# Does Art. 18 ECHR grant protection against politically motivated criminal proceedings? (Part 2) – Prerequisites, questions of evidence and scope of application

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*In the first part of this essay,[1] we concluded that the European Court of Human Rights in Strasbourg has attributed a new role to Art. 18 ECHR, elevating this provision to a novel human rights guarantee against politically or otherwise unduly motivated criminal proceedings. This second part of the essay is dedicated to procedural aspects and issues concerning the application of Art. 18 ECHR. First, we determine the requirements for a conviction under this provision and how they can be proven. Since the burden and standard of proof have decisive influence on the success of applications lodged with the European Court of Human Rights, the effectiveness of the protection against criminal prosecution driven by ulterior motives depends upon these questions. Second, we assess the scope of application of Art. 18 ECHR including, most importantly, the question of whether there is room for its application when absolute Convention guarantees are violated. Third, we examine the potential legal consequences of a conviction under Art. 18 ECHR and evaluate their suitability as compensation for the violation. Finally, we give a brief outlook on the role and effects of Art. 18 ECHR in the future.*

## I. Introduction: the new role of Art. 18 ECHR

In the first part of this study we have analysed whether the more recent jurisprudence of the European Court of Human Rights (hereinafter: the ECtHR or the Court) in Strasbourg attributes a new role to a provision that had not attracted much attention for half a century. Indeed, several of the judgments it rendered in the past years can be interpreted in this sense: according to a traditional reading, Art. 18 of the European Convention on Human Rights (hereinafter: the ECHR or the Convention) only prohibited a misuse of the possibilities to legally restrict Convention guarantees and thus served as "limit on the limits" or "Schranken-Schranke".[2] However, Art. 18 ECHR gained a new significance once the Court began to apply the provision when examining claims relating to criminal proceedings that had allegedly been initiated for political reasons. In one of these decisions, it even stated that a breach of Art. 18 ECHR, which can only be applied in conjunction with another article of the Convention, can occur although there has also been a breach of that other article taken alone.[3] In other words, the Court has

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[1] First part: Satzger/Zimmermann/Eibach, EuCLR 2014, pp. 91 et seqq.

[2] For further references see Satzger/Zimmermann/Eibach, EuCLR 2014, p. 105.

[3] Gusinskiy v. Russia, Application no. 70276/01, of May 2004 para 73; Cebotari v. Moldova, Application no. 35615/06, of 13 November 2007, para 49.

given Art. 18 ECHR an autonomous field of application. In the first part of this study, it has been submitted that the "added value" of a conviction based (also) on Art. 18 ECHR consists in its stronger stigmatising effect because a breach of Art. 18 ECHR signals that the criminal justice system of the respondent State has been perverted into a tool for the suppression of the citizens. Such a "systemic malfunction" shows that essential principles underlying the Convention, particularly the commitment to democratic pluralism, are put into question and therefore the foundation of trust that normally exists between all signatory States is shattered.

However, this new role of Art. 18 ECHR has raised many questions: what are the precise prerequisites for a conviction, how can they be proven, and who bears the burden of proof? In which situations – i. e. in conjunction with which Convention rights – does the provision apply? And, finally: what are the legal consequences of a conviction based on Art. 18 ECHR? The present contribution will offer answers to these questions and shall thus help to develop a consistent concept for this new human rights guarantee.

## II. Questions of evidence

In its more recent judgments, questions of evidence have increasingly attracted the Court's attention. The first time the ECtHR addressed the burden and standard of proof at large was the first Khodorkovskiycase.[4] In the Lutsenko[5] and Tymoshenko[6] judgments as well as the second Khodorkovskiy (and Lebedev)[7] decision, it developed its case-law further. The stronger focus on these issues can be seen as one of the consequences of the new dimension attributed to Art. 18 ECHR: it mirrors the shift from a merely auxiliary to an autonomous role of this provision. However, the Court's decisions have left several questions unanswered. In the following paragraphs, it shall thus be assessed (1) what exactly needs to be proven, (2) by whom, and (3) how.

### 1. What needs to be proven? – General requirements for a breach of Art. 18 ECHR

Before it is possible to decide on the burden of proof and on which concrete factual circumstances may be taken as indicating a violation of Art. 18 ECHR, a general threshold for such an infringement needs to be determined. If the autonomous role of said provision consists in stigmatising the respondent State for a purposeful misuse of its criminal justice system and thus for a "systemic malfunction"[8], it is obvious that any such threshold for a conviction must be set high. Basically, this is also the essence of the Court's jurisprudence, as all recent judgments

[4] Khodorkovskiy v. Russia, Application no. 5829/04, of 31 May 2011, paras 256 et seqq.
[5] Lutsenko v. Ukraine, Application no. 6492/11, of 3 July 2012, paras 107 et seqq.
[6] Tymoshenko v. Ukraine, Application no. 49872/11 of 30 April 2013, paras 295 et seqq.
[7] Khodorkovskiy and Lebedev v. Russia, Application nos. 11082/06 and 13772/05, of 25 July 2013, paras 899 et seqq.
[8] Satzger/Zimmermann/Eibach, EuCLR 2014, p. 112.

state unanimously that *"[…] an applicant must convincingly show that the real aim of the authorities was not the same as that proclaimed (or as can be reasonably inferred from the context)."*[9] However, a closer look shows that two somewhat differing approaches can be discerned in the Court's case law: In the first Khodorkovskiy judgment, it is stated that the applicant must satisfy the Court "*that the whole legal machinery of the respondent State in the present case was ab intio* (sic.) *misused, that from the beginning to the end the authorities were acting with bad faith and in blatant disregard of the Convention.*"[10] By contrast, in its Lutsenk o judgment, the ECtHR used a different formula, condemning the reasons given by the government for the applicant's detention as being "*against the spirit of the Convention*".[11] It can be assumed that the "blatant disregard of the Convention test" more or less equals the criterion "against the spirit of the Convention". However, the first Khodorkovskiy decision put a considerably stronger focus on the systemic dimension of the problem by requiring evidence for the misuse of the criminal justice system in its entirety, affecting not only single procedural measures but the proceeding as a whole. In its second Khodorkovskiy (and Lebedev) decision, the Court tried to explain this discrepancy in its case law: it noted the "*vastness of the applicants' claim*"[12] and underlined that, compared to the Lutsenko case, their "*allegations [were] much wider and more far-reaching*" because they did not "*complain about an isolated incident*".[13]

