatkulov and Askarov v. Turkey* [GC], §§ 100 and 122).

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 (*Loizidou v. Turkey* (preliminary objections), § 71).

#### *2. Status of the application*

8. **Scope:** Any private individual 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). The victim does not have to specify which Article has been breached (*Guzzardi v. Italy*, § 61).

9. **Entitled persons:** Any *individual or legal entity* may exercise the right of individual application, 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.

Any *non-governmental organisation*, in the broad sense – that is, excluding organisations exercising governmental powers – may exercise the right of application. As regards public-law entities which do not exercise any governmental powers, see *Holy Monasteries v. Greece*, § 49, and *Radio France and Others v. France* (dec.), §§ 24-26; for those which are legally and financially independent of the State, see *Islamic Republic of Iran Shipping Lines v. Turkey*, §§ 80-81, and *Unédic v. France*<sup>1</sup>, §§ 48-59.

On the other hand, a municipality (*Ayuntamiento de Mula v. Spain* (dec.)), or part of a municipality which shares in the exercise of public authority (*Municipal Section of Antilly v. France* (dec.)), is not entitled to make an application on the basis of Article 34 (see also *Döşemealtı Belediyesi v. Turkey*\* (dec.)).

*Any group of individuals:* Informal alliances, usually temporary, between several individuals (the “*Belgian linguistic*” case). However, local authorities or any other government bodies cannot lodge applications through the individuals who make them up 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.)).

10. Article 34 does not allow complaints *in abstracto* of a violation of the Convention. Applicants may not complain against a provision of domestic law simply because it appears to contravene the Convention (*Monnat v. Switzerland*, §§ 31-32), nor does the Convention provide for the institution of an *actio popularis* (*Klass and Others v. Germany*, § 33; *The Georgian Labour Party v. Georgia* (dec.); and *Burden v. the United Kingdom* [GC], § 33).

11. **Applications lodged through a representative:** Where applicants choose to be represented rather than lodging the application themselves, Rule 45 § 3 of the Rules of Court 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 *Aliiev v. Georgia*\*, §§ 44-49. On the authenticity of an application, see *Velikova v. Bulgaria*, §§ 48-52.

12. **Abuse of the right of individual application:** With regard to **conduct on the part of an applicant** contrary to the **purpose of the right of application**, see the notion of **abuse of the right of individual application** within the meaning of Article 35 § 3 of the Convention (*Miroļubovs and Others v. Latvia*\*, §§ 62 et seq.).

### 3. Freedom to exercise the right of application

13. 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, and *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).

14. 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

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1. The Court delivers its judgments and decisions in English and/or French, its two official languages. The text of judgments and decisions marked with an asterisk is only available in French.

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).

Consideration must be given to the vulnerability of the applicant and the risk that the authorities may influence him or her (*Jambor 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).

15. Some noteworthy examples:

- as regards interrogation by the authorities concerning the application: *Akdivar and Others v. Turkey* [GC], § 105, and *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;
- 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;
- intimidation and pressuring of an applicant by the authorities in connection with the case before the Court: *Lopata v. Russia*, §§ 154-60.

16. 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; and *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.

#### 4. Obligations of the respondent State

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

17. 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).

18. 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.

19. 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; and *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

20. 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).

In the context of the system of individual application, it is important for States to furnish all the assistance necessary for effective examination of the application. A failure on the government's part to submit such information as is in its hands without a satisfactory explanation may allow inferences to be drawn not only as to the well-foundedness of the allegations (*Maslova and Nalbandov v. Russia*, §§ 120-21) but also with regard to Article 38 of the Convention (lack of access to police custody records: *Timurtaş v. Turkey*, § 66; lack of access to copies of the investigation file: *Imakayeva v. Russia*, § 201). As regards failure to disclose a classified report to the Court, see *Nolan and K. v. Russia*, §§ 56 et seq.

Preventing a lawyer from having access to a client's medical file, which was essential for the purposes of the application in question, was found to constitute hindrance to the exercise of the right of individual application for the purposes of Article 34 (*Boicenco v. Moldova*, § 158). For meetings between a lawyer and an applicant compulsorily detained in a psychiatric hospital, see *Shtukurov v. Russia*, §§ 138 et seq. Compare with a delay by the government in providing certain additional information, which was deemed "regrettable", without however amounting to obstruction of the exercise of the right of individual application under Article 34 (*Öcalan v. Turkey* [GC], § 201).

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.

The Court may find a breach of Article 38 even in the absence of a separate decision on admissibility (Article 29 § 3): see *Enukidze and Girgylani v. Georgia*, § 295.

### (c) Investigations

21. 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).

## B. Victim status

### *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. ...”

22. Under Article 34, only applicants who consider themselves victims of a breach of the Convention can complain to the Court. 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).

#### 1. Notion of “victim”

23. 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). 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).

24. 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** (*Gorraiz Lizarraga and Others v. Spain*, § 38; *Monnat v. Switzerland*, §§ 30-33; *Stukus and Others v. Poland*, § 35; and *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).

#### 2. Direct victim

25. The act or omission in issue must **directly affect** the applicant (*Amuur v. France*, § 36). However, this criterion cannot be applied in a mechanical and inflexible way (*Karner v. Austria*, § 25).

26. On a case-by-case basis the Court has accepted applications from “potential” victims, that is, from persons who could not complain of a direct violation.

27. *Some examples*: the judgment on telephone tapping in Germany (*Klass and Others v. Germany*, § 34); for a case concerning extradition, see *Soering v. the United Kingdom*; for measures restricting the distribution of information on abortion to women of child-bearing age, see *Open Door and Dublin Well Woman v. Ireland*, § 44.

28. However, **suspicion or conjecture** is not enough to establish victim status. As regards the absence of a formal expulsion order, see *Vijayanathan and Pusparajah v. France*, § 46; alleged consequences of a parliamentary report: *The Christian Federation of Jehovah’s*

*Witnesses in France v. France* (dec.); a potential fine on an applicant company: *Senator Lines GmbH v. fifteen Member States of the European Union* (dec.) [GC]; alleged consequences of a judicial ruling concerning a third party in a coma: *Rossi and Others v. Italy\** (dec.). 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. With reference to **domestic legislation**, individuals may contend that a law violates their rights, in the absence of an individual measure of implementation, if it obliges them to either modify their conduct or face prosecution (*Norris v. Ireland*; *Bowman v. the United Kingdom*), or if they are members of a class of people who risk being directly affected by the legislation (*Burden v. the United Kingdom* [GC], § 34; *Johnston and Others v. Ireland*). For a case concerning a country's **Constitution**, see *Sejdić and Finci v. Bosnia and Herzegovina* [GC], § 29.

### 3. Indirect victim

30. The Court may accept an individual application from a person considered an **indirect victim**, where there is a personal and specific link between the direct victim and the applicant.

31. *Examples* include: under Article 2, an application from the victim's wife (*McCann and Others v. the United Kingdom* [GC]), and from a dead man's nephew (*Yaşa v. Turkey*, § 66). Under Article 3, an application from the mother of a man who disappeared while in custody (*Kurt v. Turkey*); however, the brother of a man who disappeared was not considered a victim (*Çakıcı v. Turkey* [GC], §§ 98-99). Under Article 5 § 5, a case concerning the husband of an applicant compulsorily detained in a psychiatric hospital (*Houtman and Meeus v. Belgium\**, § 30). Under Article 6 § 1 (fair trial), see *Grădinar v. Moldova* (impartiality of the courts); *Brudnicka and Others v. Poland*, §§ 26 et seq. (right to defend a deceased spouse's reputation); and *Marie-Louise Loyen and Bruneel v. France\** (length and fairness of proceedings). Under Article 6 § 2, see a case concerning the widow of a defendant who was the victim of a breach of his right to be presumed innocent (*Nölkenbockhoff v. Germany*, § 33). On the basis of Article 10, see *Dalban v. Romania* [GC], § 39, concerning the interests of the applicant's widow. However, shareholders in a company cannot claim to be victims of a violation of the company's rights under Article 1 of Protocol No. 1 (*Agrotexim and Others v. Greece*, §§ 62 and 64), save in exceptional circumstances (*Camberrow MM5 AD v. Bulgaria* (dec.)).

### 4. Death of the victim

32. Applications can be brought only by living persons or on their behalf; a deceased person cannot lodge an application, even through a representative (*Kaya and Polat v. Turkey\** (dec.)). However, the victim's death does not automatically mean that the case is struck out of the Court's list.

33. Generally speaking, the family of the original applicant may pursue the application provided that they have a sufficient interest in so doing, **where the original applicant dies after** the application has been lodged with the Court. For cases concerning heirs or close relatives such as a widow and children, see *Raimondo v. Italy*, § 2, and *Stojkovic v. "the former Yugoslav Republic of Macedonia"*, § 25; for parents, see *X v. France*, § 26; for a different case, see *Malhous v. the Czech Republic* (dec.) [GC]; see also, conversely, the judgment in *Scherer v. Switzerland*, §§ 31-32; for a case concerning a universal legatee not related to the deceased, see *Thévenon v. France* (dec.); see also *Léger v. France* (striking out) [GC], §§ 50-51.

