

*Kudeshkina v the Russian Federation (No.2)*

**Application No.28727/11**

---

**WRITTEN SUBMISSION ON BEHALF OF THE INTERNATIONAL COMMISSION  
OF JURISTS**

*pursuant to Article 36 § 2 of the European Convention on Human Rights and Rule 44 § 3 of the  
Rules of the European Court of Human Rights*

---

**I. INTRODUCTION**

**II. JURISDICTION OF THE COURT**

- A. Committee of Ministers supervision does not in itself restrict the jurisdiction of the Court
- B. Previously considered cases can be admissible where there is new information or facts
- C. Refusal to reopen proceedings is likely to be grounds for admissibility in cases concerning substantive rights

**III. THE RIGHT TO REPARATION FOLLOWING A JUDGMENT OF THE COURT**

- A. Obligation of effective remedy and reparation
  - 1. Obligation to provide reparation under international law
  - 2. Obligation of reparation in the ECHR system
    - a. States have an obligation to provide reparation for a violation of Convention rights
    - b. Means of reparation must be tailored to the particular violation and situation of the victim
- B. Restitution as a form of reparation following a judgment of the Court
  - 1. *Restitutio in integrum* is recognised in international law
  - 2. *Restitutio in integrum* is recognised in the Jurisprudence of the Court
- C. Reopening of proceedings is recognised as an important form of restitution
  - 1. In international law and practice
  - 2. In the Convention and jurisprudence of the Court

**IV. FREEDOM OF EXPRESSION AND THE JUDICIARY**

**V. CONCLUSIONS**

## I. INTRODUCTION

These written comments are submitted on behalf of the International Commission of Jurists (ICJ), pursuant to leave granted by the President of the First Section of the Court in accordance with Rule 44 § 3 of the Rules of Court. Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952 and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

This intervention analyses three questions relevant to the case before the Court. First, it considers the basis on which the Court can establish jurisdiction *rationae materiae* in a case which has previously been considered by the Court, in light of the guiding principle that the scrutiny of the Court, and protection of the Convention rights, must be effective in practice. Second, the intervention addresses the international law principle of reparation, and in particular rights of restitution. It considers how these principles inform the question of whether there is a new violation of a Convention right, in conjunction with Article 46 ECHR, following a decision of the domestic courts not to use powers available to them to reopen proceedings previously found by the Court to violate the Convention. Finally, the intervention sets out international standards on freedom of expression of the judiciary, relevant to the assessment of when an interference with such rights is necessary and proportionate to a legitimate aim, or amounts to a violation of the Convention.

## II. JURISDICTION OF THE COURT

Under Article 35.2.b, the Court does not have jurisdiction to adjudicate an application “that is substantially the same as a matter that has already been considered by the Court.” However, the jurisprudence of the Court affirms that an applicant may bring a new complaint before the Court following a first judgment, claiming that in the process of the execution of the judgment, in particular in the re-consideration of the case by the domestic court, he or she had suffered a new violation of rights protected under the Convention. This raises the question of the jurisdiction *ratione materiae* of the Court and therefore the admissibility of the new application. It particularly raises issues regarding the admissibility requirements of Article 35.2.b and regarding the respective roles of the Court and of the Committee of Ministers. In considering these questions, guiding principles are that the scrutiny of the Convention organs must be effective, and that the Court must be able to assert jurisdiction of the Court where necessary to give practical and effective protection to the Convention rights.<sup>1</sup>

### A. Committee of Ministers supervision does not in itself restrict the jurisdiction of the Court

The respective roles of the Committee of Ministers of the Council of Europe and the European Court of Human Rights as regards the execution of judgments following the finding of a violation of the rights guaranteed by the Convention are clearly established under Article 46.2-5 and 39.4 and by the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.<sup>2</sup> The supervision of the execution of the Court’s judgment by the respondent State is entirely the responsibility of the Committee of Ministers, which communicates with the Government and the injured party<sup>3</sup> to obtain information on the measures taken to redress the violation. In this respect, the function of the Court is limited to providing interpretation upon referral

---

<sup>1</sup> *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)*, no. 32772/02, June 30, 2009, paras.46, 67; *Bianchi v. Switzerland*, no. 7548/04, June 22, 2006, para. 84.

<sup>2</sup> Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, adopted by the Committee of Ministers on 10 May 2006 at the 964<sup>th</sup> meeting of the Ministers’ Deputies, in particular Rules 1, 6, 7, 8, 9, 16 and 17.

<sup>3</sup> *Ibid.*, Rule 9(1) on *Communications to the Committee of Ministers*. Rule 9(2) allows for “communications from non-governmental organizations, as well as national institutions for the promotion and protection of human rights”.

of such a question by the Committee of Ministers.<sup>4</sup> The Court has generally declined to examine a complaint which exclusively concerned compliance with one of its judgments, since it is the responsibility of the Committee of Ministers to verify whether a State has complied with obligations imposed on it by a judgment of the Court.<sup>5</sup>

The ongoing supervision of the Committee of Ministers, however, is not in itself a determinant factor in the assessment of the admissibility of a new application. The jurisdiction of the Court depends on the existence of new elements and on new issues raised that were not examined under the first application (see below).<sup>6</sup> A new violation can occur during the implementation of a judgment<sup>7</sup> and raise a “new issue” which will attract the competence of the Court.<sup>8</sup> Furthermore, the Court has consistently held that ultimately, pursuant to Article 32.2, “in the event of dispute as to whether the Court has jurisdiction, the Court shall decide”.<sup>9</sup>