This creates the impression that the Court distinguishes between two classes of convictions: applicants claiming a "first degree violation" of Art. 18 ECHR would have to prove that the entire criminal proceeding was politically motivated, and then the very rigid requirements formulated in Khodorkovskiy would apply. In order to prove a "second degree violation" of Art. 18 ECHR, by contrast, it would suffice to demonstrate that only specific measures in the criminal proceeding were carried out with illegitimate motives. Indeed, the Lutsenko judgment had been based on the assumption that, especially with regard to the arrest and detention of the applicant, the authorities had been driven by ulterior motives.[14] Thus, the Court did not refer to the proceeding as such. The judges instead justified the application of Art. 18 ECHR with the authorities' attempt to "punish" Mr. Lutsenko for publicly disagreeing with the accusations brought against him.[15] Similarly, in the Tymoshenko decision the majority decided to examine the applicant's claim under Art. 18 ECHR only with a view to her pre-trial detention, which they interpreted as "punishment" for a lack of respect towards the criminal court.[16]

However, this distinction between different types of infringements is questionable: firstly, it should not be forgotten that it was the Court itself that came up with

[9] Khodorkovskiy v. Russia, para 255; Lutsenko v. Ukraine, para 106, Timoshenko v. Ukraine, para 294; Khodorkovskiy and Lebedev v. Russia, para 899.
[10] Khodorkovskiy v. Russia, para 260.
[11] Lutsenko v. Ukraine, para 108.
[12] Khodorkovskiy and Lebedev v. Russia, para 904.
[13] Khodorkovskiy and Lebedev v. Russia, para 905.
[14] Lutsenko v. Ukraine, para 108.
[15] Lutsenko v. Ukraine, para 109.
[16] Tymoshenko v. Ukraine, paras 297 and 299.

the *ab initio* test. When the applicants referred to this concept in the second Khodorkovskiy case, it can therefore be assumed that they did so because the first judgment had indicated that a claim under Art. 18 ECHR would not be successful otherwise. Under these circumstances, it is to be criticised that the Court rejected their allegations because they "wanted too much". Secondly, the applicants' claims in the Lutsenko and Tymoshenko cases were not so different from those in the Khodorkovskiy cases as they also criticised that they had been prosecuted on political grounds.[17] It was in fact the Court that interpreted them as complaints against the ill-motivation of specific measures in their criminal proceedings.[18] Thirdly, regardless of this narrow interpretation, the Court mentioned "*distinguishable features which allow[ed] [it] to look into the matter separately from the more general context of politically motivated prosecution*".[19] In fact, it dedicated several lines to the description of the political situation in Ukraine.[20] Hence, it is hardly plausible that the political dimension did not play any role for the convictions based on Art. 18 ECHR. Fourthly and finally, a distinction between two classes of infringements of Art. 18 ECHR is not convincing: if a violation of Art. 18 ECHR in conjunction with another article is ascertained although it has already been established that the other article had also been breached taken alone, this signals that something more than an "ordinary" violation of Convention guarantees has occurred. This additional element is the fact that the infringement happened not accidentally but on purpose, thus shattering the foundation of trust with the respondent State.[21] That being so, it makes little sense to distinguish between a criminal proceeding where only isolated measures have been taken for ulterior motives and one that was illegitimate in its entirety – either the foundation of trust is shattered or it is not. Furthermore, it is impossible to separate a specific measure from the proceeding as such. If, for instance, the government wants to ensure that an opponent will not be a candidate in the next elections, it may suffice to ruin his or her credibility through a detention order. Even if the proceeding as such was initiated on the basis of reasonable suspicion and only the detention was ordered for ulterior motives, that would nonetheless be dangerous from the perspective of democracy.[22] In other words, the entire proceeding is "infected" once that an individual measure is politically motivated.

For these reasons it is not convincing to draw a distinction between different types of infringements of Art. 18 ECHR. It follows that the Khodorkovskiy decision(s) have rightly been criticised for establishing a standard which is almost impossible to meet, thus curtailing the range of Art. 18 ECHR.[23] Admittedly, this very restrictive

[17] Lutsenko v. Ukraine, para 100; Tymoshenko v. Ukraine, para 289.

[18] See also the criticism of judges Jungwiert, Nußberger and Potocki in their joint concurring opinion, Tymoshenko v. Ukraine, pp. 66 et seqq.

[19] Lutsenko v. Ukraine, para 108; see also Tymoshenko v. Ukraine, para 298.

[20] Lutsenko v. Ukraine, para 104; Tymoshenko v. Ukraine, paras 296 and 298.

[21] Satzger/Zimmermann/Eibach, EuCLR 2014, p. 111.

[22] Tymoshenko v. Ukraine (concurring opinion of judges Jungwiert, Nußberger and Potocki), p. 67.