34. The situation is different, however, where the **direct victim died before** the application to the Court (*Fairfield v. the United Kingdom* (dec.)).

For an application concerning **complaints relating to the death of a close relative**, see *Velikova v. Bulgaria* (dec.); for the **disappearance** of a close relative, see *Varnava and Others v. Turkey* [GC], § 112.

For complaints under Article 6, see *Micallef v. Malta* [GC], §§ 48 et seq., and the references cited therein.

As regards close relatives raising complaints under Articles 8 to 11 and Article 3 of Protocol No. 1 in relation to proceedings and facts concerning the deceased, see *Gakiyev and Gakiyeva v. Russia*, §§ 164-68 and the references cited therein. On the subject of **transferable grievances**, see *Sanles Sanles v. Spain* (dec.).

35. Furthermore, the Court has powers to assess whether it is appropriate to continue its examination **for the purpose of protecting human rights** (*Karner v. Austria*, §§ 25 et seq.). These powers are subject to the existence of a question of general interest (*ibid.*, § 27, and *Marie-Louise Loyen and Bruneel v. France\**, § 29). This may arise, in particular, where the application concerns legislation or a legal system or practice in the respondent State (see, *mutatis mutandis*, *Karner v. Austria*, §§ 26 and 28; see also *Léger v. France* (striking out) [GC], § 51).

#### 5. Loss of victim status

36. The applicant must be able to justify his or her status as a victim throughout the proceedings (*Burdov v. Russia*, § 30).

37. Nevertheless, the **mitigation of a sentence or the adoption of a measure favourable to the applicant** by the domestic authorities will deprive the applicant of victim status only if the violation is acknowledged expressly, or at least in substance, and is subsequently redressed (*Scordino v. Italy (no. 1)* [GC], §§ 178 et seq. and § 193). This will depend, among other things, on the nature of the right alleged to have been breached, the reasons given for the decision (*Jensen v. Denmark* (dec.)) and the persistence of the unfavourable consequences for the person concerned after that decision (*Freimanis and Līdums v. Latvia\**, § 68).

38. *Examples*: *Dalban v. Romania* [GC], § 44 (Article 10); *Brumărescu v. Romania* [GC], § 50 (Article 1 of Protocol No. 1 and Article 6). For complaints under Article 6 concerning proceedings which were eventually quashed or followed by an acquittal, see *Oleksy v. Poland* (dec.) (and compare with the complaint concerning the length of those proceedings); compare with *Arat v. Turkey*, § 47, and *Bouglame v. Belgium\** (dec.); for other specific situations, see *Constantinescu v. Romania*, §§ 40-44; *Guisset v. France*, §§ 66-70; *Chevrol v. France*, §§ 30 et seq.; *Moskovets v. Russia*, § 50 (detention); *Moon v. France\**, §§ 29 et seq. (fine); *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).

39. 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).

40. Whether an individual has victim status 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.), and *Scordino v. Italy (no. 1)* [GC], § 202; see also *Jensen and Rasmussen v. Denmark* (dec.), and *Gäfgen v. Germany* [GC], §§ 118 and 119).

41. *Precedents*:

On the appropriateness of measures taken by the domestic authorities in the context of Article 2 of the Convention, see *Nikolova and Velichkova v. Bulgaria*, §§ 49-64.

As regards Article 3 of the Convention, see *Gäfgen v. Germany* [GC], §§ 115-29 and *Kopylov v. Russia*, § 150. Regarding allegations of a breach of Article 3 on account of conditions of detention, see *Shilbergs v. Russia*, §§ 66-79. See also *Ciorap v. Moldova (no. 2)*, §§ 23-25, where the Court found that the applicant was still a victim within the meaning of Article 34 of the Convention since the compensation awarded by the domestic court was considerably lower than the minimum generally awarded in Strasbourg in cases where there has been a violation of Article 3.

Under Article 6 § 1 (length of proceedings), see *Scordino v. Italy (no. 1)* [GC], §§ 182-207; *Cocchiarella v. Italy* [GC], §§ 84-107; and *Delle Cave and Corrado v. Italy*, §§ 26 et seq. For a delay in enforcing a final judicial decision, see *Kudić v. Bosnia and Herzegovina*, §§ 7-18, and *Burdov v. Russia (no. 2)*.

42. 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.

43. 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: *Shevanova v. Latvia* (striking out) [GC], §§ 44 et seq.; and after the Chamber judgment: *Sisojeva and Others v. Latvia* (striking out) [GC], § 96).

## I. PROCEDURAL GROUNDS FOR INADMISSIBILITY

### A. Non-exhaustion of domestic remedies

#### *Article 35 § 1 – Admissibility criteria*

“The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.”

44. 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)). As the Court observed in *De Wilde, Ooms and Versyp v. Belgium*, 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).

45. 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).

46. The question has arisen whether a particular remedy was domestic or international. If it is domestic, it will normally need to be exhausted before an application is lodged with the Court. If it is international, 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

47. 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

48. 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 (see *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

49. Applicants must nevertheless 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

50. 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

51. 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

52. 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).

53. 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* (dec.)); 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).

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.) and *Prystavska v. Ukraine* (dec.)).

#### (f) Availability and effectiveness

54. 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).

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* [GC], §§ 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

55. 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

56. 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 Sapmelacat Ry and Others v. Finland* (dec.)), which prove to be relevant (*Sakhnovskiy v. Russia* [GC], §§ 43-44).

57. 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.)).

58. 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.

59. 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 and 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* [GC], §§ 68-75; *Sejdovic v. Italy* [GC], § 55; and *Veriter v. France*\*, § 60).

60. 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).

61. 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

62. 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).

63. 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 (see *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 (*Scoppola v. Italy (no. 2)* [GC], § 126); Article 8 (*A, B and C v. Ireland* [GC], § 155); and Article 13 (*Sürmeli v. Germany* [GC], § 78, and *M.S.S. v. Belgium and Greece* [GC], § 336).

#### 6. Creation of new remedies

64. 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 (see *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.); *Andrašik and Others v. Slovakia* (dec.); *Nogolica v. Croatia* (dec.); *Brusco v. Italy* (dec.); *Korenjak v. Slovenia* (dec.), §§ 66-71); or concerning a new

compensatory remedy in respect of interferences with property rights (*Charzyński v. Poland* (dec.) and *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); 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, see *Depauw v. Belgium\** (dec.), and more generally *McFarlane v. Ireland* [GC], § 117; for a remedy newly introduced after a pilot judgment: *Fakhretdinov and Others v. Russia* (dec.), §§ 36-44; and regarding a departure from domestic case-law: *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).

65. 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, 129 and 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 set up a new remedy, the Court has ascertained whether that remedy is effective (for example, *Robert Lesjak v. Slovenia*, §§ 34-55; *Demopoulos and Others v. Turkey* (dec.) [GC], § 87). Should this be so, the Court has held that other applicants in similar cases were required to use 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 recent 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*

“The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.”

#### 1. Purpose of the rule

66. The purpose of the six-month rule is to promote security of the law, ensure that cases raising issues under the Convention are examined within a reasonable time, and protect the authorities and other persons concerned from being in a situation of uncertainty for a long period of time (*P.M. v. the United Kingdom* (dec.)).

67. This rule also provides the prospective applicant with sufficient time to consider whether to lodge an application and, if so, to decide on the specific complaints and arguments to be raised (*O’Loughlin and Others v. the United Kingdom* (dec.)), and facilitates the establishment of facts in a case, the passage of time rendering problematic any fair examination of the issues raised (*Nee v. Ireland* (dec.)).

68. It marks out the temporal limits of supervision carried out by the Court and signals to both individuals and State authorities the period beyond which such supervision is no longer possible (*İpek v. Turkey* (dec.); *Di Giorgio and Others v. Italy\** (dec.)).

69. It is not open to the Court to set aside the application of the six-month rule (for example in the absence of observations from a government on that question) (*Belaousof and Others v. Greece\**, § 38).

70. 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).

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

##### (a) Final decision

71. 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.)).

72. 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.)).

73. 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.)).

74. 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

75. 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.)).

76. 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.)).

#### (c) Service of the decision

77. **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).

78. **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.)).

#### (d) No service of the decision

79. 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).<sup>80</sup> The applicant or his/her lawyer must show due diligence in obtaining a copy of the decision deposited with the court’s registry (*Ölmez v. Turkey\** (dec.)).

#### (e) No remedy available

81. 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).

82. Where an applicant avails himself 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 (*Varnava and Others v. Turkey* [GC], § 158).

**(f) Calculation of the six-month period**

83. Time starts to run on the date following the date on which the final decision has been pronounced in public, or on which the applicant or his representative was informed of it, and expires six calendar months later, regardless of the actual duration of those calendar months (*Otto v. Germany* (dec.)). 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.); *Büyükdere and Others v. Turkey\**, § 10).

