Articles

Does Art. 18 ECHR grant protection against politically motivated criminal proceedings? –

Rethinking the interpretation of Art. 18 ECHR against the background of new jurisprudence of the European Court of Human Rights[1]

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This paper explores a range of issues regarding the application of Art. 18 ECHR to complaints concerning politically motivated criminal proceedings. In view of the pivotal role that provision may play in an application lodged within the European Court of Human Rights, an academic debate is of paramount importance. Accordingly, the objective of this paper is to draft a legal doctrine for Art. 18 ECHR. To this aim, the Court's decisions in the cases of Mikhail Khodorkovskiy and Platon Lebedev, Yulia Tymoshenko, Vladimir Gusinskiy, Mihail Cebotari, and Yuriy Lutsenko are critically assessed. Based on a scrutiny of its function and scope in the system of the Convention, it is subsequently examined whether Art. 18 ECHR bears the potential to develop into an autonomous guarantee not to be prosecuted for improper reasons.

I. Introduction

Over the last decade, the European Court of Human Rights (hereinafter: ECtHR) has been confronted with an increasing number of complaints alleging a violation of Art. 18 of the European Convention of Human Rights (hereinafter: ECHR). Under the heading "Limitation on use of restrictions on rights", the wording of this article states:

"The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

At first sight, the content of this article seems to be rather limited. Indeed, for a very long time it did not play a significant role, neither in the jurisprudence of the ECtHR nor in the literature on the Convention. In recent years, however, some

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very high profile cases invoked Art. 18 ECHR. In particular, the cases of Mikhail Khodorkovskiy[3]and Yulia Tymoshenko[4] enjoyed remarkable attention in the media. Furthermore, several lesser-known judgments were delivered which also made reference to Art. 18 ECHR. Mention should be made to the cases of Vladimir Gusinskiy[5], Mihail Cebotari[6] and Yuriy Lutsenko[7].

All these cases have in common that the respective applicant made serious allegations against his or her domestic judicial system. In the respective applicants' opinion, the criminal proceedings directed against them in their home countries were based on ulterior and directly or indirectly politically motivated reasons and thus allegedly resulted in a violation of Art. 18 ECHR.

As there was hardly any case law on the interpretation of Art. 18 ECHR, and as academic comments on this article were virtually inexistent, the ECtHR had to determine the contents of Art. 18 ECHR largely by itself and with little guidance by the academic community. As a consequence, the recent decisions by the ECtHR do not set out a clear and convincing position on the dogmatic classification of Art. 18 ECHR and the criteria applicable to it. Nevertheless, the questions raised in these cases are crucial ones: Is the Strasbourg Court competent to examine whether a particular criminal proceeding is wholly or partly driven by political motives, and, if so, does this amount to a human rights violation *per se* or in combination with other guarantees under the Convention?

In this essay, which is also intended as a contribution to the as of yet rather scarce literature on the subject of Art. 18 ECHR, we present the most relevant cases decided by the ECtHR and analyse its respective judgments in an effort to present a convincing and innovative scientific basis for an answer to the aforementioned questions.

II. Article 18 ECHR in the jurisprudence of the ECtHR: Transition from a merely auxiliary to an independent role

In the last century, very few cases even touched upon Art. 18 ECHR. Some of the better known are Kamma v. The Netherlands[8], Engel v. The Netherlands[9] or Handyside v. The United Kingdom[10], Sporrong and Lönnroth v. Sweden[11], Bozano v. France[12] and Oates v. Poland[13]. As the ECtHR did not develop a dogmatic concept going beyond necessities of the individual case, *Villiger* adequately describes

[3] Khodorkovskiy v. Russia, Application no. 5829/04, of 31 May 2011.
[4] Tymoshenko v. Ukraine, Application no. 49872/11, of 30 April 2013.
[5] Gusinskiy v. Russia, Application no. 70276/01, of 19 May 2004.
[6] Cebotari v. Moldava, Application no. 35615/06, of 13 November 2007.
[7] Lutsenko v. Ukraine, Application no. 6492/11, of 3 July 2012.
[8] Kamma v. Netherlands, Application no. 4771/71, of 14 July 1974.
[9] Engel and others v. Netherlands, Application 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, of 8 June 1976.
[10] Handyside v. United Kingdom, Application no. 5493/72, of 7 December 1976.
[11] Sporrong and Lönnroth v. Sweden, Application no. 7151/75; 7152/75, of 23 September 1982.
[12] Bozano v. France, Application no. 9990/82, of 18 December 1986.
[13] Oates v. Poland, Application 35036/97, of 11 May 2000.

the ECtHR's jurisprudence as convincing on a practical front, but not from a dogmatic point of view.[14] Consequently, the early jurisprudence is negligible for our analysis.[15]

Several of the judgments issued in the last decade regarding alleged violations of Art. 18 ECHR have, however, engaged with the Article in significantly more depth, and this more recent jurisprudence is of much higher relevance. In the majority of these cases, the applicants maintained that the criminal proceedings were *politically motivated*, i. e. used as a tool in order to achieve political aims and/or to destroy political opponents. There has been a substantial increase of complaints relying on Art. 18 ECHR. The reason for the higher "popularity" of the provision is not entirely clear, though several factors could play a role: First, the dissolution of the old Soviet Union was followed by an increasing number of new States Parties to the ECHR in Eastern Europe. Moreover, Protocol No. 11 to the ECHR entered into force, which brought about a simplification of the procedure and subsequently caused a surge in the workload of the ECtHR in general.[16] Furthermore, several (mostly) Eastern European States are still "young" democracies and thus suffer from certain democratic deficits. Despite considerable progress in these countries, it is striking that each of the cases to be discussed was directed against either Moldova, Ukraine or Russia. Finally, the success of some applications to the ECtHR could also explain the heightened sensibility towards the "illegality" of undue criminal proceedings and the growing number of persons willing to bring their case to the Strasbourg Court.

Whatever the decisive factor may be, a closer analysis of the treatment and interpretation of this provision by the Strasbourg judges seems to be overdue.

1. The case of Gusinskiy[17]

Vladimir Gusinskiy, a Russian and Israeli national, was both Chairman of the Board and a majority shareholder of Media Most, a private Russian media holding company.[18] In 2000, Media Most was involved in a dispute with Gazprom, a natural gas monopoly controlled by the Russian State, concerning Media Most's alleged debts to Gazprom. On 15 March 2000, a criminal investigation against Mr. Gusinskiy was opened concerning allegations of fraud.[19] On 13 June 2000, Mr. Gusinskiy, who had been abroad, returned to Russia to comply with a witness summons issued by the General Prosecutor's Office in relation to another criminal case. On arrival, he was arrested and imprisoned.[20] The order was based on the fact that the crime of

[14] Villiger, Handbuch der Europäischen Menschenrechtskonvention, 2th edition (1999), p. 466.

[15] Detailed information on this specific part of the jurisprudence with further references: Arai in: van Dijk (et alii), Theory and Practice of the European Convention on Human Rights, 4th edition (2006), pp. 1097 et seq.

[16] Protocol No. 11 available online at: http://conventions.coe.int/Treaty/en/Treaties/Html/155.htm, (14 May 2014).

[17] Gusinskiy v. Russia, Application no. 70276/01, of 19 May 2004.

[18] Gusinskiy v. Russia, para 9.

[19] Gusinskiy v. Russia, para 14.

