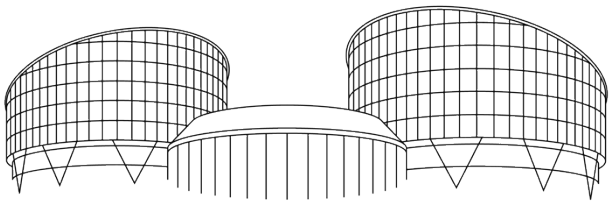

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

DIVISION DE LA RECHERCHE
RESEARCH DIVISION

Articles 34 and 35 The notion of "complaint" and/or "subject matter of the dispute", and the application of the principle jura novit curia in the case-law of the Court, and the scope of the Grand Chamber's jurisdiction as to the admissible complaints

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STUDY OF THE ECHR CASE-LAW
ARTICLES 34 AND 35

SUMMARY

The analysis of the Court's case-law shows that the concept of *"complaint"* and/or *"subject matter of the dispute"* is more complex than it may appear. In particular, a certain evolution in the case-law is highlighted as regards the submission of new complaints during the proceedings. Before 2000 the Court had a relatively flexible approach because it did not hesitate to attach other complaints to the *facts* or to elaborate on the initial complaints. However, it would seem that the Court has since adopted a stricter approach; to dismiss a given complaint it has preferred to examine the *legal arguments* put forward by the applicant rather than the facts of the case. It has then arrived at the conclusion that it is a *new* complaint, either considering that it is not an elaboration of the substance of the initial complaint, or by simply finding that the complaint falls outside the subject matter of the dispute.
In practice, and particularly in the same context as that of *Guerra and Others v. Italy*, the Court seems to have departed in certain cases from the definition given in that case to the effect that "*a complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on*". Thus it would seem that a complaint is characterised more precisely by the facts of which the applicant complains through legal argument.

Relying in particular on Article 32 of the Convention, the Convention organs take a broad approach to their jurisdiction in respect of a complaint: exclusive in law, it may pertain to the interpretation of the facts to the extent that they are closely linked to the complaint and to the legal analysis. However, to create a dispute or take on board facts that have no bearing on the complaints would be overstepping their jurisdiction.
The precise legal characterisation of the facts submitted by the parties falls within the exclusive remit of the Convention organs. They may assess the circumstances complained of by an applicant in relation to all the Convention requirements, and not only from the perspective of the parties. They may give the facts a different legal characterisation to that given by the applicant or the Government and examine the complaint under other Convention provisions. They may of their own motion decide on the elaboration of a complaint "*in substance*" and ultimately settle any disagreement as to the subject matter of the dispute.
In addition, the question of the facts declared admissible was interpreted quite broadly in a number of cases of the old Court.
Lastly, in some cases the Convention organs have ruled on facts which the applicants were not – or were no longer – complaining of in support of their complaint.

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INTRODUCTION

1. The report concerns the concepts of "*complaint*" and "*subject matter of the dispute*" and the application of the principle *jura novit curia* in the Court's case-law, in the light of: the Court's powers to redefine the complaint and/or the subject matter of the dispute; the scope of the Court's powers in relation to the complaints and to the parties' arguments about admissibility and merits; and the relevance of the subsidiarity principle in that context. The study includes also a survey of the manner in which the Court has distinguished between elaborating on the substance of a complaint, on the one hand, and the introduction of a new and separate complaint, on the other, especially in the following contexts: the rule of exhaustion of domestic remedies (especially exhaustion "in substance"; the application of the six-month rule; and the scope of the Grand Chamber's jurisdiction in referral cases in regard to a complaint declared admissible by the Chamber and, similarly, the old Court's jurisdiction as delimited by the former Commission's decision on admissibility).

2. To identify in the Court's case-law the substance of the concept of "*complaint*" and/or "*subject matter of the dispute*", the research has involved much cross-checking. It has thus been necessary to look at the meaning given to these concepts in the various contexts: exhaustion of domestic remedies, six-month rule, what constitutes a new complaint or the elaboration of an existing complaint, or the question of a complaint raised "*in substance*" in the initial application or before the domestic courts. To make the result of the research easier to follow, the content of this report will be divided into four chapters.

I. The concepts of "*complaint*" and "*subject matter of the dispute*"

3. It can be seen from the case-law, which is particularly vast in this area, that the Court has repeatedly referred to the *Guerra* case, using the definition of "*complaint*" set out in that judgment in many decisions in judgments, and in various contexts.

4. It is not easy to draw a systematic conclusion from this vast case-law. Therefore, relying on the approach of the Court itself and in order to make the case-law clear, it is proposed to use the *Guerra* definition as a useful benchmark, while applying it to the various contexts studied.

A. Definition of "complaint"

(1) In the documents addressed to applicants: a statement of the alleged violations

5. The various information documents made available to potential applicants to explain how to complete the application form show how the Court itself understands the concept of "*complaint*". In most of the documents a complaint is presented as a statement of alleged violations, even though the terminology used tends to vary significantly.

6. Neither Rule 47 of the Rules of Court nor the form itself uses the term "*complaint*". They merely require applicants to make "*a concise and legible statement of the alleged violation(s) of the Convention and the relevant arguments*" (Rule 47 §1 (f)).

7. The explanations addressed to applicants as to what constitutes a complaint vary from one document to another. Complaints are sometimes distinguished from the facts and are assimilated to a "*statement of violations*"[1], whilst elsewhere they are described as an indication of the Convention rights alleged by the applicant to have been violated[2]. Complaints may be regarded merely as alleged violations or otherwise as statements of the facts that the applicant considers to have breached of his or her rights[3].

8. Lastly, it is specified that complaints must concern breaches of one or more of the rights in the Convention or the Protocols thereto[4]. The instructions given to applicants state as follows (emphasis added)[5]:

> "For each complaint raised, you must specify the Article of the Convention or Protocol invoked and give brief explanations as to how it has been infringed. Explain as precisely as you can what your complaint under the Convention is. Indicate which Convention provision you rely on and explain why the facts that you have set out entail a violation of that provision. Explanations of this kind must be given for each individual complaint."

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1. Practice direction on institution of proceedings, 19 September 2016, § 5 (f)): http://www.echr.coe.int/Documents/PD_institution_proceedings_FRA.pdf
2. "Questions & Answers", p. 6 : http://www.echr.coe.int/Documents/Questions_Answers_FRA.pdf.
3. "Common mistakes", respectively mistakes 2 and 7 http://www.echr.coe.int/Documents/Applicant_common_mistakes_FRA.pdf
4. "Notes for filling in the application form": http://www.echr.coe.int/Documents/Application_Notes_FRA.pdf, p. 1.
5. *Ibid*., par. 59-60.

(2) In the Court's case-law

(a) GENERAL DEFINITION OF COMPLAINT

9. In *Guerra and Others v. Italy*, 19 February 1998, § 43, *Reports of Judgments and Decisions* 1998-I, the Court clarified that "*a complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on*". Even though this definition was adopted in a specific context – examination of complaints submitted by the applicants in the course of the proceedings – it has nevertheless been reiterated on many occasions[6] and in different contexts, right up until recently (see in particular *Solarino v. Italy*, no. 76171/13, § 27, 9 February 2017).

(b) CONCRETE IDENTIFICATION OF COMPLAINT

10. In accordance with the definition in *Guerra and Others v. Italy* (1998, cited above), where an applicant has not stated or elaborated on the facts supporting an alleged violation of the Convention, the Court has found that the relevant complaint has been dropped by the applicant (see *Öztürk v. Turkey* [GC], no. 22479/93, § 40, ECHR 1999-VI), or that this complaint was not raised in the initial application (*Buzatu v. Romania*, no. 34642/97, § 39, 1 June 2004).

11. An analysis of the case-law on the introduction of new complaints or elaboration on the substance of a complaint, on the exhaustion rule and on the six-month rule, provides some indications as to what constitutes a "*complaint*" within the meaning of the case-law, particularly where the Court seeks to ascertain whether a newly submitted complaint has already been raised "*in substance*" before the domestic courts[7] and/or in the initial application. In the light of the above-mentioned definition of "*complaint*" in

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[6]. *Berktay v. Turkey*, no. 22493/93, § 179, 1 March 2001; *Akdeniz v. Turkey*, no. 25165/94, § 88, 31 May 2005; *Sâmbata Bihor Greek Catholic Parish v. Romania*, no. 48107/99, § 93, 12 January 2010; *Pentiacova and Others v. Moldova* (dec.), no. 14462/03, ECHR 2005-I; *Çelikbilek v. Turkey*, no. 27693/95, § 104, 31 May 2005; *Niţă v. Romania*, no. 10778/02, § 27, 4 November 2008; *Ömer Aydın v. Turkey*, no. 34813/02, § 36, 25 November 2008; *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 54, 17 September 2009; *Gardel v. France*, no. 16428/05, § 57, ECHR 2009; *Anusca v. Moldova*, no. 24034/07, § 26, 18 May 2010; *Eugenia Lazăr v. Romania*, no. 32146/05, § 60, 16 February 2010; *Şerife Yiğit v. Turkey* [GC], no. 3976/05, § 52, 2 November 2010; *Gatt v. Malta*, no. 28221/08, § 19, ECHR 2010; *Nelissen v. the Netherlands*, no. 6051/07, § 62, 5 April 2011; *Association "21 December 1989" and Others v. Romania*, nos. 33810/07 and 18817/08, § 162, 24 May 2011; *Takush v. Greece*, no. 2853/09, § 50, 17 January 2012; *İlker Ensar Uyanık v. Turkey*, no. 60328/09, § 30, 3 May 2012; *Pleşca v. Romania*, no. 2158/08, § 34, 18 June 2013; *B. v. Romania (no. 2)*, no. 1285/03, § 71, 19 February 2013; *M. and M. v. Croatia*, no. 10161/13, § 167, ECHR 2015 (extracts); *Erményi v. Hungary*, no. 22254/14, § 19, 22 November 2016.

[7]. *Akdivar and Others v. Turkey*, 16 September 1996, § 142, *Reports of Judgments and Decisions* 1996-IV; *Fressoz and Roire v. France* [GC], no. 29183/95, § 37, ECHR 1999-I; *Azinas v. Cyprus* [GC], no. 56679/00, § 38, ECHR 2004-III.

Guerra and Others v. Italy (1998, cited above) it is necessary to analyse the extent to which the Court seeks to establish the "*facts complained of*" by the applicant when it examines whether the applicant has previously raised a complaint in substance.

12. In a certain number of cases the Court has found that the applicant had raised the complaint, having alleged before the domestic courts (even as a secondary argument) that his or her Convention rights had been breached. Those situations provide scant indication of what a complaint actually is, but may shed light on certain **synonyms of that concept**.

13. In various decisions and judgments that Court has regarded a complaint as a *doléance* using that word as a synonym [in the French, "*grievance*" in the English, but not always]. For example, in the judgment *Powell and Rayner v. the United Kingdom*, 21 February 1990, § 29, Series A no. 172, the Court explained that: "*the allegations of violation of Articles 6 and 8 constituted separate complaints [doléances] in their own right and not, as suggested by the applicants, mere legal submissions or arguments relating to the same facts as those underlying the allegation of violation of Article 13*", leading it to conclude "*that it ha[d] no jurisdiction ... to rule on the grievances under Articles 6 and 8*". Similarly in *Philis v. Greece (no. 1)*, 27 August 1991, § 56, Series A no. 209, the Court found that "*the complaint based on Article 14 ... relate[d] to the same facts as the complaints [doléances] under Articles 6 and 13*". In the judgments *Castells v. Spain*, 23 April 1992, § 30, Series A no. 236 and *Fressoz and Roire v. France* [GC], no. 29183/95, § 39, ECHR 1999-I, the Court found that the applicants had raised before the domestic courts a "*complaint*" [*doléance*] connected with Article 10 of the Convention. The Grand Chamber also used the French term in *Öztürk v. Turkey* [GC], no. 22479/93, § 40, ECHR 1999-VI, finding that "*its examination [would] be confined to the complaints [doléances] under Article 10 of the Convention and Article 1 of Protocol No. 1*". In the decisions *Tekin and Baltaş v. Turkey* (dec.), nos. 42554/98 and 42581/98, 12 April 2001, and *Talat Tunç v. Turkey* (dec.), no. 32432/96, 1 April 2003, the Court referred to the applicants' "*doléances primitives*" [French only]. Lastly in the admissibility decision in *Scoppola v. Italy (no. 2)* (dec.), no. 10249/03, 13 May 2008, the Court explained the subject of the applicant's "*doléances"* [French only].

14. Furthermore, an analysis of the judgments in which the Court has found that the applicant had ***not*** raised his complaint in substance before the domestic courts provides a better understanding of what is meant by complaint in practice. In those situations the Court has paid greater attention to the ***legal grounds*** raised rather than ***analysing the facts***, in a manner that

is quite different from the principle laid down in *Guerra and Others v. Italy* (1998, cited above)[8].

B. Parameters of the complaint and the subject matter of the dispute

(1) The complaint and the subject matter of the dispute over time

(a) Introduction of subsequent facts constituting an extension of the complaint

15. The Court accepted very early on that it could entertain facts arising after the lodging of the application, provided they constituted an extension of the dispute or complaint initially submitted to the Court.