84. 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.)).

**(g) Continuing situation**

85. 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).

86. Where the alleged violation constitutes a continuing situation against which no domestic remedy is available, the six-month period starts to run from the end of the continuing situation (*Ülke v. Turkey\** (dec.)). As long as the situation continues, the six-month rule is not applicable (*Iordache v. Romania\**, § 50). See also *Varnava and Others v. Turkey* [GC], §§ 161 and seq.

**3. Date of introduction of an application<sup>2</sup>****(a) First letter**

87. According to the established practice of the Convention institutions and Rule 47 § 5 of the Rules of Court, the date of introduction of the application shall as a general rule be considered to be the date of the first communication from the applicant setting out – even summarily – the object of the application, on condition that a duly completed application form has been submitted within the time-limit fixed by the Court (*Kemevuako v. the Netherlands* (dec.)).

88. The date of the postmark recording the date on which the application was sent is the date considered as the date of introduction, and not the date stamped on the application indicating receipt (*Kipritci v. Turkey\**, § 18). For special circumstances that may justify a different approach, see *Bulinwar OOD and Hrusanov v. Bulgaria\**, §§ 30 and seq.

**(b) Difference between the date of writing and the date of posting**

89. In the absence of any explanation for an interval of more than one day between the date on which the letter was written and the date on which it was posted, the latter is to be regarded as the date of introduction of an application (*Arslan v. Turkey* (dec.); *Růžičková v. the Czech Republic\** (dec.)).

This rule is also applicable to the question as to whether the original application form was dispatched within the requisite eight-week period (*Kemevuako v. the Netherlands* (dec.), § 24); and for dispatch by fax (*Otto v. Germany* (dec.)).

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2. See the Rules of Court and the Practice Direction on the Institution of Proceedings.



**(c) Dispatch by fax**

90. It is insufficient to send the application form only by fax without providing the Court with the original within the requisite time-limit (*Kemevuako v. the Netherlands* (dec.), §§ 22 et seq).

**(d) Interval after the first communication**

91. It would be contrary to the spirit and aim of the six-month rule if, by any initial communication, an application could set into motion the proceedings under the Convention and then remain inactive for an unexplained and unlimited length of time. Applicants must therefore pursue their applications with reasonable expedition, after any initial introductory contact (*P.M. v. the United Kingdom* (dec.)). A failure to comply with the eight-week period (see Rule 47 § 5 of the Rules of Court and paragraph 4 of the Practice Direction on the Institution of Proceedings) will lead the Court to consider that the date of introduction is that of the submission of the completed application form (*Kemevuako v. the Netherlands* (dec.), §§ 22-24).

**(e) Characterisation of a complaint**

92. 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**

93. 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.)).

94. 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.)).

95. 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.)).

96. 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.)).

**4. Examples****(a) Applicability of time constraints to procedural obligation under Article 2 of the Convention**

97. Where **death** has occurred, applicant relatives are expected to take steps to keep track of the investigation's progress, or lack thereof, and to lodge their applications with due expedition once they are, or should have become, aware of the lack of any effective criminal investigation (*Varnava and Others v. Turkey* [GC], §§ 158 and 162).

98. In **disappearance** cases it is indispensable that the relatives of the missing person do not delay unduly in bringing a complaint about the ineffectiveness or lack of such investigation before the Court. Where disappearances are concerned, applicants cannot wait

indefinitely before coming to Strasbourg. They must demonstrate a certain amount of diligence and initiative and introduce their complaints without undue delay (*ibid.* [GC], § 165, and on the delay §§ 162-66).

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

99. 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).

### 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>3</sup>”

#### 1. Anonymous application

100. An application to the European Court of Human Rights **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.

101. 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 the National Federation of Nurses v. France* (dec.)).

#### 2. Non-anonymous application

102. **An unsigned application form** containing all personal details sufficient to eliminate any doubt as to the identity of the applicant and followed by correspondence duly signed by the applicant’s representative is not anonymous (*Kuznetsova v. Russia* (dec.)).

103. **Application introduced 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 *Shamayev and Others v. Georgia and Russia*, § 275.

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3. An anonymous application within the meaning of Article 35 § 2 (a) of the Convention is to be distinguished from the question of non-disclosure 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 Rules 33 and 47 § 3 of the Rules of Court and the practice directions annexed thereto).

104. An application introduced **by a church body or an association with religious and philosophical objects** the identity of whose members is not disclosed is not rejected as being anonymous (Articles 9, 10 and 11 of the Convention): see *Omkarananda and the Divine Light Zentrum v. Switzerland* (dec.).

## D. Redundant application

### *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 ...<sup>4</sup>”

105. An application is considered as being “substantially the same” where the parties, the complaints and the facts are identical (*Pauger v. Austria* (dec.); *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], § 63).

Where this is found to be the case, the application will be declared inadmissible.

### 1. Identical applicants

106. Applications concerning the same subject matter but introduced jointly by individuals and by an association that has submitted a communication to the United Nations Human Rights Committee cannot be regarded as having been submitted by the same complainants (*Folgerø and Others v. Norway* (dec.)) or a communication submitted to the Office of the United Nations High Commissioner for Human Rights by a non-governmental organisation and not by the applicants: *Celniku v. Greece\**, §§ 36-41. The same applies to a request submitted to the Working Group on Arbitrary Detention by a non-governmental organisation and a request submitted by the applicants (*Illiu and Others v. Belgium\** (dec.)).

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

### 2. Identical complaints

108. The concept of complaint is defined as the purpose or legal basis of the claim.

It is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on (*Guerra and Others v. Italy*, § 44; *Scoppola v. Italy (no. 2)* [GC], § 54; and *Previti v. Italy\** (dec.), § 293).

109. The Court’s analysis is carried out complaint by complaint. Only complaints that are substantially the same as those examined in respect of another application will be rejected under Article 35 § 2 (*Dinç v. Turkey\** (dec.)).

110. Where the applicant repeats complaints that he or she has already raised in a previous application, the application will be declared inadmissible (*X v. Federal Republic of Germany\** (dec.); *Duclos v. France\** (dec.); *Clinique Mozart Sarl v. France\** (dec.); *Rupa v. Romania\** (dec.), § 52; and *Coscodar v. Romania\** (dec.), § 27).

111. Whereas the subject matter concerned a different apartment and a different tenant in the same apartment block, a new application raising essentially the same issues as those of a case previously declared inadmissible, submitted by the same applicant and repeating the

4. This provision formerly appeared under Article 27.

complaints previously formulated without adducing any new evidence is substantially the same as the initial application and therefore inadmissible (*X v. Federal Republic of Germany*\* (dec.)).

112. The following are examples of applications that are not substantially the same:

- a dispute relating to the conditions of an applicant’s detention in police custody is not the same as one concerning his conviction by the National Security Court or one relating to the forfeiture of parliamentary office following the dissolution of the party of which the applicants were members (*Sadak v. Turkey*\*, §§ 32-33);
- a dispute relating to the conditions of an applicant’s detention in police custody and his conviction by the National Security Court is not the same as one concerning the forfeiture of parliamentary office (*Yurttas v. Turkey*\*, §§ 36-37).

113. The Court is master of the characterisation to be given in law to the facts and does not consider itself bound by the characterisation given by an applicant or a government. Accordingly, an application lodged for the purposes of having re-examined, under different provisions of the Convention, facts that were at the origin of another application concerns the same complaint and must therefore be rejected as inadmissible (*Previti v. Italy*\* (dec.), §§ 293-94).

### 3. Identical facts

114. The fact that a complaint is identical to another one does not in itself prevent the application from being declared admissible if new information is adduced.

115. Where the applicant submits new information, the application will not be essentially the same as a previous application: see *Chappex v. Switzerland*\* (dec.), and *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).

116. Otherwise, the application will be declared inadmissible (*Hokkanen v. Finland* (dec.); *Adesina v. France* (dec.); *Bernardet v. France*\* (dec.); *Gennari v. Italy*\* (dec.); and *Manuel v. Portugal*\* (dec.)).

## E. Application already submitted to another international body

### *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.”

117. The purpose of this provision is to avoid a plurality of international proceedings relating to the same cases.

118. The conditions of admissibility laid down by this paragraph are cumulative:

- the application must not be substantially the same as another application, that is, the facts, parties and complaints must not be identical (see point **I.D.** on redundant applications), and
- the application must not have already been submitted to another procedure of international investigation or settlement.

119. Where the Court finds, on account of the existence of a decision given on the merits at the time at which it examines the case, that the conditions laid down in Article 35 § 2 (b) are met, it must declare inadmissible an application that has already been examined by another international body.

120. In order to fall within the scope of Article 35 § 2 (b), the case in question must present characteristics that enable it to be regarded as an individual application within the meaning of Article 34.

### 1. *The concept of procedure*

#### (a) **The procedure must be public**

121. The Committee on Human Rights of the Inter-Parliamentary Union, which is a private association, constitutes a non-governmental organisation, whereas Article 27 of the Convention (now Article 35 § 2) refers to intergovernmental institutions and procedures (*Lukanov v. Bulgaria* (dec.)).