In addition, the jurisprudence of the Court shows that the fact that the resolution of a situation is not final is not an obstacle to the jurisdiction of the Court.<sup>10</sup> Indeed, the Court has previously asserted jurisdiction while the Committee of Ministers had not even effectively initiated its review.<sup>11</sup>

### ***Committee of Ministers supervision should not lead to inadmissibility under the six-month rule***

In cases where the alleged new violation concerns the measures taken by a State in the post-judgment phase to afford redress, requiring the applicant to wait until the Committee of Ministers’ supervision is completed, in order to bring the new complaint, could risk the case being found inadmissible for failure to respect the six month rule, under Article 35.1 of the Convention. Were the Court not to be competent to assert jurisdiction in such cases, then they would risk escaping effective scrutiny under the Convention.<sup>12</sup> **In order to effectively fulfil its role in such cases, therefore, the jurisdiction *ratione materiae* of the Court should be interpreted so as to allow for cases that have reached *res judicata* to be admissible, irrespective of the on-going supervision of the Committee of Ministers, where there is a risk that a fresh violation could escape scrutiny under the requirements provided for under Article 35.1 of the Convention.** This reflects the principle that the Convention is intended to guarantee rights that are not theoretical and illusory but practical and effective.<sup>13</sup>

### **B. Previously considered cases can be admissible where there is new information or facts**

The criteria for the admissibility *ratione materiae* of an application as provided for under Article 35.2.b of the Convention<sup>14</sup> provide that an application is to be declared inadmissible if it is substantially the same as a matter that has already been examined by the Court and contains no relevant new information. The formulation “substantially the same” is to be understood as the same complaint, brought by the same person and on the same facts.<sup>15</sup> The Court has, however, considered applications which relate to the same facts as a previous application if the applicant submits new

---

<sup>4</sup> Ibid., Rule 10 on *Referral to the Court for interpretation of a judgment*.

<sup>5</sup> *Mehemi v. France (no. 2)*, no. 53470/99, April 10, 2003, para. 43; *Schelling v. Austria*, no. 46128/07, September 16, 2010.

<sup>6</sup> *VgT v. Switzerland (no. 2)*, op. cit. footnote 1, para. 62; *Steck-Risch and Others v. Lichtenstein*, no. 29061/08, May 11, 2010; *Kafkaris v. Cyprus*, 9644/09, June 21, 2011, para.75; *Schelling v. Austria*, op. cit. footnote 4; *Mehemi v. France (no. 2)*, op. cit. footnote 4, para. 43.

<sup>7</sup> *Lyons and Others v. the United Kingdom*, no. 15227/03, July 8, 2003; *Kafkaris v. Cyprus*, op. cit. footnote 5, para. 75.

<sup>8</sup> *Kafkaris v. Cyprus*, op. cit. footnote 5, para. 75.

<sup>9</sup> *Emre v. Switzerland (no. 2)*, no. 5056/10, October 11, 2011, para. 39; *VgT v. Switzerland (no. 2)*, op. cit. footnote 5, para. 66.

<sup>10</sup> *Mehemi v. France (no. 2)*, op. cit., footnote 4; *Emre v. Switzerland (no. 2)*, op. cit. footnote 8.

<sup>11</sup> *Emre v. Switzerland (no. 2)*, op. cit. footnote 8, para. 42.

<sup>12</sup> *VgT v. Switzerland (no. 2)*, op. cit. footnote 5, para. 67.

<sup>13</sup> *VgT v. Switzerland (no. 2)*, op. cit. footnote 5, para.46; *Artico v. Italy*, no. 6694/74, May 13, 1980, para. 33; *Bianchi v. Switzerland*, op. cit. footnote 1, para. 84.

<sup>14</sup> Article 35.2.b states “The Court shall not deal with any application submitted under Article 34 that ... is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.”

<sup>15</sup> *VgT v. Switzerland (no. 2)*, op. cit. footnote 5, para. 63.

information that has not been examined by the Court, while rejecting applications that are directed only to supporting a previous complaint with new legal arguments.<sup>16</sup>

Whether the Court is competent *ratione materiae* therefore depends on whether the application “contains relevant new information possibly entailing a fresh violation” or whether “it concerns only the execution of initial application without raising any new facts”.<sup>17</sup> Through its jurisprudence, the Court has provided examples of elements constituting relevant new information,<sup>18</sup> as well as examples of facts that were not considered to be “relevant new grounds capable of giving rise to a fresh violation”.<sup>19</sup> For instance, in the *VgT (No.2)* case, the Court found that the dismissal by the Federal Court of the request to reopen proceedings was based on new grounds, and therefore that its refusal to grant permission to broadcast the contentious commercial at issue in the case was capable of giving rise to a fresh violation of Article 10 ECHR.<sup>20</sup> In the *Emre* case, the Court found that new facts arose because the domestic tribunal considering re-opening of the case had not examined all the arguments of the Court and only sought to redress the violation by addressing one aspect of the Court’s judgment - the permanent nature of the applicant’s expulsion. This new element was found to be capable of giving rise to a fresh violation of Article 8, and the Court ultimately found a violation of Article 8 in conjunction with Article 46 ECHR.<sup>21</sup>