[23] Tymoshenko v. Ukraine (concurring opinion of the judges Jungwirt, Nußberger and Potocki), p. 68; see also the criticism voiced by the applicants in Khodorkovskiy and Lebedev v. Russia, para. 892.

approach might be explained by some specific features of the respective cases (particularly the nature of the offences in question,[24] an aspect that we will consider in detail when the applicable standard of proof is determined[25]). In an – albeit very cautious – attempt to develop more coherent general requirements for a conviction based on Art. 18 ECHR, it could be said that the applicant must convince the Court that his or her prosecution runs counter to fundamental principles underlying the Convention and thus results in a "frustration of the treaty".[26] This is possible when it can be demonstrated that the criminal justice system has been perverted into a weapon to suppress political opponents and fight democratic pluralism (like in the Ukrainian cases) or to pursue interests that are alien to criminal proceedings (like economic interests in the Gusinskiy case[27]). Furthermore, such a profound violation of the Convention can be proven by showing that the government has restricted a citizen's freedom merely because he or she has invoked a Convention right. For instance, the Lutsenko case can be assigned to this category because one reason which the authorities had advanced to justify the applicant's detention had been his failure to testify and admit his guilt.[28] Finally, another principle underlying the Convention is that the signatory States' must be loyal to the Court. Therefore, it is likely that the Court will ascertain a breach of Art. 18 ECHR if – like in the Cebotari case[29] – the judges are satisfied that prosecution is intended to exert pressure on a citizen to make him or her withdraw an application to the ECtHR.

## 2. Who needs to prove a breach of Art. 18 ECHR? – The burden of proof

Another controversial question is who should bear the burden of proof. In principle, the burden of proof in proceedings before the ECtHR lies with the applicant.[30] However, the Court created a certain ambiguity in one of its earlier decisions on Art. 18 ECHR because it did not deny from the outset – so it seems – that the burden of proof could shift to the government. This was indicated in the Cebotari judgment, where the ECtHR stated that "*the Government have failed to satisfy the Court that there was a reasonable suspicion that the applicant had committed an offence, with the result that there was no justification for his arrest and detention*."[31] But why should the government do so if the burden of proof lies with the applicant? The easiest explanation would have been that the ECtHR regarded the facts presented by the applicant – primarily some rulings by Moldovan civil courts, according to

[24] "Abuse of office", see Lutsenko v. Ukraine, para 108; "common criminal offences", see Khodorkovskiy and Lebedev v. Russia, para 906.

[25] See infra. II-3.

[26] Satzger/Zimmermann/Eibach, EuCLR 2014, p. 112.

[27] Gusinskiy v. Russia, para 76.

[28] Lutsenko, para. 70; see also para 72: "the advancing of such grounds appears particularly disturbing as they indicate that a person may be punished for relying upon his basic rights to a fair trial".

[29] Cebotari v. Moldova, para 53.

[30] Khodorkovskiy v. Russia, para 256; Khodorkovskiy and Lebedev v. Russia, para 903; Meyer-Ladewig, Europäische Menschenrechtskonvention, Art. 38, para 22.

[31] Cebotari v. Moldova, para 53.

which he had not acted fraudulently – as *prima facie* evidence for a violation of Art. 18 ECHR which the government would have needed to refute. However, the ECtHR did not pursue this line in its subsequent decisions. In the Khodorkovskiy judgment, it even expressly refused this interpretation: "*Particularly, the Court notes that there is nothing in the Court's case-law to support the applicant's suggestion that, where a prima facie case of improper motive is established, the burden of proof shifts to the respondent Government. The Court considers that the burden of proof in such a context should rest with the applicant*"[32]. This approach was confirmed in the second Khodorkovskiy (and Lebedev) judgment, where the Court reiterated that the burden of proof must remain with the applicant "*even where the appearances speak in favour of the applicant's claim of improper motives*".[33]

The reason behind this rule for the burden of proof is easy to discern, as the new, autonomous role of Art. 18 ECHR manifests itself also in this regard (in the Cebotari case, by contrast, the provision still had a merely auxiliary function[34]): if a judgment in which the Court finds a violation of Art. 18 ECHR signals that the respondent State has misused its criminal justice system and thus departed from elementary rules recognised by all civilised countries, this is probably the most serious reproach imaginable. Therefore, it is convincing when the Court emphasises that initially every State party to the Convention has on its side a "presumption of good faith"[35]. Since it means no less than that the State concerned has frustrated the treaty and thus entails a particular stigma, this presumption can only be rebutted in the worst and clearest cases. Otherwise, an excessive use of Art. 18 ECHR may have undesirable consequences. On the one hand, it could have an inflationary effect and thus sap the conviction's special weight. On the other hand, the attached stigma may in all but the clearest of cases incite the State to resist its conviction, and thus, in the long run, damage the legitimacy of the Court itself. With a view to human rights protection that would mean a big step backward as the Court entirely depends on the States' willingness to respect its judgments (see also *infra*. IV.2).

Although it is therefore understandable that the Court is anxious not to give Art. 18 ECHR in its new dimension a broad field of application, the main problem remains: How shall the applicant ever be able to prove that the prosecuting authorities were pursuing a "hidden agenda"[36]? That circumstance is completely within the internal sphere of the State agencies.[37] Unless they are willing to testify – certainly a rather theoretical scenario – the final link in the chain of evidence cannot be presented by the applicant. This was pointed out most clearly in the concurring opinion of judges *Jungwiert*, *Nußberger* and *Potocki* to the Tymoshenko judgment: "*[…] Article 18 contains the word 'purpose', which necessarily refers to a subjective intention*

[32] Khodorkovskiy v. Russia, para 257.
[33] Khodorkovskiy and Lebedev v. Russia, para 903.
[34] Satzger/Zimmermann/Eibach, EuCLR 2014, p. 96 and pp. 100 et seq.
[35] This precise wording stems from Khodorkovskiy and Lebedev v. Russia, para 905; however, the concept was already used in Khodorkovskiy v. Russia, para. 255; see also Lutsenko v. Ukraine, para. 106; Tymoshenko v. Ukraine, para 294.
[36] Khodorkovskiy v. Russia, para 255.
[37] Tymoshenko v. Ukraine, concurring opinion of judges Jungwiert, Nußberger and Potocki, p. 67.