[20] Gusinskiy v. Russia, paras 14 et seq.

fraud, of which Mr. Gusinskiy was suspected, constituted a serious public threat punishable by imprisonment alone, and that he might obstruct the establishment of the truth and attempt to elude the investigation and trial.[21] During the detention, the Acting Minister for Press and Mass Communications offered to drop the criminal charges against Mr. Gusinskiy if he were to agree to the sale of Media Most to Gazprom at a price to be determined by the latter. The agreement between Gazprom and Mr. Gusinskiy was signed on 20 July 2000.[22] Subsequently, the criminal prosecution was stopped and Mr. Gusinskiy was released.[23]

On 9 January 2001, Mr. Gusinskiy filed a complaint to the ECtHR, arguing, *inter alia*, that his imprisonment constituted an abuse of power because the authorities intended to force him to sell his business to Gazprom on unfavourable terms.[24]

In its decision, the Court first stated that there had been a violation of Art. 5 ECHR; the detention had been based on a Russian provision which was not "sufficiently accessible and precise" and thus not "in accordance with a procedure prescribed by law" (Article 5 § 1 ECHR) as interpreted by the Court.[25] The Court further considered the complaint under Art. 18 ECHR and repeated its former view[26]: *"Article 18 of the Convention does not have an autonomous role. It can only be applied in conjunction with other Articles […] a violation can only arise where the right or freedom concerned is subject to restrictions permitted under the Convention."*[27] In relation to the detention in question and the violation of Art. 5 ECHR, the Court then examined whether the detention was applied for any purpose other than bringing the accused before the legal authority.[28] The Court emphasised that it was not the purpose of criminal proceedings and detention to be used as part of commercial bargaining strategies. Since the facts strongly suggested that Mr. Gusinskiy's prosecution was used to intimidate him, the ECtHR found that the restriction of his liberty was applied not only for the purpose of bringing him before the legal authority on reasonable suspicion, but also for other reasons. According to the ECtHR, this could be concluded from the facts that representatives of Gazprom had asked Mr. Gusinskiy to sign the agreement while he was in prison, that a state minister endorsed this agreement with his signature, and that a state investigating officer implemented the agreement by dropping the charges against Mr. Gusinskiy.[29] As the Court had already affirmed a breach of Art. 5 ECHR,[30] the additional value of Art. 18 ECHR is indeed negligible. However, – in accordance with its earlier judgments[31] – the Court stated that*:*

[21] Gusinskiy v. Russia, para 16.
[22] Gusinskiy v. Russia, paras 27 et seq.
[23] Gusinskiy v. Russia, para 30.
[24] Gusinskiy v. Russia, paras 1, 70 et seqq.
[25] Cf. Amuur v. France, judgment of 25 June 1996, Reports 1996-III, pp. 850 et seq, § 50.
[26] With reference to Kamma v. the Netherlands, and Oates v. Poland.
[27] Gusinskiy v. Russia, para 73.
[28] Gusinskiy v. Russia, para 74.
[29] Gusinskiy v. Russia, paras 76 et seq.
[30] Gusinskiy v. Russia, paras 48 et seqq.
[31] Gusinskiy v. Russia, para 73.

"[t]here may […] be a violation of Article 18 in connection with another Article, although there is no violation of that Article taken alone."[32]

This means that, even if there had been a "*sufficiently accessible and precise*"[33] legal basis for the detention in Russian law, a violation of Art. 18 could have been found – but only "*in conjunction with Art. 5*".[34]

2. The case of Cebotari[35]

In 1997, Mihail Cebotari, a Moldovan engineer, was the head of a Moldovan state-owned power distribution company, Moldtranselectro. His company entered into an agreement for the importation of electricity with a number of companies, including a Moldovan private company called Oferta Plus. The complex agreement provided, *inter alia*, that Oferta Plus would make advance payments for the electricity supplied to Moldtranselectro, who would later pay it back. In March 1998, the Government of Moldova authorised the Ministry of Finance to issue nominative Treasury bonds in favour of private companies for the payment of debts arising from the importation of electricity supplied to state institutions. In March 1998, Mr. Cebotari – in his capacity as head of Moldtranselectro – applied for such a Treasury bond with a value of MDL 20,000,000 in favour of Oferta Plus. The Treasury bond was issued; it provided that Moldtranselectro had to submit to the Ministry of Finance documents proving the supply of electricity to state institutions. Oferta Plus presented the Treasury bond to the Ministry of Finance. However, the latter refused to pay, asserting that Moldtranselectro had failed to submit evidence concerning the payment by Oferta Plus for the imported electricity. After lengthy civil proceedings, the Supreme Court of Justice, on 7 February 2001, finally decided in favour of Oferta Plus.[36] On 13 April 2004, Oferta Plus filed an application to the ECtHR concerning the non-enforcement of this judgment.[37] Two weeks later, a Government Agent informed the Ministry of Finance of this application and requested it to "*take all the necessary steps in order to avoid a finding of a violation against the State by the Court, with the consequent impairment of the country's image*".[38]

In June 2004, the Ministry lodged a request for revision of the judgments in favour of Oferta Plus with the Plenary Supreme Court of Justice. Although the request did not specify any reasons for revision, it was successful in the end and the Supreme Court decided in favour of the Ministry.

On 19 October 2004, criminal proceedings were initiated against Oferta Plus and Mr. Cebotari on charges of large-scale embezzlement of state property. The Prosecutor General's Office maintained that Oferta Plus had not paid for electricity

[32] Gusinskiy v. Russia, para 73; see also Cebotari v. Moldava, para 49.
[33] Gusinskyi v. Russia, para 62.
[34] Gusinskiy v. Russia, para 78.
[35] Cebotari v. Moldava, Application no. 35615/06, of 13 November 2007.
[36] Cebotari v. Moldova, paras 13 et seq.
[37] Oferta Plus S.R.L. v. Moldova, Application no. 14385/04, of 19 December 2006.
[38] Oferta Plus v. Moldova, para 26.

supplied to state institutions. In particular, Mr. Cebotari was accused of having applied for the issuance of the Treasury bond knowing that the energy supplied to Moldtranselectro had not been consumed by state institutions.[39] On 9 August 2006, he was arrested.[40] While the official grounds for the arrest were, *inter alia*, the danger of influencing the investigation, Mr. Cebotari claimed that an investigator made it clear to him that his arrest or release depended on whether he would persuade Oferta Plus to withdraw the case before the ECHR.[41] Mr. Cebotari's complaint under Art. 18 ECHR (taken in conjunction with Art. 5 ECHR) was based on the assertion that his detention had been arbitrary and not motivated by the purposes prescribed in Article 5 § 1 (c) ECHR.[42]

In its decision, the Court repeated that Art. 18 ECHR does not have an autonomous role, that it is only applicable when taken in conjunction with other guarantees of the Convention and that there may be a violation of Article 18 ECHR in connection with another Article even if there is no violation of that Article taken alone. Furthermore, the Court referred to its reasoning in the Gusinskiy case, according to which a violation of Art. 18 ECHR can only occur where the right or freedom concerned is subject to restrictions permitted under the Convention.[43] Examining Art. 5 § 1 (c) ECHR first, the Court stressed that the words "*reasonable suspicion*" describe "*the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence*".[44] That a suspicion is held in good faith is, by contrast, not sufficient. Regarding the case before it, the Court – taking into account the civil courts' findings[45] – opined that the facts could not lead an objective observer to reasonably believe that Mr. Cebotari might have committed the offence imputed to him.[46] As a consequence, the Court concluded "*that the real aim of the criminal proceedings and of the applicant's arrest and detention was to put pressure on him with a view to hindering Oferta Plus from pursuing its application before the Court.*"[47] It therefore found "*that the restriction on the applicant's right to liberty was applied for a purpose other than the one prescribed in Article 5 § 1(c). On that account there has been a breach of Article 18 of the Convention taken in conjunction with Article 5 § 1.*"[48]

[39] Cebotari v. Moldova, para 31.
[40] Cebotari v. Moldova, paras 29 et seq.
[41] Cebotari v. Moldova, paras 32 et seq.
[42] Cebotari v. Moldova, paras 1, 47.
[43] Cebotari v. Moldova, para 49 with reference to Gusinskiy v. Russia, para 73.
[44] See Fox, Campbell and Hartley v. the United Kingdom, Application nos. 12244/86; 12245/86; 12383/86, of 30 August 1990, para 32.
[45] The Court ignored the rulings which followed the reopening of the proceedings on 12 July 2004, because the reopening of the procedure before the Supreme Court was – according to the Court's earlier finding – wrongful; see Oferta Plus, paras 138 et seq.
[46] Cebotari v. Moldava, para 48.
[47] Cebotari v. Moldova, para 53.
[48] Cebotari v. Moldova, para 53.