16. The Court thus took into account a period of detention subsequent to the lodging of the application back in 1961 in *Lawless v. Ireland (no. 2)*, 7 April 1961, p. 51, § 12, Series A no. 2 (as it explained itself in *Stögmüller v. Austria*, 10 November 1969, p. 9, § 7, Series A no. 9). In the judgment in *Neumeister v. Austria*, 27 June 1968, p. 38, § 7, Series A no. 8, the Court examined the length of the applicant's pre-trial detention, lasting for more than a year after the applicant lodged his application. It took the view that it would be excessively formalistic to require the applicant to lodge fresh applications in respect of each final decision rejecting a request for release and would "*pointlessly involve both the Commission and the Court in a confusing multiplication of proceedings which would tend to paralyse their working*".

17. In *Stögmüller v. Austria*, 1969 (cited above, pp. 41-42, §§ 7-12), the Court examined in greater depth the question of the submission of facts subsequent to the lodging of the application, in the light of the Government's objection of non-exhaustion of domestic remedies in respect of those new facts. It thus explained that it was "*in accordance with national and international practice that a court should hold itself competent to examine facts which occurred during the proceedings and constitute a mere extension [of] the facts complained of at the outset*", as was "*clearly the case in matters of detention while on remand*". Consequently (§ 12),

> "it is in the light of the circumstances of the case that the question is, in appropriate cases, to be assessed whether and to what extent it was necessary, pursuant to Article 26, for the detained applicant, who had exhausted the remedies before the Commission declared his application admissible, to make later on further appeals to the national courts in order to make it possible to examine, at international level, the reasonableness of his continued detention."

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[8]. On this point, see *infra* "*Complaints, facts and legal grounds*" (I – B – 2 – (c)).

(see also *Matznetter v. Austria*, 10 November 1969, pp. 26-30, §§ 5-6, Series A no. 10).

18. The Court has also pointed out in *Weeks v. the United Kingdom*, 2 March 1987, § 37, Series A no. 114 that it "*is competent, in the interests of the economy of the procedure, to take into account facts occurring during the course of the proceedings in so far as they constitute a continuation of the facts underlying the complaints declared admissible by the Commission*". But as the applicant had lodged a second application in respect of a period of detention that was subsequent to the period at issue in the first, the Court refused to entertain it. The Court subsequently applied the principles to subjects other than detention, such as decisions about child custody (*Olsson v. Sweden (no. 1)*, 24 March 1988, § 56, Series A no. 130).

19. The new Court has followed that case-law. Thus in *Öcalan v. Turkey* ([GC], no. 46221/99, § 190, ECHR 2005 IV) the Grand Chamber took into account the entire duration of the applicant's detention, from the lodging of the application, explaining that *"[t]here is no justification for excluding from the scope of that general jurisdiction events that took place up to the date of the Grand Chamber's judgment, provided that they are directly related to the complaints declared admissible*". The Court thus included in its examination the last part of that detention, even though that period was the subject of a fresh application.

20. In such matters one judgment illustrates the difficulty of distinguishing between facts and complaints. In *Konovalov v. Ukraine*, no. 13242/02, § 33, 18 October 2007, the applicant had complained about the length of the proceedings to obtain compensation for accidents at work, in violation of Article 6 of the Convention, and of its consequences, but subsequently raised, after communication of the application to the Government, "*a new complaint under Article 8 of the Convention in so far as the prolonged non-payment of that compensation prevented him from paying his utility bills and thus breached his right to respect for his home*". The Court then pointed out expressly "*that it was competent, in the interest of the economy of the procedure, to take account of subsequent facts if they constitute[d] a continuation of the facts underlying the communicated complaints*" (§ 34, citing in that connection *Olsson v. Sweden (no. 1)*, cited above, § 56), concluding that "*the violation was allegedly sustained by the applicant for the entire duration of the proceedings and [was] not the result of a fact that occurred subsequent to the communication of the application to the Government*" (§ 35). However, as the Court had itself noted (§ 33), it was a question of examining a new complaint raised by the applicant concerning the same facts – and not facts occurring after the lodging of the application. The Court should thus have examined that allegation as a complaint arising in the course of the proceedings and should have ascertained whether or not it was based on the same basic facts as those

submitted in the initial application, or on the original complaints, in order to determine whether it was entitled to take it into account[9].

(b) INTRODUCTION OF SUBSEQUENT COMPLAINTS HAVING A CONNECTION WITH THE ORIGINAL FACTS / ORIGINAL COMPLAINT

21. Subsequent to the lodging of an application, an applicant may submit new complaints to the Court in two main situations. This case-law gives us a further opportunity to analyse the Court's understanding of "*complaint*" when it defines the subject matter of the dispute.

22. In the **first situation**, the Court has already delivered a judgment: it logically takes the view that a violation of the same right during a period following its first judgment constitutes a complaint that has not yet been examined (*Wasserman v. Russia (no. 2)*, no. 21071/05, § 37, 10 April 2008; *Sampani and Others v. Greece*, no. 59608/09, § 125, 11 December 2012) and of which the merits can be examined in a new application. Here the new period of violation means that it can be regarded as a fresh complaint.

23. In the **second situation** the applicant raises another complaint in the course of the proceedings before the Court, prior to delivery of the judgment on the merits: the question whether this complaint should be examined or rejected then arises. There are semantic differences in the way this type of complaint is dealt with, revealing a certain evolution in the Court's case-law: subsequent complaints have on occasion been accepted when based on the same ***facts*** as those described in the original application; in other cases a manifest connection between the original and subsequent ***grounds*** has been required; lastly, it has sometimes been necessary to establish a connection with the ***complaints*** originally raised by the applicants.

24. Originally, before the Commission and Court, a complaint submitted during the proceedings could be admitted without complying with the six-month rule provided it was "*intimately linked to the matters that formed the subject of the original complaints*" (*Delcourt v. Belgium*, 17 January 1970, § 40, Series A no. 11; *Winterwerp v. the Netherlands*, 24 October 1979, § 72, Series A no. 33[10]); and was based on "*the essential facts as originally presented*" by the applicant (*Fox, Campbell and Hartley v. the United Kingdom*, nos. 12244/86, and 2 others, Commission decision of 10 May 1988; and *Hilton v. the United Kingdom* (dec.), no. 12015/86, Commission decision of 6 July 1988), that is to say that it "*relates to the same facts as the [original] complaints*" (*Philis v. Greece (no. 1)*, 1991, cited above, § 56). In more recent decisions the Court has also accepted "*new legal arguments ... closely related to the facts which formed the subject of part of the applicants' original complaints*" (*Tekin and Baltaş v. Turkey* (dec.), 2001,

9. On this point, see *infra*, (b).
10. For further developments on this judgment, see *infra* in this sub-section.

cited above) or has taken the view that "*it also has to examine these new complaints, together with the applicant's original complaints, since they are closely related to the facts which constitute the subject matter of the latter*" (*Talat Tunç v. Turkey* (dec.), 2003, cited above).

25. Using a different vocabulary, the Commission and Court have also taken the view that a complaint introduced in the course of the proceedings can be admitted without complying with the six-month rule provided there is an "*evident connection*" with the original grounds (*Delcourt v. Belgium*, 1970, § 40; *Guerra and Others v. Italy*, 1998; *Tekin and Baltaş v. Turkey* (dec.), 2001; *Talat Tunç v. Turkey* (dec.), 2003, all cited above). In the judgment *Contrada v. Italy*, 24 August 1998, § 50, *Reports of Judgments and Decisions* 1998-V, the Court found that as the new grounds were "*unconnected*" with those originally submitted it had to dismiss this complaint, without regard to the applicant's characterisation of the facts.

26. In a certain number of cases, the Court (old and new) has required that a connection be established between the newly introduced complaint and the original complaints. In *Winterwerp v. the Netherlands*, 1979, § 72, cited above, the Court found that "*although the complaint in question was not mentioned explicitly in Mr. Winterwerp's application to the Commission, it has an evident connection with the complaints he initially made*". The approach in this judgment is nevertheless ambivalent because the Court in actual fact sought to connect the new complaint (under Article 6) not only to the *original complaint* (Article 5) but also to the *facts underlying that original complaint* (arbitrary detention without being brought before a judge or informed of the decisions extending that detention). In more recent cases the Court has insisted that the belated complaint, submitted after the expiry of the six-month period, should "*pertain to ... specific aspects of the original complaints submitted within the time-limit*" of six months in order to be examined (*Sâmbata Bihor Greek Catholic Parish v. Romania* (dec.), no. 48107/99, 25 May 2004; *Cornea v. Romania* (dec.), no. 13755/03, § 50, 15 May 2012; *Ayhan v. Turkey* (dec.), no. 40315/05, § 37, 1 October 2013). In the decision in *Loyen v. France* (dec.), no. 46022/99, § 4, 27 April 2000, it stated that the complaints in question were "*new complaints, which had not been raised, expressly or in substance, when the applicant lodged his application*"; whereas in other decisions it merely described the belated complaints as "*new complaints*" without seeking to attach them to an original complaint (*S.A. Dangeville v. France* (dec.), no. 36677/97, § 3, 12 September 2000; *Craxi 2 v. Italy*, no. 34896/97, 11 October 2001). There are also a significant number of more recent cases in which the Court has merely taken the view, without developing its analysis, that the newly submitted complaint was not "*an elaboration of the applicant's original complaint*" (see, for example, *Skubenko v. Ukraine* (dec.), no. 41152/98, 6 April 2004; *Piryanik v. Ukraine*, no. 75788/01, § 20, 19 April 2005; *Kopylov v. Russia*, no. 3933/04, § 110, 29 July 2010; *Antonyuk v. Russia*,

no. 47721/10, § 94, 1 August 2013; *Alimov v. Turkey*, no. 14344/13, § 87, 6 September 2016). Lastly, in the same vein and without any other reasoning, the Court has also taken the view that the complaints submitted after the communication of the case to the Government "*fell outside the subject matter of the dispute*" (*Maznyak v. Ukraine*, no. 27640/02, § 22, 31 January 2008; *Snigur and Onyshchenko v. Ukraine*, nos. 33064/06 and 35799/06, § 13, 18 June 2009; *Khmylyova v. Ukraine*, no. 34419/06, § 29, 18 June 2009).

27. It can be seen from this survey that there has been some evolution in the case-law: the Commission and Court laid down the principle that a complaint submitted in the course of the proceedings had to be attached to the **facts** initially described by the applicants (except in the *Winterwerp v. the Netherlands,* 1979, cited above, which is ambivalent as to the terms used but consistent in practice in referring to the facts[11]). However, since the 2000s (with the exception of *Tekin and Baltaş v. Turkey* (dec.), 2001, and *Talat Tunç v. Turkey* (dec.), 2003, both cited above), the Court has no longer required a connection with the original ***facts*** but now requires a connection with the original ***complaints***; on some occasions, it has not even given any reasoning on this issue and has refrained from examining whether there was an elaboration of the substance of the initial complaint. The analysis of the practical consequences of these semantic differences illustrates the various approaches adopted by the Court in dealing with new complaints submitted by applicants[12].

(2) Complaints, facts and legal grounds

28. In a certain number of cases the complaint in question has been quickly rejected by the Court where it is clear that it is a new complaint which has not previously been raised expressly or in substance, and that it is unconnected with the facts or original complaint. In other cases, by contrast, the question is more complex: it is in those situations that the boundaries between the facts, the legal grounds or arguments and the complaints are less clear-cut.

29. Accordingly, the concept of complaint appears in practice to be more complex and more flexible than the definition given in *Guerra and Others v. Italy*, 1998, cited above, would seem to suggest (a). Thus, a practical analysis of the Court's case-law and a comparison of the various cases tend to highlight the underlying variability of the concept of complaint, overlapping with the facts and/or the legal grounds. The Court sometimes relies on the facts complained of to circumscribe the complaint (inclusive approach) (b) while in other judgments it will essentially refer to the legal

[11]. See above in this sub-section, previous paragraph.
[12]. On this point see below 2-(b) and 2-(c).

grounds or arguments submitted by the applicants (exclusionary approach) (c).

(a) DIFFICULTY OF GRASPING THE COMPLAINT

30. In *Handyside v. the United Kingdom*, 7 December 1976, § 41, Series A no. 24, an argument of the Commission delegates, referred to by the Court, also illustrates this difficulty. Thus, "*the delegates of the Commission specified that the allegations not retained ... ([on] Articles 1, 7, 9, 13 and 14 of the Convention) related to the same facts as did those based on Article 10 of the Convention and Article 1 of Protocol No. 1. They were accordingly not separate complaints but mere legal submissions or arguments that had been put forward along with others*". Even though the applicants' allegations based on various Convention provisions concerned the same facts and indeed constituted legal submissions, they were nevertheless also complaints in their own right.

(b) THE "*INCLUSIVE*" APPROACH: TAKING ACCOUNT OF THE FACTS TO EXAMINE THE COMPLAINT IN QUESTION

31. In situations where the Court is confronted with a complaint that has not been clearly raised by the parties from the start of the proceedings, it must examine whether this complaint may be attached to the explanations given by the applicants in their original application in order to determine whether it is an elaboration of an already existing complaint, and/or whether the complaint had been raised expressly or in substance before the domestic courts and/or in the applicants' initial application.