*which can be revealed only by the person or persons holding it, unless it is – accidentally – documented in some way […]*"[38] The three judges convincingly reached the conclusion that in virtually all cases, it is indispensable for the ECtHR to rely on objective circumstances which only *imply* that the government acted for improper motives: "*It is therefore necessary to accept evidence of the authorities' improper motives which relies on inferences drawn from the concrete circumstances and the context of the case.*"[39] In that sense, all objective circumstances can only serve as *prima facie* evidence for a violation of Art. 18 ECHR, without *directly* proving it.

Can these deliberations be reconciled with the Court's position in the Khodorkovskiy (and Lebedev) judgments, where the relevance of "contextual evidence" was completely rejected[40]? In fact, those decisions are based on the problematic distinction between "first and second degree violations" of Art. 18 ECHR (see supra II–1) and tend to obscure that subjective motives normally can only be inferred from objective circumstances. Other paragraphs of the very same judgments reveal that this view is questionable. There, the ECtHR refers to the "July agreement" in the Gusinskiy case as a piece of evidence "*from which it was clear that the applicant's detention had been applied in order to make him sell his media company to the State.*"[41] Similarly, the Court relies on its Cebotari judgment as precedent for the applicant's obligation to prove the authorities' improper motives, because in that case "*the applicant's arrest [had been] visibly linked to an application pending before the Court.*"[42] But can the circumstances of these two cases truly be regarded as examples of irrefutable evidence? A look into the original texts of the quoted decisions shows that things were not quite as obvious. In the Gusinskiy judgment, the Court had stated that the facts strongly *suggested* that the applicant's prosecution was used to intimidate him.[43] In other words: even in the Gusinskiy case, which the Court has repeatedly quoted as precedent for the applicant's obligation to present more than *prima facie* evidence, the authorities' improper motives behind the applicant's detention could only be deduced from the circumstances. Likewise, the Cebotari judgment was ultimately based on an inference because the Court stated it could only *conclude* that the real aim of the criminal proceedings and of the applicant's arrest and detention was to put pressure on him.[44]

From this it follows that the Court's *dicta* in the Khodorkovskiy (and Lebedev) cases are not fully supported by the decisions quoted as precedents. Furthermore, it is not convincing in substance that the applicant must present a complete chain of evidence showing that the authorities acted for improper motives. Due to the nature of Art. 18 ECHR, which focuses on the authorities' subjective motives, contextual evidence should not be regarded as insufficient from the outset. Cer-

[38] Tymoshenko v. Ukraine (concurring opinion of judges Jungwiert, Nußberger and Potocki), p. 67.
[39] Tymoshenko v. Ukraine (concurring opinion of judges Jungwiert, Nußberger and Potocki), p. 67.
[40] Khodorkovskiy and Lebedev v. Russia, paras 902 et seq.
[41] Khodorkovskiy v. Russia, para 256; also Tymoshenko v. Ukraine, para 295.
[42] Khodorkovskiy v. Russia, para 256; also Tymoshenko v. Ukraine, para 295.
[43] Gusinskiy v. Russia, para 76.
[44] Cebotari v. Moldova, para 53.

tainly it is in line with the seriousness of a claim based on Art. 18 ECHR to require a *very high level of substantiation*. But it is submitted that once the facts presented by the applicant meet this requirement, this should be enough.[45] The respondent government will then of course have the opportunity to refute this impression. It is at that point that the burden of proof will shift to the authorities. By contrast, and in this regard the Court's position is to be fully supported, "*[a] mere suspicion that the authorities used their powers for some other purpose than those defined in the Convention is not sufficient to prove that Article 18 was breached*."[46] Thus, the problem rather is to define what the circumstances presented by the applicant must be like – in other words: what the standard of proof for a violation of Art. 18 ECHR is.

## 3. How can a breach of Art. 18 ECHR be proven? – The applicable standard of proof

In light of the above, the Court's jurisprudence regarding the standard of proof merits even greater attention. The judges' general approach is a very rigid one, as they have repeatedly pointed out that "*[…] the Court applies a very exacting standard of proof.*"[47] However, the Court's jurisprudence leaves room for doubt as to whether the application of this standard of proof has been fully consistent in the various cases. For instance, the maxim "*high political status does not grant immunity*" was a cornerstone of the Court's reasoning in the first Khodorkovskiy judgment[48], where a breach of Art. 18 ECHR was denied. It has been repeated in most decisions relating to Art. 18 ECHR ever since.[49] By contrast, in the Lutsenko decision and, particularly, in the Tymoshenko decision, the applicants' profile as prominent figures of the opposition was one of the aspects used by the Court to support a conviction based on Art. 18 ECHR.[50] Similarly, the relevance of NGO reports and even domestic court decisions was clearly rejected in the first Khodorkovskiy judgment,[51] whereas the Court emphasised in Lutsenko[52] and Tymoshenko that "*[m]any national and international observers, including various non-governmental organisations, media outlets, those in diplomatic circles and individual public figures, considered these events to be part of the politically motivated prosecution of opposition leaders in Ukraine.*"[53] As we have already seen, such contradictory statements cannot be convincingly explained with a more far-reaching claim of Mr. Khodorkovskiy compared to the Lutsenko and Tymoshenko cases. Therefore, they carry the risk of creating an impression of arbitrari-

[45] This may seem inconsistent with Khodorkovskiy and Lebedev v. Russia, para 906, also para 901. However, those statements must be seen in the particular factual context of that case, which will be addressed in the following chapter on the applicable standard of proof.

[46] Khodorkovskiy v. Russia, para 255; Lutsenko v. Ukraine, para 106; Timoshenko v. Ukraine, para 294; in the same vein: Khodorkovskiy and Lebedev v. Russia, para 899.

[47] Khodorkovskiy v. Russia, para 256; Khodorkovskiy and Lebedev v. Russia, para 899; Lutsenko v. Ukraine, para 107; Tymoshenko v. Ukraine, para 295.

[48] Khodorkovskiy v. Russia, para 258.

[49] Khodorkovskiy and Lebedev v. Russia, para 903; Lutsenko v. Ukraine, para 106.