3. The cases of Khodorkovskiy and Lebedev[49]

a) The national criminal proceedings

Mikhail Khodorkovskiy was a very influential Russian businessman and one of the richest men in Russia during the 1990 s. He was board member as well as the major shareholder of Yukos, which became under his *aegis* the largest oil company in Russia.[50] Platon Lebedev, also a Russian national, was the former vice chairman of Yukos and acted as Mr. Khodorkovskiy's "right hand". Beside his business activities, Mr. Khodorkovskiy also engaged in Russian domestic politics and openly aligned himself with the opposition by financing opposition parties.[51] Not least because of his political involvement, he had a public disagreement with President Vladimir Putin.[52]

In 2003, the General Prosecutor's Office started a **– first – criminal investigation** into the business activities of Mr. Khodorkovskiy; he was charged with the fraudulent acquisition of firms during the mass privatisation of the 1990 s. Moreover, the General Prosecutor's Office included charges of large-scale tax evasion, mainly on the grounds that Yukos operated via trading companies which were registered in low-tax zones, regarded as "*sham companies*" by the prosecutor.[53] Mr. Khodorkovskiy and Mr. Lebedev were arrested in 2003.[54] On 31 May 2005, both were sentenced by the Meshchanskiy District Court for fraud and tax evasion to nine years' imprisonment in a regime correctional colony.[55]

In September 2005, the Moscow City Court confirmed the conviction but reduced the sentence by one year.[56] Meanwhile, in 2004, the Russian authorities had lodged a claim for tax arrears owed by Yukos. This ultimately led to the insolvency and bankruptcy of Yukos, which subsequently was forced to sell its assets and was liquidated on 12 November 2007.[57]

Simultaneously with the investigation based on the assumption of fraudulent acquisition of firms and tax evasion, the General Prosecutor's Office conducted a separate **– second – criminal investigation** into other matters related to the business activities of Yukos in 1998-2003. Mr. Khodorkovskiy and Mr. Lebedev were suspected of having embezzled profits arising from the output of the companies affiliated with Yukos. Furthermore, they were charged with money laundering. In this matter, Mr. Khodorkovskiy and Mr. Lebedev were found guilty on 27 December 2010 and were both sentenced to six additional years of imprisonment. The appellate court confirmed this second judgment on 24 May 2011 but reduced

[49] Khodorkovskiy v. Russia, Application no. 5829/04, of 31 May 2011; Khodorkovskiy and Lebedev v. Russia, Application nos. 11082/06 and 13772/05, 25 July 2013.
[50] Khodorkovskiy v. Russia, para 7; Khodorkovskiy and Lebedev v. Russia, para 8.
[51] Khodorkovskiy and Lebedev v. Russia, para 9.
[52] Khodorkovskiy and Lebedev v. Russia, para 366.
[53] Khodorkovskiy and Lebedev v. Russia, para 16.
[54] Khodorkovskiy and Lebedev v. Russia, paras 18, 26 et seqq.
[55] Khodorkovskiy and Lebedev v. Russia, paras 238, 276.
[56] Khodorkovskiy and Lebedev v. Russia, para 320.
[57] Khodorkovskiy and Lebedev v. Russia, para 18; for further details see: OAO Neftyanaya kompaniya Yukos v. Russia, Application no. 14902/04, of 20 September 2011.

the sentence by two years.[58] One year later, a Russian appeal court reduced the sentences by another two years due to a new legal statute in the Russian Criminal Code.[59] On 6 August 2013, the Russian Supreme Court once again reduced the sentence of Mr. Khodorkovskiy by two months.[60] In December 2013, Mr. Khodorkovskiy was pardoned by Russian President Vladimir Putin, and in January 2014, Mr. Lebedev's sentence was reduced by the Supreme Court so that he was released.

b) First application to and judgment of the ECtHR (Khodorkovskiy v. Russia, 31.5.2011)

Two complaints had been filed with the Court in relation to the aforementioned proceedings. The first application, lodged by Mr. Khodorkovskiy on 9 February 2004, mainly concerned the pre-trial stage.[61] He alleged that conditions in the remand prisons and in the court room during his trial were contrary to Article 3 ECHR, that his arrest and subsequent detention was contrary to Article 5 ECHR, and that the criminal proceedings against him were politically motivated and thus contrary to Article 18 ECHR. In its judgment the Court initially departed from its earlier statements[62] regarding the role and function of Art.18 ECHR:

"*The Court reiterates that it has already found that, at least in one respect, the authorities were driven by improper reasons. […] However, the applicant's claim under Article 18 is different from his grievances under Article 5. […] The Court reiterates that the whole structure of the Convention rests on the general assumption that public authorities in the member States act in good faith. Indeed, any public policy or an individual measure may have a "hidden agenda", and the presumption of good faith is rebuttable.*"[63]

This citation indicates a new, more important role given to Art. 18 ECHR. However, the ECtHR then held that such a particularly serious complaint required very strong evidence. In that context, it acknowledged that the applicant had political ambitions which went counter to the mainstream line of the administration, as well as having had the means to become a serious political player.[64] In addition, it had been a state-owned company (Gazprom) which benefited most from the dismantlement of the applicant's industrial empire.[65] Nevertheless, the ECtHR emphasised that due to Mr. Khodorkovskiy's position, it would have been virtually impossible to prosecute him without far-reaching political consequences. In that regard, the Court pointed out that "*high political status does not grant immunity*".[66]

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[58] Khodorkovskiy and Lebedev v. Russia, paras 360 et seq.

[59] Eshchenko/Smith-Spark, Russian tycoon Khodorkovsky's prison sentence cut by 2 years, http://edition.cnn.com /2012/12/20/world/europe/russia- tycoon-sentence/ (14 May 2014).

[60] Weaver, Russian Court cuts Mikhail Khodorkovsky's prison sentence, http://www.ft.com/cms/s/0/f6b6caae-fe7d-11e2-b9b0-00144feabdc0.html (14 May 2014).

[61] Khodorkovskiy v. Russia, paras 1, 249.

[62] Gusinskiy v. Russia, paras 73 et seqq; Cebotari v. Moldova, paras 49 et seqq.

[63] Khodorkovskiy v. Russia, paras 254 et seq.

[64] Khodorkovskiy v. Russia, para 257.

[65] Khodorkovskiy v. Russia, para 257.

[66] Khodorkovskiy v. Russia, paras 257 et seq.