Therefore, jurisdiction in accordance with Article 35.2.b can be established where the domestic courts, in reconsidering a case following a judgment of the Court, rely on new grounds,<sup>22</sup> or where they apply an analysis of the Convention principles or jurisprudence that diverges widely from that applied by the Court in finding a violation in the initial case.<sup>23</sup> **Such new elements, which change the nature or quality of the situation of the applicant are sufficient to be capable of leading to a new violation and therefore to allow for the admissibility of a new application under Article 35.2.b.**

**Similarly, it is submitted that a decision by a domestic court of final appeal not to apply available domestic procedures to reopen a decision found by the Court to violate the Convention, changes the nature of the applicant’s situation and is therefore capable of leading to a new violation of Convention rights, in the absence of any other form of effective redress in the domestic system. This is particularly the case where the decision of the domestic courts either disregards the judgment of the Court in whole or in part,<sup>24</sup> or applies a different analysis of the Convention rights to that applied by the Court in its initial judgment. In such cases, the domestic system is no longer capable of affording practical and effective redress to the applicant for the violation at issue. This change in the applicant’s situation is capable of leading to a new violation of a substantive Convention right (such as Article 10 ECHR) in conjunction with Article 46 ECHR.**

### **C. Refusal to reopen proceedings is likely to be grounds for admissibility in cases concerning substantive rights**

While there is no automatic right to have proceedings re-opened, refusal to re-open proceedings is more likely to be capable of leading to a fresh violation where substantive Convention rights, rather than procedural rights under Article 6, are at issue. The Court has underlined this difference in the

---

<sup>16</sup> *Kafkaris v. Cyprus*, op. cit. footnote 5, para. 68.

<sup>17</sup> *Steck-Risch and Others v. Lichtenstein*, op. cit. footnote 5;

<sup>18</sup> *Mehemi v. France (no. 2)*, op. cit. footnote 4, para. 44; *Emre v. Switzerland (no. 2)*, op. cit. footnote 8, para. 41-44 ; *VgT v. Switzerland (no. 2)*, op. cit. footnote 5, para. 67-68; *Steck-Risch and Others v. Lichtenstein*, op. cit. footnote 5;

<sup>19</sup> *Steck-Risch and Others v. Lichtenstein*, op. cit. footnote 5; *Kafkaris v. Cyprus*, op. cit. footnote 5, para. 59, 70, 76; *Schelling v. Austria*, op. cit. footnote 4;

<sup>20</sup> *VgT v. Switzerland (no. 2)*, op. cit. footnote 5, para. 65.

<sup>21</sup> *Emre v. Switzerland (no. 2)*, op. cit. footnote 8, para. 41-43, para. 72-77.

<sup>22</sup> *VgT v. Switzerland (no. 2)*, op. cit. footnote 5, para.65; *Steck-Risch and Others v. Lichtenstein*, op. cit. footnote 5: distinction made between the instant case and the *VgT* case.

<sup>23</sup> *Emre v. Switzerland (no. 2)*, op. cit. footnote 8, para.41.

<sup>24</sup> *Emre v. Switzerland (no. 2)*, op. cit. footnote 8.

*VgT (no. 2)* case,<sup>25</sup> where it distinguished the reopening of proceedings found to be in breach of Article 6, with proceedings that concerned substantive rights such as rights under Article 10 ECHR, and found a fresh violation of Article 10.

Applications claiming a fresh violation of Article 6 in conjunction with Article 46 have on occasion been found inadmissible because of the difficulty in speculating on the outcome of the proceedings, had the proceedings been in conformity with the requirements of Article 6. In other words, reopening the proceedings at the domestic level did not appear to be necessary to redress the violation, as there was no reason to believe that the review of the case domestically would change its outcome.<sup>26</sup>

**By contrast, in cases of violation of a substantive Convention right, re-opening of the proceedings will often be capable of substantially changing the situation of the applicant and of redressing the initial violation found by the Court. If re-opening of the proceedings is refused, then in the absence of other means of adequate redress within the national system, the initial violation of the applicant's rights will be compounded.**

### III. THE RIGHT TO REPARATION FOLLOWING A JUDGMENT OF THE COURT

The question of whether a decision denying the reopening of proceedings following a judgement of the Court, amounts to a new violation of Convention rights, is in part a question of whether the right to reparation for that violation has been adequately met. International law principles on the right to reparation, and in particular the right to restitution, are therefore relevant to an assessment of whether there is a fresh violation of the Convention rights in such circumstances.

#### A. Obligation of effective remedy and reparation

##### 1. Obligation to provide reparation under international law

The obligation of reparation is a well-established general principle of international law. It is notably affirmed by the Permanent Court of International Justice in the *Factory at Chorzow* case, which described the obligation of reparation in international law as follows:

It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself. Differences relating to reparations, which may be due by reason of failure to apply a convention, are consequently differences relating to its application.<sup>27</sup>

The *ILC Articles on the Responsibility of States for Internationally Wrongful Acts* affirm the obligation of reparation for an internationally wrongful act.<sup>28</sup> They provide that “full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination...” The recognition in international human rights law that individuals have a right to an effective remedy and reparations for violation of their human rights is a particularised application of these principles, originally developed in the context of Inter-State responsibility. The obligation of states to make reparation to individuals for violations their human

---

<sup>25</sup> *VgT v. Switzerland (no. 2)*, op. cit. footnote 5, para. 46 (citing the Chamber judgment *VgT v. Switzerland*, no. 24699/94 of June 28, 2001, para.52).

