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

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Case-law overview

English edition

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Jurisdiction and admissibility[1]

Jurisdiction of States (Article 1)

The decision in *Ukraine and the Netherlands v. Russia*[2] concerned the exclusion from jurisdiction of military operations carried out during an active phase of hostilities.

In its two inter-State applications, the Ukrainian Government alleged an administrative practice by Russia resulting in numerous Convention violations in the areas of eastern Ukraine under separatist control. The inter-State application lodged by the Netherlands Government concerned the downing of flight MH17. In its decision, the Grand Chamber held that Russia had had effective control over all areas in the hands of separatists from 11 May 2014 and that the impugned facts fell within the spatial jurisdiction (*ratione loci*) of Russia within the meaning of Article 1, with the exception of the Ukrainian Government's complaint about the bombing and shelling of areas outside separatist control. The question of whether the latter complaint came under Russia's personal jurisdiction (State agent authority and control) was joined to the merits. The Grand Chamber confirmed its *ratione materiae* jurisdiction to examine complaints concerning armed conflict. It dismissed the respondent Government's further preliminary objections (the alleged lack of the "requirements of a genuine application" (Article 33), non-exhaustion of domestic remedies and non-compliance with the six-month time-limit) and declared admissible: the Netherlands Government's complaints under the substantive and procedural aspects of Articles 2, 3 and 13 in respect of the downing of flight MH17, and the Ukrainian Government's complaints about an alleged administrative practice contrary to Articles 2 and 3, Article 4 § 2 and Articles 5, 8, 9 and 10 of the Convention and Articles 1 and 2 of Protocol No. 1, Article 2 of Protocol No. 4, and Article 14 of the Convention in conjunction with Articles 2 and 3, Article 4 § 2 and Articles 5, 9 and 10 of the Convention and Articles 1 and 2 of Protocol No. 1[3].

The Grand Chamber decision is noteworthy in that the Court shed some light on how to interpret the exclusion from jurisdiction of "military operations carried out during an active phase of hostilities", in accordance with the principle set out in *Georgia v. Russia (II)*[4].

The Grand Chamber referred to its judgment in the case of *Georgia v. Russia (II)* (cited above), according to which the first question to be addressed in cases concerning armed conflict was whether the complaints concerned "military operations carried out during an active phase of hostilities". In that case, the question had been answered in the affirmative and, as a result, the substantive complaints about events concerning the "active phase of hostilities" had fallen outside the "jurisdiction" of the respondent State for the purposes of Article 1, while the duty to investigate deaths which had occurred remained. At the same time, in that case, there had been a distinct, single, continuous five-day phase of intense fighting. The Court had therefore been able to separate out complaints which it had identified as concerning

1. This overview of selected cases from 2023 was drafted within the Directorate of the Jurisconsult and does not bind the Court.

2. *Ukraine and the Netherlands v. Russia* (dec.) [GC], nos. 8019/16 and 2 others, adopted on 30 November 2022 and delivered on 25 January 2023. See also under Article 35 § 1 (Exhaustion of domestic remedies), Article 35 § 1 (Four-month period) and Article 33 (Inter-State cases) below.

3. The Grand Chamber declared inadmissible the following complaints by the Ukrainian Government: the individual complaints concerning the alleged abduction of three groups of children and accompanying adults (failure to exhaust domestic remedies); and the complaints of administrative practices in breach of Article 11 (lack of sufficient prima facie evidence of the repetition of acts) and of Article 3 of Protocol No. 1 (presidential elections being outside the scope of this provision).

4. *Georgia v. Russia (II)* [GC], no. 38263/08, 21 January 2021.

"military operations carried out during the active phase of hostilities", in the sense of "armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos". The alleged attacks falling under this exception covered "bombing, shelling and artillery fire". In the present decision, the Grand Chamber clarified that the *Georgia v. Russia (II)* judgment could not be seen as authority for excluding entirely from a State's Article 1 jurisdiction a specific temporal phase of an international armed conflict: indeed, in that case the Court had found jurisdiction to exist in respect of the detention and treatment of civilians and prisoners of war even during the "five-day war". A State could therefore have extraterritorial jurisdiction in respect of complaints concerning events which had occurred while active hostilities were taking place. Unlike the above case, the vast majority of the complaints advanced in the present case (except for those relating to the downing of flight MH17 and artillery attacks) concerned events unconnected with military operations occurring within the area under separatist control and therefore they could not be excluded from the spatial jurisdiction of Russia on the basis of this exception.

As regards the downing of flight MH17, which had taken place in the context of active fighting between the two opposing forces, the Court stated that it would be wholly inaccurate to invoke any "context of chaos" in this regard. It noted the exceptional and painstaking work of the international Joint Investigation Team (JIT), which had been able to pierce "the fog of war" and elucidate the specific circumstances of this incident. The Court further specified that the chaos that might exist on the ground as large numbers of advancing forces sought to take control of territory under cover of a barrage of artillery fire did not inevitably exist in the context of the use of surface-to-air missiles, which were used to attack specific targets in the air. There was moreover no evidence of fighting to establish control in the areas directly relevant to the missile launch site or the impact site, both being under separatist control and thus within the spatial jurisdiction of Russia. The jurisdiction of Russia in respect of this incident could not therefore be excluded on the basis of "the active phase of hostilities" exception.

As regards the Ukrainian Government's complaint about the bombing and shelling, the victims had been outside the areas controlled by separatists and those complaints were excluded from Russia's spatial jurisdiction. The Grand Chamber joined to the merits the question of whether that complaint was also excluded from Russia's personal jurisdiction (on account of State agent authority or control) by virtue of the above exception identified in *Georgia v. Russia (II)*.

Admissibility (Articles 34 and 35)

Petition (Article 34)

The judgment in *Grosam v. the Czech Republic*[5] concerned the distinction between complaints and secondary arguments and the consequent delimiting of the Court's ability to recharacterise a complaint.

The disciplinary chamber of the Supreme Administrative Court had found the applicant guilty of misconduct and fined him.

In his application to the Court, he complained under Article 6 § 1 of the lack of fairness of the disciplinary proceedings. He also complained, under Article 2 of Protocol No. 7, that domestic law excluded appeals against the disciplinary chamber of the Supreme Administrative Court. After notice of the case had been given to the respondent Government, a Chamber of the Court, of its own motion, invited the parties to submit further observations under Article 6 § 1 on whether, given its composition, the disciplinary chamber met the requirements of a "tribunal established by law" within the meaning of that provision. In his observations of 5 November 2015, the applicant contended that it did not. In its judgment, the Chamber recharacterised the complaint under Article 2 of Protocol No. 7 as one to be examined under Article 6 § 1 and found a violation of that provision: the disciplinary chamber did not meet the requirements of an independent and

5. *Grosam v. the Czech Republic* [GC], no. 19750/13, 1 June 2023. See also under Article 32 (Jurisdiction of the Court) below.

impartial tribunal and, furthermore, there was no need to examine the admissibility or merits of the remaining complaints under Article 6 § 1 (fairness of the disciplinary proceedings).

The Grand Chamber disagreed, finding that the applicant's arguments under Article 2 of Protocol No. 7 could not be interpreted as raising a complaint that the disciplinary chamber had not been an independent and impartial tribunal within the meaning of Article 6 § 1. The applicant had not raised such a complaint in his application form but only subsequently in his observations to the Chamber, after it had given notice of the application to the respondent Government. The Grand Chamber therefore found this new complaint to be inadmissible, given that it had been submitted more than six months after the disciplinary proceedings against the applicant had ended (in 2012). Going on to examine the remaining complaints within the scope of the referred case, the Grand Chamber dismissed the complaints under Article 6 § 1 (fairness of the disciplinary proceedings) as manifestly ill-founded and, having agreed with the Chamber that Article 6 § 1 was applicable under its civil but not its criminal head, the Grand Chamber rejected as incompatible *ratione materiae* with the provisions of the Convention the complaint under Article 2 of Protocol No. 7 (the concept of "criminal offence" used in that provision corresponding to that of "criminal charge" in Article 6 § 1).

The Grand Chamber judgment is noteworthy because the Court, being master of the characterisation to be given in law to the facts of a case, confirmed and clarified the limits of its power to recharacterise an applicant's complaints and, in so doing, it ensured that the scope of the case did not extend beyond the complaints contained in the application.

The Court reiterated that it could base its decision only on the facts "complained of", which ought to be seen in the light of the legal arguments underpinning them and vice versa, these two elements of a complaint being intertwined (*Radomilja and Others v. Croatia*[6]). Drawing upon its approach in the context of the exhaustion of domestic remedies, the Court emphasised that it was not sufficient that a violation of the Convention was "evident" from the facts of the case or the applicant's submissions. Instead, applicants had to complain that a certain act or omission had entailed a violation of the rights set forth in the Convention or the Protocols thereto, in a manner which should not leave the Court to second-guess whether a certain complaint had been raised or not (*Farzaliyev v. Azerbaijan*[7]). Referring to a similar position of the International Court of Justice (ICJ – compare the judgments in the cases of *Nuclear Tests (Australia v. France)*[8] and *Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia)*[9]), the Court emphasised that it had no power to substitute itself for the applicant and formulate new complaints simply on the basis of the arguments and facts advanced. Drawing inspiration again from the *Nuclear Tests* judgment of the ICJ, the Court clarified that it was necessary to distinguish between complaints (that is, the arguments pointing to the cause or the fact constitutive of the alleged violations of the Convention) and secondary arguments.

On that basis, the Court considered whether the applicant's complaint under Article 2 of Protocol No. 7, as formulated in his application, could be examined under Article 6 § 1 (as a complaint about an independent and impartial tribunal) as the Chamber had done after recharacterising it to fall within that provision. In his application, the applicant did not claim that the inclusion, in the composition of the disciplinary chamber, of members who were not professional judges entailed a violation of Article 2 of Protocol No. 7. Rather, he argued that that body could not be regarded as the "highest tribunal" within the meaning of paragraph 2 of that provision, as its lay members were not subject to the same requirements of expertise and independence as judges. That argument was therefore aimed only at excluding the application of the exception provided for in Article 2 § 2 of Protocol No. 7, according to which the right of appeal did not apply where an accused had been tried in the first instance by the highest tribunal. Moreover, the applicant emphasised that the composition of the disciplinary chamber was atypical among the higher judicial institutions in the Czech Republic, which normally did not involve lay assessors (their participation being common in some first-instance courts). In short, he did not argue that the disciplinary chamber was not a

6. *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, 20 March 2018.
7. *Farzaliyev v. Azerbaijan*, no. 29620/07, 28 May 2020.
8. *Nuclear Tests (Australia v. France)*, judgment of 20 December 1974, *ICJ Reports* 1974, p. 253.
9. *Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia)*, ICJ judgment of 1 December 2022.

"tribunal" but merely that it was not the "highest tribunal".

In the Court's view, that was a secondary argument which could not be equated with a complaint: indeed, the applicant had not claimed the composition of the disciplinary chamber to be the cause or fact constitutive of a violation of Article 2 of Protocol No. 7. His argument could not therefore be interpreted as raising a complaint that the disciplinary chamber was not an independent and impartial tribunal within the meaning of Article 6 § 1. If the applicant had wished, at that stage, to complain of a breach of those guarantees set forth in Article 6 § 1, he should have stated so in his application form in a clear manner, especially as the scope of Article 6 was very broad and the complaints under that provision had to contain all the parameters necessary for the Court to define the issue it would be called upon to examine (*Ramos Nunes de Carvalho e Sá v. Portugal*[10]). Although the applicant had formulated such a complaint in his observations to the Chamber, that was a new complaint: since it related to distinct requirements arising from Article 6 § 1, it could therefore not be viewed as concerning a particular aspect of his initial complaint under Article 2 of Protocol No. 7.

Accordingly, by raising a question concerning compliance with the requirement of a "tribunal established by law" under Article 6 § 1, the Chamber had extended, of its own motion, the scope of the case beyond the one initially referred to it by the applicant in his application. It had thereby exceeded the powers conferred on the Court by Articles 32 and 34 of the Convention.

Exhaustion of domestic remedies (Article 35 § 1)

The decision in *Ukraine and the Netherlands v. Russia*[11] concerned, *inter alia*, the effectiveness of domestic remedies in the context of the downing of flight MH17.

In its decision, the Grand Chamber, *inter alia*, dismissed the respondent Government's preliminary objection concerning non-exhaustion of domestic remedies and declared admissible the Netherlands Government's complaints under the substantive and procedural aspects of Articles 2, 3 and 13 in respect of the downing of flight MH17.

The Grand Chamber decision is noteworthy in that the Court examined the effectiveness of domestic remedies taking into account the important political dimension of the case.

The Court reiterated that the exhaustion requirement applied to inter-State applications denouncing violations allegedly suffered by individuals (*Ukraine v. Russia (re Crimea)*[12]). When assessing the effectiveness of domestic remedies in this context, the Court had regard to the existence of a dispute as to the underlying facts. For example, as regards the abduction and transfer to Russia of the three groups of children alleged by the Ukrainian Government, the Russian investigative authorities had not contested the underlying facts (namely, the border crossing) but only the forcible nature of the transfer. The Court therefore concluded that the Russian authorities ought to have been afforded the opportunity by the Ukrainian Government to investigate their allegations and the evidence collected by them, notably in the context of a judicial appeal. By contrast, as regards the downing of flight MH17, this complaint had been consistently met by the respondent Government with a blanket denial of any involvement whatsoever. In the latter context, the Court also emphasised the political dimension of the case, being unconvinced as to the effectiveness of domestic remedies in a case where State agents were implicated in the commission of a crime, especially one condemned by the United Nations Security Council. In this regard, the Court referred to its finding of a violation of the procedural aspect of Article 2 in *Carter v. Russia*[13], which concerned the high-profile poisoning of a Russian dissident abroad by State agents. In the instant case, the Court pinpointed the Russian authorities' formalistic failure to initiate an investigation into the allegation that Russian nationals had been involved in the downing of flight MH17. Indeed, the Russian authorities had been contacted on multiple occasions by victims' relatives and had had ample legal possibilities to launch such an investigation, even in the absence of a specific request.

10. *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, § 104, 6 November 2018.

11. *Ukraine and the Netherlands v. Russia* (dec.) [GC], nos. 8019/16 and 2 others, adopted on 30 November 2022 and delivered on 25 January 2023. See also under Article 1 (Jurisdiction of States) above, and Article 35 § 1 (Four-month period) and Article 33 (Inter-State cases) below.

12. *Ukraine v. Russia (*re *Crimea)* (dec.) [GC], nos. 20958/14 and 38334/18, 16 December 2020.

13. *Carter v. Russia*, no. 20914/07, 21 September 2021.

The judgment in *FU QUAN, s.r.o. v. the Czech Republic*[14] concerned the domestic courts' failure to apply the principle of *jura novit curia*.

The applicant company's property (mostly merchandise) had been seized during criminal proceedings against the managing director and the other member of the company. Following their acquittal, the company brought a civil action for the damage caused by the State. The action was dismissed for lack of *locus standi*, the company not being a party to the criminal proceedings in issue. The company complained to the Court under Article 6 § 1 and Article 1 of Protocol No. 1. A Chamber considered that it had been up to the courts, applying the principle of *jura novit curia*, to subsume the facts of the case under the relevant domestic-law provisions in order to deal with the merits of the action: it was clear that the company had claimed compensation for the depreciation of its merchandise. The Chamber therefore dismissed the Government's preliminary objection (exhaustion of domestic remedies) and found a breach of Article 1 of Protocol No. 1 given the unjustified protracted retention of the property. The Chamber also decided that there was no need to rule separately on the complaint under Article 6 § 1 concerning the alleged denial of access to a court resulting from a formalistic and restrictive interpretation of national law by the domestic courts.

The Grand Chamber, however, considered that the complaint under Article 6 § 1 was the applicant company's main complaint and rejected it as manifestly ill-founded. Furthermore, having ascertained the scope of the complaints under Article 1 of Protocol No. 1, the Grand Chamber observed that the Chamber had examined only one of the complaints raised, even though there were three altogether. Given its findings concerning the complaint in respect of access to a court, the Grand Chamber rejected two of these complaints for non-exhaustion of domestic remedies: the applicant company had not properly availed itself of the possibility of obtaining compensation for undue delay in lifting the order for the seizure of its property and for the authorities' alleged failure to take care of it. As regards the third complaint (damage to the property following the unwarranted prosecution and detention of the company's managing director and other member), such a compensation claim did not have a sufficient basis in domestic law. The guarantees of Article 1 of Protocol No. 1 being therefore inapplicable, the Grand Chamber rejected this complaint as incompatible *ratione materiae* with the provisions of the Convention.

The Grand Chamber judgment is noteworthy in that the Court confirmed that the courts' ability to apply the principle of *jura novit curia* had no bearing on the obligation on the applicants to exhaust domestic remedies under Article 35 § 1.

As to the complaints under Article 1 of Protocol No. 1, the Grand Chamber reiterated the following principles established in its case-law in the context of exhaustion of domestic remedies. Even in those jurisdictions where the domestic courts in civil proceedings were able, or even obliged, to examine the case of their own motion (that is, to apply the principle of *jura novit curia*), applicants were not dispensed from raising before them a complaint which they might intend to subsequently make to the Court (*Kandarakis v. Greece*[15]), it being understood that for the purposes of exhaustion of domestic remedies the Court had to take into account not only the facts but also the legal arguments presented domestically (*Radomilja and Others v. Croatia*[16]). Likewise, it was not sufficient that a violation of the Convention was "evident" from the facts of the case or the applicant's submissions: rather, he or she must actually complain (expressly or in substance) of such a violation in a manner which left no doubt that the same complaint subsequently submitted to the Court had indeed been raised at domestic level (*Farzaliyev v. Azerbaijan*[17]). The Grand Chamber considered that this, clearly, could not be said to have been the situation in the instant case.

The judgment in the case of *Communauté genevoise d'action syndicale (CGAS) v. Switzerland*[18] concerned the unjustified abandon by the applicant association of an application for holding a public event in view of a COVID-19 related ban;

14. *FU QUAN, s.r.o. v. the Czech Republic* [GC], no. 24827/14, 1 June 2023. See also under Article 6 § 1 (Right to a fair hearing in civil proceedings – Access to a court) and under "Rules of Court" below.
15. *Kandarakis v. Greece*, nos. 48345/12 and 2 others, § 77, 11 June 2020.
16. *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 117, 20 March 2018.
17. *Farzaliyev v. Azerbaijan*, no. 29620/07, § 55, 28 May 2020.
18. *Communauté genevoise d'action syndicale (CGAS) v. Switzerland* [GC], no. 21881/20, 27 November 2023.

victim status and compliance with the exhaustion requirement.

The applicant is an association whose declared aim is to defend the interests of workers and of its member organisations. In May 2020, it refrained from organising a public event after a competent authority informed it, by telephone, that the requested authorisation would be refused given the enacted federal Ordinance COVID-19 no. 2 (COVID-19 pandemic).

Relying on Article 11 of the Convention, the applicant association alleged that that Ordinance had deprived it of the right to organise or to take part in any public gatherings in the period from March to May 2020.

In 2022 a Chamber of the Court declared the application admissible (the applicant association could claim to be a victim in so far as it had been obliged to refrain from organising public meetings to avoid the criminal penalties provided for in the Ordinance and there was no effective remedy available) and found a violation of Article 11 of the Convention. The Grand Chamber disagreed and declared the application inadmissible for having failed to exhaust domestic remedies: an application for a preliminary ruling on constitutionality, lodged in the context of an ordinary appeal against a decision implementing federal ordinances, was a remedy which was directly accessible to litigants and made it possible, where appropriate, to have the provision at issue declared unconstitutional.

While this was the first time the Grand Chamber had addressed the exceptional context of the COVID-19 pandemic, it did so from the standpoint of the requirement to exhaust domestic remedies under Article 35 § 1 of the Convention. In that connection, the Court clarified two issues related to the fact that the complaint had stemmed from the content of a domestic-law provision (rather than a specific measure restricting freedom of assembly): in the first place, the applicant association's unjustified decision not to continue with the authorisation procedure for the intended event had deprived it, not only of its status as a "direct" victim, but also of an opportunity to bring the matter before the domestic courts; and secondly, the requirement of judicial review in advance of the date of the planned event was not decisive for the determination of the effectiveness of a remedy allowing for review of a law's compatibility with the Convention.

(i) As to the applicant association's victim status, while the Court had previously held that applicants were permitted to complain about a law in the absence of any individual implementing measure (for example, *Marckx v. Belgium*[19]; *Burden v. the United Kingdom*[20]; *Sejdić and Finci v. Bosnia and Herzegovina*[21]; and *Tănase v. Moldova*[22]), those cases had concerned texts applicable to predefined situations regardless of the individual facts and, in consequence, had been likely to infringe the applicants' rights by their mere entry into force. However, the present case was different: the ban on public events at issue did not amount to a "general measure" since the Ordinance authorised exemptions. However, the applicant association had deliberately chosen not to continue with the authorisation procedure for the planned event, even before receiving a formal decision from the competent administrative authority that could have been challenged before the courts, and it had refrained from submitting any other authorisation requests. In the Court's view, such conduct, without adequate justification, had a bearing on the applicant association's victim status. Indeed, as a non-profit-making private association the applicant was not subject to criminal sanctions and could therefore not rely on any fear of same. In any event, there was nothing to suggest that the mere fact of taking administrative steps to organise public events would have amounted to conduct that was likely to be sanctioned. The applicant had therefore failed to show that it had been "directly affected" by the Ordinance in issue.

(ii) By abandoning the authorisation procedure, the applicant association had also renounced the opportunity to complain about the ban on public events before the domestic courts. While the applicant had argued, *inter alia*, that it was unlikely that the ordinary court would have complied with the requirement to rule in advance of the date of the intended public event (*Bączkowski and Others v. Poland*[23]), it was clarified that this criterion had been developed in the Court's case-law on judicial review of a specific measure restricting freedom of assembly whereas the present situation concerned

19. *Marckx v. Belgium*, 13 June 1979, Series A no. 31.
20. *Burden v. the United Kingdom* [GC], no. 13378/05, ECHR 2008.
21. *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, ECHR 2009.
22. *Tănase v. Moldova* [GC], no. 7/08, ECHR 2010.
23. *Bączkowski and Others v. Poland*, no. 1543/06, § 81, 3 May 2007.

the very content of the law (Ordinance) itself: accordingly, that criterion was not, of itself, decisive for determining the effectiveness of a remedy to review whether legislation was compatible with the Convention.

Finally, in the unprecedented and highly sensitive context of the COVID-19 pandemic, it was all the more important that the national authorities be first given the opportunity to strike a balance between the relevant competing private and public interests or between different rights protected by the Convention, taking into consideration local needs and conditions and the public-health situation as it stood at the relevant time (see the decision in *Zambrano v. France*[24]). Drawing attention to its fundamentally subsidiary role, the Court further reiterated that, in healthcare policy matters, the margin of appreciation afforded to States was a wide one. Accordingly, the Court concluded that the applicant association had failed to take appropriate steps to enable the national courts to fulfil their fundamental role in the Convention protection system, namely, to prevent or put right eventual Convention violations through their own legal system.

Four-month period (Article 35 § 1)

The decision in *Ukraine and the Netherlands v. Russia*[25] concerned, *inter alia*, the relevance of non-domestic remedies in an inter-State case for the purposes of the six-month rule.