32. In **one approach**, which may be described as "***inclusive***", the Court primarily analyses all the ***facts*** described in the original complaint in order to attach the new complaint to them. This technique enables the Court to examine the new complaint quite easily, provided the applicant has described facts to which the complaint may be attached and with which a link may be established. This manner of proceeding gives the Court greater leeway in order to find, in the facts described, a way of attaching to them the complaint in question (in comparison with any attempt to attach the new complaint to any previously invoked complaint, see under (c) below).

33. In cases where there is a newly submitted complaint during the proceedings, it is this inclusive approach that has been followed by the Court, for example in *Delcourt v. Belgium*, 1970, § 40; *Winterwerp v. the Netherlands*, 1979, § 72; *Fox, Campbell and Hartley v. the United Kingdom*, 1988; *Hilton v. the United Kingdom* (dec.), 1988; *Philis v. Greece (no. 1)*, 1991, § 56, all cited above; *K. and T. v. Finland* [GC], no. 25702/94, § 145, ECHR 2001-VII; *Tekin and Baltaş v. Turkey* (dec.), 2001, and *Talat Tunç v. Turkey* (dec.), 2003, both cited above. In all these cases the Court has developed its arguments by going back over the facts as described by the

applicants in their original application in order to establish the existence of a link between the complaint in question and the facts.

34. This approach was less clear-cut in *Guerra and Others v. Italy*, 1998, cited above, since the Court did not base its reasoning so much on the idea of finding a connection for the new complaints in the facts of the case, although it must be said that it was here that the Court for the first time laid down the principle that "*a complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on*", in recharacterising the facts and placing them under Articles 8 and 2 of the Convention, which had already been relied on by the applicants during the proceedings.

35. Moreover, as regards the question of a complaint raised "*in substance*" before the domestic courts, the Court has also looked to the facts described by the applicants in finding that the complaint had indeed been raised in substance. For example, to conclude that the applicant had raised in substance a complaint under Article 2, both before the domestic courts and in her application before the Commission, it primarily looked to the facts described by the applicant (*Akdeniz v. Turkey*, no. 25165/94, §§ 90-91, 31 May 2005: in particular the fact that she had explained that the conditions of her son's disappearance had made her fear for his life). The Grand Chamber also had regard to the facts of the case in finding that a complaint under Article 6 had been raised in substance before the domestic courts in *Micallef v. Malta* [GC], no. 17056/06, §§ 55-59, ECHR 2009. The Court noted in that case that it was impossible for the applicant to seek the withdrawal of a judge because the list of grounds for withdrawal under domestic law did not include the uncle-nephew relationship; but that the applicant had complained through a constitutional procedure about the violation of Article 6 of the Convention on account of the lack of impartiality of the Court of Appeal (§§ 56-57). In *Gäfgen v. Germany* [GC], no. 22978/05, § 144, ECHR 2010, the Court ascertained what questions had been raised by the applicant at national level in his complaints. Similarly in *Sabeh El Leil v. France* [GC], no. 34869/05, §§ 30-34, 29 June 2011, the Court examined whether the applicant had raised in substance an Article 6 complaint: the Court analysed what the applicant had complained of in the domestic courts (the question of the jurisdictional immunity of Kuweit and its consequences), and not only whether he had alleged a lack of access to a court (as argued by the Government).

36. As regards an ambivalent complaint in the applicant's observations, the Court found in *Coman v. Romania* (dec.), no. 4293/11, § 33, 2 September 2014, that "*a mere reference to Article 3 of the Convention, without any other clarification, raised after the subject matter of the dispute had been clearly circumscribed by the applicant himself, does not constitute a sufficient manifestation of the applicant's wish to bring an Article 3 complaint before the Court. Consequently, given ... that the applicant has*

not substantiated his complaint since the application was communicated, the Court finds that the applicant has not persisted in his intention to submit to the Court a complaint under Article 3 of the Convention". The Court has thus confirmed again recently and in line with *Guerra and Others v. Italy*, 1998, cited above, that the description of the facts is required to back up a legal argument so that a complaint is made out.

37. Nevertheless, the Court has rejected at some length a new complaint relating to a fact that was not mentioned in the original application (see for example *Sahin v. Germany* [GC], no. 30943/96, § 44, ECHR 2003-VIII: the applicant had raised for the first time the question of a blind judge's participation in domestic proceedings – something he had not mentioned before; *Adrian Radu v. Romania*, no. 26089/13, §§ 18-19, 7 April 2015: the Court addressed detention conditions in the only prison mentioned by the applicant in his application, and rejected the new complaint about the conditions of his transfer from the prison to the court).

38. Consequently, in all these situations, the Court did take account of the facts of the case in agreeing to examine the complaint, in accordance with the principle set out in *Guerra and Others v. Italy*, 1998, cited above, § 43. That is not always the case.

(c) THE "*EXCLUSIONARY*" APPROACH: EXCLUSION OF THE FACTS IN FAVOUR OF THE LEGAL SUBMISSIONS TO REJECT THE COMPLAINT IN QUESTION

39. The **second approach** can be classified as "***exclusionary***" in so far as its aim is to exclude – to reject the newly introduced complaint: that leads the Court to conclude that it is a new complaint and not the elaboration of an existing complaint.

To arrive at that conclusion, the Court gives little or no consideration to the description of the facts by the applicants in their original application. It focuses more on the ***legal grounds*** and ***legal arguments*** submitted by the applicants, whether in their initial application (to establish a link between the new complaint and the original complaint, or to ascertain whether the complaint was raised "*in substance*" in the application), or in the domestic proceedings (in the context of the examination of compliance with the exhaustion rule). In the various situations, the Court proceeds in a similar manner: it looks at the ***legal submissions or arguments*** put forward, but does not really dwell on the facts. This approach seems to contrast with the definition given in *Guerra and Others*, 1998, cited above.

(i) Whether there is a connection between the new complaint and the original complaint

40. In some judgments the Court seeks to establish the existence of a connection between the new complaint and the original ***complaint***, often leading it to conclude that there is no such link and to reject the complaint more recently alleged. It certainly seems more difficult to attach the new

complaint to the *complaints or legal arguments* originally submitted by the applicant *than to the facts described* thereby. The Court has therefore identified a *new* complaint rather than an *elaboration on the substance* of the original one.

41. For example, in *Contrada v. Italy*, 1998, cited above, §§ 41 and 45-50, the applicant had initially raised complaints before the Commission alleging (in particular) that his arrest and detention (Article 5 § 1 (c)) and the length of his detention (Article 5 § 3) had been illegal. Before the Court he alleged for the first time that there had been a violation of Article 3 in the light of the detention conditions, and asked the Court, on the basis of the *Guerra* judgment, to find that it had jurisdiction to entertain complaints under Article 5 § 1 (c) and Article 3 on account of their connection with the original Article 5 § 3 complaint. The Court found as follows:

> "49. In the instant case the Court observes, firstly, that on 14 January 1997 the Commission declared the complaint under Article 5 § 1 (c) inadmissible as it considered that the national authorities had a wide margin of appreciation in deciding what weight should be attached to the statements that had led to the applicant's arrest. It further notes that although Mr Contrada complained from the outset that he had been detained for an unreasonable period (Article 5 § 3), the complaint under Article 3 concerns the actual conditions of detention, not its length.
>
> 50. In conclusion, although both the relevant grounds concern the applicant's deprivation of liberty the Court has no jurisdiction *ratione materiae* to hear them, as the first complaint is identical to the one declared inadmissible by the Commission and the second must be regarded as being a new complaint, unconnected to the complaint under Article 5 § 3, such that the Court is unable to adopt the legal qualification suggested by the applicant."

Focussing on the legal arguments submitted by the applicant, the Court regarded the complaint as a "*new*" one.

42. In the case of *Kats and Others v. Ukraine*, no. 29971/04, §§ 87-88, 18 December 2008, the applicants were the parents and son of Olga Biliak, who had died in detention. Initially the applicants had complained, in particular, about violations of: Article 2, arguing that the death of Olga Biliak was due to negligence on the part of the authorities and complaining about the lack of an effective and independent investigation into the causes of death; Article 3 on account of ill-treatment sustained by her on her arrest and poor conditions of detention; Article 5 as regards the arrest and initial detention of Olga Biliak and the arbitrariness of her subsequent pre-trial detention (see the summary of complaints in the partial decision on admissibility in *Kats and Others v. Ukraine* (dec.), no. 29971/04, 14 March 2006). In the judgment on the merits, *Kats and Others v. Ukraine*, cited above, §§ 87-88, the Court noted that the applicants had raised other complaints about: failure by the authorities to take account of Olga Biliak's injuries as revealed by the autopsy (Article 3) and the fact that she was not released pending trial, thus complaining of the entire period of detention

(Article 5 § 3). The Court took the view that "*the new complaints [were] related in a general sense to the present case, but [did] not constitute an elaboration of the applicants' original complaints to the Court communicated to the Government* ...". The Court thus dismissed those complaints based on the applicants' legal arguments and finding that no connection could be established with the original complaints.

(ii) Whether the complaint was raised "in substance" at domestic level

43. In cases where the question of the exhaustion of domestic remedies has arisen and where the Court has considered that the complaint in question had not been raised in substance before the domestic courts, the Court has sought above all to ascertain whether the applicant had raised before the domestic courts a ***legal argument*** equivalent to alleging a violation of a Convention provision (on this approach, but where the Court found that the complaint had indeed been raised in substance before the domestic courts, see for example *Karapanagiotou and Others v. Greece*, no. 1571/08, §§ 28-30, 28 October 2010), without necessarily looking into the facts described by the applicant.

44. In the case of *Van Oosterwijck v. Belgium*, 6 November 1980, § 34, Series A no. 40, the applicant, a transsexual, complained about a refusal by the domestic courts to amend his birth certificate to take account of his new sexual identity. The Court found that the applicant had "*not even plead[ed] in substance the complaints he later made in Strasbourg; before the Belgian courts he [had] relied neither on the Convention nor on any other plea to the same or like effect*". In the Court's view, *"[t]he applicant could thus have relied on Article 8 in his own country and argued that it had been violated in his respect*" (§ 33). Consequently, the applicant had indeed complained of certain facts under domestic law (non-recognition of his new sexual identity), but had not raised certain legal grounds or arguments (violation of his right to respect for his private life), leading the Court to find that he had not raised his complaint in substance.

45. In the case of *Ahmet Sadık v. Greece*, 15 November 1996, *Reports of Judgments and Decisions* 1996-V, a politician had been convicted of breaching the peace during an election campaign, by distributing leaflets which described the Muslim community of Western Thrace as "*Turkish*". The applicant alleged that many Convention provisions had been breached (§ 21), and the Government argued that domestic remedies had not been exhausted as regards Article 10 of the Convention. The Court explained that it did not follow the position of a Commission delegate who had "*maintained that it was not necessary for the domestic remedy to be based on the same ground as the international remedy*" (§§ 29-30). The Court found that the applicant had, at domestic level, "*put forward arguments which were based solely on domestic law and [had] not raise[d] the matter of freedom of expression*", and that the fact that "*the Greek courts [had*

been] able, or even obliged, to examine the case of their own motion under the Convention [could] not have dispensed the applicant from relying on the Convention in those courts or from advancing arguments to the same or like effect before them, thus drawing their attention to the problem he intended to submit subsequently, if need be, to the institutions responsible for European supervision ..." (§ 33). As in the case of *Van Oosterwijck v. Belgium*, cited above, the applicant had indeed complained of the relevant facts in the domestic courts but had not submitted a *ground* or *argument* (not even one of equivalent effect) based on a violation of Article 10 and therefore had not exhausted domestic remedies in the Court's view.

46. In the case of *Azinas v. Cyprus* [GC], no. 56679/00, ECHR 2004-III (subsequent to *Guerra and Others v. Italy*, 1998, cited above) the applicant complained in particular about his dismissal from the civil service and the loss of his pension rights as a result, and therefore alleged a violation of Article 1 of Protocol No. 1. The Government objected that domestic remedies had not been exhausted as the applicant had expressly withdrawn that "*complaint*" in the domestic proceedings (§ 34). The Grand Chamber allowed the Government's objection, noting that, before the Supreme Court "*counsel for the applicant [had] expressly withdr[awn] that ground*", with the result that the Supreme Court had "*immediately dismissed the withdrawn grounds*"; in addition, at a second hearing, counsel had "*reaffirmed that he had withdrawn the first, second and fifth grounds*" (§ 40). Whilst the term "*ground*" may have been chosen by the Grand Chamber to reflect the term used before the Supreme Court under domestic law, it is nevertheless clear that the concept of complaint refers primarily to the legal grounds or arguments submitted by the applicant.

47. The Court has further explained the scope of the applicant's obligation to raise "*in substance*" the complaint before the domestic courts in the case of *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 75, 25 March 2014, in which it placed the terms "*grounds*" and "*argument*" at the centre of its reasoning:

> "75. In so far as there exists at the national level a remedy enabling the domestic courts to address, at least in substance, the argument of a violation of a given Convention right, it is that remedy which should be exhausted ... It is not sufficient that the applicant may have unsuccessfully exercised another remedy which could have overturned the impugned measure on other grounds not connected with the complaint of a violation of a Convention right. It is the Convention complaint which must have been aired at national level for there to have been exhaustion of "effective remedies". It would be contrary to the subsidiary character of the Convention machinery if an applicant, ignoring a possible Convention argument, could rely on some other ground before the national authorities for challenging an impugned measure, but then lodge an application before the Court on the basis of the Convention argument ..."