<sup>26</sup> *Schelling v. Austria*, op. cit. footnote 4; *Steck-Risch and Others v. Lichtenstein*, op. cit. footnote 5; *Lyons and Others v. the United Kingdom*, op. cit. footnote 6.

<sup>27</sup> *Factory at Chorzow (Germ. v. Pol.)*, 1927 P.C.I.J. (ser. A) No. 9 (July 26), para.55; Cited in “Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C. J. Reports 1949, p. 174”. See also, International Court of Justice, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* 2005 ICJ 116,82 § 259, 19 December 2005.

<sup>28</sup> Articles of the International Law Commission on responsibility of states for Internationally Wrongful Acts [ILC Articles on the Responsibility of States for Internationally Wrongful Acts], reproduced in *Official Records of the General Assembly*, 56<sup>th</sup> Session, Supplement No. 10 (A/56/10), Article 31.

rights is affirmed by a range of international instruments<sup>29</sup> and jurisprudence.<sup>30</sup> In particular, the *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law*, adopted by consensus of all states in the UN General Assembly, affirm that the right to reparation includes “restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.”<sup>31</sup>

## 2. Obligations of remedy and reparation in the ECHR system

### a. States have an obligation to provide reparation for a violation of Convention rights

Within the framework of the Council of Europe, the right to reparation is provided for under the European Convention on Human Rights<sup>32</sup> as well as under other international legal instruments<sup>33</sup>. Under the ECHR, it finds general expression in the right to an effective remedy in Article 13 ECHR, which requires a remedy for violation of the Convention rights that is effective in practice as well as in law and that its exercise must not be unduly hindered by the acts or omissions of state authorities.<sup>34</sup> Most importantly, it is expressed through the system of international protection established in Part II of the Convention, and in particular in Article 46.1, establishing the binding nature of Court judgments on State Parties, and Article 41, providing for just satisfaction to be awarded by the Court if the law of the State concerned “allows only partial reparation to be made”. Together, Articles 46 and 41 provide the framework for measures of reparation following a judgment of the Court. The Court itself, but also other organs of the Council of Europe such as the Parliamentary Assembly (PACE)<sup>35</sup> and the Committee of Ministers<sup>36</sup>, have stressed the positive obligations that States have to abide by the Court’s judgments, binding under Article 46.1, in such a way as to put an end to the violation.<sup>37</sup> In so doing they have referred to the principles established by the ILC Articles on the Responsibility of States.<sup>38</sup>

---

<sup>29</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 2 (3), Article 9 (5), Article 14 (6); UN General Assembly, *International Convention for the Protection of All Persons from Enforced Disappearance*, 20 December 2006, Article 24.5; UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, Article 39; UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, Article 14; UN General Assembly, *Rome Statute of the International Criminal Court (last amended January 2002)*, 17 July 1998, A/CONF. 183/9, Article 75; UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, Article 6; Human Rights Committee, *General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13; *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, Article 63; UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law: resolution / adopted by the General Assembly*, 21 March 2006, A/RES/60/147, in particular Principles 15 to 24; *UN Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, Commission on Human Rights, Sixty-first session, February 8, 2005, E/CN.4/2005/102/Add.1, Principles 31 to 34; UN General Assembly, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power : resolution / adopted by the General Assembly*, 29 November 1985, A/RES/40/34, Principles 8 to 13.

<sup>30</sup> *Inter-Am.Ct.H.R., Velásquez Rodríguez Case, Compensatory Damages, Judgment of July 21, 1989, (Art. 63(1) American Convention on Human Rights), Series C No. 7, paras. 25-30).*

<sup>31</sup> *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation*, op. cit. footnote 28, Principle 18.

<sup>32</sup> *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, ETS 5, Article 5(5), Article 13, Article 41.

<sup>33</sup> *Council of Europe Convention on Action Against Trafficking in Human Beings*, 16 May 2005, CETS 197, Article 15; *European Convention on the Compensation of Victims of Violent Crimes*, 24 November 1983, CETS 116; Council of Europe, *Guidelines and reference texts on eradicating impunity for serious human rights violations*, XVI – Reparation.

<sup>34</sup> *Aksoy v. Turkey*, no.21987/93, December 18, 1996, para.95; *Aydin v. Turkey*, no.23178/94, September 25, 1997, para.103.

<sup>35</sup> PACE, *Report on the Execution of judgments of the European Court of Human Rights*, Doc. 8808, 12 July 2000, para. 35; PACE, *Resolution 1411(2004) on the Implementation of decisions of the European Court of Human Rights*, 23 November 2004; PACE, *Resolution 1684(2004) on the implementation of decisions of the European Court of Human Rights*, 23 November 2004.

<sup>36</sup> Recommendation No. R(2000)2 of the Committee of Ministers to member states on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights, January 19, 2000; Recommendation Rec(2006)8 of the Committee of Ministers on assistance to crime victims, adopted on June 14, 2006 at the 967th meeting of the Ministers’ Deputies.

<sup>37</sup> *Papamichalopoulos and Others v. Greece (former Article 50)*, no. 14556/89, October 31, 1995, para. 34; *Scozzari and Giunta v. Italy*, nos. 39221/98 and 41963/98, July 13, 2000, para. 249; *Kafkaris v. Cyprus*, op. cit. footnote 5, para. 73; *Mehemi v. France (no. 2)*, op. cit. footnote 4, para. 43; *Emre v. Switzerland (no. 2)*, op. cit. footnote 8, para. 69.