[50] Tymoshenko v. Ukraine, para 296.

[51] Khodorkovskiy v. Russia, paras 259 et seq.

[52] Lutsenko v. Ukraine, para 104.

[53] Tymoshenko v. Ukraine, para 296.

ness. This would be most regrettable because a conviction based on Art. 18 ECHR would lose a lot of its impact if it itself appeared as "political decision". Therefore, it is necessary to strive for a more systematic, more consistent approach.

Having this in mind, the cases in which the Court – so far – has seen a sufficient factual basis for a conviction based on Art. 18 ECHR can be divided into two categories:

### a) Direct proof

Less complicated are the (rare) cases in which the applicant can provide "direct proof"[54], i. e. evidence which itself documents that the government was pursuing ulterior motives. This is best illustrated by the case of Gusinskiy, where the applicant and a Russian federal minister had signed an agreement linking the applicant's release to the sale of his company ("July agreement"). So far, the Gusinskiy case has remained the only one to which the Court refers as example for such "direct proof" and it should be noted that there Art. 18 ECHR was still considered to have a merely auxiliary function.[55] However, it could be argued that the situation was not too different in the Lutsenko case, where statements by the prosecutor and a court at least strongly suggested that the applicant had been detained due to his refusal to admit his guilt and testify in the criminal proceeding against him.[56]

The deficiencies of this category are obvious, though: the availability of "direct proof" depends largely on the efforts taken by the authorities to conceal their true intentions. Therefore, clear cases like the ones just mentioned will certainly remain the exception. In order to tackle politically motivated criminal proceedings even when the authorities act more shrewdly and it is thus impossible for the applicant to provide "direct proof" of the government's ulterior motives, it is necessary to define objective circumstances which suffice to substantiate a claim under Art. 18 ECHR.

### b) Indirect proof

That such "indirect proof" – i. e. circumstances indicating that the reasoning advanced by the government was not the real motivation for the infringement of Convention guarantees – can be sufficient is demonstrated by the Court's Lutsenko and Tymoshenko decisions. Both show significant parallels: initially, the Court analyses the reasoning advanced by the authorities and establishes that it is not credible. Therefore it ascertains a violation of the respective Convention guarantee, but due to the cases' "distinguishable features" continues with an examination of the real motives. Two aspects are emphasised in this respect:

(1) in both cases, the accusations against the applicants had a direct connection to their political activities.

[54] This is the expression used by the Court when referring to the July agreement in the Gusinskiy case, see Khodorkovskiy, para 260.

[55] See Satzger/Zimmermann/Eibach, EuCLR 2014, pp. 94 et seq. and pp. 100 et seq.

[56] Those were some of the reasons advanced by the prosecution when it requested the applicant's detention, see Lutsenko, paras 32 and 67.

(2) at the same time, they fell in the context of what many observers perceived as concerted action against the opposition because criminal proceedings were initiated against a whole range of former government officials soon after a change of power.

In its Khodorkovskiy and Lebedev judgment, the Court suggested that it was primarily the first element that justified a different decision than in the Lutsenko and Tymoshenko cases: "*none of the accusations against them concerned their political activities stricto sensu, even remotely. The applicants were not opposition leaders or public officials. The acts imputed to them were not related to their participation in the political life, real or imaginary – they were prosecuted for common criminal offences*".[57] Although the judges explicitly did not exclude that *some of the authorities* might have had a "hidden agenda"[58], they therefore denied a violation of Art. 18 ECHR. This might explain what the Court meant with its *ab initio* test: when already the alleged offence on which the authorities base the prosecution is of a political nature, it is easier to conclude that the entire proceeding is motivated politically. In the *Khodorkovskiy* and *Lebedev* case, by contrast, the Court found that the proceeding had a "healthy core" and that it was impossible to conclude that the applicants would not have been prosecuted otherwise.[59]

So far, the Court's jurisprudence can therefore be summarised as follows: only when a criminal proceeding has a political dimension already due to the nature of the offence, "contextual evidence" for a concerted action against the opposition is taken into account as an additional indication for a breach of Art. 18 ECHR. In these narrow circumstances, the applicant's status as well as NGO reports and similar observations can play a role.

### c) Critical assessment

With a view to the particular impact of a conviction based on Art. 18 ECHR, it is – in principle – to be welcomed that the Court is hesitant to consider "contextual evidence": especially the scepticism towards (external and internal) political observers is understandable because each of them might have personal interests that are difficult to ascertain. Of course, it is also correct that nobody can hope for immunity only because of his or her political status – it is one of the great achievements of modern societies that even political leaders are held responsible for their wrongdoings. Likewise, the Court has rightly pointed out that findings in domestic court decisions (for instance the denial of legal assistance on the grounds of the political nature of the proceeding) may have been based on a standard which would not be adequate for Art. 18 ECHR with its particular gravity. In this regard, however, it should be noted that generally, court decisions are much more reliable than diplomatic or political statements. At least court decisions from many States parties to the Convention can be assumed to have been rendered on a solid factual basis by

[57] Khodorkovskiy and Lebedev v. Russia, para 906.
[58] Khodorkovskiy and Lebedev v. Russia, para 906.
[59] Khodorkovskiy and Lebedev v. Russia, para 908.

impartial judges. Therefore, the Court should at least examine the facts established by those national courts and consider their evidentiary value on a case-by-case basis.