The inter-State application lodged by the Netherlands Government concerns the downing of flight MH17. In its decision, the Grand Chamber, *inter alia*, dismissed the respondent Government's preliminary objection concerning non-compliance with the six-month time-limit and declared admissible the Dutch Government's complaints under the substantive and procedural aspects of Articles 2, 3 and 13 in respect of the downing of flight MH17.

The Grand Chamber decision is noteworthy in that the Court clarified, in the novel and exceptional context of this complaint, how the interplay between the six-month rule and the exhaustion of "domestic" remedies, enshrined in Article 35 § 1, is to be transposed to potential remedies outside the respondent State or to avenues which States themselves may wish to pursue at the international level prior to lodging an inter-State case with this Court, especially where there is no clarity from the outset as to the circumstances of the alleged violation of the Convention and the identity of the State allegedly responsible for it.

As there had been no effective remedy in Russia available to the relatives of the victims of flight MH17, the normal starting-point for the running of the six-month time-limit would be the date of the incident itself (17 July 2014). The Court, however, emphasised the novel factual nature of the present case: first, the identity of the State allegedly responsible for a violation of the Convention had not been apparent from the date of the act in issue itself (given the lack of clarity as to the identities of the perpetrators, the weapon used and the extent of any State's control over the area concerned, as well as Russia's denial of any involvement whatsoever); secondly, the criminal investigation carried out by the Netherlands authorities with the assistance of the JIT could not been seen as a "domestic" remedy in respect of complaints lodged against Russia. The Court therefore considered the relevance of the latter investigation, as well as the international-law remedies pursued, for the purposes of compliance with the six-month time-limit in the inter-State context and in the exceptional circumstances of the present case. The Court had particular regard to the interests of justice and the purposes of Article 35 § 1. On the one hand, this provision could not be interpreted in a manner which would require an applicant State to seise the Court of its complaint before having reasonably satisfied itself that there had been an alleged breach of the Convention by another State and before that State had been identified with sufficient certainty. On the other hand, it would indeed be unjust and contrary to the purpose of Article 35 § 1 if the effect of reasonably awaiting relevant findings of an independent, prompt and effective criminal investigation, in order to assist the Court in its own assessment of the complaints, were to render those complaints out of

24. *Zambrano v. France* (dec.), no. 41994/21, § 26, 21 September 2021.

25. *Ukraine and the Netherlands v. Russia* (dec.) [GC], nos. 8019/16 and 2 others, adopted on 30 November 2022 and delivered on 25 January 2023. See also under Article 1 (Jurisdiction of States) and Article 35 § 1 (Exhaustion of domestic remedies) above, and Article 33 (Inter-State cases) below.

time. With this in mind, the Court concluded that it would be artificial to ignore the investigative steps taken in the Netherlands and in the context of the JIT, which had precisely enabled the pertinent facts to be elucidated, all the more so as no investigation had been undertaken in the respondent State. Furthermore, as those steps had been carried out promptly, regularly and diligently, it could not be said that there had been a delay in the referral of the complaints to this Court such that it would be difficult to ascertain the pertinent facts, rendering a fair examination of the allegations almost impossible. In other words, the aim of the time-limit in Article 35 § 1 had not been undermined by the lodging of the application some six years after the aircraft had been downed.

The Court further acknowledged the relevance of remedies under international law in an inter-State dispute, particularly where the allegation is that the State itself, at the highest level of government, bears responsibility. While such remedies are not mentioned in Article 35 § 1 and, as a result, the running of the time-limit in that Article is not linked to their exercise, the Court had already accepted that, in some circumstances, it might be appropriate to have regard to such remedies when assessing whether the obligation of diligence incumbent on applicants had been met (*Varnava and Others v. Turkey*[26]). It was therefore legitimate for the Netherlands Government to have explored the opportunity of negotiations with Russia, which had ended in 2020. In sum, in the exceptional circumstances of the case, the complaints had been lodged in time.

The Court also confirmed that, unlike the exhaustion requirement, the six-month time-limit was applicable to allegations of administrative practices.

The decision in *Orhan v. Türkiye*[27] concerned the determination of the applicable time-limit (six or four months), in accordance with Article 8 § 3 of Protocol No. 15.

The time-limit for lodging applications provided for in Article 35 § 1 of the Convention, which used to be six months, was reduced to four months by Article 4 of Protocol No. 15. Under Article 8 § 3 of that Protocol, the new time-limit came into force on 1 February 2022[28]. According to that provision, the new time-limit does not apply to applications in respect of which the final decision within the meaning of Article 35 § 1 "was taken" prior to the date of its entry into force.

On 18 July 2022 the applicant, who had been sentenced to life imprisonment, lodged an application with the Court raising several complaints under Articles 5, 6, 13 and 14 of the Convention. The final domestic decision in the process of exhaustion of remedies was adopted by the Constitutional Court on 19 January 2022, that is, prior to the date on which the new time-limit established by Protocol No. 15 came into force. However, it was notified to the applicant after that date, on 25 February 2022.

The Court began by determining which time-limit for applying – the former six-month time-limit or the new four-month time-limit – was applicable in the present case. It considered that the six-month time-limit was applicable, since it had been in force on 19 January 2022, the date on which the final domestic decision had been given. The relevant period had started to run on the day after notification of the decision, that is, on 26 February 2022 (*dies a quo*) and had ended on 25 August 2022 (*dies ad quem*). As the application had been lodged on 18 July 2022, the Court concluded that the time-limit for applying under Article 35 § 1 had been complied with. The Court nevertheless declared the application inadmissible on other grounds.

The decision is noteworthy in that the Court addressed a situation in which the final domestic decision had been handed down before the date of entry into force of the new time-limit established by Protocol No. 15 (1 February 2022), but had been notified after that date. The Court clarified in that regard that the applicable time-limit for submitting an application – the former six-month time-limit or the new four-month time-limit – should be determined by reference to the date on which the final domestic decision was adopted, and not the date on which it was notified to the person concerned. In other words, the fact that the latter date was after the entry into force of the new time-limit did not affect the determination of the applicable time-limit.

The Court stated, as a general observation, that the six-month time-limit should apply to

26. *Varnava and Others v. Turkey* [GC], nos. 16064/90 and 8 others, § 170, ECHR 2009.

27. *Orhan v. Türkiye* (dec.), no. 38358/22, adopted on 6 December 2022 and delivered on 19 January 2023.

28. Specifically, on expiry of a transitional period of six months after the date of entry into force of Protocol No. 15. Protocol No. 15 came into force on 1 August 2021.

applications in respect of which the final domestic decision within the meaning of Article 35 § 1 had been handed down prior to 1 February 2022, irrespective of when it had been notified to the person concerned, that is to say, even where the date of notification was after 31 January 2022. The new four-month time-limit should be applied to applications in respect of which the final domestic decision had been taken after 31 January 2022.

The issue regarding the determination of the applicable time-limit had arisen in the present case because, according to the Court's settled case-law, the period for submitting an application began running not on the date on which the decision exhausting domestic remedies was adopted, but on the date on which it was notified to the person concerned (where this was provided for in domestic law) or finalised (*Papachelas v. Greece*[29]). This was so even though the English version of Article 35 § 1 – like Article 8 § 3 of Protocol No. 15 – indicated the date on which the decision "was taken" as the starting-point of the relevant period. The Court explained in that regard that the practice followed with regard to the starting-point of the period for submitting an application was not relevant to the issue raised in the present case, and considered that the ordinary meaning of the words should take precedence in determining which time-limit was applicable, for the following reasons.

First, the identification of the applicable time-limit – four or six months – was clearly a separate issue from the determination of the date on which the relevant period started to run.

Secondly, Article 35 § 1 and Article 8 § 3 of Protocol No. 15 pursued different purposes: the former contained general procedural and jurisdictional rules, while the latter laid down a transitional period following the entry into force of Protocol No. 15.

Thirdly, in determining the starting-point of the period for submitting an application, the Court was guided by the need to preserve the effectiveness of the right of individual petition, in a manner compatible with the object and purpose of the Convention. The time-limit for submitting applications was designed not only to ensure legal certainty, but also to afford the prospective applicant time to consider whether to lodge an application and, if so, to decide on the specific complaints and arguments to be raised (*Worm v. Austria*[30]). Furthermore, a period for appealing could only start to run from the date on which the appellant was able to act effectively. Otherwise, the authorities could substantially reduce the time available for lodging an application or even deprive the applicant of the opportunity of lodging a valid application with the Court by delaying notification of their decisions. Those considerations weighed in favour of taking as the reference point the date of notification, or the date on which the applicant had had the opportunity to actually find out the content of the final decision (finalisation date). Moreover, this approach was consistent with the Court's case-law regarding access to a court for the purposes of Article 6 of the Convention (*Miragall Escolano and Others v. Spain*[31]). However, no considerations of this kind requiring the Court to depart from the ordinary meaning of the words arose when it came to determining the applicable time-limit under Article 8 § 3 of Protocol No. 15.

Fourthly, applying the time-limit in force at the time the final domestic decision was notified rather than that in force at the time the decision was taken would run counter to the very objectives referred to above and would have adverse consequences for the applicant in the present case, who had been entitled to expect, if need be after seeking appropriate advice, that he had six months from the date of notification of the Constitutional Court's decision in which to submit an application.

Fifthly, applying the time-limit in force on the date of adoption of the final domestic decision was consistent with the aim of Article 8 § 3 of Protocol No. 15, which was to prevent the new four-month time-limit from being applied retrospectively, that is, to applications in respect of which the final domestic decision had been adopted on a date when that time-limit was not yet in force.

Lastly, the Court made clear that there was no inconsistency between, on the one hand, taking into account the time-limit in force on the date of adoption of the final domestic decision, as expressly provided for by Protocol No. 15, and, on the other hand, setting as the start date of the applicable time-limit – whether the old or the new one – the date of notification or finalisation of the decision, having regard to the object and purpose of the Convention in accordance with the Court's well-established case-law.

29. *Papachelas v. Greece* [GC], no. 31423/96, ECHR 1999-II.

30. *Worm v. Austria*, 29 August 1997, *Reports of Judgments and Decisions* 1997-V.

31. *Miragall Escolano and Others v. Spain*, nos. 38366/97 and 9 others, ECHR 2000-I.

Competence *ratione temporis* (Article 35 § 3 (a))

The decision in *Pivkina and Others v. Russia*[32] concerned the Court's temporal jurisdiction mainly with respect to acts or omissions spanning the date on which a respondent State ceased to be a Party to the Convention.

On 16 March 2022 the Russian Federation ceased to be a member of the Council of Europe. Shortly thereafter, the Court, sitting in Plenary formation, adopted a Resolution stating that the Russian Federation would cease to be a High Contracting Party to the Convention on 16 September 2022 ("the termination date"). The applications in this case concerned different factual scenarios, alleging violations of various Convention provisions. Some of the facts occurred up until, some occurred after, and some spanned across the termination date. The Court reconfirmed its jurisdiction to deal with cases where all acts and judicial decisions leading to the alleged Convention violations had occurred up until the termination date[33]. The Court further rejected complaints as incompatible *ratione personae* with the provisions of the Convention where both the triggering act and the applicant's judicial challenge to it had occurred after the termination date. As regards the case where the facts spanned across the termination date, the Court found that some of the complaints fell within its temporal jurisdiction and gave notice thereof to the respondent Government. It rejected the remaining complaints as incompatible *ratione temporis* with Article 35 § 3 of the Convention.

The decision is noteworthy in that the Court developed a test for determining its temporal jurisdiction with regard to alleged Convention violations spanning across the date on which a respondent State ceased to be a party to the Convention.

(i) While the situation where a respondent State ceased to be a party to the Convention was novel, the Court observed that it was similar to situations where the acts or omissions occurred or began before the ratification date (prior to the entry into force of the Convention for the respective State) but their effects or a chain of appeals extended beyond that date. The Court therefore developed a test for determining its temporal jurisdiction with regard to acts or omissions spanning across the termination date, drawing upon its case-law (*Blečić v. Croatia*[34]) and the approach followed by the Inter-American Court of Human Rights[35]. The Court's jurisdiction is determined in relation to the facts constitutive of the interference. In cases where the interference occurs before the termination date but the failure to remedy it occurs after the termination date, it is the date of the interference that must be retained. It is therefore essential to identify, in each specific case, the exact moment of the alleged interference, considering both the facts of which the applicant complains and the scope of the Convention right alleged to have been violated. This approach ensures that complaints are not treated differently based solely on the length of the process of exhaustion of remedies, and it prevents the State from evading responsibility by protracting remedial proceedings.

(ii) The Court went on to apply this test to the alleged violations of different Convention provisions:

Article 3 (substantive aspect): An act of ill-treatment which occurred before the termination date falls within the Court's temporal jurisdiction.

Article 3 (procedural aspect): The Court applied the test developed for situations spanning the ratification date – what is important for determining the Court's temporal jurisdiction is that a significant proportion of the required procedural steps were or ought to have been carried out during the period when the Convention was in force in respect of the respondent State.

Article 3 and Article 5 § 3 (a "continuous situation"): Such a situation (for example, allegedly inhuman detention conditions) falls within the Court's jurisdiction only in respect of the part occurring before the termination date, following which the respondent State is no longer bound to ensure Convention-compliant conditions or to conduct judicial proceedings within a reasonable time. However, a period of detention approved before the termination date but extending beyond it will fall within the Court's jurisdiction in its entirety

32. *Pivkina and Others v. Russia* (dec.), no. 2134/23 and 6 others, 6 June 2023. See also under Article 35 § 3 (a) (Competence *ratione personae*) and Article 32 (Jurisdiction of the Court) below.

33. *Fedotova and Others v. Russia* [GC], nos. 40792/10 and 2 others, 17 January 2023.

34. *Blečić v. Croatia* [GC], no. 59532/00, ECHR 2006-III.

35. Judgment of the Inter-American Court of Human Rights in *Ivcher-Bronstein v. Peru* (competence), 24 September 1999, Series C No. 54; Advisory opinion OC-26/20 of the Inter-American Court of Human Rights of 9 November 2020 requested by the Republic of Colombia, Series A No. 26.

(up to the date until which the latest extension was approved) on account of the "overflowing" effect of the extension order.

Article 6 (fairness of a trial): Only complaints concerning proceedings where a judgment at last instance was given before the termination date, fall within the Court's jurisdiction. This also applies to complaints under Articles 7 or 18 which arise from the same proceedings.

Article 8: An instantaneous act (such as a search) which occurred before the termination date falls within the Court's temporal jurisdiction, even if the final appeal decision was issued after that date.

Article 10: Acts constitutive of an interference encompass any restrictive measures taken against an applicant in connection with his or her expressive conduct (such as an arrest and detention on remand, the institution of administrative-offence proceedings, the search and/or seizure of a journalist's electronic devices). The Court's jurisdiction is based on whether such acts occurred before or after the termination date.

Article 11: An interference can take various forms, such as measures taken by authorities before or during an assembly, as well as punitive measures thereafter. Any such measures which occurred before the termination date will fall within the Court's jurisdiction.

Article 5 and Article 2 of Protocol No. 7: The acts constitutive of an interference (such as excessively lengthy and unrecorded detention at a police station and immediate enforcement of a custodial sentence) which occurred before the termination date fall within the Court's jurisdiction. Any domestic court decisions in relation to an applicant's complaints in this respect, which were given after the termination date, should be regarded as the exercise of an available domestic remedy rather than a new or independent instance of interference.

Competence *ratione personae* (Article 35 § 3 (a))

The decision in *Pivkina and Others v. Russia*[36] concerned the Court's temporal jurisdiction mainly with respect to acts or omissions spanning the date on which a respondent State ceased to be a Party to the Convention.

On 16 March 2022 the Russian Federation ceased to be a member of the Council of Europe. Shortly thereafter the Court, sitting in Plenary formation, adopted a Resolution stating that the Russian Federation would cease to be a High Contracting Party to the Convention on 16 September 2022 ("the termination date"). The applications in this case concerned different factual scenarios, alleging violations of various Convention provisions. Some of the facts occurred up until, some occurred after, and some spanned across the termination date. The Court reconfirmed its jurisdiction to deal with cases where all acts and judicial decisions leading to the alleged Convention violations had occurred up until the termination date[37]. The Court further rejected complaints as incompatible *ratione personae* with the provisions of the Convention where both the triggering act and the applicant's judicial challenge to it had occurred after the termination date. As regards the case where the facts spanned across the termination date, the Court found that some of the complaints fell within its temporal jurisdiction and gave notice thereof to the respondent Government. It rejected the remaining complaints as incompatible *ratione temporis* with Article 35 § 3 of the Convention.

36. *Pivkina and Others v. Russia* (dec.), no. 2134/23 and 6 others, 6 June 2023. See also under Article 35 § 3 (a) (Competence *ratione temporis*) above and Article 32 (Jurisdiction of the Court) below.

37. *Fedotova and Others v. Russia* [GC], nos. 40792/10 and 2 others, 17 January 2023.

"Core" rights

Prohibition of torture and inhuman or degrading treatment and punishment (Article 3)

Inhuman or degrading treatment

The judgment in *Schmidt and Šmigol v. Estonia*[38] concerned the consecutive enforcement of disciplinary punishments and imposition of security measures in prison, resulting in prolonged periods of solitary confinement.

The applicants were convicted prisoners, each of whom had received a series of disciplinary sanctions in the form of solitary confinement in a punishment cell. The consecutive enforcement of those measures resulted in particularly lengthy periods continuously spent by the applicants in solitary confinement. The first applicant spent, in a punishment cell, periods of 69 days, 30 days, 65 days, 60 days, and 747 days: he was also once held in a locked isolation cell for 33 consecutive days as an additional security measure (not considered a punishment), owing to his dangerous behaviour. The breaks between those periods, when he could return to the normal detention regime, lasted between 6 and 36 days. The second applicant was subjected to the punishment cell regime three times during a period of one year and four months, the respective periods lasting 392, 55 and 34 days with two two-day breaks in between.

The Court found a violation of Article 3 on account of the extended periods spent by the applicants in solitary confinement, considering that neither the breaks between those periods nor the various measures of social, psychological, and medical support offered by the prison authorities had been sufficient to alleviate the negative and damaging effects arising from such confinement.

The compatibility with Article 3 of the Convention of solitary confinement of detainees is not a novel issue in the Court's case-law, even if applied as a disciplinary punishment (for example, *Ramishvili and Kokhreidze v. Georgia*[39]; *Razvyazkin v. Russia*[40]; and *Khodorkovskiy and Lebedev v. Russia*[41]) or as a security/safety measure (for example, *Onoufriou v. Cyprus*[42]; *Borodin v. Russia*[43]; and *A.T. v. Estonia (no. 2)*[44]).

This judgment is the first to deal with consecutive disciplinary sanctions and security measures: while domestic law set an upper limit on the duration of each disciplinary sanction, the absence of such a limit on the overall duration of consecutive periods of uninterrupted sanctions had resulted, in the applicants' case, in their seclusion for excessive periods of time.

The judgment is therefore noteworthy in that the Court:

(a) acknowledged the difference between solitary confinement as a disciplinary punishment and as a security measure, and acknowledged that it might not be possible to suspend/postpone a security measure owing to a variety of security concerns that prison authorities had to tackle in the interests of their personnel or prisoners;

38. *Schmidt and Šmigol v. Estonia*, nos. 3501/20 and 2 others, 28 November 2023.
39. *Ramishvili and Kokhreidze v. Georgia*, no. 1704/06, §§ 79-88, 27 January 2009.
40. *Razvyazkin v. Russia*, 13579/09, §§ 102-08, 3 July 2012.
41. *Khodorkovskiy and Lebedev v. Russia*, nos. 11082/06 and 13772/05, §§ 468-74, 25 July 2013.
42. *Onoufriou v. Cyprus*, no. 24407/04, §§ 71-81, 7 January 2010.
43. *Borodin v. Russia*, no. 41867/04, §§ 129-35, 6 November 2012.
44. *A.T. v. Estonia (no. 2)*, no. 70465/14, §§ 74-86, 13 November 2018.

(b) referring to the United Nations Standard Minimum Rules for the Treatment of Prisoners ("the Nelson Mandela Rules"), the European Prison Rules and the conclusions of the CPT, emphasised that solitary confinement as a punishment should only be used exceptionally and as a measure of last resort;

(c) indicated that solitary confinement should be alternated with periods of return to the normal prison regime. The longer the solitary confinement, the longer those intervening periods should be; and

(d) declared that prolonged solitary confinement, in itself, entailed an inherent risk of harm to any person's mental health, irrespective of the material conditions surrounding it, and even in the absence of any noticeable deterioration of the applicants' physical health.

Positive obligations

The judgment in *S.P. and Others v. Russia*[45] concerned segregation, humiliation and abuse of prisoners by fellow inmates on account of their inferior status in an informal prisoner hierarchy tolerated by the authorities.

The applicants, serving prisoners, complained of being constantly subjected to humiliating treatment and physical abuse by fellow inmates on account of being assigned to the lowest "outcast" group in an informal prisoner hierarchy, enforced by threats or violence and tolerated by the prison authorities. The applicants described being constantly segregated, both socially and physically. They were allocated either separate or the least comfortable places in the dormitory and canteen, and were prohibited from using any other areas under threat of punishment. They were provided with separate cutlery (with holes) and lower quality or leftover food. Their access to prison resources, including showers and medical care, was limited or blocked. They were forbidden from coming into close proximity with, let alone from touching, other prisoners under threat that that person would become "contaminated". All the applicants were forced to perform what was considered "dirty work", such as cleaning latrines or shower cubicles. Their complaints were summarily rejected by the authorities. The Court found a violation of Article 3 of the Convention (substantive aspect). In its view, the applicants' stigmatisation and segregation, coupled with their assignment to menial labour and denial of basic needs, enforced by threats of violence as well as by occasional physical and sexual violence, meant that they had endured for a number of years mental anxiety and physical suffering amounting to inhuman and degrading treatment. Furthermore, while being aware of the applicants' vulnerable situation, the authorities had taken no individual or general measures to ensure their safety and well-being and to address this systemic and widespread problem. The Court also found a violation of Article 13 in conjunction with Article 3 of the Convention (in respect of the applicants who raised that complaint).

The judgment is noteworthy in that the Court considered, for the first time, as a specific phenomenon, the degrading effects of an informal prisoner hierarchy, a systemic and widespread problem in penal facilities in Russia[46]. The judgment is interesting in three respects: firstly, for the manner in which the Court proceeded to establish the facts; secondly, for the Court's analysis of the ritualistic and symbolic features of the treatment complained of; and, thirdly, for the application, in this particular novel context, of the established positive obligation to take necessary measures to protect the physical or psychological integrity and well-being of prisoners (*Premininy v. Russia*[47]).

(i) In view of the difficulties due to the unofficial, *de facto* nature of the hierarchy complained of, the Court proceeded to establish the facts in the following manner. In the first place, the Court analysed the quality and consistency of the applicants' submissions. The applicants – held in far-off and distant places at different times – had submitted similar accounts of the abuse they had faced, including detailed accounts of the events that had led to their classification as "outcast" prisoners. They had also provided evidence to support their claims. Secondly, the Court took

45. *S.P. and Others v. Russia*, nos. 36463/11 and 10 others, 2 May 2023.

46. See also the concluding observations of the United Nations Committee against Torture (CAT) on the fourth periodic report of Armenia (2017) (CAT/C/ARM/CO/4) and on the third periodic report of Kazakhstan (2014) (CAT/C/KAZ/CO/3); see also the reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Armenia (CPT/Inf (2021) 10), to Georgia (CPT/Inf (2022) 11), to Lithuania (CPT/Inf (2023) 01) and to the Republic of Moldova (CPT/Inf (2020) 27).