In practice, the Court looked at whether the applicants had relied before the domestic courts on the alleged discrimination, and found they had not (§§ 78-82, especially § 79). The applicants had nevertheless complained about not having received payment for the daily compensation that had in principle been due from the State authorities. In that case, once again, the applicant had indeed complained of certain facts but had not submitted that they were victims of discrimination, which was a legal ground or argument.

C. Conclusion

48. In conclusion, the analysis of the Court's case-law shows that the concept of complaint is more complex than it may seem. In practice, the Court itself has transposed in different contexts the definition of complaint given in *Guerra and Others*, cited above, to the effect that "*a complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on*". However, it would seem that, in certain situations, the practical application of that definition contrasts with the statement of principle. Precisely in the same context as that of *Guerra and Others*, a certain evolution can be seen in the case-law where a complaint is submitted for the first time in the course of the proceedings: before 2000, the Court adopted a relatively flexible - and inclusive – approach, because it sought to attach a newly submitted complaint to the *facts* complained of by the applicant, or to identify in those facts the substance of the complaint in question. In other words, it did not hesitate to develop the original complaints and/or attach other complaints to the facts. However, it would seem that the Court, from the 2000s onwards, has taken a stricter – and exclusionary – approach, because it has focussed on the *legal arguments* submitted by the applicant more than on the facts complained of. It has thus often arrived at the conclusion that it is a new complaint, either finding that it is not an elaboration of the substance of an original complaint, or merely declaring that the complaint falls outside the subject matter of the dispute.

It would thus appear that a complaint is characterised by the facts of which the applicant complains through legal argument. On this basis, the explanations given in the documents currently addressed to applicants seem to be more tailored to the Court's practice, since they ask the applicants, when they draft their complaints, to explain "*why the facts ... set out entail a violation of [the relevant Convention] provision*".

II. The principle *juris novit curia* and its application by the Court

49. This Latin maxim is used in the Court's case-law[13] and can be summarised as follows: it is incumbent on the parties to furnish the facts of a case and the responsibility of the judge to determine and apply the relevant law. As former President Dean Spielmann pointed out in a recent talk, the Court's jurisdiction is limited by the terms of Article 19 of the Convention. As a result, it does not generally or mainly deal with facts. It addresses the facts only through the prism of its role as judge of Convention law[14]. The Strasbourg institutions are not courts of fourth instance (see *De Tommaso v. Italy* [GC], no. 43395/09, § 170, 23 February 2017).

50. There is a wealth of settled case-law in this area. The Court has constantly emphasised that it remains "*master of the characterisation to be given in law to the facts of the case*" and that "*it is not bound by the characterisation given by the applicant or the Government*" (see *Şerife Yiğit v. Turkey* [GC], no. 3976/05, § 52, 2 November 2010; *Scoppola v. Italy (no. 2)* (dec.), 2008, § 54; *Powell and Rayner v. the United Kingdom*, 1990, § 29, *Guerra and Others v. Italy*, 1998, § 44, all cited above).

A. The legal characterisation/recharacterisation of the facts lies with the Court

(1) An exclusive competence of the Convention organs

51. From the outset (see judgment of 23 July 1968 on the merits of the "*Belgian linguistics*" case, Series A no. 6, p. 30, § 1), the Court acknowledged that it was master of the characterisation to be given in law to the facts of the case. In *Handyside v. the United Kingdom*, 1976, § 41, cited above, it explained that "*the provisions of the Convention and of the Protocol form a whole; once a case is duly referred to it, the Court may take cognisance of every question of law arising in the course of the proceedings and concerning facts submitted to its examination by a Contracting State or by the Commission*" (see also *König v. Germany*, 28 June 1978, § 96, Series A no. 27).

52. Those principles have been reiterated on many occasions by the Court (*Foti and Others v. Italy*, 10 December 1982, § 44, Series A no. 56; *Guerra and Others v. Italy*, 1998, cited above, § 44; *Camenzind v. Switzerland*, 16 December 1997, § 50, *Reports of Judgments and*

[13]. See the study by D. Shelton ("The rules and the reality of petition procedures in the Inter-American human rights system", Working Paper #2, May 2014, p. 22).

[14]. See "*The European Court of Human Rights: Master of Law but not of the Facts*?", event report, main speaker Judge Spielmann, November 2014.

Decisions 1997-VIII; *Aksu v. Turkey* [GC], nos. 4149/04 and 41029/04, § 43, ECHR 2012; *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 54, 17 September 2009; *Tarakhel v. Switzerland* [GC], no. 29217/12, § 55, ECHR 2014 (extracts); *Bouyid v. Belgium* [GC], no. 23380/09, § 55, ECHR 2015).

In particular, according to the judgment in *Gutsanovi v. Bulgaria*, no. 34529/10, § 206, ECHR 2013 (extracts), "*the precise legal characterisation of the facts submitted to it by the parties falls within the Court's exclusive remit*".

53. Respondent governments have often stressed that the power to decide on the legal characterisation only concerns the facts disputed by the applicant (see, for example, *Foti and Others v. Italy,* 1982, cited above, §§ 42 et seq.) and have asked the Court not to rule *ultra petita*. For example, in *Baratta v. Italy*, no. 28263/09, § 98, 13 October 2015, the Government alleged that "*the fact of extending the subject matter of the application to complaints that were not expressly raised by the applicant would have no legal basis and might breach the principles whereby the parties must be free to assert their grievances and the procedure before the Court must be fair*".

54. In his separate opinion in *Guzzardi v. Italy*, 6 November 1980, Series A no. 39, the judge Sir Gerald Fitzmaurice expressed his views on this question as follows:

> "The *ultra petita* (or as it is sometimes called, the *ex*, or *extra*, *petita*) rule precludes that an international tribunal or equivalent body should deal with matters that are not the subject of the complaint brought before it, and still more that it should give a decision on those matters against the defendant party in the case. If it does this, *proprio motu*, it is acting *ultra vires*. It would be perfectly proper for the Commission, if satisfied that a certain complaint has both definitely been made and was justified, to hold that a breach of a given Article of the Convention was involved, even though the complainant, while making the complaint, did not invoke that particular Article or allege a breach of it. It would be quite another thing, however, for an international tribunal or equivalent body to hold a sort of roving commission over the facts of a case in order to see whether, if established, some of them could be regarded as entailing an illegality or breach of treaty, - and then in due course to find that they could and did, although they were not matters (or not the actual matters) of which the plaintiff had complained or alleged any illegality or breach. This would be tantamount to saying to the plaintiff "We do not think you have a good case in regard to the particular matters you have complained of, but we perceive other matters (or aspects of the case) which you did not complain of, but of which in our view you justifiably could have complained, and so we shall be happy to find in your favour in those respects." Of course it would never be put so crudely, but it might well in practice amount to that, however carefully wrapped up. The distinction involved can admittedly be a fine one, but is none the less real and important."

(2) Broad *de lege ferenda* powers

55. According to its case-law the Court:

- chooses the Convention Article under which it examines a complaint where the applicant has not relied on a given Article (*Solarino v. Italy*, 2017, cited above, § 27).
- may examine *ex proprio motu* a complaint under a given Article or paragraph that has not been relied on by the parties, such as adding to Article 5 (expressly relied on) Article 3 (not expressly formulated) in a case concerning conditions of detention (*Assenov and Others v. Bulgaria*, 28 October 1998, §§ 129-132, *Reports of Judgments and Decisions* 1998-VIII). The applicant or his representative would still need to follow up this new complaint, otherwise it would mean that the applicant no longer wishes the Court to continue its examination of the complaint raised *ex proprio motu* (see to that effect *Bellomonte v. Italy* (dec.), no. 28298/10, 1 April 2014, §§ 92-93).

56. In that context, the Convention organs may also take into account not only the original application but also any additional pleadings intended to complement it, while removing any initial omissions or obscurities (see, for example, *Guzzardi v. Italy*, 1980, §§ 62-63 and *Foti and Others v. Italy*, 1982, both cited above). This was re-emphasised by the Court (see *K.-H.W. v. Germany* [GC], no. 37201/97, § 107, ECHR 2001-II (extracts); *Baratta v. Italy*, 2015, cited above, § 99), which acknowledged that it had the "*right to characterise the applicant's complaint and to examine it under more than one Convention provision*". It added that *"[s]uch a reclassification, which took into account, among other considerations, the applicant's new arguments, [could] not be considered arbitrary*" (*Scoppola v. Italy (no. 2)* [GC], 2009, cited above, § 55).

57. The case of *Guzzardi v. Italy*, 1980, cited above, of the former Court is interesting (§§ 58 et seq.). The Government reproached the Commission for having taken into consideration *ex proprio motu* Articles 5 and 6 even though at the outset Mr Guzzardi had only relied on Articles 3, 8 and 9 of the Convention and Article 2 of Protocol No. 1. The Government did not dispute the fact that the legal characterisation of an impugned act was incumbent on the judge, but pleaded that the Commission had overlooked another general principle, the obligation to rule only on those facts that had been raised by the claimant. In the Government's view, the applicant had not even raised in substance the question of interference with his physical freedom. The Government emphasised that in order to find a breach of Article 5, the Commission had relied on the circumstance that the applicant had not mentioned the facts in question either in his first letter or in the

application form and memorial, with the result that the Commission had "*erred outside its jurisdiction*". The old Court responded as follows:

> "It should not be forgotten, however, that the original application sent to the Commission is often followed by additional documents intended to complete it by eliminating initial omissions or obscurities (see the above-mentioned Ringeisen judgment, pp. 37-38, par. 90). The Court would also point out that from the start Mr. Catalano described Cala Reale as an "extremely small area", "guarded by the police" who used to "forbid access to anybody and everybody", a scrap of land (pezzo or pezzetto di terra) "inhabited only by habitual criminals and police officers"; his client, he added, was being subjected there to "the most barbarous imprisonment, the most degrading and pernicious incarceration" (and a violation of the right to a proper administration of justice). For the Government, these expressions were merely "hyperboles and metaphors" employed in a context alien to Article 5 ..., but the Court considers, as did the Commission, that they amounted to a complaint of a failure to observe the right guaranteed by Article 5.
>
> 63. Furthermore, it is not decisive whether Mr. Guzzardi was complaining of his living conditions on Asinara rather than of a deprivation of liberty. It is somewhat unreal to draw such distinction in the present case. The Commission and the Court have to examine in the light of the Convention as a whole the situation impugned by an applicant. In the performance of this task, they are, notably, free to give to the facts of the case, as found to be established by the material before them (see the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 64, par. 160), a characterisation in law different from that given to them by the applicant.
>
> Seen in an overall context, the material submitted to the Commission and the Court clearly shows that the present case raises an issue under Article 5."

In the case of *Foti and Others v. Italy,* 1982, cited above, §§ 42 et seq., the Government reproached the Commission for having taken into consideration the question of "*reasonable time*" within the meaning of Article 6 § 1. They argued that by taking the initiative of scrutinising the applicants' right to a hearing "*within a reasonable time*" the Commission had failed to confine itself to applying the maxim "*da mihi facta, dabo tibi jus*": it had overstepped its jurisdiction. The Court indicated as follows (§ 44):

> "The institutions set up under the Convention nonetheless do have jurisdiction to review in the light of the entirety of the Convention's requirements circumstances complained of by an applicant. In the performance of their task, the Convention institutions are, notably, free to attribute to the facts of the case, as found to be established on the evidence before them, a characterisation in law different from that given by the applicant or, if need be, to view the facts in a different manner."

See, in that vein, also *Camenzind v. Switzerland,* 1997, cited above, § 50, and *Shamayev and Others v. Georgia and Russia*, no. 36378/02, § 436, ECHR 2005-III; *Rehbock v. Slovenia*, no. 29462/95, § 63, ECHR 2000-XII, for example.

58. The Court has recently confirmed that approach (see *Baratta v. Italy,* 2015, cited above) reiterating in particular "*that it is incumbent on it to study, in the light of the Convention as a whole, the situation complained of by the applicant*", including in his pleadings subsequent to the application itself, and that it is entitled to consider the elements supplied to the Court "*in an overall context*".

59. The Court may also give the facts a different legal characterisation from that given by the applicant, because it is not bound by the submissions of applicants or governments (*Scoppola v. Italy (no. 2)* [GC], § 54 and *Aksu v. Turkey* [GC], 2012, § 43, both cited above). This is a mere legal reclassification: the Court examines the facts under a different Article from that relied on by the applicant (see, for example, *Gatt v. Malta*, no. 28221/08, § 19, ECHR 2010; *Erményi v. Hungary*, no. 22254/14, §§ 18-19, 22 November 2016).

60. The Court may also decide to address only one of the Articles that an applicant has expressly invoked before it, i.e. an Article which covers, in its opinion the "*main legal question*" of the application (*Tarakhel v. Switzerland* [GC], 2014, cited above, § 55, and the references cited therein, and Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania [GC], no. 47848/08, § 156, ECHR 2014).

61. It may even consider a complaint of its own motion under a provision in respect of which the Court/Commission had declared the complaint to be inadmissible while declaring it admissible under a different one (for example, *Pentiacova and 48 Others v. Moldova* (dec.), no. 14462/03, 4 January 2005).