<sup>38</sup> *VgT v. Switzerland (no. 2)*, op. cit. footnote 5, para.86.

**b. Means of reparation must be tailored to the particular violation and situation of the victim**

While Contracting Parties have an obligation to execute the Court's judgments under Article 46.1, it follows from the declaratory nature of the Court's judgments<sup>39</sup> that a State retains substantial discretion to choose the means by which it will redress the violation.<sup>40</sup> However, "such means [must be] compatible with the conclusions set out in the Court's judgment".<sup>41</sup> In determining whether a measure of implementation, such as re-opening of proceedings, gives rise to a fresh violation of the Convention, it is relevant to consider whether the measure is in conformity with the conclusion and the spirit of the Court's judgment.<sup>42</sup> The Court can indicate "to a respondent State the type of measures that might be taken to put an end to the situation"<sup>43</sup>, and in exceptional circumstances can even order a specific individual measure, where the violation of the Convention rights found in the case "does not leave any real choice as to the measures required to remedy it".<sup>44</sup> Under general international law, the most appropriate forms of reparation must be granted according to the individual circumstances of the case. These may include, for example, measures of cessation, non-repetition, as well as measures of restitution.<sup>45</sup>

Thus, **notwithstanding the Contracting Parties' discretion as to the manner of execution of a judgment, the means to afford redress must be compatible with the conclusions of the Court<sup>46</sup> and more generally with the Convention.** This restriction is therefore related to the requirement that the Convention be implemented in good faith,<sup>47</sup> itself derived from the principle of *pacta sunt servanda*.<sup>48</sup>

**B. Restitution as a form of reparation following a judgment of the Court**

**1. *Restitutio in integrum* is recognised in international law**

*Restitutio in integrum* is expressly recognised by international law as an essential form of reparation.<sup>49</sup> Restitution is defined in the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts, under Article 35, as the obligation "to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution: (a) is not materially impossible; (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation."<sup>50</sup> The *UN Basic Principles and Guidelines on the right to a remedy and reparations* reaffirm this obligation in the context of international human rights law: "restitution should, wherever possible, restore the victim to the original situation before the violations of

<sup>39</sup> *VgT v. Switzerland (no. 2)*, op. cit. footnote 5, para. 61; *Marckx v. Belgium*, no. 6833/74, June 13, 1979, para.58; *Lyons and Others v. the United Kingdom*, op. cit. footnote 6; *Kafkaris v. Cyprus*, op. cit. footnote 5, para. 73.

<sup>40</sup> *Lyons and Others v. the United Kingdom*, op. cit. footnote 6.

<sup>41</sup> *Scozzari and Giunta v. Italy*, op. cit. footnote 36, para. 249; *Lyons and Others v. the United Kingdom*, op. cit. footnote 6; *Schelling v. Austria*, op. cit. footnote 4; *Steck-Risch and Others v. Lichtenstein*, op. cit. footnote 5.

<sup>42</sup> *Emre v. Switzerland (no. 2)*, op. cit. footnote 8, para. 68.

<sup>43</sup> *VgT v. Switzerland (no. 2)*, op. cit. footnote 5, para. 88.

<sup>44</sup> *Assanidze v. Georgia*, no. 71503/01, April 8, 2004, para. 202-203; *Steck-Risch and Others v. Lichtenstein*, op. cit. footnote 5.

<sup>45</sup> ILC Articles on the Responsibility of States for Internationally Wrongful Acts, op. cit. footnote 27, Article 31; UN *Basic Principles and Guidelines on the Right to a Remedy and Reparation*, op. cit. footnote 28, principles 18, 19, 23.

<sup>46</sup> *Scozzari and Giunta v. Italy*, op. cit. footnote 36, para. 249; *Mehemi v. France (no. 2)*, op. cit. footnote 4, para. 43.

<sup>47</sup> *Emre v. Switzerland (no. 2)*, op. it. footnote 8, para.75.

<sup>48</sup> United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, Article 26 – "*Pacta sunt servanda*".

<sup>49</sup> ILC Articles on the Responsibility of States for Internationally Wrongful Acts, op. cit. footnote 27; UN General Assembly, *International Convention for the Protection of All Persons from Enforced Disappearance*, 20 December 2006, Article 24.5; *Rome Statute of the International Criminal*, op. cit. footnote 28, Article 75; Human Rights Committee, *General Comment No. 31*, op. cit. footnote 28; *American Convention on Human Rights, "Pact of San Jose"*, *Costa Rica*, 22 November 1969, Article 63(1); UN *Basic Principles and Guidelines on the Right to a Remedy and Reparation*, op. cit. footnote 28, Principles 18-19; *UN Set of principles for the protection and promotion of human rights through action to combat impunity*, op. cit. footnote 28, Principle 34; *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, op. cit. footnote 28, Principles 8-10; Report by the Special Rapporteur on Torture, *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Forty-fifth session, E/CN.4/Sub.2/1993/8, 2 July 1993.