#### (b) **The procedure must be international**

122. The Human Rights Chamber of Bosnia and Herzegovina is not an international procedure, despite the fact that it was set up by an international treaty and the fact that several of its members are international members (*Jeličić v. Bosnia and Herzegovina* (dec.)).

#### (c) **The procedure must be independent**

123. Such is the case of the United Nations Working Group on Arbitrary Detention because it is composed of independent experts who are eminent persons specialised in human rights (*Peraldi v. France*\* (dec.)).

124. However, the “1503 procedure” of the United Nations Committee on Human Rights is essentially an inter-governmental body composed of State representatives; it is not “another procedure of international investigation” (*Mikolenko v. Estonia* (dec.)).

#### (d) **The procedure must be judicial**

125. The application must be brought before a judicial or quasi-judicial body (*Zagaria v. Italy*\* (dec.)).

126. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), whose role is a preventive one, is not such a body. The information gathered by the CPT is of a confidential nature. Individuals do not have a right to participate in the procedure or to be informed of the recommendations that may be adopted by the committee unless these are made public (*Zagaria v. Italy*\* (dec.); *Annunziata v. Italy*\* (dec.); *Genovese v. Italy*\* (dec.); and *Stolder v. Italy*\*, §§ 16-19).

### 2. *Procedural guarantees*

#### (a) **Adversarial proceedings**

127. Persons submitting communications under the 1503 procedure before the United Nations High Commissioner for Human Rights cannot participate in the procedure, which is confidential. They are not informed of the measures that may be taken by the United Nations, unless these are made public. This procedure cannot therefore be regarded in another

procedure as an individual application within the meaning of Article 34 (*Celniku v. Greece\**, §§ 39-41).

**(b) Requirements imposed on the judicial body**

128. The decisions of the procedure in question must be reasoned, served on the parties and published (*Peraldi v. France\** (dec.)).

*3. The role of the procedure*

129. An institution having a preventive role cannot be regarded as an international procedure (*Zagaria v. Italy\** (dec.); *De Pace v. Italy\**; or *Gallo v. Italy\** (dec.) (concerning the CPT)). Furthermore, the information gathered by this body is confidential; individuals do not have a right to participate in the proceedings or to be informed of the recommendations of this institution unless these are made public.

130. The same is true of a body that examines a general situation (*Mikolenko v. Estonia* (dec.)), or of a special rapporteur assigned to draw up a report on the human rights of detainees (*Yağmurdereli v. Turkey\** (dec.)).

The lodging of a complaint by an individual with the European Commission against legislation or a practice attributable to a member State does not constitute a procedure of international investigation or settlement. It affords the Commission an opportunity to bring “infringement proceedings” or “pre-litigation proceedings” – the sole purpose of which is to secure voluntary compliance by the member State with the requirements of European Union law, or an action for breach of Community law – the result of which is not to settle an individual situation. A complaint of that nature cannot be treated as akin to an individual application under Article 34 of the Convention, from either the procedural standpoint or that of its potential effects. Accordingly, the Commission’s procedure cannot be described as one “of international investigation or settlement” (*Karoussiotis v. Portugal\**, §§ 62-77).

**(a) The procedure must be able to determine responsibilities**

131. This is not the case:

- of the Committee on Missing Persons in Cyprus, because Turkey is not a party to the proceedings before that Committee and the latter cannot attribute responsibility for the deaths of any missing persons (*Varnava and Others v. Turkey* (dec.));
- of the United Nations Commission on Human Rights’ Working Group on Enforced or Involuntary Disappearances, because it cannot attribute responsibility for the deaths of any missing persons or make findings as to their cause (*Malsagova and Others v. Russia\** (dec.)).

132. However, the Working Group on Arbitrary Detention, which can make recommendations allowing State responsibility to be attributed regarding cases of arbitrary detention, can be regarded as a procedure of international investigation (*Peraldi v. France\** (dec.)).

**(b) The procedure must have the aim of putting an end to the violation**

133. The purpose of the recommendations of the Working Group on Arbitrary Detention, which are sent to the governments, is to have the effect of putting an end to the situations complained of (*Peraldi v. France\** (dec.); *Illiu and Others v. Belgium\** (dec.)).

134. The victims of a violation must be able to obtain redress. This is not the case of the United Nations Commission on Human Rights (*Mikolenko v. Estonia* (dec.)) or the Working Group on Enforced or Involuntary Disappearances (*Malsagova and Others v. Russia* (dec.)).

#### (c) The effectiveness of the procedure

135. The decision must be published: before the CPT, individuals do not have a right to be informed of the recommendations that may be adopted, unless these are made public (*Zagaria v. Italy*\* (dec.), and *De Pace v. Italy*\*).

136. Under the procedure before the United Nations Working Group on Arbitrary Detention, opinions, together with recommendations, sent to the government concerned can be annexed to the annual report presented to the Commission on Human Rights, which can then make recommendations to the General Assembly of the United Nations; on account of its potential effects, this procedure can be regarded as an individual application (*Peraldi v. France*\* (dec.)).

137. The following are thus regarded as “another international procedure”:

- the United Nations Human Rights Committee (*Calcerrada Fornieles and Cabeza Mato v. Spain* (dec.); *Pauger v. Austria* (dec.); and *C.W. v. Finland* (dec.));
- the Committee on Freedom of Association of the International Labour Organisation (*Cereceda Martín and Others v. Spain* (dec.));
- the United Nations Working Group on Arbitrary Detention (*Peraldi v. France*\* (dec.)).

## F. 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 incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded or an abuse of the right of individual application; ...”

#### 1. General definition

138. 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).

139. 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 (*Miroļubovs and Others v. Latvia*\*, § 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*

140. 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.); and *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, and *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 – 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.), and *Predescu v. Romania*, §§ 25-27).

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

## 3. *Offensive language*

142. 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.); and *Stamoulakatos v. the United Kingdom* (dec.)).

143. 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.); 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*

144. 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 (*Mirošubovs and Others v. Latvia*\*, § 66; *Hadrabová and Others v. the Czech Republic* (dec.); and *Popov v. Moldova*, § 48).

145. 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 (*Miroļubovs and Others v. Latvia\**, § 68). It is thus this type of conduct, where a degree of seriousness is involved, that is an abuse of the right of application.

146. 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*). For concrete examples of the application of this principle, see, for an example where the application was rejected, *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*

147. 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* (dec.), and *Philis v. Greece* (dec.)).

148. The Court may also find that there has been an abuse of the right of application where the application manifestly lacks any real purpose and/or concerns a petty sum of money. In *Bock v. Germany* (dec.) the applicant complained of the length of civil proceedings that he had instituted for reimbursement of the cost of a dietary supplement prescribed by his doctor, namely 7.99 euros. The Court observed that it was overloaded with a very large number of pending applications raising serious human rights issues, and that there was a disproportion between the triviality of the facts and the use of the protection system set up by the Convention having regard to the pettiness of the amount involved (including when compared with the applicant's salary) and to the fact that the proceedings concerned not a pharmaceutical product, but a dietary supplement. It also pointed out that proceedings such as these contributed to the congestion of the courts at the domestic level and thus to one of the causes of the excessive length of proceedings. The application was therefore rejected as an abuse of the right of application. 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*

149. 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* (dec.), and also *Khadzhaliyev 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

150. 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

151. 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.

152. 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).

153. 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).

154. 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 (*Mykhaylenky and Others v. Ukraine*, §§ 43-45, and *Cooperativa Agricola Slobozia-Hanesei v. Moldova*, § 19).

155. 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.); and *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* (dec.); and *Durini v. Italy* (dec.));
- if the application is brought against a **State that has not ratified** the Convention (*E.S. v. Federal Republic of Germany* (dec.)), 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* (dec.); and *De Saedeleer v. Belgium\**, § 68).

## 2. Jurisdiction

156. 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 16 Other Contracting States* (dec.) [GC], § 35; *Ilaşcu and Others v. Moldova and Russia* [GC], § 300; and *Weber and Saravia v. Germany* (dec.)).

157. 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* (*Assanidzé v. Georgia* [GC], §§ 144 et seq.; *Hussein v. Albania and 20 Other Contracting States* (dec.); *Isaak and Others v. Turkey* (dec.); and *Stephens v. Malta (no. 1)*, § 45).

## 3. Responsibility and imputability

158. 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; and *Loizidou v. Turkey* (preliminary objections), § 62). However, this will occur only exceptionally (*Ilaşcu and Others v. Moldova and Russia* [GC], § 314, and *Banković and Others v. Belgium and 16 Other Contracting States* (dec.) [GC], § 71), namely where a Contracting State is in effective control over an area or has at the very least a decisive influence over it (*Ilaşcu and Others v. Moldova and Russia* [GC], §§ 314-316 and 392; *Medvedyev and Others v. France* [GC], §§ 63-64; and, for the concept of “overall control”, *Ilaşcu and Others v. Moldova and Russia* [GC], §§ 315-16; see also *Banković and Others v. Belgium and 16 Other Contracting States* [GC] (dec.), §§ 67 et seq., and §§ 79-82; *Cyprus v. Turkey* [GC], §§ 75-81; *Loizidou v. Turkey* (preliminary objections), § 52; and *Marković and Others v. Italy* [GC], § 54).