The main point of criticism, however, relates to the fact that the nature of the offence seems to be the main criterion for a conviction based on Art. 18 ECHR. This is because it tends to discriminate against the opposition, as persons who have never held a public office can hardly be charged with such offences. Virtually the only situation in which they could invoke Art. 18 ECHR would be where they are prosecuted for expressing their opinion. But what if the government misuses a regular criminal proceeding (maybe even for a minor offence) to eliminate an opponent? As explained above, that would not entail less danger for democracy than a prosecution for an offence committed in office would. Particularly, Art. 18 ECHR would be useless if the authorities deliberately initiated a proceeding based upon false allegations. These considerations show that there ought to be further criteria based on which a breach of Art. 18 ECHR can be established. For instance, one criterion could be the *accumulation of procedural mistakes* infringing upon Convention guarantees. Such a criterion appears suitable because there is a high probability that authorities who are pursuing ulterior motives will not only disregard a specific procedural right, but will do all they consider necessary in order to bring the proceeding to the desired end. If, for instance, the authorities systematically and seriously hindered an effective defence against the accusations,[60] this can indicate that they were steering the proceeding towards a pre-determined outcome from the very beginning. Such a series of grave procedural deficiencies therefore also suggests that they were pursuing what the Court calls a "hidden agenda", i. e. that the motivation for the proceeding was not to bring the person concerned to justice, but to eliminate him or her as an opponent.

Thus, it is submitted that where no direct proof for a breach of Art. 18 ECHR exists, a multi-factor approach should apply: when either the offence is of political nature (because the act was allegedly committed in office or at least related to political activities) or the proceeding suffered from an accumulation of procedural mistakes, the Court should take into account the general context. If the applicant then can provide reliable sources which support the conclusion that the government was misusing the criminal justice system for ulterior purposes, this should be regarded as sufficient on his part. If this approach had been applied in the Khodorkovskiy case(s), a different result would have appeared conceivable. At the same time, the Court's concern that basing the finding of a violation of Art. 18 ECHR on "contextual evidence" might lead to a total exclusion of criminal responsibility for (former) politicians would be resolved.

## III. The scope of application of Art. 18 ECHR

In the cases where the ECtHR has ascertained a breach of Art. 18 ECHR, the provision so far has always been applied in conjunction with Art. 5 ECHR. How-

[60] See Cebotari v. Moldova, paras 58 et seqq; Khodorkovskiy and Lebedev v. Russia, para 737; Lutsenko v. Ukraine, para 90.

ever, to assess the possible relevance of Art. 18 ECHR in the future, it needs to be clarified whether the provision can also be applied in conjunction with other guarantees. In this regard, a distinction should be made between relative (1) and absolute (2) Convention rights.

## 1. Application to (all) relative Convention rights

The vast majority of Convention rights are relative rights, i. e. they can be restricted. Is Art. 18 ECHR applicable to all of them and, if so, how could this be justified? First, the structure of the Convention speaks in favour of a broad application to all relative rights as Art. 18 ECHR is positioned at the very end of the first section of the Convention (entitled "rights and freedoms"). This shows that Art. 18 ECHR is not intended to cover only deprivations of liberty falling under Art. 5 ECHR, but cases concerning other relative rights as well. Otherwise, Art. 18 ECHR could have been incorporated in Art. 5 ECHR. Second, teleological considerations also support this interpretation. The rationale of the provision is to avoid a systematic misuse of state power, especially against political opponents, under the cloak of seemingly lawful criminal proceedings. However, such an abuse of power does not necessarily always involve an infringement of Art. 5 ECHR. Rather, various other Convention guarantees could be affected when a criminal proceeding is employed, for instance, to suppress the applicant's political activities.[61] This is illustrated by the following examples:

- Art. 18 ECHR taken in conjunction with Art. 6 para. 1 ECHR could be pertinent in cases in which the applicant's possibilities to effectively defend himself or herself are systematically undermined. This would be the case if, for instance, the authorities arrange for the trial to be held by a biased judge (which runs counter to the right to an independent and impartial tribunal established by law, Art. 6 para. 1 ECHR[62]).
- Since every criminal prosecution entails negative consequences for the suspect's reputation, the mere fact that an ongoing investigation is made public can considerably reduce the political prospect of the citizen concerned. If the authorities intentionally create the impression that the accused must be guilty during the proceeding, this breach of Art. 6 para. 2 ECHR (the presumption of innocence) may severely impact the accused's political career. If it can be proven that this was done on purpose, particularly in order to exclude the accused from political life, there is no reason why Art. 18 ECHR should not apply. *A fortiori*, this holds true when allegations against a political opponent are entirely false and fabricated.
- Moreover, Art. 18 ECHR could also become relevant in conjunction with Art. 8 ECHR, for example when apartments or offices are searched to intimidate an opponent.

[61] A useful survey of the application of Art. 18 ECHR to relative Convention rights can be found in: Pabel/Schmahl/Steiger, Internationaler Kommentar zur Europäischen Menschenrechtskonvention, 2014, Art. 18 paras. 6 et seqq.

[62] SSW-StPO/Satzger, Art. 6, para 10; especially to the „established by law" criterion see F. Zimmermann, in: European Criminal Policy Initiative, A Manifesto on European Criminal Procedure Law, 2014, pp. 232 et seqq.

- The same is true for Art. 18 ECHR in conjunction with Art. 1 of the First Additional Protocol to the ECHR: if, for instance, a financial penalty is imposed or possessions are confiscated with the intention to weaken an opponent's political capacity to act, this is no less problematic for democracy than an illegitimate detention order. In fact, the ECtHR did examine the Russian government's intentions in the tax and enforcement proceedings against the company Yukos under Art. 18 ECHR taken in conjunction with Art. 1 of the Additional Protocol No. 1.[63].
- Finally, there could be room for an application of Art. 18 ECHR in conjunction with Art. 4 of the Seventh Additional Protocol to the ECHR (the *ne bis in idem* principle) when, for instance, authorities reopen a case which has already been finally disposed of although there is no evidence of new facts. When this happens not only "by accident" but deliberately to intimidate an opponent or impede political or economic activities, only a conviction based on Art. 18 ECHR can sufficiently express this intentional and systematic abuse of power.

In all these cases the dangers for democracy are comparable to those resulting from a politically motivated deprivation of liberty in the sense of Art. 5 ECHR. Therefore, it is submitted that Art. 18 ECHR should not only be applied in conjunction with Art. 5 ECHR, but also in conjunction with all other relative rights. Only this broad application can ensure that Art. 18 ECHR will be (or become) an effective tool against any perversion of the criminal justice system.