62. Where there are two or more applicants, the Court may also extend a uniform examination of one complaint, which has not been raised by the other applicants, to all of them, where it is based on a relevant precedent (see *Kulykov and Others v. Ukraine*, 2017, nos. 5114/09 and 17 others, §§ 118-120, 19 January 2017: "*Having regard to the findings in the case of Oleksandr Volkov v. Ukraine ..., the Court decided that, for the sake of a uniform approach and equal protection of human rights, the complaint under Article 8 of the Convention should be examined in all the applications.*").

63. In sum, while the Court is bound by the factual basis of the complaint raised by the applicant, it may call into question the legal consequences of those facts in the applicant's submission (see *Van Den Bouwhuijsen and Schuring v. the Netherlands* (dec.), no. 44658/98, 16 December 2003), this being in line with the old Court's approach.

64. This practice as a whole has been constant, especially since the old Court's judgment in *Guerra and Others v. Italy*, 1998, cited above, §§ 39-46, as upheld by the new Court (for example, *Berktay v. Turkey*, no. 22493/93, § 168, 1 March 2001; *Rehbock v. Slovenia*, 2000, cited above, § 63).

65. The case-law is based **on Article 32 of the Convention**, under which *"[t]he jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47*" and *"[i]n the event of dispute as to whether the Court has jurisdiction, the Court shall decide*" (see for example, *Scoppola v. Italy (no. 2)* [GC], 2009, § 53 and *Shamayev and Others v. Georgia and Russia*, 2005, § 293, both cited above)[15].

B. Consideration by the Court of the applicants' facts and arguments

66. In principle, the legal recharacterisation by the Court is based on only those facts and arguments that the applicant has expressly submitted in his application or any subsequent observations. It therefore does not raise any issue concerning the rule of exhaustion of domestic remedies (*Gatt v. Malta*, 2010, cited above, § 24). The question remains whether the Strasbourg organs may interpret and assess those facts on a discretionary basis, or even address facts that the applicant has excluded from his complaint.

(1) The facts forming the subject matter of the dispute are a matter for the applicant

67. A study of case-law shows that on many occasions the Court has begun by circumscribing the "*subject matter of the dispute*". While an excessively vague statement of facts is not regarded as a complaint, an application satisfying the conditions of presentation includes facts of which only one part may constitute the "*complaint*" or the "*subject matter of the dispute*". The Court has full jurisdiction only within the scope of the subject matter of the dispute (*Akdeniz v. Turkey*, 2005, cited above, § 89).

68. The Court's task is thus to circumscribe what can be regarded, on the basis of the applicant's pleadings, as the **subject matter of the dispute** (*A, B and C v. Ireland* [GC], no. 25579/05, §§ 114 and 123, ECHR 2010; *Mitchell and Holloway v. the United Kingdom*, no. 44808/98, § 53, 17 December 2002) – and this can lead it to call into question the way in which the Government have interpreted the complaint (*Zdebski and Zdebska v. Poland* (dec.), no. 27748/95, 6 April 2000).

69. The analysis of the case-law shows that this preliminary exercise - establishing what the applicant complains of or does not complain of - is frequent. One example can be found in the decision in *Broniowski v. Poland*

[15]. The old Court's case-law was to the same effect (see in particular *Guerra and Others,* 1998, § 43).

(dec.) [GC], no. 31443/96, 19 December 2002. The Court defines at length the "*factual basis*" of the complaint under Article 1 of Protocol No. 1 (§§ 75-76):

> "... The Court observes, however, that the applicant did not complain of being deprived of the original property abandoned by his family outside the present borders of Poland. It also notes that, in contrast to the applicants in the Commission cases cited by the Government, he did not complain about the denial of a compensation claim based on laws or facts dating from before the ratification of the Protocol either. Nor was his complaint directed against a single specific decision or measure taken before, or even after, 10 October 1994 ...
>
> The factual basis for his Convention claim is the alleged failure to satisfy an entitlement to a compensatory measure which was vested in him under Polish law on the date of the Protocol's entry in force and which, despite intervening legislation, subsists today ...
>
> In so far as the applicant's complaints are directed against the acts and omissions of the Polish State ... the Court has temporal jurisdiction to entertain the application. ..."

70. This delimitation of the facts, which determines the Court's exclusive jurisdiction in law, is essential for the purposes of establishing its *ratione temporis* jurisdiction (*Agrotexim Hellas S.A., Biotex S.A., Hymofix Hellas S.A., Kykladiki S.A., Mepex S.A. and Texema S.A. v. Greece*, no. 14807/89, Commission decision of 12 February 1992 (D.R.) no. 72, p. 148; *Fürst Von Thurn und Taxis v. Germany* (dec.), no. 26367/10, § 19, 14 May 2013), compliance with the requirement of exhaustion of domestic remedies within the meaning of Article 35 § 1 (*Jeladze v. Georgia*, no. 1871/08, 18 December 2012, § 35; *Air Canada v. the United Kingdom*, no. 18465/91, Commission decision of 1 April 1993) or with the six-month rule (*Marinakos v. Greece* (dec.), no. 49282/99, 29 March 2001); the existence of "*victim*" status (*Ilascu and Others v. Moldova and Russia* (dec.) [GC], no. 48787/99, 4 July 2001) or of a "*continuous situation*" justifying an examination of all the periods of detention complained of (Article 5) (*Bouros and Others v. Greece*, nos. 51653/12 and 4 others, § 67, 12 March 2015); the existence of an "*interference*" or a "*positive obligation*" within the meaning of Convention case-law (see, under Article 8, *Bohlen v. Germany*, no. 53495/09, § 46, 19 February 2015, and *Dubská and Krejzová v. the Czech Republic* [GC], nos. 28859/11 and 28473/12, ECHR 2016); or as to which norm of Article 1 of Protocol No. 1 is applicable to the facts of the case (*Couturon v. France*, no. 24756/10, § 30, 25 June 2015, and *Silahyürekli v. Turkey*, no. 16150/06, § 33, 26 November 2013).

71. Moreover, the Court has addressed the question whether or not it can examine facts which post-date the application but which are directly related to facts dealt with therein, and it has answered in the affirmative. For example, in order to assess the length of detention or proceedings, it has kept to the national and international approach that a court considers itself empowered to entertain facts that have arisen in the course of the

proceedings (i.e. after the lodging of the application) and representing mere continuations of the facts originally complained of (*Stögmüller v. Austria,* 1969, cited above, p. 9, § 7, see also below).

72. The Court's practice is also to determine the subject matter of the dispute in a case which is part of a group of quite similar cases, in order to indicate how this case is different from the others that it has already examined (*Durisotto v. Italy* (dec.), no. 62804/13, § 31, 6 May 2014; *Manofescu v. Romania* (dec.), no. 44307/05, § 23, 12 January 2010 (Article 6)).

73. This precise framework constitutes the only subject matter of the dispute/complaint that the Court examines, even if it decides on rejection (*Million v. France* (dec.), no. 6051/06, 30 August 2007; *Pfleger v. Austria* (dec.), no. 27648/95, 24 November 1998). In that case it does not go beyond the framework (*idem*). In *Kats and Others v. Ukraine*, cited above, it found:

> "87. The Court observes that further new complaints under Article 3 of the Convention were submitted after communication and in response to the Government's objections as to the admissibility and merits of the application ...
>
> 88. In the Court's view, the new complaints are related in a general sense to the present case, but do not constitute an elaboration of the applicants' original complaints to the Court communicated to the Government by the decision of 14 March 2006. The Court considers, therefore, that it is not appropriate to take this matter up separately now in the context of the present application ..."

74. As a result, if the applicant indicates that he does not maintain a complaint under any particular Article of the Convention, the Court accedes to his request (see, among other authorities, *Russu v. Moldova*, no. 7413/05, §§ 17-18, 13 November 2008; *A. v. the United Kingdom*, 23 September 1998, § 29, *Reports of Judgments and Decisions* 1998-VI).

75. In addition, if the applicant indicates that he does not wish to complain about certain facts or precise periods in relation to the complaints submitted, the Court stands by that clarification and limits its examination accordingly (see, in particular, *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, § 77, ECHR 2012; *Murray v. the Netherlands* [GC], no. 10511/10, § 89, ECHR 2016; *Önder v. Turkey* (dec.), no. 14359/10, 5 February 2013).

76. Other examples of the above can be cited:

- Under Article 2, in the case of *Metin Gültekin and Others v. Turkey*, no. 17081/06, § 35, 6 October 2015, the Court clearly indicated the facts of the case that the applicant had not complained of and that its analysis was confined to the matter complained of.
- As regards Article 3, the Court considered itself exempted from examining certain facts (duress by police during arrest) because the applicant had not complained about them (*Ayan v. Turkey*,

no. 24397/03, § 50, 12 October 2010; *Özen and Others v. Turkey*, no. 29272/08, § 80, 23 February 2016).

- As to Article 5, the Court takes note of periods of detention that have not really been complained of (see for example *Abdullahi Elmi and Aweys Abubakar v. Malta*, nos. 25794/13 and 28151/13, §§ 139-141, 22 November 2016).
- In a case of telephone tapping where Articles 8 and 13 were not relied on in addition to Article 6, the Court did not examine those other Articles (*Kaçan v. Turkey*, no. 58112/09, § 48, 12 July 2016). Examined under Article 8 (procedural aspect), the Court dismissed the application in *Ly v. France* (dec.), no. 23851/10, § 42, 17 June 2014, concerning the decision-making process on an application for family reunification "*in spite of its duration, of which the applicant did not complain*".
- The Court adopts the same approach (confining itself to the facts complained of) in cases concerning Article 6 § 1 (*Veliyev v. Russia*, no. 24202/05, § 174, 24 June 2010), Article 6 § 2 (*Claes and Others v. Belgium*, nos. 46825/99 and 6 others, § 47, 2 June 2005) and Article 6 § 3 (*Coban (Asim Babuscum) v. Spain* (dec.), no. 17060/02, 6 May 2003); Article 7 (*Bamouhammad v. Belgium*, no. 47687/13, §§ 124-125, 17 November 2015; *Greco v. Italy* (dec.), no. 70462/13, 1 September 2015; *Weber v. Suisse*, no. 24501/94, Commission decision of 17 May 1995)), and Article 8 (*Wieser and Bicos Beteiligungen GmbH v. Austria*, no. 74336/01, §§ 44-45, ECHR 2007-IV).
- Lastly, this practice was followed in a case concerning Article 1 of Protocol No. 1 (*Van Den Bouwhuijsen and Schuring v. the Netherlands* (dec.), 2003, cited above, see also, *mutatis mutandis*, *Wozniak and Others v. Poland* (dec.), nos. 33081/11 and 14403/12, § 54, 3 June 2014)[16].

77. It remains to be pointed out that, in the event of any disagreement on the part of the Government concerning the content of the applicant's complaint, the Court addresses the question under Article 32 of the

[16]. "*The Court notes that the applicants explicitly do not complain of the fact that pursuant to the AWW the first applicant was not entitled to a widow's pension because she had not been married to her partner ... Indeed, it was for this reason that the first applicant did not apply for a widow's pension for herself. It was the applicants' contention, however, that the component of a full widow's pension consisting of the difference between the amount of pension awarded to a widow with a child and that awarded to a widow without children – i.e. 30% of the statutory minimum wage – should be considered as constituting a benefit for a child who has lost one of its parents. ...*"

Convention (*Sutyagin v. Russia*, no. 30024/02, §§ 204-206, 3 May 2011), which provides:

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

Similarly, in the event of any disagreement between the parties as to the subject matter of the application, the Court settles the matter in accordance with Articles 32 and 34 of the Convention (*Alija v. Greece* (dec.), no. 73717/01, 2 October 2003).

(2) How the Convention organs deal with the facts

78. According to the judgment in *Foti and Others v. Italy*, 1982, cited above, §§ 42 et seq.

> "[t]he international system of protection established by the Convention functions on the basis of applications be they governmental or individual, alleging violations ... It does not enable the Commission and the Court either **to take up a matter irrespective of the manner in which it came to their knowledge** or even, in the context of pending proceedings, to seize on facts that have not been adduced by the applicant - be it a State or an individual - and to examine those facts for compatibility with the Convention".

79. The new Court has also found that "*it is not its role to examine **submissions which do not concern the factual matrix** of the case before it*" (*A, B and C v. Ireland* [GC], 2010, cited above, § 123).

80. Without calling these general principles into question, the practice of the Convention organs shows that the international court has a certain role to play in relation to the facts as submitted by the applicant.

81. The case-law confers on the Court some room for manoeuvre. Indeed "*the Convention being a living instrument, the rules of Articles 32 and 34 must be interpreted flexibly and without excessive formalism. Consequently, the Court nonetheless does have jurisdiction to review in the light of the entirety of the Convention's requirements circumstances complained of by an applicant*" (*Alija v. Greece* (dec.), 2003, cited above).