159. 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* (dec.); *Öcalan v. Turkey* [GC], § 91; and *Medvedyev and Others v. France* [GC], §§ 66-67).

With regard to acts taking place in a United Nations buffer zone, see *Isaak and Others v. Turkey* (dec.).

160. 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* (dec.)), but regard must be had to the State's positive obligations under the Convention (*Ilaşcu and Others v. Moldova and Russia* [GC], §§ 312-13, §§ 333 et seq.). See also *Stephens v. Cyprus, Turkey and the United Nations* (dec.).

161. 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.), and *Blagojević 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.

162. 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.); and *Manoilescu and Dobrescu v. Romania and Russia* (dec.), §§ 99-111).

163. 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, *Siliadin v. France*, §§ 77-81, and *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).

164. 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*

165. 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 and Behrami v. France and Saramati v. France, Germany and Norway* (dec.) [GC], §§ 146-52).

166. 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.) and *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.

167. 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.)).

168. 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 (*Boivin v. 34 Member States of the Council of Europe* (dec.) – individual labour dispute with Eurocontrol; *Lopez Cifuentes v. Spain*\* (dec.) – disciplinary proceedings within the International Olive Council, §§ 28-29; and *Beygo v. 46 Member States of the Council of Europe*\* (dec.) – disciplinary proceedings within the Council of Europe). 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 Communities, 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.)).

169. 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, and compare with *Behrami and 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 Communities (*Matthews v. the United Kingdom* [GC]);
- enforcement against the applicant of a French law implementing a Community Directive (*Cantoni v. France* [GC]);
- denial of access to the German courts (*Beer and Regan v. Germany* [GC], and *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 Community law (*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*) (a Community 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 Communities (*Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v. the Netherlands* (dec.)).

170. 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, and *Matthews v. the United Kingdom* [GC], §§ 26-35).

171. As regards applications brought directly against institutions of the European Community, 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* (dec.)), alternatively: their member States (a) jointly and (b) severally; and the other references cited in *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, § 152; for a recent authority, *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.)).

172. 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

173. 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, and *Drozd and Janousek v. France and Spain*, §§ 84-90).

174. 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.

175. 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, and *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 16 Other Contracting States* (dec.) [GC], § 75).

176. 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.)).

177. 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. Federal Republic of Germany* (dec.), and *W.M. v. Denmark* (dec.), § 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 16 Other Contracting States* (dec.) [GC], § 73).

178. 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 16 Other Contracting States* (dec.) [GC], § 35; *Ilaşcu and Others v. Moldova and Russia* [GC], § 300; and *Weber and Saravia v. Germany* (dec.)).

## 2. Specific cases

179. As regards applications concerning **dependent territories**, if the Contracting State has not made a **declaration under Article 56** (former Article 63) 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* (dec.); and *Yonghong v. Portugal* (dec.)). 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).

180. 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* (dec.)).

181. 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

182. 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; and *Varnava and Others v. Turkey* [GC], § 130).

183. 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).

184. 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).

185. 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

186. 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).

187. 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* (dec.), and *Stamoulakatos v. Greece (no. 1)*, § 32).

188. 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* (dec.)).

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<sup>5</sup> (*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

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5. "Where a High Contracting Party had made a declaration recognising the competence of the Commission or the jurisdiction of the Court under former Article 25 or 46 of the Convention with respect to matters arising after or based on facts occurring subsequent to any such declaration, this limitation shall remain valid for the jurisdiction of the Court under this Protocol."



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; and *Varnava and Others v. Turkey* [GC], § 133).

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

189. 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, and *Varnava and Others v. Turkey* [GC], § 131).

190. 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).

191. 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, and *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.)).

192. 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.)).

193. 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: see *Kerimov v. Azerbaijan* (dec.)).

194. 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

195. 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*\* (dec.)).

196. 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-Czapska v. Poland* [GC], §§ 152-53).

197. **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.

198. 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).

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

199. 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**

200. 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 (*Šilih v. Slovenia* [GC], §§ 161-63). Firstly, only procedural acts and/or omissions occurring after the critical date can fall within the Court’s temporal jurisdiction (§ 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, 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. 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 (§ 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.).

201. 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.

**(d) Consideration of prior facts**

202. 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**

203. A special situation results from complaints concerning the **length of judicial proceedings** (Article 6 § 1) 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, and *Foti and Others v. Italy*, § 53).

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

204. 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).

205. 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**

206. 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.”

207. 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. Federal Republic of Germany* (dec.)), the right to self-determination (*X v. the Netherlands* (dec.)), and the right of foreign nationals to enter and reside in a

Contracting State (*Peñafigiel Salgado v. Spain*\* (dec.)), since those rights do not, as such, feature among the rights and freedoms guaranteed by the Convention.

208. 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).

209. 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).

210. **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*).

211. 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.*, and *Lyons v. the United Kingdom* (dec.)).

212. 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 – Right to a fair trial**

“1. In the determination of his **civil rights and obligations** ... everyone is entitled to a fair ... hearing by ... [a] tribunal ...”

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

213. 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).

214. 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).

215. 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.

**(b) The term “dispute”**

216. 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.*, and *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).

217. 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 (*Skorobogatykh 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).

218. 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 (*Bentham v. the Netherlands*, § 32). The dispute may also concern matters of fact.

219. 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, and *Athanassoglou and Others v. Switzerland* [GC], §§ 46-55; see, most recently, *Sdruzeni Jihoceske Matky v. the Czech Republic\** (dec.); for a case concerning limited noise pollution at a factory, see *Zapletal v. the Czech Republic\** (dec.), or the hypothetical environmental impact of a plant for treatment of mining waste: *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: see *Revel and Mora v. France\** (dec.)).

220. 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’Erablière A.S.B.L. v. Belgium\**, §§ 28-30).

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

221. Article 6 does not lay down any specific content for a “right” in Contracting States’ domestic law, and in principle the Court must refer to domestic law in determining whether a right exists. 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).

222. The right in question has to have a legal basis in domestic law. The Court cannot, by way of interpretation of Article 6 § 1, create a substantive civil right which has no legal basis in the State concerned (*Fayed v. the United Kingdom*, § 65).

223. However, whether a person has an actionable domestic claim may depend not only on the content, properly speaking, 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. In the latter category of cases, Article 6 § 1 of the Convention may apply (*Al-Adsani v. the United Kingdom* [GC], §§ 46-47, and *Fogarty v. the United Kingdom* [GC], § 25). In principle, though, Article 6 cannot have any application to substantive limitations on a right existing under domestic law (*Roche v. the United Kingdom* [GC], § 119).

224. 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).

225. 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.), and *Andronikashvili v. Georgia* (dec.)).

226. Applicants must also have a tenable claim to the rights recognised in domestic law. The Court has accepted that associations also qualify for protection under Article 6 § 1 if they seek recognition of specific rights and interests of their members (*Gorraiz Lizarraga and Others v. Spain*, § 45) or even of particular rights to which they have a claim as legal persons (such as the right of the “public” to information and to take part in decisions regarding the environment: see *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’Erablière A.S.B.L. v. Belgium*\*).

227. Where legislation lays down conditions for admission to an occupation or profession, a candidate who satisfies them has a right to be admitted to the 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 (*Chevrol 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 eventual finding was that the applicant did not meet the legal requirements (right to continue practising the medical specialisation which the applicant had taken up abroad: see *Kök v. Turkey*\*, § 37).

**(d) “Civil” nature of the right**

228. 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).

229. 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**

230. 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*), 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 (*Alatukkala 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 *I.T.C. Ltd v. Malta* (dec.)).

231. 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, and *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.

232. 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**

233. 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).

234. 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 (a secretary and switchboard operator in the Polish embassy: see *Cudak v. Lithuania* [GC], §§ 44-47), 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 other references cited therein), and to proceedings concerning the professional career of a customs officer (right to apply for an internal promotion: see *Fiume v. Italy*\*, §§ 33-36).

235. 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 (*Paksas 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.

236. 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 (see *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 (*Helmerts 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, and *Užkauskas v. Lithuania*, §§ 32-40); the right to be a member of an association (*Sakellariopoulos 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: see *APEH Üldzötteinek 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

237. 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).

238. 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 (*Ferrazzini v. Italy* [GC], § 29). Similarly excluded are summary injunction proceedings concerning customs duties or charges (*Emesa Sugar N.V. v. the Netherlands* (dec.)).

239. 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: see *Maaouia v. France* [GC] § 38; extradition: *Peñafiel Salgado v. Spain\** (dec.), and *Mamatkulov and Askarov v. Turkey* [GC], §§ 81-83; and an 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: see *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 (*Jurismic and Collegium Mehrerau v. Austria*, §§ 54-62).