However, the ECtHR

"[…] admits that the applicant's case may raise a certain suspicion as to the real intent of the authorities […]. However, it is not sufficient for this Court to conclude that the whole legal machinery of the respondent State in the present case was ab initio misused, that from the beginning to the end the authorities were acting with bad faith and in blatant disregard of the Convention. This is a very serious claim which requires an incontrovertible and direct proof. Such proof, in contrast to the Gusinskiy case, is absent from the case under examination."[67]

In conclusion, the ECtHR held that while various other guarantees of the Convention had been violated,[68] no violation of Art. 18 ECHR had been established.[69]

c) Second application to and judgment of the ECtHR (Khodorkovskiy and Lebedev v. Russia, 25.7.2013)

The applications leading to second case of Mr. Khodorkovskiy and Mr. Lebedev[70] were lodged with the Court on 16 March 2005 and 28 March 2005, respectively.[71] Both applicants complained about their criminal conviction for tax evasion and fraud and other events related to the criminal proceedings against them. Most important for the purposes of this paper is their allegation that their prosecution was motivated by political reasons and thus contrary to Article 18 ECHR. Examining the second application, the Court refused to "*ignore the own findings*" and also considered the arguments contained in Mr. Khodorkovskiy's and Mr. Lebedev's first application.[72] Compared to other complaints, the allegations in this case were much more far-reaching in that the applicants tried to demonstrate that the case was in its entirety a "*travesty of justice*".[73] The "*vastness*" of the claim under Art. 18 ECHR can be appreciated by considering the fact that Mr. Khodorkovskiy and Mr. Lebedev did not raise complaints about any isolated incident as such, but rather sought to persuade the ECtHR that "*everything in their case was contrary to the Convention, and that their conviction was therefore invalid*"[74]. This was considered a very serious allegation.[75] The ECtHR admitted that some political groups or government officials had their own reasons to push the prosecution of both applicants as it was clear that the Russian authorities had been trying to reduce the political influence of Russian "*oligarchs*".[76] Nevertheless, it stated that the case against them had a "*healthy core*".[77] Even if there had been a mixed intention behind their

[67] Khodorkovskiy v. Russia, paras 260.
[68] Art. 3 ECHR; Art. 5 § 1 (b) ECHR; Art. 5 § 3 ECHR; Art. 5 § 4 ECHR; see Khodorkovskiy v. Russia, paras 126, 143, 202, 234, 241 et seq.
[69] Khodorkovskiy v. Russia, paras 260 et seq.
[70] On 2 July 2013, the ECtHR decided to join the two cases, pursuant to Rule 42 § 1 of the Rules of Court, see Khodorkovskiy and Lebedev v. Russia, para 6.
[71] Khodorkovskiy and Lebedev v. Russia, paras 1, 6, 886.
[72] Khodorkovskiy and Lebedev v. Russia, paras 786, 897.
[73] Khodorkovskiy and Lebedev v. Russia, paras 904 et seq.
[74] Khodorkovskiy and Lebedev v. Russia, para 905.
[75] Khodorkovskiy and Lebedev v. Russia, paras 904 et seq.
[76] Khodorkovskiy and Lebedev v. Russia, para 901.
[77] Khodorkovskiy and Lebedev v. Russia, para 908.

prosecution, this did not grant the applicants immunity from answering the accusations *a fortiori*, as they had been prosecuted for "*common criminal offences, such as tax evasion, fraud, etc.*" and thus not for acts in relation to their participation in political life.[78] According to the ECtHR, the presence of a political element in the authorities' measure was not necessarily "*decisive*", provided that its "*fundamental aim*" was "*legitimate*" and the same as proclaimed by the government.[79] In sum, concerning the criminal proceedings against Mr. Khodorkovskiy and Mr. Lebedev as the main issue of that case, the ECtHR could not find a breach of Art. 18 ECHR[80] – but, similarly as in its first decision regarding the application by Mr. Khodorkovskiy, various other violations of ECHR guarantees were found.[81]

4. The case of Lutsenko[82]

Yuriy Lutsenko was the leader of the Ukrainian opposition party, "Peoples Self-Defence", and had served as Minister of the Interior under the former Prime Minister Yulia Tymoshenko.[83] He was arrested and charged on 13 December 2010 for exceeding his official powers.[84] On 27 February 2012 (after 14 months in pre-trial imprisonment), Mr. Lutsenko was sentenced to four years in jail for embezzlement and abuse of office.[85] Subsequently, on 3 April 2013, he lost his appeal[86] but, nevertheless, it was reprieved a few days later by Ukrainian President Viktor Yanukovych.[87] Mr. Lutsenko, for his part, lodged his application against Ukraine with the ECtHR on 21 January 2011, complaining *inter alia* that his arrest had been used by the authorities to exclude him from political life and from participating in upcoming parliamentary elections.[88] When examining Mr. Lutsenko's application under Art. 5 para. 1 ECHR, the ECtHR picked up a notion originally expressed in the Khodorkovskiy case[89]: it held that a complaint under Art. 18 ECHR is different from one under Art. 5 ECHR based on an improperly motivated arrest: "*No detention which is arbitrary can be compatible with Article 5 § 1, the notion of arbitrariness in this context extending beyond a lack of conformity with national law. As a consequence, a deprivation of liberty, which is lawful under domestic law, can still be arbitrary and thus contrary to the Convention, in particular where there has been an element of bad faith or deception on the part of the authorities*".[90] Therefore, the Court ruled that Art. 5 § 1

[78] Khodorkovskiy and Lebedev v. Russia, para 906.
[79] Khodorkovskiy and Lebedev v. Russia, para 907 with reference to Handyside v. the United Kingdom, para 52.
[80] Khodorkovskiy and Lebedev v. Russia, paras 908 et seq.
[81] Art. 3 ECHR; Art. 5 § 3 ECHR; Art. 5 § 4 ECHR; Art. 6 § 1 ECHR in conjunction with Art. 6 § 3 (c) and (d) ECHR; Art. 8 ECHR; Art. 1 Prot, No, 1, see Khodorkovskiy and Lebedev v. Russia, paras 486, 509, 524, 648, 716, 735, 737, 851, 885.
[82] Lutsenko v. Ukraine, Application no. 6492/11, of 3 July 2012.
[83] Lutsenko v. Ukraine, para 7.
[84] Lutsenko v. Ukraine, paras 11 et seqq, 26.
[85] Lutsenko v. Ukraine, paras 38, 46.
[86] http://www.euronews.com/2013/04/03/ukrainian-court-keeps-tymoshenko-ally-in-jail/ (14 May 2014).
[87] http://www.bbc.co.uk/news/world-europe-22057073 (14 May 2014).
[88] Lutsenko v. Ukraine, paras, 1, 100.
[89] Khodorkovskiy v. Russia, para 254.
[90] Lutsenko v. Ukraine, para 62.

ECHR had been breached. It should be noted that it reached this result without reference to Art. 18 ECHR, whereas in the Gusinskiy and Cebotari judgments, Art. 18 ECHR still had been invoked to establish that an arbitrary detention violated Art. 5 ECHR.

However, the ECtHR went on to state that the circumstances of the case suggested that Mr. Lutsenko's arrest and detention had their own "*distinguishable features*". In particular, the Court referred to the fact that soon after the change of power, Mr. Lutsenko had been accused of abuse of power and, subsequently, prosecuted for that reason. In these circumstances, the ECtHR noted the political pressure on Mr. Lutsenko immediately before the upcoming elections.[91] On this basis, the ECtHR found that it was allowed to look into the matter also from the more general context of politically motivated prosecution.[92] It held that the grounds for his detention as indicated by the Ukrainian authorities (*inter alia* the applicant's communication with the media) were against the "*spirit of the Convention*"[93]. This term points in the same direction as the rebuttable presumption of states' acting in good faith used in the Khodorkovskiy judgment – both refer to the respect for the rule of law and common values of democratic and pluralist societies. In the ECtHR's opinion, the authorities' reasoning demonstrated the attempt to punish Mr. Lutsenko for his public disagreement with accusations against him as well as for asserting his innocence.[94] Accordingly, the Court held – notwithstanding the already established violation of Art. 5 § 1 ECHR– that there also had been a violation of Art. 18 ECHR (taken in conjunction with Art. 5 ECHR).[95]