82. In practice, the Court has given itself the power to proceed with its own interpretation and assessment **of the facts** under the Convention, as in the following cases:

- The first is a case from the old Court: *Guzzardi v. Italy*, 1980, cited above, see §§ 62-63. The Court found that a body of facts and criticisms constituted a complaint under Article 5:

> "The Court would also point out that from the start Mr. Catalano described Cala Reale as an "extremely small area", "guarded by the police" who used to "forbid access to anybody and everybody", a scrap of land (pezzo or pezzetto di terra)

"inhabited only by habitual criminals and police officers"; his client, he added, was being subjected there to "the most barbarous imprisonment, the most degrading and pernicious incarceration" (and a violation of the right to a proper administration of justice). For the Government, these expressions were merely "hyperboles and metaphors" employed in a context alien to Article 5 ..., but the Court considers, as did the Commission, that they amounted to a complaint of a failure to observe the right guaranteed by Article 5. ... [T]he material submitted to the Commission and the Court clearly shows that the present case raises an issue under Article 5."

- The second example is a judgment of the old Court: *Foti and Others v. Italy*, 1982, cited above, §§ 42 et seq. At the time when they first petitioned the Commission, three of the applicants had not stated, expressly or in substance, that the criminal proceedings against them had been unreasonably prolonged. The judgment nevertheless addresses Article 6 § 1 of the Convention for the following reasons: at the outset, the indications provided by the applicants showed that the proceedings had been pending for years; they had kept the Commission informed of developments in the proceedings, either on their own initiative, in letters to the Commission, or in response to its questions, asking it to rule on their complaints as a matter of urgency. As a result it was "*possible for the Commission to consider that the facts adduced by the applicants potentially involved an issue of trial within a "reasonable time", within the meaning of Article 6 § 1*".

83. The new Court gave a ruling to the same effect in its decision *Alija v. Greece* (dec.), 2003, cited above, finding that the complaint had been raised "*in substance*":

"According to the Government, the applicant did not complain about the lack of reasoning in the impugned decisions. According to the wording of the application, Article 6 § 1 of the Convention had been breached for the sole reason that the applicant had been deprived of the right to have his case heard a second time by a higher court, in view of the refusal by the public prosecutor at the Court of Cassation to appeal on points of law. If the Court were to take into consideration the reasoning of the impugned decisions this would be tantamount to overstepping its jurisdiction … In the present case, it is true that the in the part of the application where he sets out the violations of the Convention the applicant does not expressly complain about the reasoning of the Court of Appeal judgment no. 989/2000 or the decision of the public prosecutor at the Court of Cassation. However, in the statement of facts in his application the applicant raised the issue of the lack of reasoning in the Court of Appeal judgment. Moreover, he alleged, in substance, that the public prosecutor's decision was incomplete and lacking in reasoning, complaining that the prosecutor had merely dismissed his appeal by writing only three words on it. Those statements unquestionably eliminate any lacunae in the complaints as worded on the application form. ..."

84. The same approach was later adopted in *Akdeniz v. Turkey*, 2005, cited above, based on Article 32 of the Convention:

> "90. In the instant case, while the applicant in her application to the Commission may not expressly have invoked Article 2 of the Convention, she has raised in substance – both before the national authorities and also in her observations submitted to the Commission – the basis of her complaint in relation to this Article. …
>
> 92. The Court would further emphasise that it has, since the adoption of its judgment in the above mentioned case of Timurtaş, taken into account the effective protection of the right to life as afforded by Article 2 of the Convention by holding that lengthy periods of unacknowledged detentions go beyond a mere irregular detention in violation of Article 5 of the Convention … It has examined such allegations from the standpoint of Article 2 as well as Article 5 …
>
> 93. It follows that it is open to the Court to consider the applicant's allegations concerning her son's detention in the light of the protection of the right to life within the meaning of Article 2 of the Convention …"

85. In *Nelissen v. the Netherlands*, no. 6051/07, 5 April 2011, it is also stated as follows:

> "63. Taking its own view of the facts of the case, the Court inferred from the application the complaint that the applicant did not have access to a procedure by which the lawfulness of his detention could be decided speedily by a court and his release ordered if the detention was not lawful. Of its own motion, the Court raised the question whether there had been a violation of Article 5 § 4 of the Convention."

86. Lastly, in the case of *M. and M. v. Croatia*, no. 10161/13, ECHR 2015 (extracts), the Court derived from the applicant's observations a complaint that was *stricto sensu* separate from the facts criticised in the application (compare §§ 104, 129-130 and 172). That case about domestic violence seems to go quite a long way in transforming facts not criticised on the application form into a complaint. It is noteworthy that the Court justifies its approach by the significance of the best interests of the child.

87. This broad assessment of the *juris novit curia* principle leads to the following question: what about the facts or arguments not maintained by the applicant or in respect of which he indicates *ab initio* that he is not complaining before the Court?

88. In a few cases the Convention organs have taken account of facts which the applicants had clearly stated that they were not complaining of **in the context of their complaint**.

- Under Article 2 (procedural aspect), in *Dora v. Turkey* (dec.), no. 16879/12, §§ 30-33, 11 October 2016, the applicant complained that criminal proceedings had not been initiated but did not complain about the general conduct of the investigation. However, the Court examined the whole case under the procedural aspect of Article 2.

- Under Article 3, in the case of *Uyan v. Turkey*, no. 7454/04, § 51, 10 November 2005, the Court took account of the lack of medical care in the event of reimprisonment – something of which the applicant had not complained - addressing the compatibility of his potential reimprisonment with Article 3. In a case of expulsion examined under Article 3, the former Commission examined a point which the applicant had excluded from his complaint in concluding that it raised no issue (*S., A.M. and Y.S.M. v. Austria*, no. 19066/91, Commission decision, 5 April 1993, pp. 195-196).
- Under Article 6 (length of proceedings) the Court expressed its position on proceedings of which the applicant had not complained: *Durand v. France* (dec.), no. 4912/10, 7 June 2011; *Mayer v. Italy* (dec.), no. 62145/00, 14 June 2007. In an older case, *Janssen v. Germany*, no. 23959/94[17] (length of proceedings), the Government noted that the applicant had not complained of part of the proceedings (the part before the Federal Court). Nevertheless, the former Commission in its report, then the Court in its judgment, examined that last stage in the proceedings as part of the whole proceedings of which the length was at issue (see, *mutatis mutandis*, *Wokke v. the Netherlands*, no. 27945/95, Commission Report of 1 July 1998, §§ 23-26 and § 27).
- Under Article 6 (defence rights), in the case of *Dawson v. Ireland* (dec.), no. 21826/02, 8 July 2004, it is stated as follows:

"The applicants have also clarified that they do not maintain their submissions concerning actions by certain bodies which prevented their legal representation during the domestic proceedings. …

While the Court notes that they do not maintain their complaints about certain actions which allegedly compromised their legal representation, they do refer in their observations to a domestic judge refusing to hear them unless they took their solicitor off record. In so far as this remains a complaint before it, the Court does not consider it unreasonable, in the interests of the good administration of justice, that domestic courts limit oral submissions to the legal representatives who are officially on record for the relevant party. …"

- Under Article 7, in *K.-H.W. v. Germany* [GC], 2001, cited above, §§ 108-109, the Court noted that the applicant had never raised the question of the statutory limitation period. The Court nevertheless addresed this point (§ 110) in finding that "*even if he had pleaded limitation, his argument could not have been accepted*".

[17]. Decision of 9 September 1998 and Commission Report of 31 May 1999 then Court's judgment of 20 December 2001.

C. Conclusion

89. It can be seen from this case-law that the Court has given itself jurisdiction, on the one hand to assess which facts **constitute "*in substance*" the subject matter of the dispute** and, on the other, to go beyond, in certain cases, the factual matrix of the complaint raised by the applicant where he has indicated expressly, in the context of his complaint, that he does not complain of a given aspect of the facts.

90. It appears, however, that this approach is consistent with its jurisdictional role and competence, namely to know and state the law. Indeed, the Court comes to the applicant's aid, so to speak, when he does not clearly express his complaint, including in his observations after communication. The Court may also rely on facts of the dispute that have been excluded by the applicant where they concretely fall within the scope of legal examination covered by the complaint and thus within its exclusive jurisdiction. The general principles in *Foti and Others v. Italy* and *A, B and C v. Ireland* [GC], cited above, are thus respected. The judge does not create the dispute but clarifies or refocuses the factual matrix of an existing dispute.

III. Scope of jurisdiction of the Grand Chamber (and the old Court) as regards an admissibility decision of the Chamber (or former Commission)

91. Where a case is referred, to what extent do the parties' arguments bind the new bench? The framework of examination after referral is circumscribed by the admissibility decision (part A). The higher body has, in that context, a broad power to re-examine the complaints which have been declared admissible (part B).

A. Framework of examination circumscribed by the admissibility decision

(1) Former Commission and old Court

92. From the outset (judgment of 23 July 1968 on the merits in the "Belgian Linguistic" case, cited above), the old Court considered only those Convention Articles that the Commission had accepted (see also *Stögmüller v. Austria*, 1969, cited above).

93. According to the applicable principles, the subject matter of the dispute referred to the old Court was circumscribed by the Commission's decision on admissibility (*Kamasinski v. Austria*, 19 December 1989, Series

A no. 168, p. 30, § 59). The Court "*is precluded from reviewing on their merits ... the complaints rejected as manifestly ill-founded, but empowered to entertain those complaints which the Commission has declared admissible*" (*Boyle and Rice v. the United Kingdom*, 27 April 1988, Series A no. 131, § 54).

94. Consequently, if **a new complaint had been filed *before* the admissibility decision,** and if the Commission accepted it and the Government was able to submit observations, the old Court saw "*no reason to depart from its well-established principle that the compass of the case before it is delimited by the Commission's decision on admissibility*" (see *Mauer v. Austria*, 18 February 1997, *Reports of Judgments and Decisions* 1997-I, § 28, and *Garyfallou AEBE v. Greece*, 24 September 1997, §§ 25-27, *Reports of Judgments and Decisions* 1997-V).

95. The Commission's admissibility decision thus fixed the subject matter of the dispute before the Court. It was only inside the framework thus established that the Court, provided the case had been lawfully brought before it, could hear all the questions of fact and law arising during the proceedings (*De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, Series A no. 12, pp. 29-30, §§ 49 and 51; *Handyside v. the United Kingdom*, 1976, § 41; judgments *Stögmüller v. Austria* and *Matznetter v. Austria*, 1969, pp. 31-32, § 5 and p. 41, § 7; *Delcourt v. Belgium*, 1970, § 40, all cited above). In sum, the facts declared admissible by the Commission determined the scope of the Court's jurisdiction (*Guerra and Others v. Italy*, 1998, cited above, § 44).

96. Moreover, it was exclusively for the Court to assess whether or not the complaints raised at the merits stage were closely linked to those set out in the initial application and examined by the Commission in its admissibility decision (*Cyprus v. Turkey* [GC], no. 25781/94, §§ 334-335, ECHR 2001-IV).

97. It is noteworthy, however, that **the old Court examined the complaints that had been declared inadmissible by the former Commission** in *Handyside v. the United Kingdom*, 1976, cited above, §§ 41 and 66. The complaints rejected by the admissibility decision of the former Commission (Articles 1, 7, 9, 13 and 14 of the Convention) concerned the same facts as those which were complained of under Article 10 and Article 1 of Protocol No. 1, the only complaints declared admissible. The old Court found that they were "***accordingly not separate complaints but mere legal submissions or arguments that had been put forward along with others***". It thus saw fit to examine the case also under Article 14, even though that part had been declared inadmissible (as manifestly ill-founded), while not accepting the other Articles relied upon by the applicant[18], indicating (§ 66): *"... the Commission rejected the application on this point as being*

[18]. See also, *mutatis mutandis,* the case of *Philis v. Greece*, cited above, 1991.

manifestly ill-founded. However, the Court was of the opinion that it should also have regard to Article 14, taken together with Article 10 of the Convention and Article 1 of Protocol No. 1 ...: some of Mr. Handyside's complaints, made after as well as before the decision of 4 April 1974 and with or without express reference to Article 14, raise the question of an arbitrary difference in treatment." (Compare *Bozano v. France*, 18 December 1986, Series A no. 111, below, which adopted the same approach as to the principle but reached a different conclusion).

In the rest of the cases, the old Court dismissed the complaints that had been found inadmissible by the Commission that the applicant had repeated before it, as for example in the case of *Contrada v. Italy*, 1998, cited above: Article 5 § 3 was the only complaint to have been declared admissible. The Court dismissed the Article 5 § 1 argument, even though it also concerned the applicant's deprivation of liberty, because it was identical to the complaint already dismissed by the Commission (§ 50).

(2) The new Court

98. For the new Court the settled case-law has been similar to that of the old, except for the approach in *Handyside v. the United Kingdom*, cited above.

99. The "*case*" referred to the Grand Chamber is the application as declared admissible by the Chamber, as the complaints declared inadmissible fall outside the dispute before the Grand Chamber (see, among other authorities, *K. and T. v. Finland* [GC], 2001, § 141, cited above; *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 109, ECHR 2007-IV; *Blokhin v. Russia* [GC], no. 47152/06, § 91, ECHR 2016; *Greek Catholic Parish of Lupeni and Others v. Romania* [GC], no. 76943/11, §§ 61-63, ECHR 2016 (extracts). This approach has been recently confirmed in *Paradiso and Campanelli v. Italy* [GC], no. 25358/12, §§ 84 and 86, ECHR 2017 (extracts).