240. 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.)).

241. Lastly, political rights such as the right to stand for election and retain one's seat (electoral dispute: see *Pierre-Bloch v. France*, § 50), 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 (for a case concerning the dissolution of a party, see *Refah Partisi (The Welfare Party) and Others v. Turkey*\* (dec.)) 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 not containing information relating to the applicant itself fell outside the scope of Article 6 § 1 (*Geraguyun Khorhurd Patgamavorakan Akumb v. Armenia* (dec.)).

In addition, the Court recently 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

242. 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).

243. 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).

244. 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, and *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.)).

245. 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). 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). However, there are also very exceptional cases in which a procedure denoted in the domestic legal system as an application for the reopening of proceedings was the only legal means of seeking redress in respect of civil claims, and its outcome was thus held to be decisive for the applicant's "civil rights and obligations" (*Melis v. Greece\**, §§ 19-20).

## 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."

#### (a) General principles

246. 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).

247. 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, *Deweert v. Belgium*, §§ 42 and 46, and *Eckle v. Germany*, § 73). Thus, for example, statements which a person made during a road check, without his having been informed of the reason why he had been questioned or of the nature and cause of any suspicion against him or told that his statements could be used against him, "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).

248. 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).

249. 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.

250. 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.

251. 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 proceedings are instituted by a public body with statutory powers of enforcement (*Benham v. the United Kingdom* [GC], § 56);
- whether the legal rule has a punitive or deterrent purpose (*Öztürk v. Germany*, § 53, and *Bendenoun v. France*, § 47);
- whether the imposition of any penalty is dependent upon a finding of guilt (*Benham v. the United Kingdom* [GC], § 56);
- how comparable procedures are classified in other Council of Europe member States (*Öztürk v. Germany*, § 53);
- the fact that an offence does not give rise to a criminal record may be significant but is not decisive, since it is usually a reflection of the domestic classification (*Ravnsborg v. Sweden*, § 38).

252. 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, and *Demicoli v. Malta*, § 34).

253. 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 (*Öztürk v. Germany*, § 54, and *Lutz v. Germany*, § 55). 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).

254. 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.

#### (b) Application of the general principles

##### Disciplinary proceedings

255. **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.*).

256. Article 6 of the Convention is clearly applicable to **court-martial proceedings** (*Findlay v. the United Kingdom*, § 69).

257. With regard to **professional disciplinary proceedings**, the question remains open since the Court has considered it unnecessary to give a ruling on the matter, having concluded that the proceedings fell within the civil head (*Albert and Le Compte v. Belgium*, § 30). 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 (*Mouillet v. France* (dec.)).

258. 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, where Article 6 was held not to be applicable to

disciplinary proceedings resulting in a punishment of seven days' solitary confinement and restrictions on the applicant's movement inside the prison for three months, without any extension of his prison term).

259. However, proceedings concerning the prison system as such do not fall within the ambit of the criminal head of Article 6. 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).

260. 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, and *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).

261. 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).

262. 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).

### **Administrative, tax, customs and competition-law proceedings**

263. The following **administrative offences** can 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*; and *Malige v. France*);
- minor offences of causing a nuisance (*Lauko v. Slovakia*);
- offences against social security legislation (failure to declare employment, despite the modest nature of the fine imposed: see *Hüseyin Turan v. Turkey\**, §§ 18-21).

264. By contrast, the Court does not consider Article 6 applicable to a precautionary measure such as the immediate withdrawal of a driving licence (*Escoubet v. Belgium* [GC]).

265. 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).

266. 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.)).

267. Article 6 under its criminal head has been held to apply to **customs law** (*Salabiaku v. France*), **competition law** (*Société Stenuit v. France*) and penalties imposed by a court with jurisdiction in **financial matters** (*Guisset v. France*).

### Political issues

268. **Electoral sanctions**, such as a disqualification from standing for election and an obligation to pay the Treasury a sum equal to the amount of excess election expenditure, do not fall under the criminal head of Article 6 (*Pierre-Bloch v. France*, §§ 53-60).

269. **Proceedings relating to the dissolution of political parties** concern political rights and accordingly do not fall within the ambit of Article 6 § 1 (*Refah Partisi (the Welfare Party) and Others v. Turkey\** (dec.)).

270. Article 6 has been held not to apply to **commissions of inquiry set up by Parliament**, since these bodies investigate matters of general and public interest (*Montera v. Italy\** (dec.)).

271. With regard to **lustration proceedings**, the Court recently concluded 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.)).

272. Article 6 has been held not to apply in its criminal aspect to impeachment proceedings against a country’s president for a gross violation of the Constitution (*Paksas v. Lithuania* [GC], §§ 66-67).

### Expulsion and extradition

273. 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** (*Peñafoel Salgado v. Spain\** (dec.)) or proceedings relating to the European arrest warrant (*Monedero Angora v. Spain\** (dec.)).

274. Conversely, however, the replacement of a prison sentence by deportation and exclusion from national territory for ten years, where the person concerned was not given the opportunity to state his views and no circumstances were taken into account other than the quasi-automatic application of a new provision of criminal law, must 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).

### Different stages of criminal proceedings, ancillary proceedings and subsequent remedies

275. Measures adopted for the **prevention of disorder or crime** are not covered by the guarantees in Article 6 (special supervision by the police: see *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.)).

276. Article 6 may be applicable to cases of compulsion to give evidence even in the absence of any other proceedings, or where an applicant is acquitted in the underlying proceedings (for example, where a person registered as the owner of a vehicle is fined for refusing to supply information as to the identity of a driver alleged to have committed a road-

traffic offence, even though the underlying proceedings were never pursued: see *O'Halloran and Francis v. the United Kingdom* [GC], § 35).

277. 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).

278. 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; and forfeiture of gold coins in *AGOSI v. the United Kingdom*, §§ 65-66). However, an administrative warning and the confiscation of a publication (inciting ethnic hatred), in view of their deterrent and punitive purpose and the severity of the punishment, belong to the criminal sphere (*Balsytė-Lideikienė v. Lithuania*, § 61).

279. 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). However, the manner in which these guarantees apply during the preliminary investigation depends on the special features of the proceedings and the circumstances of the case (*John Murray v. the United Kingdom*, § 62).

280. 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).

281. As regards the staying of criminal proceedings on account of parliamentary immunity, while there is no right under Article 6 of the Convention to a particular outcome of criminal proceedings or, as a result, to a formal conviction or acquittal following the laying of criminal charges, there is indisputably a right to have one's case heard by a court within a reasonable time once the judicial process has been set in motion. Accordingly, the inability of a member of parliament to have his parliamentary immunity lifted in order to defend himself in criminal proceedings that have been stayed until the expiry of his term of office falls within the scope of Article 6 § 1 (*Kart v. Turkey* [GC], §§ 67-70).

282. 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: see *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; see, in relation to Article 7, the seizure of land on account of illegal construction in a coastal area in *Sud Fondi Srl and Others v. Italy\** (dec.)). 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).

283. 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* (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.



284. 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); see also *Caldas Ramírez de Arrellano v. Spain* (dec.) where such proceedings are a further stage of the relevant criminal proceedings and their results may be decisive for the convicted persons.

285. Lastly, 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 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).

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

286. 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).

287. 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).

288. The notion of a “penalty” under Article 7 of the Convention is also an autonomous concept (*Welch v. the United Kingdom*, § 27). 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.)).

289. Lastly, the notions of “criminal offence” and “penalty” may also be relevant for the applicability of Articles 2 and 4 of Protocol No. 7 (*Greco v. Romania\**, § 81, and *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, 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**

290. 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 (*Mentes and Others v. Turkey*, § 73; *Stjerna v. Finland*, § 37; *López Ostra v. Spain*, § 51; *Burghartz v. Switzerland*, § 24; and *Płoski v. Poland*, § 32).