5. The case of Tymoshenko[96]

Yulia Tymoshenko is one of the best known politicians in Ukraine. She was one of the main opponents of ex-President Victor Yanukovych and is expected to play a prominent role in post-Yanukovych Ukraine. In 2005 and once again between 2007 and 2010, she had been Prime Minister of the country. Previously, she had been one of the leaders of the "Orange Revolution", during which she had openly criticised Mr. Yanukovych on a number of occasions.[97]

On 11 April 2011,[98] criminal proceedings were initiated against Mrs. Tymoshenko for abuse of power and embezzlement in the context of a gas agreement with the Russian enterprise Gazprom.[99] On 11 October 2011, she was found guilty by

[91] Lutsenko v. Ukraine, para 104.
[92] Lutsenko v. Ukraine, para 108.
[93] Lutsenko v. Ukraine, para 108.
[94] Lutsenko v. Ukraine, paras 108 et seq.
[95] Lutsenko v. Ukraine, para 110.
[96] Tymoshenko v. Ukraine, Application no. 49872/11, of 30 April 2013.
[97] Tymoshenko v. Ukraine, para 9.
[98] Two earlier proceedings in May 2010, do not require a detailed assessment with a view to Art.18 ECHR. The first proceeding concerned the misuse of funds allocated for the purchase of ambulances while the second related to funds received by the Ukrainian state within the framework of the Kyoto Protocol, see Tymoshenko v. Ukraine, para 20.
[99] Tymoshenko v. Ukraine, paras, 14 et seq.

the Kyiv Pecherskyy District Court and sentenced to seven years' imprisonment. Furthermore, a three-year prohibition on exercising public functions was imposed on her. On 23 December 2011 and on 29 August 2012, respectively, the decisions were confirmed by the Ukrainian appeal court and the Higher Specialised Court.[100]

On 19 April 2012, another criminal proceeding against her was initiated, based on allegations of embezzlement and tax evasion. However, this second proceeding did not result in a conviction; it had been postponed repeatedly due to her serious health problems.[101] Despite substantial public pressure, Mr. Yanukovych – while in power – consistently refused to grant a reprieve to Mrs. Tymoshenko. Due to the revolution in 2014, she was released in February 2014.O

Mrs. Tymoshenko applied to the ECtHR on 10 August 2011, complaining, *inter alia,* that her detention had been used by the authorities to exclude her from political life and to prevent her from standing for the parliamentary elections of October 2012.[102] The ECtHR underlined the overall similarity of her case to the circumstances in the Lutsenko case: Soon after the change of power, the former Prime Minister had been accused of abuse of power and prosecuted.[103] Again, the Court discerned a number of specific features in order to examine the matter from a general perspective.[104] As the main justification for Tymoshenko's detention had been her supposed "*hindering of the proceedings and contemptuous behaviour*"[105], the ECtHR held that the detention was intended to punish her for a lack of respect towards the respective domestic court.[106] In light of these considerations, the ECtHR held that the restriction of her liberty was applied not for the purpose of bringing her before a competent legal authority on reasonable suspicion of having committed an offence, but for other reasons.[107] Although formally, Mrs. Tymoshenko had been detained for the purpose envisaged by Art. 5 § 1 (c) ECHR, the Court considered the factual context and the reasoning of the authorities.[108] It therefore not only ruled that the entire pre-trial detention had been arbitrary and thus contrary to Art. 5 § 1 ECHR,[109] but moreover considered this a sufficient basis for finding a violation of Art. 18 ECHR taken in conjunction with Art. 5 ECHR.[110]

In a joint **concurring opinion**[111], three judges – Mr. *Jungwiert*, Mrs. *Nußberger* and Mr. *Potocki* – considered that the reasoning of the majority did not address the applicant's main complaint, namely that her detention had been used to exclude her from political life. They pointed out that, in interpreting Art. 18 ECHR, the direct

[100] Tymoshenko v. Ukraine, paras 17 et seq, 37.
[101] http://www.theguardian.com/world/2012/apr/19/yulia-tymoshenko-tax-evasion-trial1 (28 March2014).
[102] Tymoshenko v. Ukraine, paras 1, 289.
[103] Tymoshenko v. Ukraine, para 296.
[104] Tymoshenko v. Ukraine, para 299.
[105] Tymoshenko v. Ukraine, para 270.
[106] Tymoshenko v. Ukraine, paras 298 et seq.
[107] Tymoshenko v. Ukraine, para 300.
[108] Tymoshenko v. Ukraine, para 299.
[109] Tymoshenko v. Ukraine, paras 271 et seq.
[110] Tymoshenko v. Ukraine, paras 300 et seq.
[111] Tymoshenko v. Ukraine (concurring opinion of judges Jungwiert, Nußberger, Potocki), pp. 66 et seqq.

link between human rights protection and democracy had to be taken into account: If the human rights of politically active persons were restricted for the purpose of hindering or making impossible their participation in the political life of a country, democracy would be in danger.[112] As a consequence, the three judges made some most remarkable statements regarding the function of Art. 18 ECHR. First, they supported the approach taken by the ECtHR in the Lutsenko judgment[113], according to which Art. 18 ECHR is not needed in order to establish that arbitrary state measures violate the Convention: "*The decisive question is […] whether, despite its arbitrariness, the detention was nevertheless ordered in good faith […]*".[114] Secondly, they underlined that complaints under Art. 18 ECHR were different from those under other Articles: *"[it] is especially disturbing if penal law is used for purposes other than bringing to justice those who have committed a crime or a wrongful act. In such cases, finding (only) violations of those human rights guaranteed under Article 5 and Article 6 of the Convention would not be sufficient, as this would not uncover and target the real problem, namely the intentional misuse of State power."*[115]

Furthermore, the three judges stated that, according to its wording, Art. 18 ECHR not only prohibits misusing the whole legal machinery *ab initio,* but also the use of specific restrictive measures.[116] In light of these considerations, the judges considered a violation of Art. 18 ECHR in conjunction with Art. 5 ECHR not only because Mrs. Tymoshenko's detention had been impermissibly based on her supposed disrespectful behaviour towards the domestic court, but also because it had been ordered for ulterior motives. According to their joint concurring opinion, the decisive question was whether the detention had been ordered in good faith or whether the real aim had been different from the one officially given.[117] For this assessment, attention had to be paid to the broader context of the proceedings: Mrs. Tymoshenko was the main political opponent of President Yanukovych and the charges against her were related to political decisions taken by her as Prime Minister. Furthermore, she had been convicted with remarkable speed compared to the regular duration of those proceedings in the Ukraine, and the investigations had been conducted in such a way that Mrs. Tymoshenko was completely hindered from continuing her political activities. In addition, the criminal charges were not brought only against Mrs. Tymoshenko, but also against more than eight high-level members of her government.[118] Finally, the three judges pointed out that there was a lack of any acceptable reason for ordering indefinite pre-trial detention against Mrs. Tymoshenko: neither did the domestic court refer to any breaches of her obligation not to leave town nor did the circumstances provide arguable grounds for assuming a lack of cooperation. Taking

[112] Tymoshenko v. Ukraine (concurring opinion of judges Jungwiert, Nußberger, Potocki), pp. 66 et seq.
[113] Lutsenko v. Ukraine, para 108.
[114] Tymoshenko v. Ukraine (concurring opinion of judges Jungwiert, Nußberger, Potocki), p. 68.
[115] Tymoshenko v. Ukraine (concurring opinion of judges Jungwiert, Nußberger, Potocki), p. 67.
[116] Tymoshenko v. Ukraine (concurring opinion of judges Jungwiert, Nußberger, Potocki), p. 68 with reference to Khodorkovskiy v. Russia, para 260 and Lutsenko v. Ukraine, para 109.
[117] Tymoshenko v. Ukraine (concurring opinion of judges Jungwiert, Nußberger, Potocki), p. 68.
[118] Tymoshenko v. Ukraine (concurring opinion of judges Jungwiert, Nußberger, Potocki), p. 69.

this into account, the three judges did not deem it necessary to require any further proof that the motives underlying the action of the authorities had not been related to proper criminal prosecution, but rather to the applicant's identity and influence as a leading opposition politician. Consequently, the three judges considered Mrs. Tymoshenko's pre-trial detention to have violated Art. 18 ECHR taken in conjunction with Art. 5 ECHR.[119]

III. Systematic analysis: role and scope of Art. 18 ECHR in the system of the Convention

Though the ECtHR has identified valuable ideas regarding the interpretation and function of Art. 18 ECHR, a consistent and fully systematic approach cannot be discerned so far. This is why we shall take a closer look at Art. 18 ECHR – without any prejudice – in order to analyse this provision thoroughly and objectively so that – as a second step – our results can then be compared to the use of Art. 18 ECHR in the case-law of the Court and offer some guidelines for its application in the future.