47. *Premininy v. Russia*, no. 44973/04, § 83, 10 February 2011, and the cases cited therein..

account of all the information from different sources provided by the applicants, including official reports (by public monitoring entities and by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment) and academic research. Those sources lent credence to the applicants' submissions. Thirdly, the Court took note of the Government's position: they had neither engaged with the applicants' detailed submissions nor provided an alternative account of events[48]. On this basis, the Court found it established that the informal prisoner hierarchy existed, that the applicants had been assigned to the lowest group in that hierarchy and had been subjected to the treatment of which they complained, and that the domestic authorities had been, or ought to have been, aware of both the hierarchy complained of and the applicants' inferior status within it and hence their particular vulnerability.

(ii) When examining the merits of the applicants' complaints under Article 3, the Court had particular regard to the following specific effects and features of the prisoner hierarchy. The applicants' separation from other inmates, through arbitrary restrictions and deprivations, had physical and symbolic dimensions: in the Court's view, the denial of human contact was a dehumanising practice that reinforced the idea that certain people were inferior and not worthy of equal treatment and respect, and the resulting social isolation and marginalisation of the "outcast" applicants must have had serious psychological consequences. In addition, the status-based allocation of menial types of work had further debased the applicants and perpetuated their separation and feelings of inferiority. The Court also noted the enduring nature of the stigma attached to their low status, which excluded any prospect of improvement, even after a lengthy period of detention or upon transfer to another institution.

(iii) The Court went on to examine whether the respondent State had complied with its positive obligation to protect individuals from inter-prisoner violence, as set out in *Premininy* (cited above, §§ 82-88). In the first place, the Court noted that the authorities had, or ought to have had, knowledge of the heightened risk of such violence faced by the applicants on account of belonging to a particularly vulnerable category of "outcast" prisoners (on the importance of vulnerability in the Court's assessment, see *Stasi v. France*[49]; *J.L. v. Latvia*[50]; *M.C. v. Poland*[51]; *Sizarev v. Ukraine*[52]; and *Totolici v. Romania*[53]). Secondly, the Court emphasised the structural nature of the problem, individual measures being incapable of changing the power structures underlying the informal prisoner hierarchy or the applicants' subordinate place in it. While a systemic and comprehensive response was therefore called for on the part of the authorities, the Court observed a lack of action at all levels. As regards policy-making, the informal prisoner hierarchy had not even been identified as a problem to be addressed in the relevant policy documents: no specific remedies had been set up to provide redress, while the existing general ones had proved to be ineffective. As regards the prison administration, the Court noted the following specific omissions: a lack of prompt security or surveillance measures and an absence of any standardised policy of punishments to prevent the informal code of conduct from being enforced; and the lack of a proper policy regarding classification, which would have included screening for any risk of victimisation or abuse. Concluding as to a breach of Article 3, the Court emphasised, in view of the extent of the problem, that the authorities' failure to take action could be seen as a form of complicity in the abuse inflicted upon the prisoners under their protection.

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48. The Government's observations were submitted before the Russian Federation ceased to be a party to the Convention.
49. *Stasi v. France*, no. 25001/07, § 91, 20 October 2011.
50. *J.L. v. Latvia*, no. 23893/06, § 68, 17 April 2012.
51. *M.C. v. Poland*, no. 23692/09, § 90, 3 March 2015.
52. *Sizarev v. Ukraine*, no. 17116/04, §§ 114-15, 17 January 2013.
53. *Totolici v. Romania*, no. 26576/10, §§ 48-49, 14 January 2014.

Prohibition of slavery and forced labour (Article 4)

Positive obligations

The judgment in the case of *Krachunova v. Bulgaria*[54] concerned the positive obligation to enable a victim of trafficking to claim compensation from her trafficker in respect of lost earnings from coerced prostitution.

During 2012 and 2013 the applicant had been a sex worker until she was intercepted by and spoke to police officers. Her pimp (X) was later convicted of human trafficking. While the domestic courts allowed the applicant's claim against X for compensation for non-pecuniary damage, her claim for compensation for pecuniary damage, based on the estimated earnings from prostitution that X had allegedly taken away from her, was dismissed essentially on the basis that it concerned money earned in an immoral manner. The applicant complained under Article 4 of the Convention. The Court held that this provision was applicable and found a violation thereof.

The judgment is noteworthy in that the Court dealt, for the first time, with the inability of a trafficking victim to seek compensation in respect of lost earnings from coerced prostitution. In the first place, and as to the applicability of Article 4, the Court confirmed that the presence of the "means" element of the international definition of trafficking in human beings could be established on the basis of subtler methods, in the absence of violence or threats thereof. Secondly, the Court laid down a novel positive obligation to enable victims of trafficking to claim compensation from their traffickers in respect of lost earnings. Thirdly, and as to earnings obtained through prostitution, the Court clarified that non-compliance with the above obligation could not be automatically justified on the grounds of morality and had to be assessed in the light of the compelling public policy against human trafficking and in favour of protecting its victims.

(i) The Court found Article 4 to be applicable, in that all three elements of the international definition of trafficking in human beings – "action", "means" and "purpose" – were present. The Court elaborated on the "means" element: there was no evidence that X had resorted to violence or threats of violence. Referring to the explanatory report to the Council of Europe Convention on Action against Trafficking in Human Beings[55], the Court noted that international law reflected clearly the understanding that modern-day trafficking was sometimes carried out by subtler means, such as deception, psychological pressure and the abuse of vulnerability, tactics which should not be seen in isolation. The applicant, a poor and emotionally unstable young woman hailing from a small village, had felt dependent on X who had had her living in his house, had retained her identity card and had taken away a substantial portion of her earnings. He had also threatened to disclose to her co-villagers the fact that she was engaged in sex work. In such circumstances, the Court clarified that the fact that the applicant might have, at least initially, consented to engage in sex work was not decisive. In any event, under the Convention on Action against Trafficking in Human Beings definitions, such consent was irrelevant if any of the "means" of trafficking had been used. Nor was it decisive that the applicant could have perhaps broken free earlier.

(ii) The Court analysed her complaint in the light of the object and purpose of Article 4 and in a way that rendered its safeguards practical and effective. It observed that its case-law to date relating to after-the-fact responses to trafficking had focused on investigation and punishment, rather than on redressing the material harm suffered by the victims. However, in some recent cases the Court had highlighted the need to protect trafficking victims after the fact from the perspective of their recovery and reintegration into society (*V.C.L. and A.N. v. the United Kingdom*[56], and *J. and Others v. Austria*[57]). From that very perspective, the possibility for victims to seek compensation from their traffickers in respect of lost earnings would constitute a means of ensuring *restitutio in integrum* and would also go a considerable way (by providing them with the financial means to rebuild their lives) towards upholding their dignity, assisting

54. *Krachunova v. Bulgaria,* no. 18269/18, 28 November 2023.
55. Council of Europe Convention on Action against Trafficking in Human Beings, CET No. 197.
56. *V.C.L. and A.N. v. the United Kingdom*, nos. 77587/12 and 74603/12, 16 February 2021.
57. *J. and Others v. Austria*, no. 58216/12, 17 January 2017.

their recovery, and reducing the risks of their falling victim to traffickers again. Moreover, such a possibility would help to ensure that traffickers were not able to enjoy the fruits of their offences, thus reducing the economic incentives to commit them. Moreover, it could give victims an additional incentive to expose trafficking, thereby increasing the odds of holding human traffickers accountable and of the prevention of future instances. The Court therefore considered that such a possibility had to be an essential part of the integrated State response to trafficking required under Article 4. It observed that that approach had found support in the available comparative-law material, in the relevant international instruments (the Palermo Protocol[58] and the Council of Europe Convention on Action against Trafficking in Human Beings), as well as in the recommendations and reports of UN bodies, the Council of Europe Group of Experts on Action against Trafficking in Human Beings (GRETA) and the Parliamentary Assembly of the Council of Europe. On that basis, the Court read into Article 4 a novel positive obligation on Contracting States to enable victims of trafficking to claim compensation from their traffickers in respect of lost earnings.

(iii) As to the domestic authorities' compliance with that positive obligation, the Court had particular regard to the sensitive prostitution context of the case, a phenomenon which was approached differently in different legal systems. In the first place, the Court circumscribed the scope of its analysis: it did not concern whether contracts for sex work had to be recognised as legally valid in themselves or whether the Convention precluded prostitution or some of its aspects from being outlawed[59]. The Court's analysis was limited to whether the positive obligation could be avoided on public-policy grounds, notably on the basis that the earnings at issue had been obtained immorally. Secondly, while concerns based on moral considerations had to be taken into account in such a sensitive domain, the manner in which domestic law approached different aspects of the problem had to be coherent and permit the various legitimate interests at play to be adequately taken into account. Moreover, human rights should be the main criterion in designing and implementing policies on prostitution and trafficking. The Court did not exclude that there might exist sound public-policy reasons to dismiss a tort claim relating to earnings obtained through prostitution. Nevertheless, it attached considerable importance to the countervailing and compelling public policy against trafficking in human beings and in favour of protecting its victims. Indeed, the present applicant had been seeking the proceeds with which her trafficker had unjustly enriched himself and which had been derived from her unlawful exploitation for coerced prostitution. The Court further observed the consonant position of the Bulgarian authorities, and notably the Constitutional Court, which regarded prostitution not as reprehensible conduct on the part of those engaging in it, but as a form of exploitation by others and as a breach of their human rights. In the light of the above, and notwithstanding the respondent State's margin of appreciation, the Court concluded that reliance on the "immoral" character of the applicant's earnings was not a sufficient justification for the authorities' failure to comply with the above-noted positive obligation.

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58. Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, adopted and opened for signature, ratification and accession by General Assembly resolution 55/25 of 15 November 2000.

59. *M.A. and Others v. France* (dec.), nos. 63664/19 and 4 others, 27 June 2023, a case pending on the merits.

Procedural rights

Right to a fair hearing in civil proceedings (Article 6 § 1)

Access to a court

The judgment in *FU QUAN, s.r.o. v. the Czech Republic*[60] concerned the domestic courts' failure to apply the principle of *jura novit curia*.

The applicant company's property (mostly merchandise) had been seized during criminal proceedings against the managing director and the other member of the company. Following their acquittal, the company brought a civil action for the damage caused to its property by the State. The action was dismissed for lack of *locus standi*, the company not being a party to the criminal proceedings in issue. The company complained to the Court under Article 6 § 1 and Article 1 of Protocol No. 1. A Chamber considered that it had been up to the courts, applying the principle of *jura novit curia*, to subsume the facts of the case under the relevant domestic-law provisions in order to deal with the merits of the action: it was clear that the company had claimed compensation for the depreciation of its merchandise. The Chamber therefore dismissed the Government's preliminary objection (exhaustion of domestic remedies) and found a breach of Article 1 of Protocol No. 1, given the unjustified protracted retention of the property. The Chamber also decided that there was no need to rule separately on the complaint under Article 6 § 1 concerning the alleged denial of access to a court resulting from a formalistic and restrictive interpretation of national law by the domestic courts.

The Grand Chamber, however, considered that the complaint under Article 6 § 1 was the applicant company's main complaint and rejected it as manifestly ill-founded. Furthermore, having ascertained the scope of the complaints under Article 1 of Protocol No. 1, the Grand Chamber observed that the Chamber had examined only one of the complaints raised, even though there were three altogether. Given its findings concerning the complaint in respect of access to a court, the Grand Chamber rejected two of these complaints for non-exhaustion of domestic remedies: the applicant company had not properly availed itself of the possibility of obtaining compensation for the undue delay in lifting the order for the seizure of its property and for the authorities' alleged failure to take care of the property. As regards the third complaint (damage to the property following the unwarranted prosecution and detention of the company's managing director and other member), such a compensation claim did not have a sufficient basis in domestic law. The guarantees of Article 1 of Protocol No. 1 being therefore inapplicable, the Grand Chamber rejected this complaint as incompatible *ratione materiae* with the provisions of the Convention.

The Grand Chamber judgment is noteworthy in that the Court analysed whether the domestic courts' failure to apply the principle of *jura novit curia* amounted to excessive formalism, in breach of the right of access to a court guaranteed by Article 6 § 1.

Unlike the Chamber, the Grand Chamber focused on the manner in which the applicant company had presented the facts in its action. First, it had not expressly specified which of the two statutory causes of action – an unlawful decision or irregular official conduct – it had intended to pursue. Secondly, when the domestic courts had treated its action as one against an unlawful decision and had dismissed it for lack of *locus standi*, the applicant

60. *FU QUAN s.r.o. v. the Czech Republic* [GC], no. 24827/14, 1 June 2023. See also under Article 35 § 1 (Exhaustion of domestic remedies) above and under "Rules of Court" below.

company had not argued, in pursuing subsequent remedies, that the lower court(s) had misconstrued it and that they should have treated it as an action based on irregular official conduct. Its arguments rather suggested that the courts' refusal to grant *locus standi* in disregard of the applicable statutory provision had been excessively formalistic. By contrast, in its subsequent submissions before the Chamber of this Court, the applicant company had adopted a totally different attitude by arguing that the excessive formalism consisted of the domestic courts' failure to treat its civil action as one based on irregular official conduct, rather than an unlawful decision. The Grand Chamber emphasised that parties could not validly put forward before the Court arguments which they had never made before the domestic courts: the applicant company had neither based its action on irregular official conduct, nor argued before the domestic courts that they should have treated it as such. In those circumstances, the domestic courts could not be blamed for not treating the applicant company's action as one based on irregular official conduct. Lastly, it had been open to the applicant company, for a further four months after the dismissal of its action, to bring a new one specifying irregular official conduct as the cause of the damage. The Grand Chamber therefore dismissed the complaint in respect of access to court.

Fairness of the proceedings

The judgment in *Yüksel Yalçınkaya v. Türkiye*[61] concerned a conviction for membership of a terrorist organisation based on the use of an encrypted messaging application.

The applicant was convicted of membership of an armed terrorist organisation ("FETÖ/PDY")[62], considered by the domestic authorities to have been behind the attempted coup of 2016. The conviction was based decisively on his use of an encrypted messaging application, ByLock, which the domestic courts had found to have been designed for the exclusive use of the members of FETÖ/PDY.

The applicant complained mainly under Articles 6, 7 and 11. The Grand Chamber (relinquishment) found a violation of Article 7 on account of the domestic courts' unforeseeable interpretation of the domestic law, which attached objective liability to the mere use of ByLock. It also found a breach of Article 6 § 1 on account of the domestic courts' failure to put in place appropriate safeguards to enable the applicant to challenge effectively the key evidence (electronic data), to address the salient issues lying at the core of the case and to provide sufficient reasons. In the Grand Chamber's view, there had also been a breach of Article 11, as the domestic courts had deprived the applicant of the minimum protection against arbitrariness and had extended the scope of the relevant offence when relying, to corroborate his conviction, on his membership of a trade union and an association (purportedly affiliated with FETÖ/PDY) that had both been operating lawfully at the material time.

The Grand Chamber judgment is noteworthy in that the Court confirmed and clarified the application of the safeguards enshrined in Article 6 § 1 with regard to two specific features of the instant case: in the first place, the unique challenges faced by the domestic authorities in their fight against terrorism in its covert, atypical forms and in the aftermath of the attempted military coup; and, secondly, the use of a high volume of encrypted electronic data stored on the server of an internet-based communication application.

In addressing the specific nature and scope of the evidence from the standpoint of the relevant guarantees under Article 6 § 1, the Court noted that electronic evidence differed in many respects from traditional forms of evidence and raised distinct reliability issues. Furthermore, the handling of electronic evidence, particularly where it concerned data that were encrypted and/or vast in volume or scope, might present the law enforcement and judicial authorities with serious practical and procedural challenges. In this connection, the Court clarified that those factors did not call for the safeguards under Article 6 § 1 to be applied differently, be it more strictly or more leniently. The Court would therefore adhere to its usual approach and assess whether the overall fairness of the proceedings had been ensured through the lens of

61. *Yüksel Yalçınkaya v. Türkiye* [GC], no. 15669/20, 26 September 2023. See also under Article 7 (No punishment without law) and under Article 15 (Derogation in time of emergency) below.

62. "Fetullahist Terror Organisation/Parallel State Structure".

the procedural and institutional safeguards and the fundamental principles of a fair trial.

In the instant case, the Court did not have sufficient elements to impugn the accuracy of the ByLock data – at least to the extent that they established the applicant's use of that application. However, as the raw data obtained from the ByLock server had not been disclosed to the applicant, he had been unable to verify first-hand the integrity and reliability of that evidence and to challenge the relevance and significance attributed to it. In the Court's view, that situation placed a greater onus on the domestic courts to subject those issues to the most searching scrutiny. The Court concluded that the prejudice to the defence on that account had not been counterbalanced by adequate procedural safeguards, having examined this issue on the basis of its well-established case-law (*Rook v. Germany*[63], *Matanović v. Croatia*[64], *Mirilashvili v. Russia*[65]). In particular, the domestic courts had neither provided reasons for the impugned non-disclosure, nor responded to the applicant's request for an independent examination of the data or to his concerns as to their reliability; and the applicant had not been given the opportunity to acquaint himself with the decrypted ByLock material (including, in particular, the nature and content of his activity on that application), which would have constituted an important step in preserving his defence rights, especially given the preponderant weight of that evidence in securing his conviction. Importantly, the courts had not sufficiently explained how it was ascertained that ByLock was not, and could not have been, used by anyone who was not a "member" of FETÖ/PDY. While acknowledging that electronic evidence of such a kind might, in principle, be very important in the fight against terrorism or other organised crime, the Court emphasised that it could not be used by the domestic courts in a manner that undermined the basic tenets of a fair trial.

As to whether the impugned failure to observe the requirements of a fair trial could be justified by the Turkish derogation under Article 15 (in connection with the attempted coup), the Court emphasised that such a derogation, even if justified, neither had the effect of dispensing the States from the obligation to respect the rule of law (*Pişkin v. Turkey*[66]), nor did it give them *carte blanche* to engage in conduct that could lead to arbitrary consequences for individuals. Accordingly, when determining whether a derogating measure was strictly required by the exigencies of the situation, the Court would also examine whether adequate safeguards had been provided against abuse and whether the measure undermined the rule of law. In the present case, no sufficient connection had been established between the above fair trial issues and the special measures taken during the state of emergency. The Court therefore found a breach of Article 6 § 1 of the Convention.

Other rights in criminal proceedings

No punishment without law (Article 7)

The judgment in *Yüksel Yalçınkaya v. Türkiye*[67] concerned a conviction for membership of a terrorist organisation based on the use of an encrypted messaging application.

The applicant was convicted of membership of an armed terrorist organisation ("FETÖ/PDY")[68], considered by the domestic authorities to have been behind the attempted coup of 2016. The conviction was based decisively on his use of an encrypted messaging application, ByLock, which the domestic courts had found to have been designed for the exclusive use of the members of FETÖ/PDY.

Before the Court, the applicant complained mainly under Articles 6, 7 and 11. The Grand Chamber (relinquishment) found a violation

63. *Rook v. Germany*, no. 1586/15, 25 July 2019.
64. *Matanović v. Croatia*, no. 2742/12, 4 April 2017.
65. *Mirilashvili v. Russia*, no. 6293/04, 11 December 2008.
66. *Pişkin v. Turkey*, no. 33399/18, § 153, 15 December 2020.
67. *Yüksel Yalçınkaya v. Türkiye*[GC], no. 15669/20, 26 September 2023. See also under Article 6 § 1 (Fairness of the Proceedings) above and under Article 15 (Derogation in time of emergency) below.
68. "Fetullahist Terror Organisation/Parallel State Structure".

of Article 7 on account of the domestic courts' unforeseeable interpretation of domestic law, which attached objective liability to the mere use of ByLock. It also found a breach of Article 6 § 1 on account of the domestic courts' failure to put in place appropriate safeguards to enable the applicant to challenge effectively the key evidence (electronic data), to address the salient issues lying at the core of the case and to provide sufficient reasons. In the Grand Chamber's view, there had also been a breach of Article 11, as the domestic courts had deprived the applicant of the minimum protection against arbitrariness and had extended the scope of the relevant offence when relying, to corroborate his conviction, on his membership of a trade union and an association (purportedly affiliated with FETÖ/PDY) that had both been operating lawfully at the material time.

The Grand Chamber judgment is noteworthy in that the Court confirmed and clarified the application of the safeguards enshrined in Article 7 with regard to two specific features of the instant case: in the first place, the unique challenges faced by the domestic authorities in their fight against terrorism in its covert, atypical forms and in the aftermath of the attempted military coup; and, secondly, the use of a high volume of encrypted electronic data stored on the server of an internet-based communication application.

The Court reiterated that Article 7 enshrines a non-derogable right that is at the core of the rule of law principle. It emphasised that the fundamental safeguards guaranteed by that provision could not be applied less stringently when it came to the prosecution and punishment of terrorist offences, even when allegedly committed in circumstances threatening the life of the nation. The Convention required the observance of the Article 7 guarantees, including in the most difficult of circumstances. The Court clarified in the course of its judgment that it was not sufficient for national law to clearly set out an offence: courts had also to comply with the law and not circumvent it through its interpretation and application to the specific facts of a case.

In the instant case, while the use of ByLock was neither criminalised as such nor part of the *actus reus* of the relevant offence, the domestic courts' interpretation had had the effect of equating such use with knowingly and willingly being a member of an armed terrorist organisation. For the Court, the issue was not the assessment of the relevance/weight to be attached to a particular item of evidence, an issue not in principle within its remit under Article 7. Rather, the issue in the present case was that the applicant's conviction had been secured without duly establishing the presence of all the constituent elements of the offence (including its specific intent) in an individualised manner. It also confirmed the right of an individual, under Article 7, not to be punished without the existence of a mental link through which an element of personal liability could be established (*G.I.E.M. S.r.l. and Others v. Italy*[69]). While the Court acknowledged the significant challenges involved in accessing the content of secure communications used by organisations operating in secrecy, it was against the principles of legality and foreseeability, and thus in disregard of the guarantees laid down in Article 7, to attach criminal liability in a virtually automatic manner to all ByLock users.

69. *G.I.E.M. S.r.l. and Others v. Italy* [GC], nos. 1828/06 and 2 others, §§ 242 and 244, 28 June 2018.

Other rights and freedoms

Right to respect for one's private and family life, home and correspondence (Article 8)

Private life

The judgment in *L.B. v. Hungary*[70] concerned the statutory requirement to publish taxpayers' personal data, including their home address, in response to non-compliance with tax obligations.

As required by the legislation, the National Tax and Customs Authority published in the list of major tax debtors on its website the applicant's personal data, including his name and home address. Introduced as a tool to tackle non-compliance with tax regulations, the systematic and mandatory publication of such data applied to all taxpayers who, at the end of the quarter, owed a large amount in tax for a period longer than 180 consecutive days.

The applicant complained under Article 8. A Chamber of the Court found no violation of this provision: the impugned publication had not placed a substantially greater burden on the applicant's private life than had been necessary to further the State's legitimate interest. Upon referral, the Grand Chamber disagreed and found a breach of Article 8 of the Convention. The reasons relied upon by the Hungarian legislature in enacting the impugned mandatory publication scheme, although relevant, had not been sufficient and a fair balance had not been struck between the competing interests at stake: on the one hand, the public interest in ensuring tax discipline and the economic well-being of the country and the interest of potential business partners in obtaining access to certain State-held information concerning private individuals and, on the other, the interest of private individuals in protecting certain forms of data retained by the State for tax collection purposes.