<sup>50</sup> ILC Articles on the Responsibility of States for Internationally Wrongful Acts, op. cit. footnote 27.

international human rights or humanitarian law occurred.”<sup>51</sup> These principles are reflected in several Council of Europe instruments, which explicitly refer to restitution as a form of reparation.<sup>52</sup> As to the forms which reparation may take, the *UN Basic Principles and Guidelines* state that “[r]estitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, **restoration of employment** and return of property.” The UN Human Rights Committee,<sup>53</sup> as well as the Inter-American Court of Human Rights<sup>54</sup> and the African Commission on Human and People’s Rights,<sup>55</sup> have held that state authorities should, in appropriate cases, ensure restoration of employment as a means of reparation.

The jurisprudence of international and regional courts has also confirmed that restitution is the form of reparation that should be sought as a priority, in order to “wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.”<sup>56</sup> The Inter-American Court in particular has stated in this respect that “[r]eparation of harm brought about by the violation of an international obligation consists in full restitution (*restitutio in integrum*), which includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm.”<sup>57</sup>

## 2. *Restitutio in integrum* is recognised in the Jurisprudence of the Court

While the ECHR does not expressly provide for the right to restitution, the Court has asserted the principle of *restitutio in integrum* through its jurisprudence and described it as “the ideal form of reparation in international law.”<sup>58</sup> Recalling that the respondent States are “in principle free to choose the means whereby they will comply with a judgment in which the Court has found a breach”, it states nonetheless that “[i]f the nature of the breach allows of *restitutio in integrum*, it is for the respondent State to effect it, the Court having neither the power nor the practical possibility of doing so itself”.<sup>59</sup> The Court has recognised the obligation of states, under Article 46.1, to take measures “the aim being to put the applicant, as far as possible, in the position he would have been in had the requirements of the Convention not been disregarded.”<sup>60</sup> Thus the State’s obligation under Article 46.1 is first to provide restitution, and only where this is not possible, to have resort to other forms of reparation.

Further, the Court has emphasised, in *Emre v France*, that a State’s obligations under Article 46.1 raise an expectation that it will take the measure of implementation that correspond most naturally with *restitutio in integrum* in the circumstances of the particular case.<sup>61</sup> The Court considered that, given the State’s obligation to execute judgments effectively and in good faith and to respect of conclusions and the spirit of the Court’s judgment, any different measure of implementation would have to be justified through careful examination of the first judgment of the Court in the case.<sup>62</sup> **Failure to apply an effective means of restitution which is available in the national legal system, therefore, may amount to a new violation of the Convention right at issue, in light of the**

---

<sup>51</sup> UN *Basic Principles and Guidelines on the Right to a Remedy and Reparation*, op. cit. footnote 28, Principle 19; The Commentary to Article 35, para.5, of the ILC Articles notes that “restitution may take the form of material restoration.... Or the reversal of some judicial act, or some combination of them”.

<sup>52</sup> *European Convention on the Compensation of Victims of Violent Crimes*, 24 November 1983, CETS 116; Council of Europe, *Guidelines and reference texts on eradicating impunity for serious human rights violations*, XVI – Reparation; Recommendation No. R(2000)2, op. cit. footnote 35.

<sup>53</sup> *Félix Enrique Chira Vargas-Machhuca v Peru*, views of 26 July 2002, CCPR/C/75/D/906/2000, para.9; *Busyo v Democratic Republic of the Congo*, Views of 9 August 2003, CCPR/C/78/D/933/2000

<sup>54</sup> *Baena Ricardo et al v Panama*, Judgment of 2 February 2001, Series C No.72, para.2003

<sup>55</sup> *Malawi African Association et al v Mauritania*, Com 54/91, 61/91, 98/93, 164/97, 196/97, 210/98 (27th Ordinary Session, May 2000)

<sup>56</sup> *Factory at Chorzow (Germ. v. Pol.)*, 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13), para. 125; ILC Articles op. cit., Commentary on Article 35, para.3: “[restitution] comes first among the many forms of reparation.” Commentary on Article 35, para.6: the Commentary notes that the primacy of restitution is of particular importance where the obligation breached is of a continuing character.

<sup>57</sup> *Velásquez Rodríguez Case*, op. cit. footnote 29, para. 194

<sup>58</sup> *VgT v. Switzerland (no.2)*, op. cit. footnote 5, para. 46.

<sup>59</sup> *Papamichalopoulos and Others v. Greece*, op. cit. footnote 36, para. 34; *Brumarescu v. Romania*, no. 28342/95, January 23, 2001.

<sup>60</sup> *VgT v. Switzerland (no.2)*, op. cit. footnote 5, para. 85; *Emre v. Switzerland*, op. cit. footnote 8, para. 69.

<sup>61</sup> *Emre v. Switzerland*, op. cit. footnote 8, para. 77.

<sup>62</sup> *Emre v. Switzerland*, op. cit., footnote 8, para. 75-76.