Most of the ECHR's guarantees constitute defensive rights against state interference (negative rights). Almost none of them amount to an absolute defence against state measures (there are only a few exceptions, e. g. Art. 3 ECHR); rather, the vast majority is subject to restrictions. Thus, if a state measure interferes with a Convention guarantee, this measure can still be justified: The ECHR provides for **explicit limits** to these guarantees, either in a *general* form as e. g. in Art. 15 to 17 ECHR, or *specifically* in the wording of a particular guarantee itself, as e. g. in the respective para. 2 of Arts. 8 to 11 ECHR. However, even if a state measure is not covered by explicitly provided limitations, there may be a justification for its interference with the individual's Convention right on the basis of the **implicit limitations** to which nearly every guarantee is subject if the individual right conflicts with the individual rights of others or any other "higher aim" of the States Parties. Such a restriction of an ECHR guarantee may be based on the aspect of implicit limitations provided that certain "limits" are respected: (1) The Contracting State must pursue a legitimate aim, (2) the interference with the individual's right must be proportionate to the State act's aim, and finally, (3) the state measure must respect the essence of the Convention guarantee. If these requirements are met, the state measure is justified and in conformity with the ECHR.

Against this background, what is the function of Art. 18 ECHR? Can it be considered part of this traditional "testing programme" and fulfil an auxiliary purpose when deciding whether one of the ECHR guarantees has been violated (see 1.)? Or – perhaps the more intriguing conception – does Art. 18 ECHR constitute an autonomous individual defensive right which protects citizens (at least *inter alia*) against politically motivated criminal proceedings (see 2.)?

[119] Tymoshenko v. Ukraine (concurring opinion of judges Jungwiert, Nußberger, Potocki), p. 70.

1. "Auxiliary function" of Article 18 ECHR for establishing a violation of other Convention guarantees

The first possibility is that Art. 18 ECHR could be regarded as having a purely auxiliary function. Then the "purpose" behind the restriction clauses, which is stressed in Art. 18 ECHR, would have to be considered when determining whether the particular Convention right in question has been violated. As a consequence, the purpose of Art. 18 ECHR would be to help draw the line between permissible interventions and those not covered by the Convention; it would limit the possibilities to restrict the Convention rights. In this sense, *Santolaya* calls Art. 18 ECHR a "peculiar limit on the limits"[120]. This denomination directly corresponds to German constitutional law terminology, where the scope of the permissible limitations ("Schranken") of freedoms enshrined in the German Constitution ("Grundgesetz") is circumscribed by so-called limits on the limits ("Schranken-Schranken"). Art. 18 ECHR could be integrated into the traditional testing programme of those "limits on the limits" in two ways: First, it could be understood as defining more clearly the nature of the "legitimate purpose" which is the first condition for any justification by implicit limits (a). Secondly, Art. 18 ECHR could be used when testing the proportionality of the state measure in relation to the (legitimate) object pursued (b). And finally, an auxiliary function not necessarily restricted to implicit limitations could be inferred from Art. 18 ECHR if it were to be understood as a general prohibition of a wide or even analogous interpretation of any possibility to restrict ECHR guarantees (c).

a) Necessity of pursuing a "legitimate aim" – protection against an arbitrary application of restrictions

According to its wording, Art. 18 ECHR mainly serves to exclude state action motivated by illegitimate reasons.[121] Thus, Art. 18 ECHR explicitly stresses that any limitation of ECHR guarantees has to be based on purposes that are in conformity with the fundamental principles underlying the Convention. Those "purposes" refer to the subjective aims pursued by the responsible state representatives; in the absence of such a provision, the Convention could not guarantee protection against measures which form part of a complex, politically motivated attack against the citizen as long as the individual state measures, considered in isolation, are legitimate "on the surface".

An illustrative example for this is Art. 5 ECHR, which guarantees the right to liberty and security of a person. Apart from that right as such, the article further contains manifold limitations enumerating certain prerequisites for restricting it. For instance, Art. 5 § 1 (a) ECHR excludes a detention upon conviction by a court from the scope of protection. *Prima facie*, such a restriction sounds reasonable and

[120] Santolaya in: Roca/Santolaya, Europe of Rights: A Compendium on the European Convention of Human Rights, 2012, p. 527.

[121] Herzog, Das Grundrecht auf Freiheit in der Europäischen Menschenrechtskonvention, AöR vol. 86 (1961) p. 194 (p. 209).

appears to be in line with human rights protection. But – is it still in conformity with the fundamental principles underlying the Convention if the conviction by a state court is the result of a criminal proceeding which is motivated by political reasons or even instrumentalised in order to defeat a political opponent? In relation to those cases, the content of Art. 18 ECHR could gain paramount importance – of course only within the testing programme of other ECHR guarantees: though the specific interference with a particular human right is objectively permitted under the Convention, its application can only be justified if the specific intention behind the state's action also is in conformity with the fundamental principles upon which the Convention is based.

Thus, interpreted this way, the test whether a "legitimate aim" is pursued is influenced by Art.18 ECHR insofar as the subjective motives and purposes behind the state act have to be taken into consideration. As far as criminal proceedings are concerned, the motivation of prosecution must be considered a decisive criterion for assessing the lawfulness of the proceeding. In that sense, Art.18 ECHR can offer protection against arbitrary prosecution.

The point of view that Art. 18 ECHR decisively declares the legitimate aims provided for by the Convention to be exhaustive when applying the implicit limits of ECHR guarantees is supported by the travaux préparatoires of the Convention, even if they are sometimes considered less than helpful.[122] With respect to Article 18 ECHR, they state that "*it is legitimate and necessary to limit […] individual freedoms, to allow everyone the peaceful exercise of their freedom […] This is permissible, this is legitimate. But when it [the limitation] intervenes to suppress, to restrain and to limit these freedoms for, this time, reasons of state; to protect itself according to political tendency which it represents, against an opposition which it considers dangerous […] then it is against public interest if it intervenes*".[123]

This excerpt illustrates clearly the original intention of the authors of the Convention: any abuse of state power against political opponents should be banned. Furthermore, the travaux préparatoires make quite clear that "*it is necessary […] to prevent abuses, violations or restrictions, on the part of the legislative power*"[124]

and that *"rights and fundamental freedoms […] should be radically and definitely protected against any arbitrary decision"*[125].

Obviously, then, the historical meaning of Art. 18 ECHR aimed at preventing an abuse of power by the powerful state to the detriment of the citizen, so as to prevent a relapse into the dark times of autocratic regimes in power in the first half of the 20th century.

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[122] Jacobs in: White & Ovey, The European Convention on Human Rights, 4th edition (2006), p. 437: "not much guidance in the preparatory work"; Santolaya in Roca/Santolaya, Europe of Rights: A Compendium on the European Convention of Human Rights, 2012, p. 527: „the travaux préparatoires do not clarify its intended effect".