The Grand Chamber judgment is noteworthy in that the Court examined, for the first time, whether, and to what extent, the imposition of a statutory obligation to publish taxpayers' personal data, including their home address, was compatible with Article 8 of the Convention. The Court defined the scope of the margin of appreciation available to the State when regulating questions of that nature and it specified the relevant criteria by which to carry out the balancing exercise between the competing interests at stake in this area.

(i) The Court had regard to the degree of consensus at national and European level. According to the comparative-law survey, in twenty-one of the thirty-four Contracting States surveyed the public authorities could, and in some cases had to, disclose publicly the personal data of taxpayers who failed to comply with their payment obligations, subject to certain conditions. While a majority of the States concerned provided unrestricted access to taxpayer information, only a few of those disclosed the home address of taxpayers.

The Court also drew on three sets of principles: general principles in its case-law on the disclosure of personal data (*inter alia*, *Z v. Finland*[71]; *S. and Marper v. the United Kingdom*[72]; and *Satakunnan*

70. *L.B. v. Hungary* [GC], no. 36345/16, 9 March 2023.

71. *Z v. Finland*, 25 February 1997, *Reports of Judgments and Decisions* 1997-I.

72. *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, ECHR 2008.

Markkinapörssi Oy and Satamedia Oy v. Finland[73]*;* specific principles concerning data protection (notably, the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data[74]) and applied by the Court; and, lastly, principles on the adoption and implementation of general measures (*Animal Defenders International v. the United Kingdom*[75]).

Taking all the above factors into account, the Court found that the Contracting States enjoyed a wide margin of appreciation when assessing the need to establish a scheme for the dissemination of personal data of taxpayers who failed to comply with their tax payment obligations, as a means, *inter alia*, of ensuring the proper functioning of tax collection as a whole.

In so far as the present impugned publication was part of the application of a general measure (and not a matter of an individual decision), the Court clarified that the choice of such a general scheme by the legislature was not in itself problematic; nor was the publication of taxpayer data as such. However, the discretion enjoyed by States in this area was not unlimited: the Court had repeatedly held that the choices made by the legislature were not beyond its scrutiny and had assessed the quality of the parliamentary and judicial review of the necessity of a particular measure (*M.A. v. Denmark*[76]).

In this particular context, the Court would therefore scrutinise whether the competent domestic authorities, be it at the legislative, executive or judicial level, had performed a proper balancing exercise between the competing interests and, in so doing, they had to have regard not only to (a) the public interest in the dissemination of the information in question, but also to (b) the nature of the disclosed information; (c) the repercussions on and risk of harm to the enjoyment of private life of the persons concerned; (d) the potential reach of the medium used for the dissemination of the information, in particular, that of the Internet; and (e) the basic data protection principles, including those on purpose limitation, storage limitation, data minimisation and data accuracy. The existence of procedural safeguards could also play an important role.

(ii) In assessing whether the Hungarian legislature had acted within the margin of appreciation afforded to it, the Court singled out two features of the impugned publication scheme: the inclusion of a home address among a taxpayer's personal data subject to the mandatory publication; and the lack of any discretion on the part of the Tax Authority to conduct an individualised proportionality assessment. With this in mind, the Court analysed the quality of the parliamentary review and identified the following shortcomings:

– no assessment had been made of the necessity and the complementary value of the impugned general measure (most notably in so far as it required the publication of the tax debtor's home address) against the background of the existing tools with the same deterrent purpose;

– no consideration had been given to the impact on the right to privacy and, in particular, the risk of misuse of the tax debtor's home address by other members of the public;

– no consideration had been given to the potential reach of the medium used for the dissemination of the information in question (the Internet), implying an unrestricted access to rather sensitive information (name and home address), with the risk of republication as a natural, probable and foreseeable consequence of the original publication; and

– no consideration had been given to data protection requirements in accordance with domestic and EU law and to the possibility of devising appropriately tailored responses in the light of the principle of data minimisation.

Accordingly, the Court concluded that, notwithstanding the respondent State's wide margin of appreciation, the interference complained of had not been "necessary in a democratic society".

In response to the request submitted by the Finnish Supreme Court, the Court delivered its advisory opinion[77] on 13 April 2023, which concerned the procedural status and rights of a biolog-

73. *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], no. 931/13, 27 June 2017.

74. Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, CET 108.

75. *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, ECHR 2013 (extracts).

76. *M.A. v. Denmark* [GC], no. 6697/18, 9 July 2021.

77. *Advisory opinion on the procedural status and rights of a biological parent in proceedings for the adoption of an adult* [GC], request no. P16-2022-001, Supreme Court of Finland, 13 April 2023. See also under Article 1 of Protocol No. 16 (Advisory opinions) below.

ical parent in proceedings for the adoption of an adult.

The request for an advisory opinion arose out of proceedings before the Finnish courts concerning the adoption of an adult, C, by his aunt, B, with whom he had lived from the age of three until adulthood. During that period, B had supplementary custody over C, granted at the request of his biological mother, A. His mother had, however, remained involved in his upbringing and they still had contact. She objected to the adoption and was heard as a witness by the District Court, on its own initiative. That court granted the adoption, finding that the statutory conditions had been met, namely that C had been brought up by B and that, while the adoptee had still been a minor, they had had a relationship comparable to that of a child and parent. A's appeal was dismissed by the Court of Appeal without consideration of the merits: under the Adoption Act, a parent of an adult was not a party to a matter concerning adoption and had no right of appeal. The biological mother applied to the Supreme Court, who in turn requested an advisory opinion based on the following questions:

> "(1) Should the Convention on Human Rights be interpreted in such a way that legal proceedings concerning the granting of an adoption of an adult child in general, and especially in the circumstances of the case at hand, are covered by the protection of a biological parent referred to in Article 8 of the Convention on Human Rights?
>
> (2) If the answer to the question asked above is affirmative, should Articles 6 and 8 of the Convention on Human Rights be interpreted in such a way that a biological parent of an adult child should in all cases, or especially in the circumstances of this case, be heard in legal proceedings concerning the granting of adoption?
>
> (3) If the answer to the questions asked above is affirmative, should Articles 6 and 8 of the Convention on Human Rights be interpreted in such a way that a biological parent should be given the status of a party in the matter, and that the biological parent should have the right to have the decision concerning the granting of adoption reviewed by a higher tribunal by means of appeal?

In this, its sixth advisory opinion under Protocol No. 16, the Court clarified whether Article 8 was applicable to legal proceedings concerning the grant of adoption of an adult child, under its family or private life aspects, and what procedural requirements were to be complied with in that context.

(i) As regards the "family life" aspect, the Court noted that the relationship between the biological mother (A) and the adopted adult (C) was not characterised by any factors of dependence (*Emonet and Others v. Switzerland*[78]; *Bierski v. Poland*[79]; and *Savran v. Denmark*[80]) or by a pecuniary or patrimonial aspect (*Marckx v. Belgium*[81]). It concluded that it was therefore inappropriate to analyse the case pending before the requesting court from the standpoint of "family life".

As regards the "private life" aspect of Article 8, the Court observed the importance of biological parentage as a component of identity (*Mennesson v. France*[82], and *Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship*[83]), the right to self-determination (*Paradiso and Campanelli v. Italy*[84]) and the principle of personal autonomy (*Fedotova and Others v. Russia*[85]). In the light of the above principles, and in so far as the biological parent's identity was at stake given the effect of the discontinuation of the legal parental relationship with the adult child, the Court concluded that legal proceedings concerning the grant of adoption of an adult child could be regarded as affecting a biological parent's private life under Article 8 of the Convention.

(ii) The Court went on to clarify the procedural requirements under Article 8 applicable to the proceedings in question and, notably, whether the biological parent of the adult adoptee had to be afforded a right to be heard, a right to be granted the status of "a party" and a right to appeal against

78. *Emonet and Others v. Switzerland*, no. 39051/03, 13 December 2007.
79. *Bierski v. Poland*, no. 46342/19, 20 October 2022.
80. *Savran v. Denmark* [GC], no. 57467/15, § 174, 7 December 2021.
81. *Marckx v. Belgium*, 13 June 1979, § 52, Series A no. 31.
82. *Mennesson v. France*, no. 65192/11, ECHR 2014 (extracts).
83. *Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother* [GC], request no. P16-2018-001, French Court of Cassation, 10 April 2019.
84. *Paradiso and Campanelli v. Italy* [GC], no. 25358/12, 24 January 2017.
85. *Fedotova and Others v. Russia* [GC], nos. 40792/10 and 2 others, 17 January 2023.

the granting of adoption. The Court pointed out that, while the biological parent was entitled to due respect for his or her personal autonomy, that had to be understood as being delimited by the personal autonomy and private life of the adopter and adult adoptee which were also, and if anything to a greater degree, concerned by such proceedings. As the domestic proceedings concerned the sphere of relations of individuals between themselves, the choice of the means calculated to ensure compliance with Article 8 came within the State's margin of appreciation. This was, in particular, true of the Finnish-law approach to adult adoption, which, unlike the adoption of a minor, was essentially a personal matter, and the interests of other parties – notably those of the biological parents – were therefore not treated as relevant considerations, the requisite assessment being focused on an essentially factual issue (the character of the relationship between adopter and adoptee while the latter was a minor). Moreover, according to the comparative survey completed (thirty-eight Contracting States), there was no common practice among those States permitting adult adoption: it was only in very few legal systems that the interests of biological parents were expressly taken into account although it was more common than not for the biological parents to have some formal standing and/or procedural rights in such proceedings. While the Court noted that the right to be heard by the domestic court was not provided for in the relevant Finnish law, the Court reiterated that its task was not to assess, in a general way, the rationale and structure of the applicable domestic law but rather to give guidance to the requesting court, so that it could ensure that the proceedings before it were conducted in accordance with the Convention. The Court emphasised the importance of the notion of personal autonomy in this respect. At the same time, where an individual's interests protected by Article 8 were at stake, such as those of a biological parent of the adult adoptee, an elementary procedural safeguard was that he or she be given the opportunity to be heard and that the arguments made were taken into account by the decider to the extent relevant. In this connection, the Court observed that this was what appeared to have happened before the District Court: the latter had, on its own initiative, heard the biological mother in person, as well as several other witnesses proposed by her; she had been able to put into evidence the nature and quality of her relationship with her now adult child throughout his childhood; and the District Court had expressly referred to her evidence. Lastly, the Court did not consider that any additional specific safeguards were called for: having regard to the wide margin of appreciation to which the State was entitled in the regulation of the procedure for adult adoption, respect for Article 8 did not require that a biological parent be granted the status of a party or the right to appeal the granting of the adoption.

(iii) In so far as Article 6 was referred to, the Court emphasised that, in order to provide useful guidance, all of the elements raised by the requesting court might need to be addressed. Therefore, while the Court, in its own practice, had often chosen to focus on Article 8 only where the complaints concerned both Articles 6 and 8, such a practice might not be appropriate in the context of Protocol No. 16. The Court observed that the right claimed by the biological mother did not appear to exist, even on arguable grounds, in domestic law. If the requesting court were to so confirm, it would follow that, from her perspective, Article 6 was not applicable to the proceedings for the adoption of an adult.

Family life

The judgment in *B.F. and Others v. Switzerland*[86] concerned the requirement of financial independence for family reunification of certain 1951 Convention refugees.

The applicants, who resided in Switzerland, were all recognised as refugees within the meaning of the Convention relating to the Status of Refugees[87] ("the 1951 Convention"). In line with domestic law, they had been granted provisional admission rather than asylum, since the grounds for their refugee status had arisen following their departure from their countries of origin and as a result of their own actions (so-called "subjective post-flight grounds"), namely their illegal exit from those countries. This meant that they were not entitled to family reunification (in contrast to

86. *B.F. and Others v. Switzerland*, nos. 13258/18 and 3 others, 4 July 2023.

87. Convention relating to the Status of Refugees, adopted on 28 July 1951.

refugees who had been granted asylum) but it was discretionary and subject to certain cumulative conditions being met. Their applications for family reunification (with minor children and/or spouses) were rejected because one of those cumulative criteria, non-reliance on social assistance, had not been satisfied and because the refusals were deemed not to breach Article 8. The Court found a violation of Article 8 in three applications, and no violation of that provision in the fourth.

The judgment is interesting as the Court examined, for the first time, the requirement of financial independence for family reunification of (certain) 1951 Convention refugees.

(i) The Court observed that common ground could be discerned at international and European levels in favour of not distinguishing between different 1951 Convention refugees as regards requirements for family reunification. This reduced the margin of appreciation afforded to the respondent State, as did the consensus at international and European level that refugees needed to have the benefit of a more favourable family reunification procedure than other aliens. The Court was not convinced that there was a difference, in terms of nature and duration, between the stay of refugees granted asylum and those provisionally admitted. The Court's case-law did not require that the circumstances in which the departure from the country of origin and the separation from the family members had occurred be taken into account, but it was not *per se* manifestly unreasonable to do so. The Court thus concluded that member States enjoyed a certain margin of appreciation in relation to requiring non-reliance on social assistance before granting family reunification in the case of refugees who had left their countries of origin without being forced to flee persecution and whose grounds for refugee status had arisen following their departure and as a result of their own actions. However, that margin was considerably more narrow than the margin afforded to member States in relation to the introduction of waiting periods for family reunification when that reunification was requested by persons who had not been granted refugee status, but rather subsidiary or temporary protection status (compare *M.A. v. Denmark*[88]).

(ii) (a) The Court considered that the particularly vulnerable situation in which refugees *sur place* find themselves, needed to be adequately taken into account in the application of a condition (such as the requirement of non-reliance on social assistance) to their family reunification requests, with insurmountable obstacles to enjoying family life in the country of origin progressively assuming greater importance in the fair-balance assessment as time passed. The requirement of non-reliance on social assistance needed to be applied with sufficient flexibility, as one element of the comprehensive and individualised fair-balance assessment. Having regard to the waiting period applicable to the family reunification of provisionally admitted refugees under Swiss law, this consideration was applicable by the time provisionally admitted refugees became eligible for family reunification. More generally, the Court observed that refugees, including those whose fear of persecution in their country of origin had arisen only following their departure from the country of origin and as a result of their own actions (as in the present case), should not be required to "do the impossible" in order to be granted family reunification. In particular, where the refugee present in the territory of the host State was and remained unable to meet the income requirements, despite doing all that he or she reasonably could do to become financially independent, applying the requirement of non-reliance on social assistance without any flexibility as time passed could potentially lead to the permanent separation of families.

(b) The Court noted that it was not called upon to determine in the present case whether and/or to what extent those considerations applied in scenarios in which refugees had to fulfil such a requirement if they submitted their applications for family reunification outside of a certain time-limit, without particular circumstances rendering the late submission objectively excusable, it being noted that such a question might arise in cases where European Union member States made use of the possibility afforded to them under the third subparagraph of Article 12 § 1 of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

(c) The Court observed that Swiss law and practice provided for a certain flexibility in the application of the requirement at issue but that there were also conditions circumscribing that flexibility. Only a small number of family reunification requests by provisionally admitted persons had been granted (thirty to fifty persons thus admitted per year, while there were nearly

88. *M.A. v. Denmark* [GC], no. 6697/18, § 161, 9 July 2021.

40,000 provisionally admitted persons, of whom nearly 10,000 were provisionally admitted refugees).

(iii) In two of the applications, the Court found that the gainfully employed applicants had done all that could reasonably be expected of them to earn a living and to cover their and their family members' expenses. In the third application, the Court was not satisfied that the Federal Administrative Court had sufficiently examined whether the applicant's health would enable her to work, at least to a certain extent, and consequently whether the requirement at issue needed to be applied with flexibility in view of her health. By contrast, the Court found no violation as regards the fourth case, considering that the Federal Administrative Court had not overstepped its margin of appreciation when it had taken the applicant's lack of initiative in improving her financial situation into account when balancing the competing interests.

Positive obligations

The judgment in *Fedotova and Others v. Russia*[89] concerned the positive obligation to provide a legal framework allowing adequate recognition and protection for same-sex couples, as well as the scope of the margin of appreciation afforded to States in this respect.

The applicants – three same-sex couples – gave notice of marriage to their local departments of the Register Office. Their notices were rejected on the grounds that the relevant domestic legislation defined marriage as a "voluntary marital union between a man and a woman", thus excluding same-sex couples. The applicants challenged those decisions without success.

Before the Court, the applicants complained that it was impossible for them to have their respective relationships formally registered and that, because of the legal vacuum in which they found themselves as couples, they were deprived of any legal protection and faced substantial difficulties in their daily lives. A Chamber of the Court found a violation of Article 8 in this respect, and the Grand Chamber endorsed this finding.

The Grand Chamber judgment is noteworthy in that the Court confirmed that Article 8 gave rise to a positive obligation for States Parties to provide a legal framework allowing same-sex couples to enjoy adequate recognition and protection of their relationship. The Court also clarified the scope of the margin of appreciation afforded to States in this respect.

(i) Article 8 had already been interpreted as requiring a State Party to ensure legal recognition and protection for same-sex couples by putting in place a "specific legal framework" (*Oliari and Others v. Italy*[90] and *Orlandi and Others v. Italy*[91]). In the instant case, the Grand Chamber confirmed, in general terms and outside of a specific national context, the existence of such a positive obligation under Article 8. In doing so, the Court relied, in the first place, on the degree of consensus found at the national and international level. The Court observed that its own approach in the above-noted case-law was consolidated by a clear ongoing trend in the States Parties towards legal recognition of same-sex couples (through the institution of marriage or other forms of partnership), since a majority (thirty) State Parties had legislated to that effect. This trend was further consolidated by the converging positions of a number of international bodies, including several Council of Europe bodies. Secondly, the Court was guided by the ideals and values of a democratic society. In its view, allowing same-sex couples to be granted legal recognition and protection undeniably served pluralism, tolerance and broadmindedness. Indeed, recognition and protection of that kind conferred legitimacy on such couples and promoted their inclusion in society. Many authorities and bodies viewed this as a tool to combat stigmatisation, prejudice and discrimination against homosexual persons.

(ii) The Court went on to clarify the scope of the national authorities' margin of appreciation in this regard. In its view, the margin of appreciation of the States Parties was significantly reduced when it came to affording same-sex couples the possibility of legal recognition and protection. The Court relied in this respect on the fact that particularly important facets of the personal and social identity

89. *Fedotova and Others v. Russia* [GC], nos. 40792/10 and 2 others, 17 January 2023. See also under Article 58 (Cessation of membership of the Council of Europe) below.

90. *Oliari and Others v. Italy*, nos. 18766/11 and 36030/11, 21 July 2015.

91. *Orlandi and Others v. Italy*, nos. 26431/12 and 3 others, 14 December 2017.

of persons of the same sex were at stake, as well as the clear ongoing trend in the Council of Europe member States. At the same time, no similar consensus could be found as to the form of such recognition and the content of such protection. It followed that the States Parties had to be afforded a more extensive margin of appreciation in determining the exact nature of the legal regime to be made available to same-sex couples. Indeed, States had the "choice of the means" to be used in discharging their positive obligations inherent in Article 8. The discretion afforded to them in that respect related both to the form of recognition and to the content of the protection.

In particular, regarding the form of recognition, the Court underlined that it did not necessarily have to be that of marriage. The Court reiterated that Article 8 could not be understood as imposing a positive obligation on the States Parties to make marriage available to same-sex couples (*Hämäläinen v. Finland*[92]). This interpretation of Article 8 coincided with the Court's interpretation of Article 12, which could not be construed as imposing such an obligation either (*Schalk and Kopf v. Austria*[93]; *Hämäläinen*; *Oliari and Others*; and *Orlandi and Others*, all cited above). Furthermore, it is consonant with the Court's conclusion under Article 14, in conjunction with Article 8, that States remain free to restrict access to marriage to different-sex couples only (*Schalk and Kopf*, cited above; *Gas and Dubois v. France*[94]; and *Chapin and Charpentier v. France*[95]).

As regards the content of the protection to be afforded, the Court was guided by the concern to ensure effective protection of the private and family life of homosexual persons. It was therefore important that the protection afforded should be adequate. In that connection, the Court referred to various aspects, in particular material aspects (maintenance, taxation or inheritance) and moral aspects (rights and duties in terms of mutual assistance), that were integral to life as a couple and would benefit from being regulated within a legal framework available to same-sex couples (*Vallianatos and Others v. Greece*[96], and *Oliari and Others*, cited above, § 169).

On the facts, the Court found that the respondent State had overstepped its margin of appreciation and had failed to comply with its positive obligation to secure adequate recognition and protection for the applicants. None of the public-interest grounds put forward by the Government (protection of the traditional family, protection of minors from the promotion of homosexuality and disapproval of the latter by the majority of the Russian population) prevailed over the applicants' interests. Official recognition had an intrinsic value for them in so far as it conferred an existence and a legitimacy *vis-à-vis* the outside world. However, under the Russian legal framework, same-sex partners were unable to regulate fundamental aspects of life as a couple such as those concerning property, maintenance and inheritance except as private individuals entering into contracts under the ordinary law, rather than as a couple. Nor were they able to rely on the existence of their relationship in dealings with the judicial or administrative authorities. Indeed, the fact that same-sex partners were required to apply to the domestic courts for protection of their basic needs as a couple constituted, in itself, a hindrance to respect for their private and family life. The Court therefore found a breach of Article 8 of the Convention.

The judgments in *O.H. and G.H. v. Germany*[97] and *A.H. and Others v. Germany*[98] concerned the legal impossibility for a transgender parent's current gender, which did not reflect the biological reality, to be indicated on the birth certificate of a child conceived after gender reclassification.

The two cases concerned transgender parents who conceived their children after obtaining recognition of their gender change in the courts. In *O.H. and G.H. v. Germany*, a single transgender man, born female, gave birth to a child who had been conceived through sperm donation and was thus recorded as the mother on the birth certificate. In *A.H. and Others v. Germany*, a transgender woman who was born male could only be recorded in the birth register as the father, because the child

92. *Hämäläinen v. Finland* [GC], no. 37359/09, ECHR 2014.
93. *Schalk and Kopf v. Austria*, no. 30141/04, ECHR 2010.
94. *Gas and Dubois v. France*, no. 25951/07, ECHR 2012.
95. *Chapin and Charpentier v. France*, no. 40183/07, 9 June 2016.
96. *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, § 81, ECHR 2013 (extracts).
97. *O.H. and G.H. v. Germany*, nos. 53568/18 and 54741/18, 4 April 2023.
98. *A.H. and Others v. Germany*, no. 7246/20, 4 April 2023.

had been conceived with her sperm. Her female partner, who had given birth to the child, was recorded as the mother. Relying on Articles 8 and 14, the applicants complained about the legal impossibility for the transgender parent's current gender, which did not reflect the biological reality, to be indicated on the birth certificate of a child conceived after the parent's gender reclassification. Finding Article 8 to be applicable under its "private life" head, the Court found that there had been no violation: the German courts had struck a fair balance between the rights of transgender parents and any partner concerned, the interests of their children, considerations as to their children's welfare and public interests. The Court dismissed the complaints under Article 14, taken together with Article 8, as manifestly ill-founded.

The interest of the judgments lies in the fact that the Court addressed for the first time the question whether an entry recording a transgender parent under his or her former gender and former forename on a child's birth certificate was compatible with Article 8. Examining this issue from the perspective of the State's positive obligations and in the light of the principles summed up in *Hämäläinen v. Finland*[99], the Court defined the margin of appreciation and clarified the criteria to be considered in weighing up the private and public interests at stake.