**obligation to execute the Court’s judgment effectively, under Article 46.1.** This reflects the general principle that “the Convention must be read as a whole” and that the question of whether there has been a fresh violation of a substantive Convention right, must take into account the need for effective execution of judgments under Article 46 ECHR.<sup>63</sup>

### **C. Reopening of proceedings is recognised as an important form of restitution**

#### **1. In international law and practice**

When seeking an effective implementation of the *restitutio in integrum* principle, a range of international tribunals has recognised that the reopening of the proceedings at the domestic level following the finding of a breach of international law can be an important and even a necessary measure. Reopening of proceedings found to have violated the right to fair trial or other human rights treaty guarantees has thus been prescribed by the UN Human Rights Committee,<sup>64</sup> the Inter-American Court,<sup>65</sup> the Inter-American Commission on Human Rights,<sup>66</sup> and the African Commission on Human and People’s Rights.<sup>67</sup> The International Court of Justice has identified an obligation to review, through judicial proceedings, criminal convictions found to violate the State’s international law obligations.<sup>68</sup> In the *Avena and other Mexican Nationals* case, it emphasised that the review and reconsideration had to take into account the violations identified, including “the question of the legal consequences of the violation upon the criminal proceedings that have followed the violation.”<sup>69</sup>

#### **2. In the Convention and jurisprudence of the Court**

A domestic court’s refusal to reopen proceedings falls to be addressed under Article 46.1 ECHR in conjunction with the Convention right in issue, since it is established that there is no right to reopen proceedings under Article 6 ECHR.<sup>70</sup> Further, the Court has considered that the Convention does not give it jurisdiction to direct a State to open a new trial or to quash a conviction<sup>71</sup> and that where domestic laws on reopening proceedings exist and are not at variance with Article 46, a refusal to reopen proceedings resulting from the proper application of such laws is not a violation of Article 46.<sup>72</sup> So, for example, it has been held that a refusal to re-open proceedings, based on domestic law provision that proceedings could only be re-opened where there was a possibility that a re-hearing would lead to a different outcome, was in compliance with Article 46.<sup>73</sup> It is a crucial condition, however, that the reopening procedure and its application in practice must be effective. In *VgT (No.2)*, the Grand Chamber held that: “the reopening procedure must also afford the authorities of the respondent State the opportunity to abide by the conclusions and the spirit of the Court judgment being executed, while complying with the procedural safeguards in the Convention.”<sup>74</sup> Thus it is recognised that reopening of proceedings is not an end but a means to fully and properly execute a judgment.<sup>75</sup>

---

<sup>63</sup> *VgT v. Switzerland (no.2)*, op. cit. footnote 5, para. 83; *Emre v. Switzerland*, op. cit. footnote 8, para. 66.

<sup>64</sup> Case *Raul Sendic Antonaccio v. Uruguay*, Views of 28 October 1981, CCPR/C/14/D/63/1979, para. 21; Case *Polay Campos v. Peru*, Views of 9 January 1998, CCPR/C/61/D/577/1994, para. 10; Case *Semey v. Spain*, Views of 21 August 2003, CCPR/C/78/986/2001, para 9.2.

<sup>65</sup> Inter-Am.Ct.H.R., *Castillo Petruzzi et al* case, Judgment of 30 May 1999, series C No.52, para.217-221.

<sup>66</sup> Report No. 127/01, Case 12.183, *Joseph Thomas* (Jamaica), 3 December 2001, para 153 (1) [right to a remedy, including re-trial or release]; Report No. 52/02, Merit s, Case 11.753, *Ramón Martínez Villareal* (United States), 10 October 2002, para 101 (1) [ *idem*].

<sup>67</sup> Case *Civil Liberties Organisation v. Nigeria*, Communication 151/96(26<sup>th</sup> Ordinary session, Nov 1999); Case *Media Rights Agenda v. Nigeria*, Communication 224/98 (28<sup>th</sup> Ordinary session, Nov 2000) para.62.

<sup>68</sup> *LaGrand case (Germany v the United States)* Judgment of 27 June 2001, ICJ reports 2001, para.125; *Avena and other Mexican Nationals (Mexico v United States of America)*, Judgment of 31 March 2004, para 131 and 140.

<sup>69</sup> *Avena and other Mexican Nationals*, op. cit. footnote 63, para 131 and 140.

<sup>70</sup> *Schelling v. Austria*, op. cit. footnote 4; *Steck-Risch and Others v. Lichtenstein*, op. cit. footnote 5.

<sup>71</sup> *Lyons and Others v. the United Kingdom*, op. cit. footnote 6.

<sup>72</sup> *Schelling v. Austria*, op. cit. footnote 4.

<sup>73</sup> *Ibid.*

<sup>74</sup> *VgT v. Switzerland (no. 2)*, op. cit. footnote 5, para.90.

<sup>75</sup> *Ibid.*, para. 90.

It should further be noted that the Committee of Ministers, in recommendations approved by the Court, has indicated that “in exceptional circumstances the re-examination of a case or a reopening of proceedings has proved the most efficient, if not the only, means of achieving *restitutio in integrum*.”<sup>76</sup> The Court has stated, for example, that “[w]here the Court finds that an applicant was convicted by a tribunal which was not independent and impartial within the meaning of Article 6 § 1, it considers that, in principle, the most appropriate form of relief would be to ensure that the applicant is granted in due course a retrial by an independent and impartial tribunal.”<sup>77</sup>

In its recommendation on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights, the Committee of Ministers encouraged Contracting Parties to provide for the possibility to re-examine a case and to reopen proceedings “in instances where the Court has found a violation of the Convention, especially where (i) the injured party continues to suffer very serious negative consequences because of the outcome of the domestic decision at issue, which are not adequately remedied by the just satisfaction and cannot be rectified except by re-examination or reopening, and (ii) the judgment of the Court leads to the conclusion that (a.) the impugned domestic decision is on the merits contrary to the Convention.”<sup>78</sup> In these exceptional circumstances, “the objectives of securing the rights of the individual and the effective implementation of the Court’s judgments prevail over the principles of *res judicata*.”<sup>79</sup> Moreover, the Court has stressed the importance of having review procedures available,<sup>80</sup> and insisted on such procedures being able to “afford effective and practical redress to a violation”.<sup>81</sup> In addition, the PACE has adopted resolutions and recommendation urging a State to implement the decisions of the Court, notably by allowing the reopening of the proceedings.<sup>82</sup>