[123] Teitgen in: Collected Edition of the „Travaux Préparatoires", Vol. I, 1975, p. 278.

[124] Benvenuti in: Collected Edition of the „Travaux Préparatoires", Vol. II, 1975, p. 136.

[125] Benvenuti in: Collected Edition of the „Travaux Préparatoires", Vol. II, 1975, p. 142.

b) Auxiliary function of Art. 18 ECHR in relation to the test of proportionality

The second point where Art. 18 ECHR could influence the "testing programme" in relation to violations of other ECHR guarantees is the proportionality test. Even where it cannot be established that a state measure pursues undue political aims, Art. 18 ECHR could play a role when examining the relation between the importance of the measure's aim and the dimension of loss of subjective rights, which must always be "proportionate". In this regard, Art. 18 ECHR could avoid an inflationary use of restrictions provided for in the Convention itself.

The principle of proportionality is based on the asserted need for a fair balance between the rights of the individual and the interests of the public.[126] In some human rights treaties, it is explicitly enshrined in the text, for instance in Art. 4 of the International Covenant on Civil and Political Rights (ICCPR) or in Art. 27 of the American Convention on Human Rights (ACHR),[127] whereas such a clear provision cannot be found in the ECHR. *Herzog,* therefore, wants to interpret Art. 18 ECHR as a general prohibition of disproportionate measures.[128] However, such an interpretation is unfounded and unnecessary.

It is unfounded because there is no hint to the principle of proportionality in the wording of Art.18 ECHR. Rather, the provision focuses on the restrictions of rights and the purposes for which these restrictions are prescribed. Since the interpretation of every provision is limited by its wording, there is no basis for construing this provision as a general manifestation of the principle of proportionality. This applies all the more if one takes into consideration that several provisions in the Convention refer to the proportionality principle more clearly than Art 18 ECHR does. In particular, this holds true for the so called "democracy clauses"[129]. Art. 8 § 2 ECHR, for instance, requires the interference to be *"necessary in a democratic society"*. In order to determine what is *"necessary"* in society, the interests of the individual must be weighed against those of the society. Thus, it seems quite obvious that these clauses establish a guarantee-specific proportionality test. Of course, Art. 18 ECHR could be understood as a more general "proportionality clause" as it is located within the "general part" of the Convention; if understood in that sense, it could therefore cover the Convention as a whole, i. e. also those guarantees which do not contain any specific "democracy clauses". But – as stated above – neither the wording nor the structure of the ECHR support this view.

Moreover, such a broad interpretation is unnecessary. Even without a specific provision dedicated to the proportionality of state measures, it is generally accepted

[126] Arai, The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR, 2001, pp. 189 et seq.

[127] For a detailed discussion of this specific topic, see: Arai, The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR, 2001, pp. 186 et seqq with further references; regarding Art. 4 ICCPR, see: Vollmer, Die Geltung der Menschenrechte im Staatsnotstand, pp. 84 et seqq.

[128] Herzog, Das Grundrecht auf Freiheit in der Europäischen Menschenrechtskonvention, AöR vol. 86 (1961) p. 194 (p. 209).

[129] E.g. Art. 6 § 1 sentence 2, Art. 8 § 2, Art. 9 § 2, Art. 10 § 2, Art. 11 § 2 of the convention.

today that this principle must be respected as one of the fundamental principles governing the application of Convention rights and freedoms.[130] And although the ECtHR rejects the idea that the principle of proportionality might be comprised in one single article, it describes the search for a fair balance as *"inherent"* in the whole of the Convention.[131] Thus, it is submitted that the proportionality test is not enshrined in Art. 18 ECHR and that the wording and understanding of the latter cannot influence the application of the proportionality principle as part of the standard "testing programme" when examining the "limits on the limits" in relation to the implicit limitations of the ECHR guarantees.

c) Art. 18 ECHR as a prohibition of any undue extension of restrictions prescribed in the Convention

Some commentators[132] regard Art. 18 ECHR as a safeguard against a broad interpretation of the limits to the Convention rights provided for by the ECHR itself, and against the analogous application of any limitation to other Convention rights: according to this opinion, Art. 18 ECHR seeks to remind the States parties not to exceed the limits of the restrictions. The logic behind this interpretation is clear: Limitation clauses (whether explicit or implicit) may justify the interference with a subjective Convention right. As a consequence, the extensive interpretation of such a clause inevitably enhances the possibilities to limit the respective freedoms guaranteed by the Convention and makes them vulnerable to a potential abuse of power. Such a risk of abuse is particularly imminent with regard to the vague terms which can be found in some articles of the Convention, for instance in the already mentioned democracy clauses (e.g. Art. 8 § 2 ECHR). The same risk is attached even more clearly to an analogous application of limitation clauses to cases which were originally not covered by any respective limitation either because the guarantee in question is not subject to any limitation clause at all or because the wording of the clause does not apply to the facts of the case.

Good examples are the various reasons justifying an arrest as enumerated in Art. 5 § 1 ECHR. States could be tempted to invoke these restrictions beyond their wording in order to justify an arrest of a political opponent. From the outset, all restrictions of subjective rights allowed by the ECHR were intended to be used according to the motto "as little as possible, as much as necessary". Therefore, any extensive or even analogous application of those limitation clauses

[130] McBride, Proportionality and the European Convention on Human Rights in: Ellis, The Principle of Proportionality in the Laws of Europe, 1999, p. 23 with further references; Eissen, The Principle of Proportionality in the Case Law of European Court of Human Rights in: Macdonald and others in: The European System for the Protection of Human Rights, 1993, p. 146; Cremona, The Proportionality Principle in the Jurisprudence of the European Court of Human Rights in Beyerlin(et alii), Recht zwischen Umbruch und Bewahrung – Festschrift für Rudolf Bernhardt, 1995, p. 323.

[131] Soering v. the United Kingdom, para. 89.

[132] E.g. Esser in Löwe/Rosenberg, Die Strafprozeßordnung und das Gerichtsverfassungsgesetz, 26th ed. (2011), p. 959.

could be contrary to the intentions of the mothers and fathers of the Convention. Bearing that in mind, the suggested interpretation of Art. 18 ECHR, which prohibits any extensive use of limitation clauses, merits support as it clarifies that the prerequisites for restrictions provided in the ECHR may not be circumvented.

However, there are good reasons to doubt that this interpretation fully and adequately reflects the content and function of Art. 18 ECHR. This becomes obvious when we once again look at its wording: the extensive interpretation of restriction clauses does not automatically and necessarily create a conflict with the purpose "for which they have been prescribed". The ECHR is rightly referred to as a "*living instrument*"[133]; new technical or social developments may require an adaptation of the interpretation of the ECHR and also a modified use of a permission to restrict freedoms and rights granted by the ECHR. For this reason it is not a weakness, but rather the strength of the Convention that it maintains a number of clauses with vague terms and legal concepts (for instance the "prevention of disorder" or the "protection of health or morals" in Art. 8 § 2 ECHR). Thus a flexible interpretation remains possible in order to adapt all rights and freedoms to modern scenarios which could not be anticipated when the Convention had been drafted. Without this considerable degree of flexibility, a legal text from 1950 would have hardly been able to continue to serve its purpose until today. To deny the possibility of a broad interpretation of restrictions could thus lead to a situation that is even less in line with the fundamental values underlying the Convention.

As such, it is entirely correct that Art. 18 ECHR calls for a cautious use of the restrictions prescribed in the Convention. Yet rather than prohibiting any broad interpretation (or maybe even analogy) altogether, Art. 18 EHCR imposes boundaries only in reference to the particular purposes for which the respective restriction has been prescribed.