## 2. Application to absolute Convention rights

Furthermore, the question arises whether Art. 18 ECHR could also be applied to absolute Convention rights in the sense of Art. 15 para. 2 ECHR. Those absolute rights are characterised by the fact that they cannot be withheld by a signatory state and are therefore guaranteed without any restriction. At first glance, the wording of Art. 18 ECHR seems to preclude its application in this area from the outset as it reads: "The *restrictions* permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been *prescribed*." But absolute rights, by definition, cannot be restricted, and even less can a purpose for their restriction be prescribed. Nevertheless, there are considerable factors that argue in favour of an application of Art. 18 ECHR even to those guarantees.

The strongest argument probably is that, otherwise, particularly clear cases of politically motivated proceedings (or individual procedural measures) would not be captured by the provision: This can be illustrated with regard to the principle of legality as enshrined in Art. 7 ECHR (*nullum crimen sine lege*): if members of the government instruct the competent authorities to prosecute an opponent for an act which is clearly not punishable, this would be incompatible with the essential criminal law guarantee of Art. 7 ECHR. Furthermore, Art. 18 ECHR could

[63] oAo Neftyanaya Kompaniya Yukos v. Russia, Application no. 14902/04, of 8 March 2012 paras 659 et seq.

become relevant in conjunction with Art. 3 ECHR. If measures like deprivation of food or sleep[64] are employed, for instance, to coerce someone into refraining from political activity, this would accordingly amount to a violation of these provisions.

It could of course be objected that a judgment by the Court that establishes a breach of one of those absolute rights (taken alone) already amounts to a serious reproach against the respondent State. However, it is submitted that a breach of Art. 7 or Art. 3 ECHR is considerably more serious when it is performed with one of the aims described above, in particular to eliminate the political opposition. And whilst a conviction based on one of those guarantees "merely" expresses the finding of individual misconduct by government agents in a specific situation, only one based on Art. 18 ECHR captures the fact that there has been an intentional and systematic abuse of power.[65] In fact, the severe reproach to a politically motivated violation is especially appropriate in regard to absolute rights: since these are indispensable prerequisites for a criminal proceeding in accordance with the rule of law, they are especially prone to manipulations. Thus, it would run counter to the new autonomous function of Art. 18 ECHR to apply it exclusively to relative and not to absolute rights.[66]

Still, it remains difficult to reconcile these teleological considerations with the wording of Art. 18 ECHR. But the wording only excludes a *direct* application of Art. 18 ECHR, not one by *analogy*. As (1) politically motivated breaches of core guarantees such as Art. 7 and Art. 3 ECHR are even more blameworthy than those of relative Convention rights, and (2) as there is clearly a gap in the law because the mothers and fathers of the Convention did not have in mind the autonomous function of Art. 18 ECHR, the logical consequence is to draw such an analogy.

Finally, one last question arises: Is there room for an application of Art. 18 ECHR in conjunction with an absolute right even if there is no violation of that absolute right taken alone? In this context, some commentators[67] refer to the generally recognised limitations of those absolute rights: for instance, the scope of application of Art. 3 ECHR is significantly curtailed through the high threshold for torture and inhuman treatment. All acts below this threshold do not formally infringe upon Art. 3 ECHR even though they may be qualified as degrading. This possibility creates room for abuse although it does not count as "restriction" in a narrow sense. However, it is submitted that Art. 18 ECHR is not applicable in those situations: where an infringement of an absolute right cannot be established, the necessary link for an application of Art. 18 ECHR is missing.[68] Moreover, possibilities of abuse do not have to be tackled by means of Art. 18 ECHR, but rather through lowering the threshold itself.

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[64] SSW-StPO/Satzger, Art. 3, para 17.

[65] See Satzger/Zimmermann/Eibach, EuCLR 2014, pp. 111 et seq.

[66] A different view is expressed in Pabel/Schmahl/Steiger, Internationaler Kommentar zur Europäischen Menschenrechtskonvention, 2014, Art. 18 paras 6 et seqq.

[67] Villiger, Handbuch EMRK, para 706.

[68] As shown in the first part of the contribution, it is precisely the circumstance that Art. 18 applies even though a violation of another Convention guarantee has already been established that gives this provision an autonomous function, see Satzger/Zimmermann/Eibach, EuCLR 2014, pp. 109 et seqq.

## IV. Legal consequences of a conviction based on Art. 18 ECHR

Finally, the following paragraph will shed light on the legal consequences that a conviction for a breach of Art. 18 ECHR can – or should – have. According to Art. 46 ECHR, the signatory States are obliged to provide redress. Other than that, the judgments of the Court are merely declaratory in nature and do not have an immediate effect on the respondent State.[69] Therefore it is only incumbent on the signatory State to take remedial action. An exception is provided by Art. 41 ECHR: according to this provision, the Court can order a sum of money to be paid by the respondent signatory State to the victim. Nevertheless, the possibilities of the Court are very limited and mostly depend on the cooperation of the respective State. Hence, we will first assess the existing case-law regarding compensation of breaches, Art. 18 ECHR (1). Building on that, we will examine which legal consequences violation of Art. 18 ECHR (2) should have.

### 1. Assessment of the Court's case-law

So far, a violation of Art. 18 ECHR (taken in conjunction with Art. 5 ECHR) has only been found by the Court in cases where Art. 5 ECHR had also been breached taken alone, which means that the deprivation of liberty as such already was unlawful. Nevertheless, the judgments at least give some hints regarding the legal consequences of a conviction based on Art. 18 ECHR. In the Gusinskiy case, the Court held that the finding of a violation of Art. 18 ECHR taken in conjunction with Art. 5 ECHR constituted in itself sufficient just satisfaction.[70] Therefore, the applicant's claim for monetary compensation was dismissed.[71] The same reasoning was applied in the Cebotari case, where the Court similarly dismissed the remainder of the applicant's claim for just satisfaction according to Art. 41 ECHR.[72] Further statements regarding other legal consequences were not made in those two cases. In the Lutsenko and the Tymkoshenko decisions, the Court did not even mention the possibility to grant just satisfaction, let alone further legal consequences.