**(b) The sphere of “private life”**

291. 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, and *Pretty v. the United Kingdom*, § 61) and will 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; *Y.F. v. Turkey*, § 33, concerning a forced gynaecological examination; *Matter v. Slovakia*, § 64; and *Worwa v. Poland*, § 80) and **mental health** (*Bensaid v. the United Kingdom*, § 47); the **physical integrity of pregnant women, in relation to abortion** (*Tysic v. Poland*, §§ 107 and 110, and *A, B and C v. Ireland* [GC], §§ 244-46); and the **physical and psychological integrity of victims of domestic violence** (*Hajduová v. Slovakia*, § 46);
- aspects of an individual’s **physical and social identity** (for example, the right to obtain information in order to discover one’s origins and the identity of one’s parents: see *Mikulic v. Croatia*, § 53, and *Odievre v. France* [GC], § 29); as concerns the seizure of documents needed to prove one’s identity, see *Smirnova v. Russia*, §§ 95-97;
- an **individual’s first name and surname** (*Mentzen v. Latvia* (dec.); *Burghartz v. Switzerland*, § 24; *Guillot v. France*, §§ 21-22; *Gzel Erdagz v. Turkey\**, § 43; and *Losonci Rose and Rose v. Switzerland\**, § 26);
- 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, *Rasmussen v. Denmark*, § 33, and *Yildirim v. Austria* (dec.));
- **the right to one’s image and photographs of an individual** (*Von Hannover v. Germany*, §§ 50-53; *Sciacca v. Italy*, § 29; and *Reklos and Davourlis v. Greece*, § 40);
- an individual’s **reputation** (*Chauvy and Others v. France*, § 70; *Pfeifer v. Austria*, § 35; *Petrina v. Romania\**, § 28; and *Polanco Torres and Movilla Polanco v. Spain\**, § 40) and **honour** (*A. v. Norway*, § 64);
- **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; and *A.D.T. v. the United Kingdom*, §§ 21-26);
- the right to establish and develop **relationships with other human beings** and the outside world (*Niemietz v. Germany*, § 29);
- **social ties between settled migrants and the community** in which they are living, regardless of the existence or otherwise of a “family life” (*ner v. the Netherlands* [GC], § 59);
- **emotional relations between two persons of the same sex** (*Mata Estevez v. Spain* (dec.));

- 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);
- an individual’s right to decide how and when his life should end, provided that he is in a position to form his own free will in that respect and to act accordingly (*Haas v. Switzerland\**, § 51);
- 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; and *Özpinar v. Turkey\**, § 46) and restrictions on access to certain professions or to employment (*Sidabras and Džiautas v. Lithuania*, §§ 47-50; *Bigaeva v. Greece\**, §§ 22-25);
- **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; and *Leander v. Sweden*, § 48; as regards DNA profiles, cell samples and fingerprints, see *S. and Marper v. the United Kingdom* [GC], §§ 68-86; as regards entry in a national sex-offenders database, see *Gardel v. France\**, § 58);
- **information about a person’s health** (for example, information about infection with HIV: see *Z. v. Finland*, § 71, and *C.C. v. Spain\**, § 33; or reproductive abilities: see *K.H. and Others v. Slovakia*, § 44), and **information on risks to one’s health** (*McGinley and Egan v. the United Kingdom*, § 97, and *Guerra and Others v. Italy*, § 60);
- **ethnic identity** (*S. and Marper v. the United Kingdom* [GC], § 66, and *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);
- **information about personal religious and philosophical convictions** (*Folgerø and Others v. Norway* [GC], § 98);
- 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).

292. Possible forms of interference with the right to respect for private life include the following:

- **searches and seizures** (*McLeod v. the United Kingdom*, § 36, and *Funke v. France*, § 48);

- **stopping and searching** of a person in a public place (*Gillan and Quinton v. the United Kingdom*, §§ 61-65);
- **surveillance of communications** and telephone conversations (*Halford v. the United Kingdom*, § 44, and *Weber and Saravia v. Germany* (dec.), §§ 76-79), though not necessarily the use of **undercover agents** (*Lüdi v. Switzerland*, § 40);
- **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);
- **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, and *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), and **noise pollution** (*Deés v. Hungary*, §§ 21-24, concerning noise generated by road traffic, and *Mileva and Others v. Bulgaria*, § 97, concerning nuisance caused by a computer club in a block of flats);
- **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);
- **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);
- **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 and family v. Finland* (dec.)).

293. 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*, § 55), 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 and 57).

294. Not every act which adversely affects physical or moral integrity will interfere with the right to respect for private life. However, treatment which does not reach the Article 3 threshold of severity may breach Article 8 in its private-life aspect where there are sufficiently adverse effects on physical and moral integrity (*Costello-Roberts v. the United Kingdom*, § 36). There may be circumstances in which Article 8 could afford protection in relation to conditions during detention which do not attain the level of severity required by Article 3 (*Raninen v. Finland*, § 63).

**(c) The sphere of “family life”**

295. The notion of family life is an autonomous concept (*Marckx v. Belgium*, Court judgment, § 31, and *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* (dec.)). 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). Again, while there is no exhaustive definition of the scope of family life, from the Court’s case-law it covers the following:

**Right to become a parent**

296. 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]).

**As regards children**

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

298. 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; and *Hokkanen v. Finland*, § 54).

299. 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* (dec.); *Nylund v. Finland* (dec.); *L. v. the Netherlands*, §§ 37-40; and *Shavdarov v. Bulgaria\**, § 40).

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

301. As concerns **adopted children** and their adoptive parents, see *X v. France* (dec.); *X v. Belgium and the Netherlands* (dec.); and *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).

302. 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).

303. 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* (dec.), and *Bronda v. Italy*, § 51.

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

305. 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 (*Slivenko v. Latvia* [GC], § 97, and *Kwakye-Nti and Dufie v. the Netherlands*\* (dec.)). However, such ties may be taken into account under the head of “private life” (*Slivenko v. Latvia* [GC], § 97). 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).

### As regards couples

306. 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).

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

308. 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).

309. Engagement does not in itself create family life (*Wakefield v. the United Kingdom* (dec.)).

310. 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, and *P.B. and J.S. v. Austria*, § 30).

### As regards other relationships

311. Family life can also exist between **siblings** (*Moustaquim v. Belgium*, § 36, and *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).

### Material interests

312. “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, and *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).

313. 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).

314. 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 private and family life, 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**

315. 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; and *Margareta and Roger Andersson v. Sweden*, § 72).

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

316. 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; and *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 *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);
- is not limited to traditional residences and so will include, for example, **caravans** and **other non-fixed abodes** (*Buckley v. the United Kingdom* (Commission report), § 64, and *Chapman v. the United Kingdom* [GC], §§ 71-74);
- 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);
- 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: see *Friend and Others v. the United Kingdom* (dec.), § 45).

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).

#### (c) Examples of interference

317. 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);
- **searches** (*Murray v. the United Kingdom*, § 88; *Chappell v. the United Kingdom*, §§ 50 and 51; and *Funke v. France*, § 48) and **other entries by the police** (*Evcen v. the Netherlands* (dec.), and *Kanthak v. Germany* (dec.));
- **planning decisions** (*Buckley v. the United Kingdom*, § 60) and **compulsory-purchase orders** (*Howard v. the United Kingdom* (dec.));
- **environmental problems** (*López Ostra v. Spain*, § 51; *Powell and Rayner v. the United Kingdom*, § 40; and *Deés v. Hungary*, §§ 21-24);
- **telephone tapping** (*Klass and Others v. Germany*, § 41);
- failure to protect **personal belongings** forming part of the home (*Novoseletskiy v. Ukraine*).

318. 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).

319. 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\**).

320. With regard to **positive obligations**, respect for the home may also entail the adoption by public authorities of measures to secure that right even in the sphere of relations between individuals, such as preventing their entry into and interference with the applicant’s home (ibid., § 59 and the references cited therein, and *Novoseletskiy v. Ukraine*, § 68).

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

321. The right to respect for one’s correspondence aims to protect the confidentiality of private communications (*B.C. v. Switzerland* (dec.)) and as such has been interpreted as covering the following areas:

- **letters** between individuals, even where the sender or recipient is a prisoner (*Silver and Others v. the United Kingdom*, § 84, and *Mehmet Nuri Özen and Others v. Turkey\**, § 41), including packages seized by **customs officials** (*X v. the United Kingdom* (dec.));



- **telephone conversations** (*Klass and Others v. Germany*, §§ 21 and 41; *Malone v. the United Kingdom*, § 64; and *Margareta and Roger Andersson v. Sweden*, § 72), 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* (dec.));
- **electronic messages (e-mails)** and information derived from the monitoring of personal Internet use (*Copland v. the United Kingdom*, §§ 41-42);
- **private radio** (*X and Y v. Belgium* (dec.)), but not when it is on a public wavelength and is thus accessible to others (*B.C. v. Switzerland* (dec.));
- correspondence intercepted in the course of **business activities** or from business premises (*Kopp v. Switzerland*, § 50, and *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).

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

323. There is no *de minimis* principle for interference to occur: opening one letter is enough (*Narinen v. Finland*, § 32).

324. To date, the Court has been prepared to find 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 (*Coteț v. Romania\**, §§ 60-65).

## 5. The concept of “possessions”

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

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

#### **(a) Protected possessions**

325. 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); and *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**

326. 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; and *Iatridis v. Greece* [GC], § 54).

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

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

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

329. 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

330. 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; and *Draon v. France* [GC], § 68).

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

332. 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, and *Vilho Eskelinen and Others v. Finland* [GC], § 94).

333. 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, and *Kopecký v. Slovakia* [GC], § 50).

#### (e) Restitution of property

334. 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.

335. 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.

336. 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), and *Kopecký v. Slovakia* [GC], § 35 (d)).

337. 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], and *Kopecký v. Slovakia* [GC], § 35 (c)).

338. 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, and *Maltzan and Others v. Germany* (dec.) [GC], § 112).

#### (f) Future income

339. 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.); and *Anheuser-Busch Inc. v. Portugal* [GC], § 64).