(i) The Court explained that the authorities had a broad margin of appreciation based on the following considerations. At the outset it noted the lack of a consensus in Europe, reflecting the fact that gender change combined with parenthood raised sensitive ethical questions. It then looked at the complexity of the balancing exercise in the present case. First, as to the rights of the transgender parents, their complaints concerned an indication in the birth register in respect of another person (their respective children), and not their own official documents. Second, as far as the children were concerned, the issue was the possible disclosure of information relating to the transgender identity of their parents, and not their own gender identity. In addition, the right of children to be informed of the details of their biological descent was capable of limiting the rights relied upon by the transgender parents. The authorities had also taken account of the children's interest in having a stable legal connection with their parents. It followed that the margin of appreciation was not narrowed by the rights relied upon by the applicants, even though they did relate to a basic aspect of private life. Lastly, consideration had to be given to the public interest in the coherence of the legal system and in the accuracy and completeness of civil registration records, which were of particular evidential value. The Court had previously recognised a degree of importance of that general interest in the balancing exercise in such matters (*Christine Goodwin v. the United Kingdom*[100], and *A.P., Garçon and Nicot v. France*[101]).

(ii) Proceeding on the premise of a broad margin of appreciation, the Court clarified the criteria that it saw as relevant to its analysis, focusing on the divergence between the interests of the children and those of their transgender parents. First, based on the essential principle that the child's best interests must be paramount (*Mennesson v. France*[102]), the Court clarified that the child's interests had to be examined exhaustively, taking account of any conflicts of interest between the child and his or her parents. The Court emphasised that this examination should not be limited by the manner in which the child's interests were presented by his or her parents. In addition, it was necessary to take account of the child's possible future interests and the interests of children in a comparable situation to whom the legislative provisions in question also applied. The Court emphasised that the welfare of the children in the present case could not have been examined on an individualised basis, on account of their infancy at the time the issue arose, as to what information should be recorded in the birth register. In the view of the Federal Court of Justice, the children's interests coincided to some extent with the general interest in ensuring the reliability and consistency of the civil registration system, together with legal certainty. The Court endorsed the approach of that apex court in finding that the right to gender identity of the parents concerned could be limited by the child's right to know his or her origins, to be brought up by his or her two parents and to have a permanent legal relationship with them. The Federal Court pointed out in particular that the legal attachment of a child to his or her parents in accordance with their respective biological

99. *Hämäläinen v. Finland* [GC], no. 37359/09, ECHR 2014.

100. *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, §§ 86-88 and 91, ECHR 2002-VI.

101. *A.P., Garçon and Nicot v. France*, nos. 79885/12 and 2 others, § 132, 6 April 2017.

102. *Mennesson v. France*, no. 65192/11, § 81, ECHR 2014 (extracts).

roles allowed the child to maintain a stable and unchanging connection with a father and a mother, even in the not merely theoretical scenario where the transgender parent subsequently sought reversal of the gender reclassification.

Secondly, the Court noted that the number of situations that could lead, on presentation of the children's birth certificates, to the disclosure of the transgender identities of the parents concerned was limited. Certain precautions were in place to reduce any inconvenience that the parents might face. In particular it was possible to obtain a birth certificate without any indication of the parents. Only a limited number of individuals, who would generally be aware of the transgender identity, were authorised to request a full copy of the birth certificate; anyone else had to show a legitimate interest. Moreover, besides the full birth certificate there were other documents which could be used containing no indication of gender change, for example if required by an employer, without revealing such information. The Court incidentally noted that the solutions proposed by the applicants would not have given them any greater protection against such disclosure. For example, in the event of the replacement of "mother" and "father" by "parent 1" and "parent 2", the indication "parent 1" would remain associated with the parent who gave birth to the child. Furthermore, if a single transgender parent were to be indicated as the father, without any mother being mentioned on the birth certificate, that might also raise questions as to that parent's status.

Lastly, the Court had regard to the fact that the biological relationship between the transgender parents and their children had not been called into question.

In the light of the foregoing, the Court found that the courts had struck a fair balance between the competing interests, in accordance with the requirements of Article 8 of the Convention.

The judgment in the case of *G.T.B. v. Spain*[103] concerned the positive obligation to facilitate "birth registration" of, and the obtention of identity documents by, a vulnerable minor, in the case of parental negligence

The applicant, a Spanish national, was born to his Spanish mother in Mexico in 1985. His birth was not registered and shortly thereafter he and his mother were repatriated to Spain. When he was 12 years old, his mother applied to have his birth registered in Spain. Owing to her lack of diligence, but also to the onerous requests of the administration, the applicant's birth was not registered until 2006 when he was 21, allowing him to finally obtain identity documents.

Relying on Articles 3 and 8 of the Convention as well as on Article 2 of Protocol No. 1, the applicant complained about the suffering and difficulties, including in the educational and private sphere, of having been undocumented for many years in Spain. The Court considered the case from the standpoint of Article 8 and found a violation of that provision.

The judgment is noteworthy in a number of respects. In the first place, the Court stated that an individual's right to have his or her birth registered and to obtain, on that basis, access to identity documents was a protected interest under Article 8. Secondly, the Court specified the relevant considerations for striking a fair balance between public and private interests at stake in that connection. Thirdly, the Court established a positive obligation to facilitate the birth registration of, and the obtention of identity documents by, a vulnerable minor in the case of parental negligence. Finally, the Court developed a test for assessing whether the domestic authorities had complied with that positive obligation.

(i) The Court reiterated its case-law to the effect that obstacles in obtaining birth registration, and the resulting lack of access to identity documents, could have a serious impact on a person's sense of identity as an individual human being (*Mennesson v. France*[104]) and on personal autonomy (*Christine Goodwin v. the United Kingdom*[105]), which could cause significant problems in a person's daily life, in particular at the administrative (*M. v. Switzerland*[106]) and educational levels. The importance of obtaining a registration of birth and, consequently, other valid identity documents had been underlined by other international bodies, notably the UN Committee on the Rights of the Child[107]. On this basis, the Court concluded that the right to respect for private life

103. *G.T.B. v. Spain*, no. 3041/19, 16 November 2023.

104. *Mennesson v. France,* no. 65192/11, § 96, ECHR 2014 (extracts).

105. *Christine Goodwin v. the United Kingdom* [GC],no. 28957/95, § 91, ECHR 2002-VI.

106. *M. v. Switzerland*, no. 41199/06, § 57, 26 April 2011.

107. See General comment No. 13 (2011) on The right of the child to freedom from all forms of violence and General comment No. 7 (2005) on Implementing child rights in early childhood. See also, Thematic Report of the Office of the UN High Commissioner for Human

under Article 8 should be seen as including, in principle, an individual right to have one's birth registered and consequently, where relevant, to have access to other identity documents.

(ii) The Court went on to outline the important public interests at stake in the process of birth registration, such as safeguarding the consistency and reliability of civil registries and, more broadly, legal certainty, which interests justified strict procedures to register a birth, in particular when it had taken place outside the relevant State's territory, as in the instant case. States therefore enjoyed a wide margin of appreciation in that respect, which covered substantive and procedural requirements imposed on the individual seeking to obtain a birth certificate. At the same time, some adaptability of the standard procedures might be required when it was imperative in the circumstances to safeguard important interests protected under Article 8, such as the right to a recognised identity.

(iii) The Court underlined the following specific features of the instant case: in the first place, the applicant's only available parent had failed to act diligently and, secondly, the applicant was particularly vulnerable given various health and social factors (a minor with a record of psychological disorders and psychiatric conditions). The Court observed that the applicant's lack of identity documents had had, at least to some extent, an impact on his ability to pursue academic studies and training. It had also made it impossible for him to secure stable employment contracts, which had affected his ability to organise his private and family life and had contributed to increasing his anxiety and distress. Drawing on its constant case-law on the paramount importance to act in the best interests of the child, the Court concluded that the authorities had been under a positive obligation under Article 8 to act with due diligence to assist the applicant, a vulnerable minor, who had been unable to obtain his birth certificate and identity documents, resulting from his parent's negligence.

(iv) Finally, the Court responded to two questions to determine whether the domestic authorities had complied with that positive obligation.

In the first place, the point in time at which it could have been said that the authorities had been sufficiently aware of the particular situation and could have reasonably been expected to have taken active measures. In the instant case, the authorities had been apprised of the applicant's vulnerable situation for most of his life and had become aware of his difficulties in registering his birth in mid-1999, when the procedure had had to be suspended because of the impossibility of summoning his mother. The Court found, however, that the positive obligation to assist the applicant had arisen in 2002, when it had become clear that, despite the authorities' repeated requests, the applicant's mother would not be able to produce documents other than those she had already submitted.

Secondly, whether the public authorities had taken sufficiently adequate and timely action to discharge their positive obligation. Disregarding the particular vulnerability of the applicant, the authorities had merely insisted on his mother's responsibility to comply with all the legally established criteria, notwithstanding their awareness that she had not acted with full diligence in the past and that no further documents concerning the applicant´s birth in Mexico would be found. As a result, four years had elapsed between the moment when it became apparent that the applicant's mother could not provide any further documents to register her son's birth, and its actual registration. There was no justification for this delay. The Court concluded that the domestic authorities had failed to discharge their positive obligation to assist the applicant in having his birth registered and, as a consequence, to obtain identity documents.

Rights "Birth registration and the right of everyone to recognition everywhere as a person before the law"; and UNICEF's report "Every child's birth right".

Freedom of thought, conscience and religion (Article 9)

Manifest one's religion or belief

In response to a request submitted by the Belgian *Conseil d'État*, the Court delivered its advisory opinion[108] on 14 December 2023, which concerned the question whether an individual may be denied authorisation to work as a security guard or officer on account of being close to, or belonging to, a religious movement considered by the national authorities to be dangerous.

The request for an Advisory Opinion arose in the context of proceedings pending in the Belgian *Conseil d'État* concerning a decision of the Minister of the Interior to withdraw, from a Belgian national, S.B., an identification card entitling him to work as a security guard on the Belgian railway network and to refuse to issue him with a second card for a similar function. That decision was based on the fact that, according to the information held by the intelligence services, S.B. was a follower of the "scientific" Salafist movement, he frequented other followers thereof and he engaged in proselytising, by electronic means, among friends and family. Since scientific Salafism was, according to the authorities, incompatible with the Belgian model of society (community segregation, questioning the legitimacy of secular law, undermining the fundamental rights of fellow citizens and a backward view of women's role, and so on), was harmful to the basic democratic values of a State governed by the rule of law and represented a threat to the country in the medium to long term, S.B. did not fulfil the statutory conditions to work as a security guard, particularly in terms of respect for fundamental rights and democratic values, integrity, loyalty and ensuring there was no risk for the security of the State or public order. On an application by S.B., the *Conseil d'État* noted that the file was lacking in concrete and precise facts imputable to him, such as to show that he might put religious imperatives before strict respect for legality or that he might discriminate against certain categories of people for religious reasons. It was on that basis that the *Conseil d'État* put the following question to the Court for an advisory opinion:

> "Does the mere fact of being close to or belonging to a religious movement that, in view of its characteristics, is considered by the competent administrative authority to represent a threat to the country in the medium to long term, constitute a sufficient ground, in the light of Article 9 § 2 (right to freedom of thought, conscience and religion) of the Convention, for taking an unfavourable measure against an individual, such as a ban on employment as a security guard?

In this its seventh advisory opinion under Protocol No. 16, the Court responded to the question whether Article 9 of the Convention would allow the authorities to rely on the mere fact that an individual was close to or belonged to a religious movement, considered to be extremist and dangerous, even though he or she had not committed any offence or professional misconduct, in order to justify an unfavourable measure like the one at issue in the domestic proceedings.

(i) The Court reasserted the distinction between the two aspects of Article 9, one concerning the right to hold a belief (the *forum internum* of each person, an absolute and unqualified right) and the right to manifest one's belief (the *forum externum* with its potential restrictions under the second paragraph of Article 9 (see *Ivanova v. Bulgaria*[109], and *Mockutė v. Lithuania*[110]). As to the fact of "being close to" or "belonging to" a movement or an ideological orientation, the Court stressed the need to ensure, in the particular circumstances of each case, whether the accusation against the individual related to the *forum internum* or the *forum externum* and thus, in other words, whether it was mere adherence in thought or a more concrete manifestation of such adherence through acts. The Court found the notion of "being close" too uncertain and preferred to focus on "belonging", which related only to the *forum externum*.

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108. *Advisory opinion as to whether an individual may be denied authorisation to work as a security guard or officer on account of being close to, or belonging to, a religious movement* [GC], request no. P16-2023-001, Belgian *Conseil d'État*, 14 December 2023. See also under Article 1 of Protocol No. 16 (Advisory Opinions) below.

109. *Ivanova v. Bulgaria*, no. 52435/99, § 79, 12 April 2007.

110. *Mockutė v. Lithuania*, no. 66490/09, § 119, 27 February 2018.

(ii) The Court declared, for the first time, that activities on the internet and on social media might in principle constitute a "manifestation" of a religion or a belief – in the form of "worship", "teaching" (encompassing the right to try to convince one's neighbour), "practice" and "observance" – and were thus protected by Article 9 of the Convention.

(iii) The Court recognised that the established fact that an individual belonged to a religious movement that, in view of its characteristics, was considered by the competent administrative authority to represent a threat, in the medium to long-term, to a democratic society and its values, might in principle justify a preventive measure against that person. However, it lay down a series of conditions that such a measure had to satisfy in order to be compatible with Article 9, namely:

(a) The measure had to have an accessible and foreseeable legal basis.

(b) The measure had to be adopted in the light of the conduct or acts of the individual concerned.

(c) The measure had to have been taken for the purpose of averting a real and serious risk for democratic society, and had to pursue one or more of the legitimate aims under Article 9 § 2 of the Convention. The assessment as to whether the risk was real and likely to materialise, and also as to its scale, was a matter for the competent national authorities. It had to be carried out in the light of the nature of the person's duties on the one hand, and of the substance of the beliefs or ideology in question, on the other, also having regard to the character of the person concerned and his or her background, actions, role and degree of adherence to the relevant religious movement. The Court explained that although the absence of any professional misconduct on the part of the individual, or of any criminal complaints recorded against him or her, or of any measures taken against the movement (dissolution or ban), should be taken into account, those factors would not necessarily be decisive.

(d) The measure had to be proportionate to the risk that it sought to avert and to the legitimate aim or aims that it pursued, which meant ensuring that the aim could not be attained by means of less intrusive or radical measures.

(e) It had to be possible for the measure to be referred to a judicial authority for a review that was independent, effective and surrounded by appropriate procedural safeguards, such as to ensure compliance with the requirements listed above.

(iv) The Court emphasised that, in any event, the authorities had to avoid any form of discrimination prohibited under Article 14 of the Convention in access to employment, particularly that based on religion, under the guise of protecting the values of a democratic society.

Freedom of expression (Article 10)

Freedom of expression

The judgment in *Halet v. Luxembourg*[111] concerned the protection of whistle-blowers.

A former employee (A.D.) of Pricewaterhouse-Coopers (PwC), a private company, disclosed several hundred confidential tax documents to the media. They were published by various media outlets to draw attention to highly advantageous tax agreements concluded between PwC (acting on behalf of multinational companies) and the Luxembourg tax authorities (the so-called "*Luxleaks*" affair). Following those revelations, the applicant, who was also a PwC employee, handed over to a journalist several tax returns of multinational companies, which were used in a television programme. The applicant was dismissed by PwC. He was also sentenced to a criminal fine of 1,000 euros, the whistle-blower defence having been refused to him even though he had been acquitted on that basis.

A Chamber of the Court found no violation of Article 10: the applicant's disclosure had been of insufficient public interest to counterbalance the harm caused to the company, and the sanction was a proportionate one. The Grand Chamber disagreed and found a breach of this provision.

The Grand Chamber judgment is noteworthy in that the Court confirmed and consolidated the principles concerning the protection of

111. *Halet v. Luxembourg* [GC], no. 21884/18, 14 February 2023.

whistle-blowers. In doing so, it refined and clarified the criteria identified in *Guja v. Moldova*[112], having regard to the current European and international context as well as to the specific features of the instant case (a breach of the statutory obligation to observe professional secrecy, as well as prior revelations by a third party concerning the same activities of the same employer).

(i) In view of the lack of an unequivocal legal definition at international and European level, the Court refrained from providing an abstract and general definition of the concept of "whistle-blower". However, it confirmed the three pertinent elements for the application of the relevant regime of protection: first, whether the employee or civil servant concerned was the only person, or part of a small category of persons, aware of what was happening at work (*Guja*, cited above, § 72, and *Heinisch v. Germany*[113]); secondly, the duty of loyalty, reserve and discretion inherent in a work-based relationship and, where appropriate, the obligation to comply with a statutory duty of secrecy; and, thirdly, the position of economic vulnerability *vis-à-vis* the person, public institution or enterprise on which they depended for employment and the risk of suffering retaliation from them. Relying on the Recommendation of the Committee of Ministers of the Council of Europe on the protection of whistleblowers, the Court clarified that it was the *de facto* working relationship of the whistle-blower, rather than his or her specific legal status, which was decisive. Finally, the assessment of whether a person was to be protected as a whistle-blower would follow the usual case-by-case approach taking account of the circumstances and specific context of each case.

(ii) Turning to the *Guja* criteria, the Court reconfirmed its approach of verifying compliance with each criterion taken separately, without establishing a hierarchy between them or an order of examination, and it also refined certain of these criteria as follows:

(a) *Channels used to make the disclosure* – While priority should be given to the internal hierarchical channel, certain circumstances might justify the direct use of "external reporting", such as the media. This was particularly the case where the internal disclosure channel was unreliable or ineffective; where the whistle-blower was likely to be exposed to retaliation; or where the relevant information pertained to the very essence of the activity of the employer concerned (particularly where the activity in issue was not in itself illegal, as had been the case with the present tax-optimisation practices).

Neither (b) *the authenticity of the disclosed information* nor (c) *the applicant's good faith* were in issue in the present case, and the Court confirmed the established case-law principles in those respects (for example, *Gawlik v. Liechtenstein*[114]).

(d) *Public interest in the disclosed information* – This concept was to be assessed in the light of both the content of the disclosed information and the principle of its disclosure. The assessment of the public interest in disclosure necessarily had to have regard to the interests that the duty of secrecy was intended to protect (especially where the disclosure also concerned third parties). Having regard to the range of information of public interest that could fall within the scope of whistle-blowing, the Court indicated that the weight of the public interest in the disclosed information would decrease depending on whether the information related to unlawful acts or practices; to reprehensible acts, practices or conduct; or to a matter that sparked a debate giving rise to controversy as to whether or not there was harm to the public interest. Information capable of being considered of public interest might also, in certain cases, concern the conduct of private parties, such as companies. The public interest also had to be assessed at the supranational (European or international) level or with regard to other States and their citizens. In sum, the assessment of that criterion had to take account of the circumstances of each case and the context in which it had occurred.

In the specific context of the instant case involving prior revelations, the Court clarified that the sole fact that a public debate had already been under way when the disclosure had taken place could not, of itself, rule out the possibility that the disclosed information might also have been of public interest: the purpose of whistle-blowing was not only to uncover and draw attention to information of public interest, but also to bring about change, which sometimes required that the alarm be raised several times on the same subject. By helping the general public to form an informed opinion on a subject of great complexity, the tax returns disclosed by the applicant had contributed to the transparency of the tax practices

112. *Guja v. Moldova* [GC], no. 14277/04, ECHR 2008.

113. *Heinisch v. Germany*, no. 28274/08, § 63, ECHR 2011 (extracts).

114. *Gawlik v. Liechtenstein*, no. 23922/19, 16 February 2021.

of multinational companies seeking to shift profits to low-tax countries, as well as the political choices made in Luxembourg in this regard. The disclosure had therefore been in the public interest, not only in Luxembourg, but also in Europe and in the other States whose tax revenues could be affected by the said practices. As to the weight of that public interest, the Court noted the important economic and social issues involved in view of the place now occupied by global multinational companies.

(e) *Detriment caused* – The Court fine-tuned the terms of the balancing exercise to be conducted, clarifying that, over and above the sole detriment to the employer, account should be taken of the detrimental effects taken as a whole, in so far as these could affect private interests (including those of third parties) and public ones (for example, the wider economic good or citizens' confidence in the fairness and justice of the fiscal policies of States). The domestic court having focused solely on the harm sustained by PwC, the Court therefore had regard also to the harm caused to the private interests of PwC's customers and to the public interests involved (for example, the public interest in preventing/punishing the theft of data and in preserving professional secrecy).

Having conducted the balancing exercise, the Court concluded that the public interest in the disclosure in issue outweighed all of the detrimental effects taking into account, in particular, the above findings as to the importance (at national and European level) of the public debate on the tax practices of multinational companies to which the information disclosed had made an essential contribution.

(f) *Severity of the sanction* – While the use of criminal proceedings had been found to be incompatible with the exercise of the whistle-blower's freedom of expression, the Court observed, however, that in many instances, depending on the content of the disclosure and the nature of the duty of confidentiality or secrecy breached by it, the conduct of the person concerned could legitimately amount to a criminal offence. Moreover, neither the letter of Article 10 nor the Court's case-law ruled out the possibility that one and the same act could give rise to a combination of sanctions or lead to multiple repercussions, whether professional, disciplinary, civil or criminal. In the present case, having regard to the nature of the penalties imposed and the seriousness of their cumulative effect and, in particular, the chilling effect, the Court considered that the applicant's criminal conviction had been disproportionate.

As a result of a global analysis of all the *Guja* criteria, the Court found that the interference with the applicant's right to freedom of expression, in particular his freedom to impart information, had not been "necessary in a democratic society" and was in breach of Article 10 of the Convention.

The judgment in *Macatė v. Lithuania*[115] concerned the question of whether restrictions on a children's book presenting same-sex relationships as essentially equivalent to different-sex ones pursued a legitimate aim.

The applicant is a children's author and is homosexual. She wrote a book of fairy tales aimed at nine to ten-year-old children, seeking to encourage tolerance and acceptance of various marginalised social groups. Some associations and members of the *Seimas* expressed concerns about two of the fairy tales, which depicted marriage between persons of the same sex. The distribution of the book was suspended for a year. When it resumed, the book was marked with a warning label stating that its contents could be harmful to children under the age of 14: this was done pursuant to an indication by a public authority that the fairy tales in question encouraged a different concept of marriage and of the creation of a family from the one enshrined in the Lithuanian Constitution and law (namely, a union only between a man and a woman). The authority relied on section 4(2)(16) of the Law on the protection of minors from the negative effects of public information ("the Minors Protection Act"). The applicant unsuccessfully brought civil proceedings against the publisher.

Before the Court, the applicant complained under Article 10 of the Convention. The Grand Chamber (on relinquishment) was unable to subscribe to the Government's argument that the aim of the measures taken against the applicant's book had been to protect children from sexually explicit content or content which "promoted" same-sex relationships as superior to different-sex ones by "insulting", "degrading" or "belittling" the latter (there was no support in the text of the book for such a conclusion). In the Grand Chamber's view, the impugned measures had actually sought to limit children's access to information presenting same-sex relationships as essentially equivalent to different-sex ones. However, such an aim could

115. *Macatė v. Lithuania* [GC], no. 61435/19, 23 January 2023.

not be accepted as legitimate under Article 10 § 2, which led the Court to find a violation of this provision.

The Grand Chamber judgment is noteworthy in that the Court assessed, for the first time, restrictions imposed specifically on children's literature (that is, literature aimed directly at, and written in a style and language easily accessible to, children) depicting same-sex relationships. The judgment is interesting in two respects: first, for the manner in which the Court determined the aim pursued by the impugned measures, and, secondly, for the assessment of the legitimacy of that aim.