### 2. Types of compensation

As we have seen, the Court has already taken into consideration the possibility to order just satisfaction according to Art. 41 ECHR in order to compensate for *inter alia*, a violation of Art. 18 ECHR. This raises the question of whether, apart from the Court's judgment ascertaining a breach of Art. 18 ECHR, more needs to be done to compensate the victim and, if so, which kind of compensation appears most suitable. It is difficult to precisely determine the kind of relief the applicant typically desires, as this was not mentioned in most of the cases. However, in the Khodorkovskiy and Lebedev case, the Court was asked to indicate certain specific mea-

[69] Khodorkovskiy v. Russia, para 270.
[70] Gusinskiy v. Russia, p. 19.
[71] Gusinskiy v. Russia, p. 20.
[72] Cebotari v. Russia, p. 15.

sures.[73] Exceptionally, the Court is able to indicate the type of measures that might be taken by the respondent state.[74] This raises the question whether such an order may be necessary to compensate for a violation of Art. 18 ECHR, or whether the Court's judgement alone or just satisfaction pursuant to Art. 41 ECHR are sufficient and possibly more suitable types of compensation.

### a) Compensation through the Court's judgment itself

To a large extent, the Court is certainly right that a conviction based on Art. 18 ECHR itself satisfies the applicant's interests. These typically are, primarily, complete rehabilitation and protection from further prosecution. While a finding of a violation of Art. 18 ECHR will usually suffice to put an end to the latter, it may fail to fully accomplish the former. To completely clear the applicant's name, in addition it may be necessary to obtain a vindicating decision from an institution at the national level.

A conviction based on Art. 18 ECHR moreover expresses not only that a particular harm has been caused to an individual, but also that the respondent State has departed from fundamental values of every democratic and pluralist society. This departure must also be compensated for. The judgment spells out this failure to adhere to democratic and pluralist values and thereby opens the door for political pressure on the authorities by other (not only) signatory States, international organisations, NGOs, etc. Especially due to its aggravated stigmatising effect, it is unlikely that the respondent State will entirely ignore the Court's finding. Therefore, the impact of the finding itself should not be underestimated.

### b) Just satisfaction according to Art. 41 ECHR

As already mentioned, a monetary compensation to be paid to the applicant is at least a theoretical option. But apart from the fact that the applicant's main interest lies rather in the statement of a systemic misuse of power, an award of just satisfaction is of secondary importance for another reason: a monthly payment would barely contribute to the stigmatising effect of a conviction based on Art. 18 ECHR because – once again – this does not adequately relate to the dimension of the infringement. Therefore, the Court's decision not to afford just satisfaction according to Art. 41 ECHR is acceptable and understandable as well.

### c) Compensation within the national criminal proceeding

Finally a breach of Art. 18 ECHR could also affect the validity of the national criminal proceeding if the Court were to indicate a specific measure to that end. If – despite the above-mentioned exacting standard of proof – the Court finds that Art. 18 ECHR has been breached, this means no less than that the responsible

[73] Khodorkovskiy v. Russia, paras 269 et seqq.

[74] E.g.: Broniowski v. Poland, Application no. 31443/96, of 22 June 2004, para 194; Hasan and Eylem Zengin v. Turkey, Application no. 1448/04, of 9 October 2007, para 84.

authorities departed from elementary principles and purposely misused the criminal justice system. Considering the gravity of this infringement, it could thus reasonably be argued that the national proceeding must not have any legal effect any longer. This is because a defect which is serious enough to constitute a breach of Art. 18 ECHR dramatically diminishes the reliability of the criminal justice system. Therefore its acceptance by the citizens, without which criminal justice cannot be achieved[75], is at risk and can only be restored if the system is cleared of this reproach. Due to these circumstances, the respective criminal proceeding should be considered null and void.[76] As a consequence, a new – but this time fair and not politically or otherwise improperly motivated – proceeding can be initiated, at least if the accusations in the original one were not entirely unfounded. Otherwise, the authorities have to refrain from prosecution.

## V. Summary and outlook

If a government misuses its national criminal justice system to enforce political or economic interests, this is utterly unacceptable – not only from the perspective of the individual concerned, but also with a view to the general principles that form the foundation of trust between all signatory States of the Convention, first and foremost the commitment to the rule of law and democratic pluralism. It is highly alarming that it has become necessary to emphasise this even more than six decades after the entry into force of the Convention. With the development of a new concept for Art. 18 ECHR, which gives this provision an autonomous field of application and helps to stigmatise especially politically motivated criminal proceedings, the Court has certainly taken important steps in the right direction. However, in future cases regard should be had to a more coherent application of Art. 18 ECHR: on the one hand, it is clear that the provision must not preclude aprosecution of individuals with a political status. But on the other, even though a high threshold for breaches of Art. 18 ECHR is justified, the Court should not establish prerequisites that are (almost) impossible to meet. Furthermore, an application of Art. 18 ECHR should not only be considered in conjunction with relative Convention rights (such as Art. 5 or Art. 6 ECHR), but – *a fortiori* – also with the absolute rights of Art. 3 and Art. 7 ECHR. Finally, the signatory States should ensure that a proceeding which violated Art. 18 ECHR does not have any legal effect. With these guidelines, Art. 18 ECHR can indeed become an effective tool against politically (or, more generally, improperly) motivated criminal proceedings.

[74] See (in a different context) European Criminal Policy Initiative, A Manifesto on European Criminal Procedure Law, ZIS 2013, pp. 430 et seqq.

[75] In this direction the applicants in Khodorkovskiy and Lebedev v. Russia, para 905.