#### (g) Professional clientele

340. 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.); and *Van Marle and Others v. the Netherlands*, § 41).

#### (h) Business licences

341. 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; and *Tre Traktörer Aktiebolag v. Sweden*, § 53).

#### (i) Inflation

342. 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.); and *Ryabykh v. Russia*, § 63).

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**

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

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

**(k) Company shares**

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

**(l) Social security benefits**

346. 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.

347. 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; and *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 incompatible with the provisions of the Convention or the Protocols thereto, **manifestly ill-founded**, or an abuse of the right of individual application; ...”

*1. General introduction*

348. 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).

349. 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.)).

350. 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], and *Demopoulos and Others v. Turkey* (dec.) [GC]).

351. 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”.

352. 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).

353. 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”

354. 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.

355. 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 ...”

356. 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, and *Perlala v. Greece\**, § 25).

357. 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:

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

358. 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).

359. 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:

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

360. 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.)).

361. 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], and *Khan v. the United Kingdom*).

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

362. 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

363. 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).

364. 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):

- (a) the proceedings were conducted before bodies empowered for that purpose by the provisions of domestic law;
- (b) the proceedings were conducted in accordance with the procedural requirements of domestic law;
- (c) the interested party had the opportunity of adducing his or her arguments and evidence, which were duly heard by the authority in question;
- (d) 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;
- (e) the proceedings resulted in a decision for which sufficient reasons were given.

#### (b) No appearance of a lack of proportion between the aims and the means

365. 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.

366. 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.

367. 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:

- (a) Was the interference in accordance with a “law” that was sufficiently accessible and foreseeable?
- (b) 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)?
- (c) 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?

368. 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; and *Mentzen v. Latvia* (dec.)).

369. 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).

370. 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**

371. 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:

- (a) 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.));
- (b) 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.)).

372. 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*

373. 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).

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

“1. Any application under Article 34 of the Convention shall be made on the application form provided by the Registry, unless the President of the Section concerned decides otherwise. It shall set out

...

(d) a succinct statement of the facts;

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

...

(g) the object of the application;

and be accompanied by

(h) copies of any relevant documents and in particular the decisions, whether judicial or not, relating to the object of the application.

...

4. Failure to comply with the requirements set out in [paragraph 1] of this Rule may result in the application not being examined by the Court.”

375. 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.”

376. 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:

- (a) 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.), and *Baillard v. France*\* (dec.));
- (b) 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).

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

377. 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*

378. 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. To date the Court has employed the new criterion in nine decisions on admissibility, namely: *Ionescu v. Romania* (dec.), §§ 28-41; *Korolev v. Russia* (dec.); *Vasilchenko v. Russia*, §§ 49-51; *Rinck v. France*\* (dec.); *Holub v. the Czech Republic*\* (dec.); *Bratři Zátkové, A.S. v. the Czech Republic*\* (dec.); *Gaftoniuc v. Romania* (dec.); *Matoušek v. the Czech Republic*\* (dec.); and *Čavajda v. the Czech Republic* (dec.).

Moreover, in two judgments the Court has dismissed an objection on grounds of inadmissibility under the new criterion raised by the government (*Gaglione and Others v. Italy*\*, §§ 14-19, and *Sancho Cruz and 14 other “Agrarian Reform” cases v. Portugal*\*, §§ 22-36).

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*”).

379. 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 judgments of the Commission (see *Eyoum-Priso v. France*\* (dec.); *H.F. K.-F. v. Germany* (dec.); and *Lechesne v. France*\* (dec.)) and the Court (see for example *Dudgeon v. the United Kingdom*; *O’Halloran and Francis v. the United Kingdom* [GC]; and *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

380. 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.

381. The Court alone is competent to interpret the new admissibility requirement and decide on its application. During the first two years following entry into force, application of the criterion is reserved to Chambers and the Grand Chamber (Article 20 § 2 of Protocol No. 14) who will establish clear case-law principles for its operation in concrete contexts.

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

382. “Significant disadvantage” is a term which is capable of, and requires, interpretation establishing objective criteria through the gradual development of the case-law of the Court. This term gives the Court some degree of flexibility, in addition to that already provided by the existing admissibility criteria (see the Explanatory Report to Protocol No. 14, CETS No. 194 §§ 78 and 80). The new criterion 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 (*Korolev v. Russia* (dec.)).

383. The wording of the criterion takes into account the disadvantage already suffered by the applicant at the national level. Factors which could be taken into consideration are the financial impact on the applicant, although not exclusively (see *Bock v. Germany* (dec.) for a recent example of a case being declared inadmissible due to the pettiness of the amount in question). In *Ionescu v. Romania* (dec.), the Court was of the view that the financial prejudice to the applicant was not great, being the sum of 90 euros where there was no information to indicate that the loss of this sum would have any important repercussions on the personal life of the applicant. In *Korolev v. Russia* (dec.), the applicant’s grievances were explicitly limited to the defendant authority’s failure to pay a sum equivalent to less than one euro awarded to him by the domestic court. In *Vasilchenko v. Russia* the applicant complained of the authorities’ failure to enforce an award of 12 euros. In *Rinck v. France*\* (dec.) the sum involved was 150 euros in addition to 22 euros in costs, where there was no evidence to indicate that this amount would have significant repercussions on the applicant’s personal life. In *Gaftoniuc v. Romania* (dec.) the amount the applicant should have received was 25 euros. Nevertheless, the Court will be conscious of the fact that the impact of a pecuniary loss must

not be measured in abstract terms; even modest pecuniary damage may be significant in light of the person's specific condition and the economic situation of the country or region where he or she lives.

384. However, the Court is mindful at the same time that the pecuniary interest involved is not the only element to determine whether the applicant has suffered a significant disadvantage. Indeed, a violation of the Convention may concern important questions of principle and thus cause a significant disadvantage without affecting pecuniary interest (*Korolev v. Russia* (dec.)). The applicant's own subjective feeling about the impact of the alleged violation has to be justifiable on objective grounds. This was the case in *Rinck v. France*\* (dec.), where the Court found that losing one point from the applicant's licence did not warrant a finding that the matter had a significant impact on his personal situation even if the applicant saw the issue as one of principle.

In *Holub v. the Czech Republic*\* (dec.), *Matoušek v. the Czech Republic*\* (dec.), and *Čavajda v. the Czech Republic*, 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; hence the applicants had not suffered a significant disadvantage within the meaning of Article 35 § 3 (b).

In contrast, the Court disagreed with the government's assertion that the applicants had not suffered a significant disadvantage in *Gaglione and Others v. Italy*\*, since the case concerned delays of at least nineteen months in paying compensation in 65% of the applications. Likewise in *Sancho Cruz and 14 other "Agrarian Reform" cases v. Portugal*\*, the Court found that in the two applications where the government had raised an objection under the new criterion, the applicants had suffered a significant disadvantage bearing in mind the high compensation figures involved.

#### 4. Two safeguard clauses

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

385. 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.

386. 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*, § 2).

387. 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. The Court has thus been frequently led, under former Articles 37 and 38<sup>6</sup>, to verify that the general problem raised by the case had been or was being remedied and that similar legal issues had been resolved by the Court in other cases (see, among many others, *Can v. Austria*,

6. Text of the Convention as in force before the entry into force of Protocol No. 14.

§§ 15-18, and *Léger v. France* (striking out) [GC], § 51). For example, where the Court has already had the opportunity to decide on the application of procedural rules by domestic authorities and the complaint is only of historic interest, the respect for human rights would not require a further examination of the same complaint (*Ionescu v. Romania* (dec.)). In *Holub v. the Czech Republic*\* (dec.), the issue in question – the fact that the applicant had not received the other parties’ observations before the Constitutional Court – had already been addressed in previous case-law (see, for example, *Milatová and Others v. the Czech Republic*; *Mareš v. the Czech Republic*\*; and *Vokoun v. the Czech Republic*\*). In *Korolev v. Russia* (dec.), the Court did not see any compelling reason of public order to warrant its examination on the merits, firstly because the Court has on numerous occasions determined issues analogous to that arising in the instant case; secondly, because both the Court and the Committee of Ministers have addressed the systemic problem of non-enforcement of domestic judgments in the Russian Federation.

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

388. It will not be possible for the Court to reject an application on account of its trivial nature if the case has not been duly considered by a domestic tribunal. This clause reflects the principle of subsidiarity, as enshrined notably in Article 13 of the Convention, which requires that an effective remedy against violations be available at the national level (*Korolev v. Russia* (dec.)). In *Holub v. the Czech Republic*\* (dec.) the Court has clarified that it is the “case” (in French, “*l’affaire*”) in the more general sense and not the “application” (in French, “*la requête*”) before the Strasbourg Court which needs to have been duly examined by the domestic courts.

389. As for the interpretation of “duly”, the new criterion will not be interpreted as strictly as the requirements of a fair hearing under Article 6 of the Convention (*Ionescu v. Romania* (dec.)).

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