(i) Having ruled out the aims relied on by the Government, the Court turned to the legislative history of section 4(2)(16) of the Minors Protection Act. Indeed, the explicit reference to homosexual or bisexual relations had been removed from the final text of this provision only to avoid international criticism. Moreover, every single instance in which that provision had been applied or relied upon concerned information about LGBTI-related issues. The Court therefore had no doubt that its intended aim was to restrict children's access to content which presented same-sex relationships as being essentially equivalent to different-sex relationships. Having regard to the relevant domestic court decisions, the Court concluded that the aim of the impugned measures against the applicant's book had been the same, namely, to bar children from such information.

(ii) As to whether the above-mentioned aim could be considered legitimate, the Court's analysis was based on the following factors.

In the first place, the Court assessed the issue from the standpoint of the best interests of children, seen in the light of their impressionable and easily influenced nature. In this regard, the Court relied upon its own findings (*Alekseyev v. Russia*[116], and *Bayev and Others v. Russia*[117]) and those of various international bodies (including the European Parliament, the Parliamentary Assembly of the Council of Europe, the Venice Commission and the European Commission against Racism and Intolerance). On the one hand, there was no scientific evidence that information about different sexual orientations, when presented in an objective and age-appropriate way, could cause any harm to children. On the other hand, the lack of such information and the continuing stigmatisation of LGBTI persons in society was harmful to children, especially those who identified as LGBTI or came from same-sex families. Furthermore, the laws of a significant number of Council of Europe member States either explicitly included teaching about same-sex relationships in the school curriculum or contained provisions on ensuring respect for diversity and for the prohibition of discrimination on grounds of sexual orientation in teaching. The Court also took note of the infringement proceedings brought by the European Commission against Hungary given its recent legislation explicitly restricting minors' access to information about homosexuality or same-sex relationships (such a law being exceptional among the Council of Europe member States).

Secondly, and prompted by the Government's argument as to the need to avoid promoting same-sex families, the Court had regard to the manner in which the information in issue had been presented. The Court emphasised that equal and mutual respect for persons of different sexual orientations was inherent in the whole fabric of the Convention. It followed that insulting, degrading or belittling persons on account of their sexual orientation, or promoting one type of family at the expense of another, was never acceptable under the Convention. However, such an aim or effect could not be discerned in the facts of the present case. On the contrary, to depict, as the applicant had done in her writings, committed relationships between persons of the same sex as being essentially equivalent to those between persons of a different sex rather advocated respect for and acceptance of all members of a given society in this fundamental aspect of their lives.

Thirdly, the Court outlined another key element for its assessment of the restrictions on children's access to information about same-sex relationships. In particular, the Court would scrutinise whether any such measures were based solely on considerations of sexual orientation, or whether there was some other basis to consider the information in issue to be inappropriate or harmful to children's growth and development.

The Court underlined that any such measures taken solely on the basis of sexual orientation had wider social implications. Such measures, whether they were directly enshrined in the law or adopted in case-by-case decisions, demonstrated

116. *Alekseyev v. Russia*, nos. 4916/07 and 2 others, 21 October 2010.

117. *Bayev and Others v. Russia*, nos. 67667/09 and 2 others, 20 June 2017.

that the authorities had a preference for some types of relationships and families over others and that they saw different-sex relationships as more socially acceptable and valuable than same-sex relationships, thereby contributing to the continuing stigmatisation of the latter. Therefore, such restrictions, however limited in their scope and effects, were incompatible with the notions of equality, pluralism and tolerance inherent in a democratic society. The Court thereby fully endorsed, and drew upon, its previous conclusions in the case of *Bayev and Others* concerning the Russian legislative ban on the "promotion of homosexuality or non-traditional sexual relations" among minors: it had held, in particular, that by adopting such laws the authorities reinforced stigma and prejudice and encouraged homophobia.

In sum, where there was no other basis in any other respect to consider information about same-sex relationships to be inappropriate or harmful to children's growth and development, restrictions on access to such information did not pursue any aims that could be accepted as legitimate, for the purposes of Article 10 § 2, and were therefore incompatible with Article 10 of the Convention.

The judgment in *Sanchez v. France*[118] concerned the liability of politicians who use social networks for political and electoral purposes in instances where hate speech is posted by other users on such politicians' accounts.

The applicant, who at the time was a locally elected councillor and a candidate in the legislative elections, was found guilty of inciting hatred and violence against Muslims. He was sentenced to a fine for not having deleted from his Facebook "wall" – which was accessible to the public and used during the election campaign – Islamophobic comments, the authors of which were also convicted (as accomplices). The conviction was the ultimate result of a complaint filed by the partner of one of the applicant's political opponents. Feeling personally targeted, she confronted one of the authors, who deleted his message immediately and told the applicant, who subsequently posted on his Facebook "wall" a message asking Internet users to be careful with the content of their comments, but without moderating those already posted. In 2021 a Chamber of the Court found no violation of Article 10, considering that the conviction was based on relevant and sufficient reasons and was "necessary in a democratic society". On referral, the Grand Chamber reached the same conclusion.

This Grand Chamber judgment is noteworthy in that the Court examined for the first time the question of the liability of users of social networks or other types of non-commercial internet fora in relation to comments posted by third parties on such users' accounts. The Court thus consolidated and supplemented its *Delfi AS v. Estonia*[119] case-law, which concerned the liability on a similar basis of a large internet news portal. In view of the specific features of the present case, the Court approached the question from the angle of the "duties and responsibilities", within the meaning of Article 10 § 2, which must be assumed by politicians when they decide to use social networks for political purposes, in particular for an election campaign, by opening fora that are accessible to the public on the internet in order to receive their reactions and comments.

(i) In the Court's view, there was no difficulty in principle for the liability of a social network account holder to be engaged on account of third-party comments, provided safeguards existed in the attribution of such liability and that there was a shared liability between all actors involved. If appropriate, the level of liability and the manner of its attribution could be graduated according to the objective situation of each actor, whether it was a host (a professional creating a social network and making it available to users) or an account holder who used the platform to publish his or her own content while allowing other users to post comments. The Court emphasised the fact that an account holder could not claim any right to impunity in his or her use of the digital tools made available on the internet. If the account holder were to be released from liability, that might facilitate or encourage abuse and misuse, not only hate speech and calls to violence, but also manipulations, lies or disinformation. For the Court there was no doubt that a minimum degree of moderation or prior filtering to identify any clearly unlawful posts as soon as possible and to ensure they were deleted within a reasonable time – even where no notice was given by an injured party – was desirable, whether by the host (in this case Facebook), or the account holder. The latter had to act within the limits that could be expected of him or her.

118. *Sanchez v. France* [GC], no. 45581/15, 15 May 2023.

119. *Delfi AS v. Estonia* [GC], no. 64569/09, ECHR 2015.

(ii) In order to determine which steps an account holder was required to take, or could reasonably be expected to take, in relation to unlawful comments by third parties, the Court set out the factors that were relevant to its analysis:

(a) the nature and context of the impugned comments (in the present case they amounted to hate speech, the impact of which became greater and more harmful in the run-up to an election);

(b) the introduction of automatic filtering of comments and the practical possibility of prior moderation (in the present case, those means were not available on Facebook);

(c) the traffic on an account: when this was excessive the resources or availability required to ensure effective monitoring would be significant, if not considerable (this issue did not arise in the present case because only about fifteen comments had been posted in response to the applicant's initial and lawful content);

(d) the deliberate choice to make access to the account forum (Facebook "wall") totally public: such a decision could not be criticised in the present case and any individual so choosing – and thus especially a politician experienced in public communication – had to be aware of the greater risk of excessive and immoderate remarks that might appear and necessarily become visible to a wider audience;

(e) knowledge of the unlawful comments of third parties (in the present case, in spite of being rapidly alerted by the authors, the applicant had not moderated the comments in question);

(f) the promptness of the reaction (in the present case, having noted that one of the authors had deleted his comment less than twenty-four hours after posting it, the Court found that to require an account holder to have acted even more promptly would be excessive and impracticable; however, the applicant had left all the other comments visible more than a month after they had been posted);

(g) the status of the account holder (in the present case not only did it concern a politician in an election campaign, but also a professional in the field of online communication strategy with some digital expertise), and in particular the person's notoriety and representativeness on which depended the level of responsibility. The Court found it relevant to apply a proportionality assessment based on that level:

> "... a private individual of limited notoriety and representativeness will have fewer duties than a local politician and a candidate standing for election to local office, who in turn will have a lesser burden than a national figure for whom the requirements will necessarily be even heavier, on account of the weight and scope accorded to his or her words and the resources to which he or she will enjoy greater access in order to intervene efficiently on social media platforms.

The Court emphasised, however, that while specific duties might be required of a politician, such requirement was indissociable from the principles relating to the rights which came with such status, and the domestic courts could usefully have referred to those principles in line with established case-law.

(iii) While the question of online anonymity was not in issue in this case (unlike in *Delfi AS*, cited above), the fact that the authors of the unlawful comments had been convicted did not rule out the possibility of separately establishing the liability of the account holder on other charges and under a different regime. In addition, in spite of the chilling effects for users of social networks or online fora, the Court confirmed that criminal-law measures were not to be ruled out in cases of hate speech or calls to violence. Moreover, the fine of EUR 3,000 had had no negative consequences for the applicant's political career or any chilling effect on the exercise of his freedom of expression.

The judgment in *Hurbain v. Belgium*[120] concerned measures taken with regard to lawful content in online press archives, on the grounds of the "right to be forgotten", and the criteria and principles for weighing up the rights at stake.

The applicant, the publisher of a daily newspaper, was ordered in a civil judgment to anonymise, on the grounds of the "right to be forgotten", the electronic archived version of an article originally published in 1994 in the newspaper's print edition and published online in 2008. The article mentioned the full name of G., a driver responsible for a fatal road-traffic accident.

In 2021 a Chamber of the Court held that there had been no violation of Article 10. The Grand Chamber agreed with that conclusion.

120. *Hurbain v. Belgium* [GC], no. 57292/16, 4 July 2023.

The Grand Chamber judgment is noteworthy in that the Court circumscribed the scope of claims arising out of the "right to be forgotten" and established the principles and criteria to be applied in order to resolve a conflict between rights under Articles 8 and 10 of the Convention, specifically in cases where the measures requested related to information that had been published in a lawful and non-defamatory manner and where the request did not concern the initial publication of the information but rather its continued dissemination online, in the press archives and for journalistic purposes.

(i) The Court acknowledged the adverse effects of the continued availability of certain information on the internet, and in particular the considerable impact on the way in which the person concerned was perceived by public opinion, as well as the risks linked to the creation of a profile of the person concerned and to a fragmented and distorted presentation of the reality. Nevertheless, the Court clarified that a claim of entitlement to be forgotten did not amount to a self-standing right protected by the Convention. In previous cases (*Węgrzynowski and Smolczewski v. Poland*[121], *Fuchsmann v. Germany*[122], *M.L. and W.W. v. Germany*[123], *Biancardi v. Italy*[124]), the "right to be forgotten online" had been linked to the right to respect for reputation, irrespective of what measures had been deployed to give effect to that right. To the extent that it was covered by Article 8, the right in question could concern only certain situations and items of information. Prior to this judgment, the Court had not upheld any measure removing or altering information that had been published lawfully for journalistic purposes and archived on the website of a news outlet.

(ii) The Court emphasised that in examining any interference with freedom of expression based on a claim of entitlement to be forgotten, it attached importance to the distinction between the activities and obligations of search engine operators and those of news publishers (*M.L. and W.W v. Germany*, cited above, § 97). Furthermore, the examination of an action against the publisher could not be made contingent on submission of a prior request for delisting to the search engine operators, and *vice versa*.

(iii) The Court noted the emergence of a consensus within Europe regarding the importance of archives, which should, as a general rule, remain authentic, reliable and complete so that the press could carry out its mission. Accordingly, the integrity of press archives should be the guiding principle in examining any request for the removal or alteration of all or part of an archived article, especially if its lawfulness had never been called into question. Such requests called for particular vigilance and thorough examination by the national authorities.

(iv) In the light of the specific context of the case (online press archives), the Court further developed and clarified the criteria for balancing the various rights at stake, drawing on the general principles and in particular the need to preserve the integrity of those archives, and also, to some extent, on the practice of the courts in the Council of Europe member States.

(a) The nature of the archived information – It had to be ascertained whether the information related to the private, professional or public life of the person concerned and whether it had a social impact, or whether, on the contrary, it fell within the intimate sphere of private life. With regard to data concerning criminal proceedings – characterised as sensitive data – the nature and seriousness of the offence were relevant. The inclusion of individualised information (full name) was an important aspect with regard to press reports and did not in itself raise an issue under the Convention, either at the time of the initial publication of reports on criminal proceedings or at the time of the entry in the online archives.

(b) The time elapsing since the events and since initial and online publication.

(c) The contemporary interest of the information – It was necessary to examine, from the perspective of the time when the request concerning the "right to be forgotten" had been made, whether the article continued to contribute to a debate of public interest (for instance, owing to the emergence of new information). In the absence of a contribution to such a debate, it had to be ascertained whether the information was of interest for any other purpose (historical, scientific or statistical) or for placing recent events in context.

(d) Whether the person claiming entitlement to be forgotten was well known, and his or her

121. *Węgrzynowski and Smolczewski v. Poland*, no. 33846/07, 16 July 2013.
122. *Fuchsmann v. Germany*, no. 71233/13, 19 October 2017.
123. *M.L. and W.W. v. Germany*, nos. 60798/10 and 65599/10, 28 June 2018.
124. *Biancardi v. Italy,* no. 77419/16, 25 November 2021.

conduct since the events – This criterion was to be examined from the perspective of the time when the request concerning the "right to be forgotten" was made. The fact of staying out of the media spotlight could weigh in favour of protecting a person's reputation.

(e) The negative repercussions of the continued availability of the information online – The person concerned had to be able to make a duly substantiated claim of serious harm to his or her private life. With regard to judicial information, the fact that the person's conviction had been removed from the criminal records and he or she had been rehabilitated were factors to be taken into consideration, although rehabilitation could not by itself justify recognising a "right to be forgotten".

(f) The degree of accessibility of the information in the digital archives – It was important to establish whether the information was available without restrictions and free of charge, or whether access was confined to subscribers or otherwise restricted.

(g) The impact of the measure on freedom of expression and more specifically on freedom of the press – When it came to deciding which of the different measures sought by the person making the request to apply, preference should be given to the measure that was both best suited to the aim pursued – assuming it to be justified – and least restrictive of the press freedom which could be relied on by the publisher concerned. Only measures which met this twofold objective could be ordered, even if that might involve dismissing the action invoking the "right to be forgotten". In the Court's view, the obligation to anonymise a lawful article might in principle fall within the "duties and responsibilities" of the press and the limits which might be imposed on it.

In the context of a balancing exercise between the various rights at stake, the criteria to be applied did not all carry the same weight. Particular attention was to be paid to properly balancing, on the one hand, the interests of the individuals requesting the measures and, on the other hand, the impact of such requests on the publishers. The principle of preservation of the integrity of press archives required the alteration and, *a fortiori*, the removal of content to be limited to what was strictly necessary, so as to prevent any chilling effect on the performance by the press of its task of imparting information and maintaining archives.

(v) In the present case the national courts had taken into account the fact that the article, which concerned a short news item, had no topical, historical or scientific interest, and the fact that G. was not well known and had suffered serious harm as a result of the continued online availability of the article with unrestricted access, which had been apt to create a "virtual criminal record" in view of the length of time that had elapsed since the original publication. After reviewing the measures that might be considered, the courts had held that anonymisation did not impose an excessive and impracticable burden on the applicant, while constituting the most effective means of protecting G.'s privacy. In the Court's view, that balancing exercise between the rights at stake had satisfied the requirements of the Convention.

Freedom of assembly and association (Article 11)

Freedom of association

The judgment in *Humpert and Others v. Germany*[125] concerned a complete prohibition on strikes by civil servants.

The applicants were State school teachers (with civil servant status, employed by different German *Länder*) and members of a trade union. They were reprimanded or fined in disciplinary proceedings for having breached their duties by participating in strikes organised by that union during their working hours. The Federal Constitutional Court dismissed their constitutional complaints, holding that the prohibition on strikes by all civil servants was a well-established traditional principle of career civil service within the German constitutional order, systemically connected with, and indissociable from, the civil servants' duty of loyalty and the "principle of alimentation", namely, their individual right to claim appropriate remuneration from the State. The Constitutional Court noted that the prohibition in question did not render the civil

125. *Humpert and Others v. Germany* [GC], nos. 59433/18 and 3 others, 14 December 2023.

servants' freedom of association entirely ineffective as the legislature had taken sufficient compensating measures, such as the participation of umbrella organisations of civil servants' trade unions in the drafting of respective statutory provisions, which enabled trade unions to make their voices heard, as well as the possibility for civil servants to have the constitutionality of their level of remuneration reviewed by the courts. The Grand Chamber (on relinquishment) found no violation of Article 11, considering that, in the specific circumstances of the case, the measure at issue did not render trade-union freedom of civil servants devoid of substance, and reflected a proper balancing and weighing-up of different, potentially competing, constitutional interests: the margin of appreciation afforded to the respondent State had therefore not been exceeded.

The Grand Chamber judgment is noteworthy because the Court adopted a more nuanced approach than in *Enerji Yapı-Yol Sen v. Turkey*[126], in which it had stated that a prohibition on strikes could not extend to civil servants in general but only to some clearly and narrowly defined categories of persons. The Court introduced a case-by-case approach, declaring that the question whether such a measure affected an essential element of trade-union freedom by rendering it devoid of substance was context-specific and could not be answered in the abstract. An assessment of all the circumstances of the case was required, considering, *inter alia*, the totality of the measures taken by the respondent State to secure trade-union freedom, to make their voice heard and to protect their members' occupational interests. The Court distinguished the present case from *Enerji Yapı-Yol Sen*, where no proper balancing exercise had been carried out at the domestic level.

(a) The Court reiterated that, while strike action was an important part of trade-union activity, it was not the only means for trade unions and their members to protect the relevant occupational interests. In principle, Contracting States remained free to decide what measures they wished to take to safeguard trade union freedom guaranteed by Article 11, so long as that freedom did not become devoid of substance. In the case of a general ban, as in the instant case, the Court needed to examine, taking into account all the relevant circumstances, whether other guarantees sufficiently compensated for that restriction, enabling the persons concerned to protect their occupational interests effectively. The Court specified that the structure of labour relations in the system concerned, such as whether the working conditions in that system were determined through collective bargaining (the latter being closely linked to the right to strike) and non-union-related representation, as well as the nature of the functions performed by the workers, were among other aspects to be taken into account in this assessment. In the present case, the Court had regard to the following aspects of the case: (i) the nature and extent of the restriction on the right to strike; (ii) the measures taken to enable civil servants' trade unions and civil servants themselves to protect occupational interests; (iii) the objectives pursued by the prohibition in question; (iv) further rights encompassed by civil servant status; (v) the possibility of working as a State school teacher as a contractual State employee with a right to strike; and (vi) the severity of the disciplinary measures applied to the applicants.

(b) The Court accepted the respondent Government's argument, based on a conclusion of the Federal Constitutional Court, that the prohibition generally pursued the overall aim of providing good administration and guaranteed the effective performance of functions delegated to the civil service, thereby ensuring the protection of the population, the provision of services of general interest and the protection of the rights enshrined in the Convention – in this case, the right of others to education protected both by the German Basic Law and by Article 2 of Protocol No. 1 to the Convention – through effective public administration in multiple situations.

(c) The Court restated and clarified the breadth of the margin of appreciation afforded to the State, specifying that it would be reduced if the restriction in question struck at the core of trade-union activity and if it affected an essential element of trade-union freedom. Thus, for example, in cases of severe restrictions on "primary" or direct industrial action by public-sector employees who were neither exercising public authority in the name of the State nor providing essential services to the population, the margin of appreciation would be narrow, and the assessment of the proportionality of the restriction should take into account all the circumstances of the case. Conversely, the margin of appreciation would be wide if a substantial restriction on the right to strike concerned civil servants exercising public authority in the name of the State or secondary action, as in that latter

126. *Enerji Yapı-Yol Sen v. Turkey,* no. 68959/01, § 32, 21 April 2009.

scenario it was not the core but a secondary or accessory aspect of trade-union activity which was affected (*National Union of Rail, Maritime and Transport Workers v. the United Kingdom*[127], and *Junta Rectora Del Ertzainen Nazional Elkartasuna (ER.N.E.) v. Spain*[128]).

(d) The Court further clarified the extent of the importance of external sources (such as, in this case, international labour law and the practice of the competent monitoring bodies set up under specialised international instruments), as well as of the consensus or the prevailing trends among the Contracting States, as auxiliary sources of law helping to determine the proportionality of the interference in issue. The Court noted that the approach taken by the respondent State, namely, to prohibit strikes by all civil servants, was clearly not in line with the trend emerging from specialised international instruments, as interpreted by the competent monitoring bodies, or from the practice of Contracting States. Moreover, those monitoring bodies had repeatedly criticised the status-based prohibition of strikes by civil servants in Germany, in particular with respect to teachers. The Court emphasised that its assessment had to be limited to compliance with the Convention and based on the specific facts of the case. Therefore, while all these elements were undoubtedly relevant, they were not in and of themselves decisive for the Court's conclusion as to whether the impugned prohibition on strikes, and the disciplinary measures imposed on the applicants, remained within the margin of appreciation afforded to the respondent State under the Convention.

Just satisfaction (Article 41)

Non-pecuniary damage

The judgment in *Georgia v. Russia (II)*[129] concerned just satisfaction in an inter-State case where the respondent State had ceased to be a member of the Council of Europe.

In its principal judgment[130] of 21 January 2021, the Court found that there had been a series of administrative practices on the part of the Russian Federation, in the context of the armed conflict between Georgia and Russia in August 2008, in violation of Articles 2, 3, 5 and 8 of the Convention, of Article 1 of Protocol No. 1 and of Article 2 of Protocol No. 4. The Court also held that Russia had failed to comply with its obligations under Article 38 of the Convention. The examination of Article 41 was reserved. The applicant Government then submitted their claims for just satisfaction, and the respondent Government did not react to the Court's invitation to submit their comments in reply. In the meantime, on 16 March 2022 the Russian Federation ceased to be a member of the Council of Europe and on 22 March 2022 the plenary Court adopted the "Resolution of the European Court of Human Rights on the consequences of the cessation of membership of the Russian Federation to the Council of Europe in light of Article 58 of the European Convention on Human Rights", stating that the Russian Federation would cease to be a Party to the Convention on 16 September 2022.

127. *National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, no. 31045/10, §§ 87-88, ECHR 2014.

128. *Junta Rectora Del Ertzainen Nazional Elkartasuna (ER.N.E.) v. Spain*, no. 45892/09, §§ 37-41, 21 April 2015.

129. *Georgia v. Russia (II)* (just satisfaction) [GC], no. 38263/08, 28 April 2023. See also under Article 46 (Binding force and execution of judgments – Execution of judgments) and Article 38 (Obligation to furnish all necessary facilities) below.

130. *Georgia v. Russia (II)* [GC], no. 38263/08, 21 January 2021.

The Court held that it had jurisdiction to deal with the applicant Government's just satisfaction claims notwithstanding the above-mentioned cessation of the Russian Federation's membership of the Council of Europe and that the respondent Government's failure to cooperate did not present an obstacle to its examination. It awarded the applicant Government lump sums in respect of non-pecuniary damage for every violation found in the principal judgment, except with respect to the 1,408 alleged victims of the administrative practice of torching and looting of houses in the "buffer zone".