100. Here again the Grand Chamber's case-law is circumscribed by the Chamber's admissibility decision (*Perna v. Italy* [GC], no. 48898/99, § 23, ECHR 2003-V, and *Azinas v. Cyprus* [GC], 2004, cited above, § 32), which entails two consequences:

- The Grand Chamber cannot decide that complaints declared inadmissible should be part of the "*case*" submitted to it, the principle being that the decision to declare a complaint inadmissible is final and no appeal lies against it (*Scoppola v. Italy (no. 2)* [GC], 2009, cited above, §§ 50-55; *Kurić and Others v. Slovenia* [GC], no. 26828/06, § 235, ECHR 2012).
  On this point, it should be noted that the approach in *Handyside v. the United Kingdom*, cited above, has not been adopted by the new Court (see in particular *Scoppola v. Italy* (no. 2) [GC], 2009,

cited above, § 55; *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08, § 79, ECHR 2016; and *Koval v. Ukraine* (dec.), no. 65550/01, 30 March 2004).

- A recharacterisation by the Chamber of a complaint subsequently declared admissible constitutes the Grand Chamber's framework of examination (*Scoppola* v. *Italy* (no. 2) [GC], 2009, cited above)[19].

101. Lastly, **it is for the Grand Chamber to settle any disagreement** between the parties as to whether or not the complaints are covered by the decision on the admissibility of the application (*K. and T. v. Finland* [GC], 2001, cited above, § 145).

102. This does not mean, however, that the Grand Chamber cannot also examine, if need be, questions concerning the admissibility of the application (*Odièvre v. France* [GC], no. 42326/98, § 22, ECHR 2003-III) as the Chamber is free to do in the context of the usual proceedings, for example under Article 35 § 4 *in fine* of the Convention (which empowers the Court to "*reject any application which it considers inadmissible ... at any stage of the proceedings*"), or when these questions have been joined to the merits, or when they are of interest at the merits stage (*K. and T. v. Finland* [GC], 2001, cited above, § 141)[20]. For the question of jurisdiction *ratione temporis*, the case of *Blečić v. Croatia* [GC], no. 59532/00, ECHR 2006-III, is of interest more generally, as it states that any question affecting the Court's jurisdiction "*is determined by the Convention itself, in particular by Article 32, and not by the parties' submissions in a particular case" and that "the mere absence of a plea of incompatibility cannot extend that jurisdiction*" (§ 67). "*Accordingly, the Court ... has to satisfy itself that it has jurisdiction in any case brought before it, and is therefore obliged to examine the question of its jurisdiction at every stage of the proceedings*".

103. Moreover, the re-examination concerns the entire case. Thus the Court cannot follow a Government's claim that referral to the Grand Chamber concerns only part of the complaints in the Chamber judgment, while disposal of the other complaints is final. The wording of Article 43 of the Convention specifies that while the existence of "*a serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance*" (paragraph 2)

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[19]. Could the Grand Chamber judgment be interpreted as laying down a new criterion in such matters, i.e. a lack of arbitrariness on the Chamber's part when the complaint is recharacterised? It is stated as follows (§ 55): "*the Court's Second Section did no more than use its right to characterise the applicant's complaint and to examine it under more than one Convention provision. Such a reclassification, which took into account, among other considerations, the applicant's new arguments, cannot be considered arbitrary*".

[20]. See also, to this effect, *Guzzardi v. Italy*, 1980, cited above, § 72, and *Cardot v. France* 19 March 1991, Series A no. 200, p. 19, § 36.

is a prerequisite for a party's request to be accepted, once it has been accepted the whole "*case*" then goes to the Grand Chamber, which will decide the case in a fresh judgment (paragraph 3). Therefore there is no basis for a merely partial referral of the case to the Grand Chamber (*Larkos v. Cyprus* [GC], no. 29515/95, § 21, ECHR 1999-I; *K. and T. v. Finland* [GC], 2001, cited above, §§ 139-141; *Göç v. Turkey* [GC], no. 36590/97, §§ 35-37, ECHR 2002-V), as the Grand Chamber's examination must concern all the complaints declared admissible (*Perna v. Italy* [GC], 1998, cited above, § 23; *Šilih v. Slovenia* [GC], no. 71463/01, § 120, 9 April 2009).

(3) Conclusion

104. The higher body (old or new Court) has jurisdiction to examine the entire case in the framework set out in the admissibility decision. The parties are not entitled to circumscribe its reexamination (*Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 86, ECHR 2005-VII). The scope of the Grand Chamber's jurisdiction is determined by the Convention itself, especially by Article 32, and not by the observations submitted by the parties in a given case. Questions of admissibility (subject to time-limits, see *Mooren v. Germany* [GC], no. 11364/03, § 57, 9 July 2009) and jurisdiction may be examined at this stage.

105. In sum, neither the higher body nor the parties can go back on facts declared admissible, unless they prove to be, for example, incompatible *ratione temporis* or *ratione materiae* and therefore ultimately inadmissible[21].

106. Moreover, in certain cases the facts continue to evolve after the admissibility decision, or even the Chamber judgment. In such cases the Grand Chamber (like the old Court) may, within the framework constituted by the admissibility decision, deal with any question of fact or law which may arises during the proceedings before it (see, among many other authorities, *Guerra and Others v. Italy*, 1998, cited above, § 44; *Chahal v. the United Kingdom*, 15 November 1996, § 86, *Reports of Judgments and Decisions* 1996-V; *Ahmed v. Austria*, 17 December 1996, § 43, *Reports* 1996-VI).

107. More precisely, "*[t]here is no justification for excluding from the scope of that general jurisdiction events that took place up to the date of the Grand Chamber's judgment, provided that* ***they are directly related to the complaints declared admissible***" (see, for example, *Öcalan v. Turkey* [GC], 2005, cited above, § 190; see also above). It can be seen from the case-law that the question largely depends, however, on the information given by the

[21]. The respondent Government cannot be deemed to be out of time in raising a preliminary objection before the Grand Chamber when the objection concerns a question concerning the Court's jurisdiction rather than a question of admissibility *stricto sensu* (*Mustafa Tunç and Fecire Tunç v. Turkey* [GC], no. 24014/05, 14 April 2015).

parties and the remedies used (compare *Ramirez Sanchez v. France* [GC], no. 59450/00, §§ 113-114, ECHR 2006-IX, with *Öcalan* [GC], cited above, § 190 *in fine*).

108. According to the settled case-law of both Courts (see, *inter alia*, *Gustafsson v. Sweden*, 25 April 1996, §§ 47 and 51, *Reports of Judgments and Decisions* 1996-II, and *Cruz Varas and Others v. Sweden*, 20 March 1991, Series A no. 201, p. 30, § 76; *K. and T. v. Finland* [GC], 2001, cited above, § 147), "*the Court is not prevented from taking into account any additional information and fresh arguments in determining the merits of the applicants' complaints under the Convention if it considers them relevant. New information may, for example, be of value in confirming or refuting the assessment that has been made by the respondent State or the well-foundedness or otherwise of an applicant's fears*". Thus the Court may take into consideration, if it finds them relevant, any "*new*" elements in the Government's observations, whether further and better particulars as to the facts underlying the complaints taken forward by the Chamber or legal arguments pertaining thereto (*Sahin v. Germany* [GC], 2003, cited above, § 43; *McMichael v. the United Kingdom*, 24 February 1995, Series A no. 307-B, § 73).

B. Broad power as regards complaints declared admissible

(1) Legal recharacterisation and characterisation of elaboration of initial complaints

109. From the early case of *Wilde, Ooms and Versyp v. Belgium*, 1971, cited above, § 49, the Court has indicated that once a case is duly referred to it, the Court may take cognisance of every question of law arising in the course of the proceedings and concerning facts submitted to its examination by a Contracting State or by the Commission. Master of the characterisation to be given in law to these facts, the Court is empowered to examine them, if it deems it necessary and if need be *ex officio*, in the light of the Convention as a whole (see, among other authorities, *Handyside v. the United Kingdom,* 1976, § 41, and *Philis v. Greece (no. 1)*, 1991, § 56, both cited above).

110. As to the characterisation of the facts:

In the case *Guerra and Others v. Italy*, 1998, cited above, the applicants had complained about a failure by the authorities to transmit information about risks of pollution under Article 10. The Commission had adopted its report under Article 10 alone. The applicants, in their observations before the Court then at the hearing, had also relied on Articles 8 and 2 of the Convention, arguing that the lack of information in question had breached their right to respect for their private and family life and their right to life.

Before the Court, the Commission delegate had merely confirmed the report's conclusion (i.e. the violation of Article 10), while the respondent Government had declared that the complaints under Articles 8 and 2 fell outside the framework established by the admissibility decision. The Court decided that it was necessary above all to determine the limits to its jurisdiction *ratione materiae*. It found as follows (§§ 44-46):

> "The Court has full jurisdiction only within the scope of the "case", which is determined by the decision on the admissibility of the application. …
>
> 45. In the instant case the grounds based on Articles 8 and 2 were not expressly set out in the application or the applicants' initial memorials lodged in the proceedings before the Commission. Clearly, however, those grounds were *closely connected* with the one pleaded, namely that giving information to the applicants, all of whom lived barely a kilometre from the factory, could have had a bearing on their private and family life and their physical integrity.
>
> 46. Having regard to the foregoing and to the Commission's decision on admissibility, the Court holds that it has jurisdiction to consider the case under Articles 8 and 2 of the Convention as well as under Article 10."

111. As regards the characterisation of any elaboration of original complaints, a quite flexible approach was adopted in *Delcourt v. Belgium*, 1970, cited above. The Commission had declared the application admissible under Article 6 (equality of arms) as to the complaint about the presence of the Prosecutor General at the deliberation of the Court of Cassation. After that decision, the applicant's representative added a complaint about the lack of communication of the prosecutor's submissions before the hearing and the inability to respond thereto. The Commission found in its report that these were "*specific aspects*" of the equality of arms complaint and accepted the new argument. The case was then examined by the Court, before which the Belgian Government challenged the admissibility of what they described as "*new complaints*", pointing out that Delcourt had failed to raise them before the Commission's examination of the merits. That objection was dismissed (*Delcourt*, cited above, §§ 39-42) and the "*new complaints*" were examined by the Court, with the following reasoning:

> "… While these grounds were doubtless not mentioned explicitly in the Application or the first memorials of the Applicant, they had an evident connection with those contained therein. From the very beginning, Delcourt claimed that the presence of a member of the Procureur général's department at the deliberations of 21st June 1965 had violated Article 6 para. 1 of the Convention. His "new complaints", which were formulated later, concerned the submissions of that same member immediately prior to his participation in the deliberations. These complaints thus also related to the role of the Procureur général's department attached to the Court of Cassation and are intimately linked with the matters which formed the subject of Delcourt's original complaint accepted by the Commission in its [admissibility] decision of 6th April 1967; indeed, they were adduced by him essentially in support of that complaint. Moreover, the Commission itself so interpreted the "new complaints" in its Report. Accordingly, the Court considers that it would be unduly formalistic and therefore

unjustified not to take account of these elements in the case. The Applicant's "new complaints" must, on the other hand, be rejected as ill-founded. ..."

112. The case of *Winterwerp v. the Netherlands*, 1979, cited above, is also pertinent. Quite unusually, the Court went against the analysis of the Commission.

113. In his petition to the Commission, the applicant had complained about being arbitrarily deprived of his liberty, without a hearing by a tribunal and without being informed of the various decisions extending his detention. The Commission had accepted the application, explaining that it had taken it "*under Article 5 of the Convention*". During the examination of the merits of the dispute, the applicant's lawyer adduced an additional complaint: the automatic loss, by his client, of the capacity to handle his property constituted a determination of "*his civil rights and obligations*", which had taken place without due process; there had thus been a breach of Article 6 § 1. In its report the Commission unanimously found that there had been a violation of Article 5 § 4, but not Article 5 § 1. In addition, it found that it did not have to rule on the alleged breach of Article 6 § 1 since "*this issue ... relate[d] to facts distinct from those originally submitted ... for its examination and ha[d] not been the subject of any detailed argument before it*".

114. The Court, for its part, acknowledged jurisdiction in respect of the complaint under Article 6 § 1, stating as follows:

"Moreover, although the complaint in question was not mentioned explicitly in Mr. Winterwerp's application to the Commission, it has an evident connection with the complaints he initially made. His grievances as stated during the admissibility proceedings, where he was not represented by a lawyer, were directed against his deprivation of liberty: he felt he was being arbitrarily detained and he objected that he had been neither allowed a hearing by a court nor informed of the decisions by which his confinement was several times prolonged ... The new issue regarding Article 6, raised by Mr. Van Loon at the merits stage before the Commission, concerned a legal consequence that follows automatically from the fact of compulsory confinement in a psychiatric hospital ... It is thus intimately linked to the matters that formed the subject of Mr. Winterwerp's original complaints declared admissible by the Commission (see, *mutatis mutandis*, the Delcourt judgment ..."

115. The later judgment of *Contrada v. Italy*, 1998, § 50, cited above, returned to that approach of the Court. Mr Contrada had complained from the outset about the length of his detention under Article 5 § 3. He subsequently relied, also in respect of his detention, on Article 3. The Court noted that this complaint concerned "*the actual conditions of detention, not its length*". It concluded: "*although both the relevant grounds [Articles 5 and 3] concern the applicant's deprivation of liberty the Court has no*

jurisdiction ratione materiae to hear them, as the first complaint is identical to the one declared inadmissible by the Commission and the second must be regarded as being a new complaint, unconnected to the complaint under Article 5 § 3, such that the Court is unable to adopt the legal qualification [sic] suggested by the applicant" (§ 50). See also the judgment *Schiesser v. Switzerland*, 4 December 1979, § 41, Series A no. 34, below.