**Where re-opening of proceedings is available in national law, a new violation of a Convention right in conjunction with Article 46 may arise where the process is not effective, in law or in practice, to provide restitution for the violation of the Convention previously found by the Court.**

#### IV. FREEDOM OF EXPRESSION AND THE JUDICIARY

An assessment of whether there is a new violation of the Convention following a refusal to re-open proceedings, requires, in cases where rights under Articles 8-11 ECHR are in issue, assessment of whether the interference is prescribed by law, and of the necessity and proportionality of the interference with those rights, in light of obligations of the State under Article 46.<sup>83</sup>

In this assessment, it is critical to note the particular interests that are at stake, in cases that concern freedom of expression of the judiciary. International standards on the judiciary recognise that impartiality and independence of the judiciary require that judges, both as professionals and as individuals, are entitled to freedom of thought, speech, expression.<sup>84</sup> In particular it is important that judges participate in debates concerning their functions and status as well as general legal debates.<sup>85</sup> Having a right and even a duty to speak about the issues and problems of the judiciary, judges

<sup>76</sup> Recommendation No. R/(2000)2, op. cit. footnote 35; *VgT v. Switzerland (no. 2)*, op. cit. footnote 5, para. 33 and 89; *Schelling v. Austria*, op. cit. footnote 4; *Steck-Risch and Others v. Lichtenstein*, op. cit. footnote 5.

<sup>77</sup> *Üküñç and Günes v. Turkey*, no. 42775/98, December 18, 2003, para 32; *Gençel v. Turkey*, no. 53431/99, October 23, 2003, para 27; *Somogyi v. Italy*, no. 67972/01, May 18, 2004, para 86; *Stoichkov v. Bulgaria*, no. 9808/02, March 24, 2005, para 81.

<sup>78</sup> Recommendation No. R/(2000)2, op. cit. footnote 35.

<sup>79</sup> Explanatory memorandum to the Recommendation No. R/(2000)2, para. 10.

<sup>80</sup> *Schelling v. Austria*, op. cit. footnote 4; *Lyons and Others v. the United Kingdom*, op. cit. footnote 6; *Steck-Risch and Others v. Lichtenstein*, op. cit. footnote 5.

<sup>81</sup> *VgT v. Switzerland (no. 2)*, op. cit. footnote 5, para. 46.

<sup>82</sup> PACE Resolution 1411(2004), op. cit. footnote 34; PACE Recommendation 1684(2004), op. cit. footnote 34.

<sup>83</sup> *Emre v. Switzerland (no. 2)*, op. cit. footnote 8, para.64; *Mehemi v. France (no. 2)*, op. cit. footnote 4.

<sup>84</sup> *Basic Principles on the Independence of the Judiciary*, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, Principle 8; Draft Universal Declaration on the Independence of Justice (“Singhvi Declaration”), E/CN.4/Sub.2/1985/18/Add.5/Rev.1.

<sup>85</sup> Promotion And Protection Of All Human Rights, Civil, Political, Economic, Social And Cultural Rights, Including The Right To Development Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy\*, A/HRC/11/41, 24 March 2009, para. 45.

themselves need be protected from improper interference from both within and outside the judiciary.<sup>86</sup> For this reason when the State has not discharged its obligation to respect the freedom of expression of judges, there is both a serious interference with Article 10 ECHR rights, and the independence and impartiality of judges are threatened. In particular, in a state where there are systemic problems of judicial independence, and where the domestic system in practice provides no possibility for effective restitution following a sanction that violates judicial freedom of expression, the impact of the interference with Article 10 rights on the individual, as well the chilling effect on the Article 10 rights of the judiciary as a whole, is particularly severe.

**The importance of the interests at stake where an interference with Article 10 rights affects judicial independence is a relevant factor to be taken into account in assessing the necessity and proportionality of an interference, and whether the denial of an appropriate measure of restitution leads to a fresh violation of Article 10 with Article 46 ECHR.**

## V. CONCLUSIONS

**Where a procedure for re-opening proceedings following a judgment of the Court exists at national level, the obligatory nature of Article 46 ECHR, and the importance of execution of judgments in good faith and in accordance with the letter and spirit of the judgment of the Court, therefore requires:**

- **that national law respects obligations of effective remedy and reparation, including restitution, for violations of Convention rights following a judgment of the Court under Article 46;**
- **that the national procedures are applied so as to provide practical and effective protection for the Convention rights;**
- **that the decision on whether to re-open proceedings is made on the basis of a proper analysis of the first judgment of the Court, and of Convention principles, and respects the reasoning and spirit of the Court's first judgment.**

**Where there has been a violation of a substantive rather than a procedural right, for which restitution could be achieved through new proceedings, the denial of such restitution through refusal to re-open proceedings is likely to lead to a fresh violation of the Convention rights, in accordance with Article 46. Where the Article 10 ECHR rights of members of the judiciary are concerned, the importance of the interests at stake means that there is a particularly heavy onus on the State to justify a denial of an appropriate means of restitution.**

---

<sup>86</sup> Ibid., para. 48.