The Grand Chamber judgment is noteworthy in that the Court, first, affirmed its jurisdiction to deal with non-substantive issues (such as just satisfaction, the binding force of a judgment and the Government's duty to cooperate) after the relevant State was no longer a High Contracting Party to the Convention and, secondly, it further clarified the application of Article 41 in inter-State cases (following *Cyprus v. Turkey*[131], and *Georgia v. Russia (I)*[132]).

(i) The Court made it clear that the cessation of a Contracting Party's membership of the Council of Europe did not release it from its duty to cooperate with the Convention bodies, and that this duty continued for as long as the Court remained competent to deal with applications against that State. Since the facts giving rise to the present inter-State application had occurred prior to 16 September 2022, the Court confirmed that it had jurisdiction to examine the just satisfaction claims in this case. It clarified that Article 38 (the respondent Government's duty to cooperate), Article 41 (just satisfaction) and Article 46 (binding force and execution of judgments) of the Convention, as well as the corresponding provisions of the Rules of Court, continued to be applicable after the respondent State had ceased to be a High Contracting Party to the Convention.

(ii) Likewise, the Russian Federation was required by Article 46 § 1 of the Convention to implement the Court's judgments despite the cessation of its membership of the Council of Europe. Article 46 § 2, requiring that the Committee of Ministers set forth an effective mechanism for the implementation of the Court's judgments, was also applicable in cases against a State which had ceased to be a High Contracting Party.

(iii) The Court restated the principles and methodology of counting and identifying alleged individual victims of a violation for the purposes of the application of Article 41 in an inter-State case, as defined in *Georgia v. Russia (I)* (just satisfaction) (§§ 68-71, cited above). In this connection, it specified that the duty of the High Contracting Parties to cooperate (Article 38 of the Convention and Rule 44A of the Rules of Court) applied to both parties to the proceedings: not only to the respondent Government, in respect of whom the existence of an administrative practice in breach of the Convention had been found in the principal judgment, but also to the applicant Government, who, in accordance with Rule 60 of the Rules of Court, had to substantiate their claims.

In particular, regarding just satisfaction for the administrative practice of plundering or destroying private property, the Court imposed on the applicant Government a strict requirement to produce additional evidence of the alleged direct victims' title to property or of residence. The applicant Government had submitted a list of 1,408 alleged victims of the administrative practice of torching and looting of houses in the "buffer zone". Referring to its case-law in individual applications, the Court pointed out that it had developed a flexible approach regarding the evidence to be provided by applicants who claimed to have lost their property and home in situations of international or internal armed conflict. However, if an applicant did not produce any evidence of title to property or of residence, his or her complaints were bound to fail. Likewise, in the present inter-State case, the evidence submitted by the applicant Government did not allow the Court to establish that the houses, allegedly torched or looted, had indeed belonged to the persons on the list or had constituted their home or dwelling within the meaning of Article 8. Accordingly, the Court held that it was not in a position to make an award under Article 41 in that respect.

131. *Cyprus v. Turkey* (just satisfaction) [GC], no. 25781/94, ECHR 2014.

132. *Georgia v. Russia (I)* (just satisfaction) [GC], no. 13255/07, 31 January 2019.

Pecuniary damage

The judgment in the case of *G.I.E.M. S.r.l. and Others v. Italy*[133] concerned the elements to be taken into account when assessing the extent of pecuniary damage caused by confiscation of property in violation of Article 1 of Protocol No. 1.

The applicants – four companies and one individual – had complained about the automatic and complete confiscation of unlawfully developed land. In 2018 the Grand Chamber found that the measure had breached Article 1 of Protocol No. 1 in respect of all the applicants; it also found a violation of Article 7 of the Convention in respect of the companies, but not the individual; and lastly a violation of Article 6 § 2 in respect of the individual. The property has been returned to all the applicants. In the present judgment, taking the violation of Article 1 of Protocol No. 1 as the sole basis for compensation, the Grand Chamber made awards in respect of pecuniary damage particularly on account of the applicants' inability to use their land. However, it refused compensation for the deterioration of the buildings, given that they had been erected in breach of administrative permits. It also refused to take account of the loss of value of the land resulting from circumstances which had no causal link with the confiscation, or the violations found. Lastly, the Grand Chamber awarded sums to the applicants for non-pecuniary damage and for costs and expenses.

This Grand Chamber judgment is noteworthy as the Court explained the relevant factors to be taken into consideration when establishing the extent of pecuniary damage resulting from the confiscation of property in violation of Article 1 of Protocol No. 1.

The Court began by confirming its well-established approach, whereby it was in principle for the applicant to adduce evidence of the existence and quantum of any pecuniary damage and to prove that there was a causal link between the claim being made and the violation(s) found.

As to the elements to be taken into account in order to assess pecuniary damage in that context, they included the value of the land and/or constructions prior to the confiscation, whether or not the land could be built upon at that time, the designated use of the property under the relevant legislation and land-use plans, the duration of the inability to use the land and the loss of value caused by the confiscation, while if necessary deducting the cost of demolishing illegal constructions.

The Court relied on its judgment in *Sud Fondi S.r.l. and Others v. Italy* (just satisfaction)[134], while emphasising that the present case had to be distinguished from it in a number of respects. In particular, the nature of the violations in question differed significantly: whereas in *Sud Fondi S.r.l. and Others v. Italy*[135], the violations of Article 7 of the Convention and Article 1 of Protocol No.1 had been found on account of the lack of legal basis of the confiscations in question, thus rendering them arbitrary, in the present case the violations had been mainly procedural, being caused solely by the fact that the applicant companies had not been parties to the proceedings in question.

In the case of *Sud Fondi S.r.l. and Others* (just satisfaction), cited above, the Court had decided that the compensation due for the inability to use the land should be based on the probable value of the land at the beginning of the situation complained of. The damage caused by that inability for the period in question could be compensated for by a sum corresponding to the statutory interest accruing throughout that period, as applied to the value of the land. The Court applied that approach in the present case.

In assessing the duration for which the property, since returned, had been unusable, the Court took as the starting point the actual confiscations and not any previous measures of seizure, given that only the confiscations had been found to constitute the violations in the judgment on the merits.

The Court thus ascertained, in each case, whether the land could be built on, noting that that status had a significant impact on the value of land. Where it was possible to build on the land to a very limited extent, it was necessary for the Court to consider, whether it could have been sold in spite of any construction thereon which did not comply with the specifications stipulated in the planning permission.

133. *G.I.E.M. S.r.l. and Others v. Italy* (just satisfaction) [GC], nos. 1828/06 and 2 others, 12 July 2023.
134. *Sud Fondi S.r.l. and Others v. Italy* (just satisfaction), no. 75909/01, 10 May 2012.
135. Sud Fondi S.r.l. and Others v. Italy, no. 75909/01, 20 January 2009.

Binding force and execution of judgments (Article 46)

Execution of judgments

The judgment in *Georgia v. Russia (II)*[136] concerned just satisfaction in an inter-State case where the respondent State had ceased to be a member of the Council of Europe.

In its principal judgment[137] of 21 January 2021, the Court found that there had been a series of administrative practices on the part of Russia, in the context of the armed conflict between Georgia and Russia in August 2008, in violation of Articles 2, 3, 5 and 8 of the Convention, of Article 1 of Protocol No. 1 and of Article 2 of Protocol No. 4. The Court also held that Russia had failed to comply with its obligations under Article 38 of the Convention. The examination of Article 41 was reserved. The applicant Government then submitted their claims for just satisfaction, and the respondent Government did not react to the Court's invitation to submit their comments in reply. In the meantime, on 16 March 2022 the Russian Federati ceased to be a member of the Council of Europe and on 22 March 2022 the plenary Court adopted the "Resolution of the European Court of Human Rights on the consequences of the cessation of membership of the Russian Federation to the Council of Europe in light of Article 58 of the European Convention on Human Rights", stating that the Russian Federation would cease to be a Party to the Convention on 16 September 2022.

The Court held that it had jurisdiction to deal with the applicant Government's just satisfaction claims notwithstanding the above-mentioned cessation of the Russian Federation's membership of the Council of Europe and that the respondent Government's failure to cooperate did not present an obstacle to its examination. It awarded the applicant Government lump sums in respect of non-pecuniary damage for every violation found in the principal judgment, except with respect to the 1,408 alleged victims of the administrative practice of torching and looting of houses in the "buffer zone".

The Grand Chamber judgment is noteworthy in that the Court affirmed its jurisdiction to deal with non-substantive issues (such as just satisfaction, the binding force of a judgment and the Government's duty to cooperate) after the relevant State was no longer a High Contracting Party to the Convention.

(i) The Court made it clear that the cessation of a Contracting Party's membership of the Council of Europe did not release it from its duty to cooperate with the Convention bodies, and that this duty continued for as long as the Court remained competent to deal with applications against that State. Since the facts giving rise to the present inter-State application had occurred prior to 16 September 2022, the Court confirmed that it had jurisdiction to examine the just satisfaction claims in this case. It clarified that Article 38 (the respondent Government's duty to cooperate), Article 41 (just satisfaction) and Article 46 (binding force and execution of judgments) of the Convention, as well as the corresponding provisions of the Rules of Court, continued to be applicable after the respondent State had ceased to be a High Contracting Party to the Convention.

(ii) Likewise, the Russian Federation was required by Article 46 § 1 of the Convention, to implement the Court's judgments despite the cessation of its membership of the Council of Europe. Article 46 § 2, which requires that the Committee of Ministers set forth an effective mechanism for the implementation of the Court's judgments, was also applicable in cases against a State which had ceased to be a High Contracting Party.

136. *Georgia v. Russia (II)* (just satisfaction) [GC], no. 38263/08, 28 April 2023. See also under Article 41 (Just satisfaction – Non-pecuniary damage) above, and Article 38 (Obligation to furnish all necessary facilities) below.

137. *Georgia v. Russia (II)* [GC], no. 38263/08, 21 January 2021.

Other Convention provisions

Derogation in time of emergency (Article 15)

The judgment in *Yüksel Yalçınkaya v. Türkiye*[138] concerned a conviction for membership of a terrorist organisation based on the use of an encrypted messaging application.

The applicant was convicted of membership of an armed terrorist organisation ("FETÖ/PDY")[139], considered by the domestic authorities to have been behind the attempted coup of 2016. The conviction was based decisively on his use of an encrypted messaging application, ByLock, which the domestic courts had found to have been designed for the exclusive use of the members of FETÖ/PDY.

Before the Court, the applicant complained mainly under Articles 6, 7 and 11. The Grand Chamber (relinquishment) found a violation of Article 7 on account of the domestic courts' unforeseeable interpretation of domestic law, which attached objective liability to the mere use of ByLock. It also found a breach of Article 6 § 1 on account of the domestic courts' failure to put in place appropriate safeguards to enable the applicant to challenge effectively the key evidence (electronic data), to address the salient issues lying at the core of the case and to provide sufficient reasons. In the Grand Chamber's view, there had also been a breach of Article 11, as the domestic courts had deprived the applicant of the minimum protection against arbitrariness and had extended the scope of the relevant offence when relying, to corroborate his conviction, on his membership of a trade union and an association (purportedly affiliated with the FETÖ/PDY) that had both been operating lawfully at the material time.

The Grand Chamber judgment is noteworthy in that the Court confirmed and clarified the application of the safeguards enshrined in Article 7 and Article 6 § 1 with regard to two specific features of the instant case: in the first place, the unique challenges faced by the domestic authorities in their fight against terrorism in its covert, atypical forms and in the aftermath of the attempted military coup; and, secondly, the use of a high volume of encrypted electronic data stored on the server of an internet-based communication application.

The Court examined the question whether the impugned failure to observe the requirements of a fair trial could be justified by the Turkish derogation under Article 15 (in connection with the attempted coup). In this respect, the Court emphasised that such a derogation, even if justified, neither had the effect of dispensing the States from the obligation to respect the rule of law (*Pişkin v. Turkey*[140]), nor did it give them carte blanche to engage in conduct that could lead to arbitrary consequences for individuals. Accordingly, when determining whether a derogating measure was strictly required by the exigencies of the situation, the Court would also examine whether adequate safeguards had been provided against abuse and whether the measure undermined the rule of law. In the present case, no sufficient connection had been established between the above fair trial issues and the special measures taken during the state of emergency. The Court therefore found a breach of Article 6 § 1 of the Convention.

138. *Yüksel Yalçınkaya v. Türkiye* [GC], no. 15669/20, 26 September 2023. See also under Article 7 (No punishment without law) and Article 6 § 1 (Fairness of the Proceedings) above.

139. "Fetullahist Terror Organisation/Parallel State Structure".

140. *Pişkin v. Turkey*, no. 33399/18, § 153, 15 December 2020.

Obligation to furnish all necessary facilities (Article 38)

The judgment in *Georgia v. Russia (II)*[141] concerned just satisfaction in an inter-State case where the respondent State had ceased to be a member of the Council of Europe.

In its principal judgment[142] of 21 January 2021, the Court found that there had been a series of administrative practices on the part of the Russian Federation, in the context of the armed conflict between Georgia and Russia in August 2008, in violation of Articles 2, 3, 5 and 8 of the Convention, of Article 1 of Protocol No. 1 and of Article 2 of Protocol No. 4. The Court also held that Russia had failed to comply with its obligations under Article 38 of the Convention. The examination of Article 41 was reserved. The applicant Government then submitted their claims for just satisfaction, and the respondent Government did not react to the Court's invitation to submit their comments in reply. In the meantime, on 16 March 2022 the Russian Federation had ceased to be a member of the Council of Europe and on 22 March 2022 the plenary Court adopted the "Resolution of the European Court of Human Rights on the consequences of the cessation of membership of the Russian Federation to the Council of Europe in light of Article 58 of the European Convention on Human Rights", stating that the Russian Federation would cease to be a Party to the Convention on 16 September 2022.

The Court held that it had jurisdiction to deal with the applicant Government's just satisfaction claims notwithstanding the above-mentioned cessation of the Russian Federation's membership of the Council of Europe and that the respondent Government's failure to cooperate did not present an obstacle to its examination. It awarded the applicant Government lump sums in respect of non-pecuniary damage for every violation found in the principal judgment, except with respect to the 1,408 alleged victims of the administrative practice of torching and looting of houses in the "buffer zone".

The Grand Chamber judgment is noteworthy in that the Court affirmed its jurisdiction to deal with non-substantive issues (such as just satisfaction, the binding force of a judgment and the Government's duty to cooperate) after the relevant State was no longer a High Contracting Party to the Convention.

The Court made it clear that the cessation of a Contracting Party's membership of the Council of Europe did not release it from its duty to cooperate with the Convention bodies, and that this duty continued for as long as the Court remained competent to deal with applications against that State. Since the facts giving rise to the present inter-State application had occurred prior to 16 September 2022, the Court confirmed that it had jurisdiction to examine the just satisfaction claims in this case. It clarified that Article 38 (the respondent Government's duty to cooperate), Article 41 (just satisfaction) and Article 46 (binding force and execution of judgments) of the Convention, as well as the corresponding provisions of the Rules of Court, continued to be applicable after the respondent State had ceased to be a High Contracting Party to the Convention.

Jurisdiction of the Court (Article 32)

The judgment in *Grosam v. the Czech Republic*[143] concerned the distinction between complaints and secondary arguments and the consequent delimiting of the Court's ability to recharacterise a complaint.

The disciplinary chamber of the Supreme Administrative Court had found the applicant guilty of misconduct and fined him.

In his application to the Court, he complained under Article 6 § 1 of the lack of fairness of the disciplinary proceedings. He also complained, under Article 2 of Protocol No. 7, that domestic law excluded appeals against the disciplinary chamber of the Supreme Administrative Court. After notice of the case had been given to the respondent Government, a Chamber of the Court, of its own motion, invited the parties to submit further observations under Article 6 § 1 on whether, given its composition, the disciplinary chamber met the requirements of a "tribunal established

141. *Georgia v. Russia (II)* (just satisfaction) [GC], no. 38263/08, 28 April 2023. See also under Article 41 (Just satisfaction – Non-pecuniary damage) and Article 46 (Binding force and execution of judgments) above.

142. *Georgia v. Russia (II)* [GC], no. 38263/08, 21 January 2021.

143. *Grosam v. the Czech Republic* [GC], no. 19750/13, 1 June 2023. See also under Article 34 (Petition) above.

by law" within the meaning of that provision. In his observations of 5 November 2015, the applicant contended that it did not. In its judgment, the Chamber of the Court recharacterised the complaint under Article 2 of Protocol No. 7 as one to be examined under Article 6 § 1 and found a violation of that provision: the disciplinary chamber did not meet the requirements of an independent and impartial tribunal and, furthermore, there was no need to examine the admissibility/merits of the remaining complaints under Article 6 § 1 (fairness of the disciplinary proceedings).

The Grand Chamber disagreed, finding that the applicant's arguments under Article 2 of Protocol No. 7 could not be interpreted as raising a complaint that the disciplinary chamber had not been an independent and impartial tribunal within the meaning of Article 6 § 1. The applicant had not raised such a complaint in his application form but only subsequently in his observations to the Chamber, after it had given notice of the application to the respondent Government. The Grand Chamber therefore found this new complaint to be inadmissible, given that it had been submitted more than six months after the disciplinary proceedings against the applicant had ended (in 2012). Going on to examine the remaining complaints within the scope of the referred case, the Grand Chamber dismissed the complaints under Article 6 § 1 (fairness of the disciplinary proceedings) as manifestly ill-founded and, having agreed with the Chamber that Article 6 § 1 was applicable under its civil but not its criminal head, the Grand Chamber rejected as incompatible *ratione materiae* with the provisions of the Convention the complaint under Article 2 of Protocol No. 7 (the concept of "criminal offence" used in that provision corresponding to that of "criminal charge" in Article 6 § 1).

The Grand Chamber judgment is noteworthy because the Court, being master of the characterisation to be given in law to the facts of a case, confirmed and clarified the limits of its power to recharacterise an applicant's complaints and, in so doing, it ensured that the scope of the case did not extend beyond the complaints contained in the application.

The Court reiterated that it could base its decision only on the facts "complained of", which ought to be seen in the light of the legal arguments underpinning them and vice versa, these two elements of a complaint being intertwined (*Radomilja and Others v. Croatia*[144]). Drawing upon its approach in the context of exhaustion of domestic remedies, the Court emphasised that it was not sufficient that a violation of the Convention was "evident" from the facts of the case or the applicant's submissions. Instead, the applicants had to complain that a certain act or omission had entailed a violation of the rights set forth in the Convention or the Protocols thereto, in a manner which should not leave the Court to second-guess whether a certain complaint had been raised or not (*Farzaliyev v. Azerbaijan*[145]). Referring to a similar position of the International Court of Justice (ICJ – compare the judgments in the cases of *Nuclear Tests (Australia v. France)*[146] and *Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia)*[147]), the Court emphasised that it had no power to substitute itself for the applicant and formulate new complaints simply on the basis of the arguments and facts advanced. Drawing inspiration again from the *Nuclear Tests* judgment of the ICJ, the Court clarified that it was necessary to distinguish between complaints (that is, the arguments pointing to the cause or the fact constitutive of the alleged violations of the Convention) and secondary arguments.

On that basis, the Court considered whether the applicant's complaint under Article 2 of Protocol No. 7, as formulated in his application, could be examined under Article 6 § 1 (as a complaint about an independent and impartial tribunal) as the Chamber had done after recharacterising it to fall within that provision. In his application, the applicant did not claim that the inclusion, in the composition of the disciplinary chamber, of members who were not professional judges entailed a violation of Article 2 of Protocol No. 7. Rather, he argued that that body could not be regarded as the "highest tribunal" within the meaning of paragraph 2 of that provision, as its lay members were not subject to the same requirements of expertise and independence as judges. That argument was therefore aimed only at excluding the application of the exception provided for in Article 2 § 2 of Protocol No. 7, according to which the right of appeal did not apply where an accused had been tried in the first instance by the highest tribunal. Moreover,

144. *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, 20 March 2018.

145. *Farzaliyev v. Azerbaijan*, no. 29620/07, 28 May 2020.

146. *Nuclear Tests (Australia v. France)*, judgment of 20 December 1974, *ICJ Reports* 1974, p. 253.

147. *Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia)*, ICJ judgment of 1 December 2022.

the applicant emphasised that the composition of the disciplinary chamber was atypical among the higher judicial institutions in the Czech Republic, which normally did not involve lay assessors (their participation being common in some first-instance courts). In short, he did not argue that the disciplinary chamber was not a "tribunal" but merely that it was not the "highest tribunal".

In the Court's view, that was a secondary argument which could not be equated with a complaint: indeed, the applicant had not claimed the composition of the disciplinary chamber to be the cause or fact constitutive of a violation of Article 2 of Protocol No. 7. His argument could not therefore be interpreted as raising a complaint that the disciplinary chamber was not an independent and impartial tribunal within the meaning of Article 6 § 1. If the applicant had wished, at that stage, to complain of a breach of those guarantees set forth in Article 6 § 1, he should have so stated in his application form in a clear manner, especially as the scope of Article 6 was very broad and the complaints under that provision had to contain all the parameters necessary for the Court to define the issue it would be called upon to examine (*Ramos Nunes de Carvalho e Sá v. Portugal*[148]). Although the applicant had formulated such a complaint in his observations to the Chamber, that was a new complaint: since it related to distinct requirements arising from Article 6 § 1, it could therefore not be viewed as concerning a particular aspect of his initial complaint under Article 2 of Protocol No. 7.

Accordingly, by raising a question concerning compliance with the requirement of a "tribunal established by law" under Article 6 § 1, the Chamber had extended, of its own motion, the scope of the case beyond the one initially referred to it by the applicant in his application. It had thereby exceeded the powers conferred on the Court by Articles 32 and 34 of Convention.

The decision in *Pivkina and Others v. Russia*[149] concerned the Court's temporal jurisdiction mainly with respect to acts or omissions spanning the date on which a respondent State ceased to be a Party to the Convention.

On 16 March 2022 the Russian Federation ceased to be a member of the Council of Europe. Shortly thereafter the Court, sitting in Plenary formation, adopted a Resolution stating that the Russian Federation would cease to be a High Contracting Party to the Convention on 16 September 2022 ("the termination date"). The applications concerned different factual scenarios, alleging violations of various Convention provisions. Some of the facts occurred up until, some occurred after and some spanned across the termination date. The Court reconfirmed its jurisdiction to deal with cases where all acts and judicial decisions leading to the alleged Convention violations had occurred up until the termination date[150]. The Court further rejected complaints as incompatible *ratione personae* with the provisions of the Convention where both the triggering act and the applicant's judicial challenge to it had occurred after the termination date. As regards the case where the facts spanned across the termination date, the Court found that some of the complaints fell within its temporal jurisdiction and gave notice thereof to the respondent Government. It rejected the remaining complaints as incompatible *ratione temporis* with Article 35 § 3 of the Convention.

Russia's Federal Law no. 43-FZ of 28 February 2023 provided that the Convention was to be considered as having ceased to be applicable to the Russian Federation as of 16 March 2022 (not the termination date). The Court, however, emphasised that its ability to determine its own jurisdiction was essential to the Convention's protection system. By acceding to the Convention, the High Contracting Parties had undertaken to comply not just with its substantive provisions but also with its procedural provisions, including Article 32, which gave the Court exclusive authority over disputes regarding its jurisdiction. The Court's jurisdiction could not therefore be contingent upon events extraneous to its own operation, such as domestic legislation that sought to affect or limit its jurisdiction in pending cases, such as the above-mentioned Russian law.