116. Moreover, it should be noted that in the case of a recharacterisation of facts by the former Commission, the Court could then decide to abide by it or to disregard it (*Assenov and Others v. Bulgaria*, 1998, cited above, §§ 128-132).

117. That power is also vested in the Grand Chamber. Being master of the legal characterisation of the facts, the Court is not bound by that of applicants or Governments (see, among other authorities, *Göç v. Turkey* [GC], 2001, cited above, § 36).

118. Thus the new Court assumed jurisdiction to recharacterise facts declared admissible, asking the parties to submit observations on an Article of the Convention that had not been examined by the Chamber (*Şerife Yiğit v. Turkey* [GC], 2010, cited above, §§ 51-53: the Convention concerned Article 8 and the Grand Chamber also examined Articles 14 and Article 1 of Protocol No. 1).

119. Similarly, in the case of *Aksu v. Turkey* [GC], cited above, the applicant had brought a case to the Court under Articles 6 and 14 (see Chamber judgment of 27 July 2010, § 40). The Chamber had adopted a legal characterisation under Articles 8 and 14 (ibid., § 41). The Grand Chamber, however, adopted only Article 8 as the legal basis of its examination (*Aksu v. Turkey* [GC], 2012, cited above, §§ 42-45).

120. The Grand Chamber is not bound by the parties' arguments in such matters. Thus in the new Court's judgment *Scoppola v. Italy (no. 2)* [GC], 2009, cited above, the Grand Chamber took the view that the recharacterisation by the Chamber, which was disputed by the Government, had not been "*arbitrary*" (see above).

121. The Court (and Grand Chamber) has "*full jurisdiction*" within the scope of the "*case*", which is determined by the decision on the admissibility of the application, and within the compass thus delimited, it may deal with any issue of fact or law that arises during the proceedings before it (*Powell and Rayner v. the United Kingdom*, 1990, § 29; *Philis v. Greece (no. 1)*, 1991, § 56; *Guerra and Others v. Italy*, 1998, § 44, all cited above, *in fine*; *Tahsin Acar v. Turkey* [GC], no. 26307/95, § 63, ECHR 2004-III).

(2) Limitation: distinct facts and complaints

122. While the Court was empowered to give to the facts declared admissible a legal characterisation that was different from that adopted by

the Commission, its jurisdiction **could not extend to the examination of new complaints** which had not been substantiated by facts at the admissibility stage (*Findlay v. the United Kingdom*, 25 February 1997, § 63, *Reports of Judgments and Decisions* 1997-I; *Cyprus v. Turkey* [GC], 2001, cited above). According to that latter judgment, complaints pertaining to distinct facts occurring after the date of the admissibility decision cannot be taken into account (*Cyprus*, cited above, § 258).

123. The Court declined jurisdiction to examine complaints which constituted separate complaints in their own right and not, as the applicants had suggested, "*mere legal submissions or arguments relating to the same facts as those underlying the allegation*" declared admissible (*Powell and Rayner*, 1990, cited above, §§ 28-29; *Olsson v. Sweden (no. 2)*, 27 November 1992, § 75, Series A no. 250, and *Başkaya and Okçuoğlu v. Turkey* [GC], no. 23536/94, § 40, ECHR 1999-IV).

124. In *Bozano v. France*, cited above, the applicant had resubmitted to the Court an allegation that the Commission had declared inadmissible: that he had never had a remedy compliant with the requirements of Article 5 § 4. The Court declined jurisdiction in that respect (*Bozano*, 1986, cited above, § 62). It noted that this argument concerned facts that were separate from those complained of by the applicant before it under Article 5 § 1. Consequently, **it did not raise a mere problem of legal characterisation, an additional ground or argument**; it constituted a separate complaint, dismissed by a decision setting limits on the dispute referred to the Court (see also *Barthold* v. Germany, 25 March 1985, § 61, Series A no. 90).

125. In the case of *Schiesser v. Switzerland*, 1979, cited above, the applicant alleged that there had been a violation of Article 5 § 3 as the district prosecutor who had placed him in pre-trial detention was not a "*judge or other officer authorised by law to exercise judicial power*", within the meaning of that provision. Subsequent to the admissibility decision, the applicant also relied on Article 5 § 4 on the ground that he had not been entitled to a remedy before a court to obtain a speedy decision on the lawfulness of his detention. For the Court it was not a mere legal ground or argument but a distinct complaint "*going beyond the framework of the case*" (*Schiesser v. Switzerland*, 1979, cited above, § 41 – compare *Delcourt v. Belgium* and *Winterwerp v. the Netherlands*, both cited above). See also *Contrada v. Italy*, 1998, cited above, § 50.

126. The distinction between the elaboration in substance of a complaint and the introduction of a new and separate complaint is explained in *Wierzbicki v. Poland*, no. 24541/94, §§ 27-28, 18 June 2002, in the following terms:

> "27. The Court observes that at the admissibility stage of the proceedings before the Commission, the applicant, who was represented by lawyers, never raised even the substance of a complaint under Article 10. The complaints submitted by the applicant were clearly limited to the procedural aspects of the domestic proceedings, which he

considered unfair, and he relied throughout the Commission proceedings on Article 6 of the Convention in this connection. The applicant now argues for the first time before the Court that the outcome of the proceedings should be analysed in the light of Article 10 of the Convention and that the decisions of the domestic courts amount to an interference with his right to freedom of expression.

28. The Court reiterates that that the scope of its jurisdiction in cases such as the instant one ... continues to be determined by the Commission's decision on admissibility, it having no power to entertain new and separate complaints (see, among other authorities, the *L.C.B. v. the United Kingdom* judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-III, pp. 1402-03)."

127. In the same vein, the new Court has no power to entertain new and separate complaints alleging violations of substantive provisions of the Convention (*Tahsin Acar v. Turkey* [GC], cited above, § 204). Any separate complaints and facts raised subsequent to the admissibility decision are clearly excluded from the Grand Chamber's jurisdiction (*Assanidzé v. Georgia* [GC], no. 71503/01, § 162, ECHR 2004-II).

128. For example, new complaints under Articles 13, 17 and 34 which were not simply "*grounds in support of submissions*" under Article 6 § 1 of the Convention, and which were raised for the first time in the pleadings submitted to the Grand Chamber, and were not therefore covered by the admissibility decision, fell outside the scope of examination of the case as it had been referred to the Grand Chamber (*Cocchiarella v. Italy* [GC], no. 64886/01, § 123, ECHR 2006-V).

129. The judgment in *Sahin v. Germany* [GC], 2003, cited above, §§ 43-44, is also relevant. The Grand Chamber explained that it was entitled to take account of "*additional information and fresh arguments*" in determining the merits of the applicant's complaints or "*of 'new' material which takes the form either of further particulars as to the facts underlying the complaints declared admissible by the Chamber or of legal argument relating to those facts*". However, it rejected the applicant's complaint presented for the first time in his observations before the Grand Chamber concerning the question of the participation of a blind judge in the proceedings before a domestic court. The Court took the view that "*this complaint [went] to a new factual element distinct from those underlying the applicant's complaints under Articles 8 and 14 ... which alone [had] been declared admissible*" (even though that complaint seemed to be based on identical procedures).

C. Conclusion

130. Consequently, in the context of the examination of a case referred, the higher body – old Court or Grand Chamber of the new Court – is bound only by the facts declared admissible. To take account of facts that are

totally disconnected from the framework of admissibility would constitute a *mutatio litis*. Any separate complaints and facts that are raised after the admissibility decision are clearly excluded from the Grand Chamber's jurisdiction (*Assanidzé v. Georgia* [GC], cited above, § 162).

Otherwise it has **full jurisdiction to recharacterise the complaint,** in other words to examine the facts declared admissible under any of the Convention Articles other than that adopted, and is thus not bound by the parties' arguments.

In addition, it should be pointed out that the notion of facts declared admissible has been interpreted quite broadly, at least in the old Court (see *Delcourt v. Belgium*, 1970 and *Winterwerp v. the Netherlands*, 1979, both cited above, and compare *Schiesser* 1979; *Contrada v. Italy*, 1998, and *Sahin* v. *Germany*, 2003, both cited above).

IV. Context in which subsidiarity is not invoked

131. In the recent case of *Vučković and Others v. Serbia* (preliminary objection) [GC], 2014, cited above, § 69, subsidiarity was invoked as follows:

> "It is a fundamental feature of the machinery of protection established by the Convention that it is subsidiary to the national systems safeguarding human rights."

132. The Court then emphasised as follows:

> "... that the Court is not a court of first instance; it does not have the capacity, nor is it appropriate to its function as an international court, to adjudicate on large numbers of cases which require the finding of basic facts or the calculation of monetary compensation – both of which should, as a matter of principle and effective practice, be the domain of domestic jurisdictions (see *Demopoulos and Others v. Turkey* (dec.) [GC], nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04 and 21819/04, § 69, ECHR 2010, ... *Akdivar and Others* judgment[22])."

133. The subsidiary nature of the Convention mechanism has been mentioned on numerous occasions, particularly in the context of the rule on the exhaustion of domestic remedies. This principle has not been invoked in reasoning on the notion of complaint or subject matter of the dispute, or the application of the *jura novit curia* principle.

134. Nevertheless, subsidiarity has the effect of defining the contours of the room for manoeuvre of the Convention organs as regards the subject matter of the dispute. It is "*the Convention argument*" relied upon before the

[22]. For an analysis of the judgments referring to subsidiarity, see the separate opinion of Judge Gölcüklü in this case.

national authorities which opens the applicant's access to the Court and gives it jurisdiction to decide the case (*Vučković and Others v. Serbia* (preliminary objection) [GC], 2014, cited above, § 75).

135. In that connection it is noteworthy that the Convention organs have given themselves broad jurisdiction based on Articles 32 and 34 of the Convention (see, in particular, *Scoppola v. Italy (no. 2)* [GC], 2009, cited above, § 53). The Court has repeatedly held that has full jurisdiction in respect of all matters concerning the interpretation and application of the Convention and the protocols thereto and that in the event of dispute as to whether the Court has jurisdiction, the decision is a matter for the Court.

136. The following position on this question was expressed by President Spielmann in 2014:

> "Judge Spielmann reasoned that although that the phrase 'master of the law' is not derived from Strasbourg case-law, it is an accurate description of the ECtHR's procedural as well as substantive powers under Article 32 of the European Convention of Human Rights ... Article 32, in combination with cases such as *De Wilde, Ooms and Versyp v Belgium*, thus endows the ECtHR with full jurisdiction on issues of fact and of law as well as the limits to its own jurisdiction. … Judge Spielmann argued that the rationale for this approach is based on the need to ensure interpretations are consistent with the object and purpose of the Convention as well as the need to ensure conceptual coherence in European human rights law. He opined that the ECtHR's role as 'master of the law' in this regard stood to be enhanced by Protocol No. 16. … Under Articles 32 and 38 of the Convention, the Court has the power to consider factual issues if they have not been sufficiently dealt with at the domestic level." [23]

GENERAL CONCLUSION

137. In conclusion, it can be seen from the Court's case-law that the notion of "*complaint/subject matter of the dispute*" is more complex than it may appear. In particular, there has been some evolution as regards the submission of new complaints in the course of the proceedings. Before 2000 the Court had a relatively flexible approach because it did not hesitate to attach other complaints to the *facts* and/or elaborate on the original complaints. However, it would seem that the Court has since adopted a stricter approach; to dismiss a given complaint it has preferred to examine the *legal arguments* put forward by the applicant rather than the facts of the case. It has then arrived at the conclusion that it is a *new* complaint, either considering that it is not an elaboration of the substance of the initial complaint, or by simply finding that the complaint falls outside the subject

[23]. Judge D. Spielmann, « *The European Court of Human Rights: Master of Law but not of the Facts?"* Event report, November 2014, pp. 1-2.

matter of the dispute. In practice, and particularly in the same context as that of *Guerra and Others v. Italy*, the Court seems to have departed in certain cases from the definition given in that case to the effect that "*a complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on*". Thus it would seem that a complaint is characterised more precisely by the facts of which the applicant complains through legal argument.

138. Relying in particular on Article 32 of the Convention, the Convention organs take a broad approach to their jurisdiction in respect of a complaint: exclusive in law, it may pertain to the interpretation of the facts to the extent that they are closely linked to the complaint and to the legal analysis. However, to create a dispute or take on board facts that have no bearing on the complaints would be overstepping their jurisdiction.

The precise legal characterisation of the facts submitted by the parties falls within the exclusive remit of the Convention organs. They may assess the circumstances complained of by an applicant in relation to all the Convention requirements, and not only from the perspective of the parties.

They may give the facts a different legal characterisation to that given by the applicant or the Government and examine the complaint under other Convention provisions.

They may of their own motion decide on the elaboration of a complaint "*in substance*" and ultimately settle any disagreement as to the subject matter of the dispute.

In addition, the question of the facts declared admissible was interpreted quite broadly in a number of cases of the old Court.

Lastly, in some cases the Convention organs have ruled on facts which the applicants were not – or were no longer – complaining of in support of their complaint.

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