148. *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, § 104, 6 November 2018.

149. *Pivkina and Others v. Russia* (dec.), nos. 2134/23 and 6 others, 6 June 2023. See also under Article 35 § 3 (a) (Competence *ratione temporis*, and Competence *ratione personae*) above.

150. *Fedotova and Others v. Russia* [GC], nos. 40792/10 and 2 others, 17 January 2023.

Cessation of membership of the Council of Europe (Article 58)

The judgment in *Fedotova and Others v. Russia*[151] is noteworthy in that the Court ruled, for the first time, on its jurisdiction to examine a case against Russia after it had ceased to be a Party to the Convention.

Referring to the wording of Article 58 (§§ 2 and 3), the Court confirmed that a State which ceased to be a Party to the Convention, by virtue of the fact that it had ceased to be a member of the Council of Europe, was not released from its obligations under the Convention in respect of any act performed by that State before the date on which it ceased to be a Party to the Convention. The Court thus reiterated its reading of this provision set out in its Resolution concerning Russia[152] delivered after sitting in plenary session. In the present case, the facts giving rise to the alleged violations of the Convention had taken place before 16 September 2022, when Russia ceased to be a Party to the Convention. Since the applications had been lodged with it in 2010 and 2014, the Court had jurisdiction to deal with them. The Court eventually found a violation of Article 8 on the ground that the respondent State had failed to comply with its positive obligation to secure adequate recognition and protection for the applicants, who were same-sex couples.

Inter-State cases (Article 33)

The decision in *Ukraine and the Netherlands v. Russia*[153] concerned exclusion from jurisdiction in the context of the active phase of hostilities, as well as the relevance of non-domestic remedies in an inter-State case for the purposes of the six-month rule.

In its two inter-State applications, the Ukrainian Government alleged an administrative practice by Russia resulting in numerous Convention violations in the areas of eastern Ukraine under separatist control. The inter-State application lodged by the Netherlands Government concerned the downing of flight MH17. In its decision, the Grand Chamber held that Russia had had effective control over all areas in the hands of separatists from 11 May 2014 and that the impugned facts fell within the spatial jurisdiction (*ratione loci)* of Russia within the meaning of Article 1, with the exception of the Ukrainian Government's complaint about the bombing and shelling of areas outside separatist control. The question of whether the latter complaint came under Russia's personal jurisdiction (State agent authority and control) was joined to the merits. The Grand Chamber confirmed its *ratione materiae* jurisdiction to examine complaints concerning armed conflict. It dismissed the respondent Government's further preliminary objections (the alleged lack of the "requirements of a genuine application" (Article 33), non-exhaustion of domestic remedies and non-compliance with the six-month time-limit) and declared admissible: the Netherlands Government's complaints under the substantive and procedural aspects of Articles 2, 3 and 13 in respect of the downing of flight MH17; and the Ukrainian Government's complaints about an alleged administrative practice contrary

151. *Fedotova and Others v. Russia* [GC], nos. 40792/10 and 2 others, 17 January 2023. See also under Article 8 (Positive obligations) above.

152. Resolution of the European Court of Human Rights on the consequences of the cessation of membership of the Russian Federation to the Council of Europe in light of Article 58 of the European Convention on Human Rights, adopted on 22 March 2022.

153. *Ukraine and the Netherlands v. Russia* (dec.) [GC], nos. 8019/16 and 2 others, adopted on 30 November 2022 and delivered on 25 January 2023. See also under Article 1 (Jurisdiction of States), Article 35 § 1 (Exhaustion of domestic remedies) and Article 35 § 1 (Four-month period) above.

to Articles 2 and 3, Article 4 § 2, and Articles 5, 8, 9 and 10 of the Convention and Articles 1 and 2 of Protocol No. 1, Article 2 of Protocol No. 4, and Article 14 of the Convention in conjunction with Articles 2 and 3, Article 4 § 2, and Articles 5, 9 and 10 of the Convention and Articles 1 and 2 of Protocol No. 1[154].

The Grand Chamber decision is noteworthy in several respects. In the first place, the Court shed some light on how to interpret the exclusion from jurisdiction of "military operations carried out during an active phase of hostilities", in accordance with the principle set out in *Georgia v. Russia (II)*[155]. Secondly, and with regard to the downing of flight MH17, the Court examined the effectiveness of domestic remedies, taking into account the important political dimension of the case. Thirdly, and in the novel and exceptional context of that same complaint, the Court clarified how the interplay between the six-month rule and the exhaustion of "domestic" remedies, enshrined in Article 35 § 1, was to be transposed to potential remedies outside the respondent State or to avenues which States themselves might wish to pursue at the international level prior to lodging an inter-State case with this Court, especially where there was no clarity from the outset as to the circumstances of the alleged violation of the Convention and the identity of the State allegedly responsible for it.

(i) The Grand Chamber referred to its judgment in the case of *Georgia v. Russia (II)* (cited above), according to which the first question to be addressed in cases concerning armed conflict was whether the complaints concerned "military operations carried out during an active phase of hostilities". In that case, the question had been answered in the affirmative and, as a result, the substantive complaints about events concerning the "active phase of hostilities" had fallen outside the "jurisdiction" of the respondent State for the purposes of Article 1, while the duty to investigate deaths which had occurred remained. At the same time, in that case, there had been a distinct, single, continuous five-day phase of intense fighting. The Court had therefore been able to separate out complaints which it had identified as concerning "military operations carried out during the active phase of hostilities", in the sense of "armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos". The alleged attacks falling under this exception covered "bombing, shelling and artillery fire". In the present decision, the Grand Chamber clarified that the *Georgia v. Russia (II)* judgment could not be seen as authority for excluding entirely from a State's Article 1 jurisdiction a specific temporal phase of an international armed conflict: indeed, in that case, the Court had found in jurisdiction to exist in respect of the detention and treatment of civilians and prisoners of war even during the "five-day war". A State could therefore have extraterritorial jurisdiction in respect of complaints concerning events which had occurred while active hostilities were taking place. Unlike the above case, the vast majority of the complaints advanced in the present case (except for those relating to the downing of flight MH17 and artillery attacks) concerned events unconnected with military operations occurring within the area under separatist control and therefore they could not be excluded from the spatial jurisdiction of Russia on the basis of this exception.

As regards the downing of flight MH17, which had taken place in the context of active fighting between the two opposing forces, the Court stated that it would be wholly inaccurate to invoke any "context of chaos" in this regard. It noted the exceptional and painstaking work of the international Joint Investigation Team (JIT), which had been able to pierce "the fog of war" and elucidate the specific circumstances of this incident. The Court further specified that the chaos that might exist on the ground as large numbers of advancing forces sought to take control of territory under cover of a barrage of artillery fire did not inevitably exist in the context of the use of surface-to-air missiles, which were used to attack specific targets in the air. There was moreover no evidence of fighting to establish control in the areas directly relevant to the missile launch site or the impact site, both being under separatist control and thus within the spatial jurisdiction of Russia. The jurisdiction of Russia in respect of this incident could not therefore be excluded on the basis of "the active phase of hostilities" exception.

As regards the Ukrainian Government's complaint about the bombing and shelling, the victims

154. The Grand Chamber declared inadmissible the following complaints by the Ukrainian Government: the individual complaints concerning the alleged abduction of three groups of children and accompanying adults (failure to exhaust domestic remedies); the complaints of administrative practices in breach of Article 11 (lack of sufficient prima facie evidence of the repetition of acts) and of Article 3 of Protocol No. 1 (presidential elections being outside the scope of this provision).

155. *Georgia v. Russia (II)* [GC], no. 38263/08, 21 January 2021.

had been outside the areas controlled by separatists and those complaints were excluded from Russia's spatial jurisdiction. The Grand Chamber joined to the merits the question of whether that complaint was also excluded from Russia's personal jurisdiction (on account of State agent authority or control) by virtue of the above exception identified in *Georgia v. Russia (II)* (cited above).

(ii) The Court reiterated that the exhaustion requirement applied to inter-State applications denouncing violations allegedly suffered by individuals (*Ukraine v. Russia (*re *Crimea)*[156]). When assessing the effectiveness of domestic remedies in this context, the Court had regard to the existence of a dispute as to the underlying facts. For example, as regards the abduction and transfer to Russia of the three groups of children alleged by the Ukrainian Government, the Russian investigative authorities had not contested the underlying facts (namely, the border crossing) but only the forcible nature of the transfer. The Court therefore concluded that the Russian authorities ought to have been afforded the opportunity by the Ukrainian Government to investigate their allegations and the evidence collected by them, notably in the context of a judicial appeal. By contrast, as regards the downing of flight MH17, this complaint had been consistently met by the respondent Government with a blanket denial of any involvement whatsoever. In the latter context, the Court also emphasised the political dimension of the case, being unconvinced as to the effectiveness of domestic remedies in a case where State agents were implicated in the commission of a crime, especially one condemned by the United Nations Security Council. In this regard, the Court referred to its finding of a violation of the procedural aspect of Article 2 in *Carter v. Russia*[157], which concerned the high-profile poisoning of a Russian dissident abroad by State agents. In the instant case, the Court pinpointed the Russian authorities' formalistic failure to initiate an investigation into the allegation that Russian nationals had been involved in the downing of flight MH17. Indeed, the Russian authorities had been contacted on multiple occasions by victims' relatives and had had ample legal possibilities to launch such an investigation, even in the absence of a specific request.

(iii) As there had been no effective remedy in Russia available to the relatives of the victims of flight MH17, the normal starting-point for the running of the six-month time-limit would be the date of the incident itself (17 July 2014). The Court, however, underlined the novel factual nature of the present case: first, the identity of the State allegedly responsible for a violation of the Convention had not been apparent from the date of the act in issue itself (given the lack of clarity as to the identities of the perpetrators, the weapon used and the extent of any State's control over the area concerned, as well as Russia's denial of any involvement whatsoever); secondly, the criminal investigation carried out by the Netherlands authorities with the assistance of the JIT could not been seen as a "domestic" remedy in respect of complaints lodged against Russia. The Court therefore considered the relevance of the latter investigation, as well as the international-law remedies pursued, for the purposes of compliance with the six-month time-limit in the inter-State context and in the exceptional circumstances of the present case. The Court had particular regard to the interests of justice and the purposes of Article 35 § 1. On the one hand, this provision could not be interpreted in a manner which would require an applicant State to seise the Court of its complaint before having reasonably satisfied itself that there had been an alleged breach of the Convention by another State and before that State had been identified with sufficient certainty. On the other hand, it would indeed be unjust and contrary to the purpose of Article 35 § 1 if the effect of reasonably awaiting relevant findings of an independent, prompt and effective criminal investigation, in order to assist the Court in its own assessment of the complaints, were to render those complaints out of time. With this in mind, the Court concluded that it would be artificial to ignore the investigative steps taken in the Netherlands and in the context of the JIT, which had precisely enabled the pertinent facts to be elucidated, all the more so as no investigation had been undertaken in the respondent State. Furthermore, as those steps had been carried out promptly, regularly and diligently, it could not be said that there had been a delay in the referral of the complaints to this Court such that it would be difficult to ascertain the pertinent facts, rendering a fair examination of the allegations almost impossible. In other words, the aim of the time-limit in Article 35 § 1 had not been undermined by the lodging of the application some six years after the aircraft had been downed.

The Court further acknowledged the relevance of remedies under international law in an inter-

156. *Ukraine v. Russia (*re *Crimea)* (dec.) [GC], nos. 20958/14 and 38334/18, 16 December 2020.

157. *Carter v. Russia*, no. 20914/07, 21 September 2021.

State dispute, particularly where the allegation is that the State itself, at the highest level of government, bears responsibility. While such remedies are not mentioned in Article 35 § 1 and, as a result, the running of the time-limit in that Article is not linked to their exercise, the Court had already accepted that, in some circumstances, it might be appropriate to have regard to such remedies when assessing whether the obligation of diligence incumbent on applicants had been met (*Varnava and Others v. Turkey*[158]). It was therefore legitimate for the Netherlands Government to have explored the opportunity of negotiations with Russia, which had ended in 2020. In sum, in the exceptional circumstances of the case, the complaints had been lodged in time.

The Court confirmed that, unlike the exhaustion requirement, the six-month time-limit was applicable to allegations of administrative practices.

Advisory opinions (Article 1 of Protocol No. 16)

In response to a request submitted by the Finnish Supreme Court, the Court delivered its advisory opinion[159] on 13 April 2023. It concerned the procedural status and rights of a biological parent in proceedings for the adoption of an adult.

See also under Article 8 (Private life) above.

In response to a request submitted by the Belgian *Conseil d'État*, the Court delivered its advisory opinion[160] on 14 December 2023, which concerned the question whether an individual could be denied authorisation to work as a security guard or officer on account of being close to, or belonging to, a religious movement considered by the authorities to be dangerous. See also under Article 9 (Manifest one's religion or belief) above.

158. *Varnava and Others v. Turkey* [GC], nos. 16064/90 and 8 others, § 170, ECHR 2009.

159. *Advisory opinion on the procedural status and rights of a biological parent in proceedings for the adoption of an adult* [GC], request no. P16-2022-001, Supreme Court of Finland, 13 April 2023.

160. *Advisory opinion as to whether an individual may be denied authorisation to work as a security guard or officer on account of being close to, or belonging to, a religious movement* [GC], request no. P16-2023-001, Belgian *Conseil d'État*, 14 December 2023.

Rules of Court

The judgment in *Svetova and Others v. Russia*[161] dealt with the consequences of a State's failure to participate in the proceedings after it ceased to be a Party to the Convention.

The applicant journalists complained about an unjustified search of their home and the indiscriminate seizure of personal belongings including electronic data storage devices. In 2021 the Court notified the respondent Government of the applicants' complaints under Articles 8, 10 and 13.

In the context of a procedure launched under Article 8 of the Statute of the Council of Europe (COE), the Committee of Ministers of the COE adopted a Resolution[162], in accordance with which the Russian Federation ceased to be a member of the Council of Europe as from 16 March 2022. Shortly thereafter the Court, sitting in plenary formation, adopted a Resolution[163] stating that the Russian Federation would cease to be a High Contracting Party to the Convention on 16 September 2022.

Referring to the wording of Article 58 (§§ 2 and 3) of the Convention and the above-cited Resolution of 22 March 2022, the Court established its jurisdiction to deal with the present case[164] since the facts giving rise to the alleged violations of the Convention had taken place before 16 September 2022. The Court further noted that, by failing to submit their written observations when requested to do so, the respondent Government had manifested their intention to abstain from further participating in the examination of the present case. Nevertheless, and relying on Rules 44A and 44C of the Rules of Court, the Court considered it could examine the case on the merits and found violations of Articles 8 and 10 of the Convention and of Article 13 in conjunction with Article 8.

The judgment is noteworthy in that a Chamber formation of the Court dealt with procedural matters arising from the cessation of membership of the Russian Federation to the Council of Europe.

(i) In the first place, the Court addressed the appointment of an *ad hoc* judge in Russian cases after 16 September 2022. On 5 September 2022 the Court, sitting in plenary formation, took formal notice of the fact that the office of the judge with respect to the Russian Federation would cease to exist after 16 September 2022. This consequently entailed that there was no longer a valid list of *ad hoc* judges who would be eligible to take part in the consideration of the cases against Russia. Having informed the parties, the President of the Chamber decided to appoint an *ad hoc* judge from among the members of the composition, applying by analogy Rule 29 § 2 (b) of the Rules of Court.

(ii) Secondly, the Court addressed the consequences of the Government's failure to participate in the proceedings, finding that this omission could not be an obstacle for its examination.

The Court drew on case-law principles developed in the context of Articles 34 and 38 of the Convention as to the obligations on States to furnish all necessary facilities to make possible a proper and effective examination of applications (*Georgia v. Russia (I)*[165], and *Carter v. Russia*[166]). The Court also relied on Rule 44A of the Rules of Court on the parties' duty to cooperate with the Court, emphasising that the cessation of a Contracting Party's membership of the Council of Europe did not release it from this duty. It was a duty which continued for as long as the Court remained competent to deal with applications arising out of acts or omissions capable of constituting a

161. *Svetova and Others v. Russia*, no. 54714/17, 24 January 2023.

162. Resolution CM/Res(2022)2 on the cessation of the membership of the Russian Federation to the Council of Europe, adopted on 16 March 2022.

163. Resolution of the European Court of Human Rights on the consequences of the cessation of membership of the Russian Federation to the Council of Europe in light of Article 58 of the European Convention on Human Rights, adopted on 22 March 2022.

164. The Court ruled, for the first time, on this matter in *Fedotova and Others v. Russia* [GC], nos. 40792/10 and 2 others, 17 January 2023. See also *Kutayev v. Russia*, no. 17912/15, 24 January 2023.

165. *Georgia v. Russia (I)* [GC], no. 13255/07, § 99, ECHR 2014 (extracts).

166. *Carter v. Russia*, no. 20914/07, §§ 92-94, 21 September 2021.

violation of the Convention, provided that the said act/omission had taken place prior to the date on which the respondent State had ceased to be a Contracting Party to the Convention.

The Court also referred to Rule 44C § 2 which stipulated that "a respondent Contracting Party's failure or refusal to participate effectively in the proceedings shall not, in itself, be a reason for the Chamber to discontinue the examination of an application". In the Court's view, this provision acted as an enabling clause for the Court, making it impossible for a party unilaterally to delay or obstruct the conduct of proceedings. The Court had already dealt with a situation where a State had not participated in at least some stages of the proceedings (for example, the respondent Government had failed to submit their memorials or participate in a hearing in the absence of sufficient cause, see *Cyprus v. Turkey*[167], and *Denmark, Norway and Sweden v. Greece*[168]): the Court considered that failure to be a waiver of the right to participate, which could not prevent the Court from conducting its examination of the case. Such a course of action by the Court was consistent with the proper administration of justice.

While the Court was not therefore prevented from examining the present case, it had to assess the consequences of such a waiver for the distribution of the burden of proof. In accordance with its usual standard of proof "beyond reasonable doubt", based on a free evaluation of all the evidence, the distribution of the burden of proof remained intrinsically linked to the specificity of the facts, the nature of the allegations made and the Convention right at stake, as well as the conduct of the parties (*Georgia v. Russia (I)*, cited above, §§ 93-95 and 138, and *Abu Zubaydah v. Lithuania*[169]). As regards the latter aspect, the Court referred to Rule 44C (§ 1 *in fine*) which empowered it to draw such inferences as it deemed appropriate from a party's failure or refusal to participate effectively in the proceedings. At the same time, such a failure by the respondent State should not automatically lead to the acceptance of the applicants' claims, and the Court had to be satisfied by the available evidence that the claim was well founded in fact and law (compare the approach taken in *Cyprus v. Turkey*, cited above, § 58, and *Mangîr and Others v. the Republic of Moldova and Russia*[170], where only one of the respondent Governments had submitted observations on the issue of jurisdiction).

In the instant case, faced with the respondent State's choice not to participate in the proceedings or to submit any documents or arguments in its defence, the Court examined the application on the basis of the applicants' submissions which were presumed to be accurate where supported by evidence and in so far as other evidence available in the case file did not lead to a different conclusion.

The judgment in *FU QUAN, s.r.o. v. the Czech Republic*[171] concerned the domestic courts' failure to apply the principle of *jura novit curia*.

The applicant company's property (mostly merchandise) had been seized during criminal proceedings against the managing director and the other member of the company. Following their acquittal, the company brought a civil action for the damage caused to its property by the State. The action was dismissed for lack of *locus standi*, the company not being a party to the criminal proceedings in issue. It complained to the Court under Article 6 § 1 and Article 1 of Protocol No. 1. A Chamber considered that it had been up to the courts, applying the principle of *jura novit curia*, to subsume the facts of the case under the relevant domestic-law provisions in order to deal with the merits of the action: it was clear that the company had claimed compensation for the depreciation of its merchandise. The Chamber therefore dismissed the Government's preliminary objection (exhaustion of domestic remedies) and found a breach of Article 1 of Protocol No. 1 given the unjustified protracted retention of the property. The Chamber also decided that there was no need to rule separately on the complaint under Article 6 § 1 concerning the alleged denial of access to a court resulting from a formalistic and restrictive interpretation of national law by the domestic courts.

The Grand Chamber, however, considered that the complaint under Article 6 § 1 was the applicant company's main complaint and rejected it as manifestly ill-founded. Furthermore, having

167. *Cyprus v. Turkey* [GC], no. 25781/94, §§ 10-12, ECHR 2001-IV.

168. *Denmark, Norway and Sweden v. Greece*, no. 4448/70, Commission decision of 16 July 1970, unreported.

169. *Abu Zubaydah v. Lithuania*, no. 46454/11, §§ 480-83, 31 May 2018.

170. *Mangîr and Others v. the Republic of Moldova and Russia*, no. 50157/06, §§ 47-60, 17 July 2018.

171. *FU QUAN, s.r.o. v. the Czech Republic* [GC], no. 24827/14, 1 June 2023. See also under Article 35 § 1 (Exhaustion of domestic remedies) and Article 6 § 1 (Right to a fair hearing in civil proceedings – Access to a court) above.

ascertained the scope of the complaints under Article 1 of Protocol No. 1, the Grand Chamber observed that the Chamber had examined only one of the complaints raised, even though there were three altogether. Given its findings concerning the complaint in respect of access to a court, the Grand Chamber rejected two of these complaints for non-exhaustion of domestic remedies: the applicant company had not properly availed itself of the possibility of obtaining compensation for undue delay in lifting the order for the seizure of its property and for the authorities' alleged failure to take care of the property. As regards the third complaint (damage to the property following the unwarranted prosecution and detention of the company's managing director and other member), such a compensation claim did not have a sufficient basis in domestic law. The guarantees of Article 1 of Protocol No. 1 being therefore inapplicable, the Grand Chamber rejected this complaint as incompatible *ratione materiae* with the provisions of the Convention.

The Grand Chamber judgment is noteworthy in that the Court emphasised the importance of submitting complaints to it in its application form in a clear manner.

The Court reiterated that the applicant had to complain that a certain act or omission had entailed a violation of the rights set forth in the Convention or the Protocols thereto, in a manner which should not leave the Court to second-guess whether a certain complaint had been raised or not (*Farzaliyev v. Azerbaijan*[172]). Ambiguous phrases or isolated words did not suffice for it to accept that a particular complaint had been raised (*Ilias and Ahmed v. Hungary*[173]), as also followed from Rule 47 § 1 (e) and (f) and Rule 47 § 2 (a) of the Rules of Court concerning the content of an individual application.

While the applicant company had mentioned in the application form that the property had been seized for five years, it had done so only to highlight the extent to which the functioning of the company had been paralysed by the allegedly unlawful decision remanding both of its members in custody. In the Grand Chamber's view, this reference to the storage of the property for five years was too ambiguous to be interpreted as raising a complaint about its prolonged seizure. Had it been the wish of the applicant company at that stage to complain of the prolonged seizure of its property, it should have stated so in its application form in a clear manner, as it had subsequently done in its observations before the Chamber. Therefore, this complaint had been submitted more than six months after the compensation proceedings had ended (and, in any event, was inadmissible for non-exhaustion of domestic remedies).

172. *Farzaliyev v. Azerbaijan*, no. 29620/07, § 55, 28 May 2020.

173. *Ilias and Ahmed v. Hungary* [GC], no. 47287/15, § 85, 21 November 2019.

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