2. Is there room for an autonomous role of Art. 18 ECHR?

The fact that Art. 18 ECHR is a rather unique provision, especially in human rights instruments at the time of its drafting,[134] may lead to the conclusion that Art. 18 ECHR exhibits a special character and thus fulfils more than a purely auxiliary function. It could instead be interpreted as being the legal basis for a substantive right of its own, independent of any other ECHR guarantee: the autonomous guarantee not to be affected by any state action – and particularly criminal prosecution – for improper purposes. As a consequence, a violation of Art. 18 ECHR could be ascertained by the Court irrespective of whether any other violations of other Convention rights could be proven.

[133] Instead of many: Tyrer v. United Kingdom, Application no. 5856/72, of 25 April 1978, para 31.

[134] Van Dijk/Viering in: Van Dijk (et alii), Theory and Practice of the European Convention on Human Rights, 4th edition (2006), pp. 511 et seq.

a) Relevance of Art. 6 ECHR for politically motivated criminal proceedings

However, it could be objected that the protection against acts and procedures of a state that are motivated by improper – especially political – reasons is already ensured by another explicit guarantee (so that an extensive interpretation of Art. 18 ECHR in this direction is not necessary and therefore not justified). In particular, Art. 6 ECHR[135] could provide such a form of protection. The objective of Art. 6 ECHR is to warrant fundamental rights of the defendant, which is the reason why it is often described as enshrining the principle of fair trial.[136] Art. 6 ECHR provides a multitude of procedural rights in order to ensure a minimum standard under the rule of law. Is this not enough to protect any individual against politically or – more generally speaking – unduly motivated criminal proceedings? Certainly, it could be argued that such proceedings do not respect the principle of fair trial in a wider sense. However, it is submitted that Art. 6 ECHR is not a sufficient and adequate tool for protecting individuals against politically motivated proceedings.

Art. 6 ECHR reads: *"[…] everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law"*. This guarantee relates to "criminal charges" which means that the scope of protection starts with the moment at which the citizen is informed about the charges against him.[137]. Though an early provision of protection is intended, this interpretation is of limited assistance against politically motivated criminal proceedings. In the cases described above[138], neither the "hearing" *before* a court nor the examination by a public prosecutor or any other decision-making body necessarily takes place after the citizen has been informed about the charges. In these cases, the application of Art. 6 ECHR is triggered too late. The decision to initiate a prosecution, which is of key importance, has been made beforehand and often – at least as far as politically motivated prosecution is concerned – even the outcome of the proceedings may have been determined by government or other political powers at a very early stage. Therefore, what is needed is **preventive** protection. The fact that the purpose of a criminal proceeding is not at all addressed in Art. 6 ECHR leads to the conclusion that this provision (predominantly) establishes prerequisites for the (pre-)trial itself, whereas aspects which precede the (criminal) proceedings remain outside its focus. Criminal proceedings which are driven by improper motives thus do not automatically imply a violation of the right to a fair trial as enshrined in Art. 6 ECHR.

Furthermore, even if the ECtHR were to examine complaints about criminal prosecution for improper motives under Art. 6 ECHR, it could only find – according to its long-established jurisprudence – that there was a violation of the

[135] Art. 5 ECHR alone is not on the contrary able to provide such a form of protection as Art. 5 ECHR is applicable only in conjunction with Art. 18 ECHR in the case of criminal motivated proceedings.

[136] Instead of many: Van Dijk/Viering in: Van Dijk (et alii), Theory and Practice of the European Convention on Human Rights, 4th edition (2006), pp. 511 et seq.

[137] SSW-StPO/Satzger, Art. 6 EMRK Rn. 10

[138] C.f. II, 1-5 in this note.

right to a fair trial if the trial was unfair *when seen as a whole*.[139] Thus, it would depend on the particular case whether the state is convicted for an unduly motivated criminal proceeding, even if there was irrefutable evidence that it was based on ulterior purposes. Hence, Art. 6 ECHR cannot be seen as a suitable provision to tackle politically motivated criminal proceedings in a satisfactory manner. As a consequence, it does not present an obstacle to the view that Art. 18 ECHR may play an autonomous role to fill what thus would otherwise be an important lacuna in the protection offered by the Convention.

b) Stigmatising effect of convictions based on Art. 18 ECHR

But in order to be able to play such an autonomous role, how must Art. 18 ECHR be interpreted and treated by the ECtHR? What would be the effects of a judgment ascertaining the violation of Art. 18 ECHR? And in what way would such a judgment differ from an "ordinary" conviction of a state for a violation of a specific ECHR guarantee?

To grasp the potential new – and most important – function which could be attributed to Art. 18 ECHR, we have to begin at the roots of the Convention – and maybe even at the roots of all State conventions. In order for a treaty to become effective, all States parties must accept limitations to their sovereignty, i. e. the limitations of state power that are imposed on them by the treaty. The ECHR (as well as all other human rights instruments) presupposes all States parties' commitment to respecting and strengthening human rights as well as the rule of law, democracy and pluralism. Thus, it also should be taken for granted that none of the States parties will "frustrate the contract" by abusing the provisions of the Convention to suppress its citizens who – to the contrary – are the beneficiaries of human rights guarantees. The Convention rests *"on the general assumption that public authorities in the member States act in good faith"*[140], the Convention – in other words – is built on a *foundation of trust* between the signatory states. When a breach of an individual Convention right occurs and can be ascertained by the Court, this does not mean that the "foundation of trust" is in danger. To the contrary: every detection and condemnation of a violation of Convention guarantees affirms and thus enhances the abstract value of human rights. The idea is that infringements of human rights can and will occur in the ordinary course of public administration. There may be flaws and mistakes in individual cases which amount to violations of citizens' subjective rights. Yet, from the state's perspective, they typically appear as accidents. They are *shortcomings limited to a specific case*. In other words: Even where a state generally and genuinely accepts the standard of human rights protection established by the ECHR, certain decisions which can be attributed to it will turn out to be incompatible with the ECHR guarantees. It is not at all necessary that such a shortcoming is a rare exception – under certain conditions (e.g. misinterpretation of

[139] SSW-StPO/Satzger, Art. 6 EMRK Rn. 31.
[140] In a similar vein: Khodorkovskiy v. Russia, para. 255.

an ECHR guarantee, incapacity of staff), there may a rather large number of such "accidents" occurring in one state. But as long as these occurrences can be regarded as "exceptions", the "foundation of trust", building the basis of the ECHR, is not disrupted.

But what if a state and its representatives deliberately disregard elementary principles of a modern democratic and pluralist society? What if guarantees are systematically disregarded in order to achieve aims which are alien to human rights protection – in the words of the Court: if there is a "hidden agenda"[141]? Especially in our context: what if a state interferes with citizens' rights just in order to achieve political aims or to destroy political opponents? In such cases, it will not be enough to merely condemn the measures taken in relation to one (or some) individual case(s). Here, we are confronted with a *state policy* which threatens the whole European accord on the recognition of certain minimum rights and thus we face the danger that the treaty is frustrated. In order to address such a systemic malfunction, e. g. when the *criminal justice system is perverted into an instrument of suppression*, it does not suffice to condemn the state for one or more violation(s) of specific Convention rights. In addition, it is necessary to explicitly identify and sanction the systemic shortcomings. This is where Art. 18 ECHR may and should – in our opinion – come into play: A violation of this article means that the state concerned has departed from the human rights protection policy common to all States parties to the ECHR and thus no longer adheres to the most elementary principles of the Convention. A judgment based on the infringement of Art. 18 ECHR then is a *clear warning signal* which is meant to *stigmatise intentional and systematic abuses* of power by one State party. Of course – interpreted that way – the question of whether a violation of Art. 18 ECHR has occurred and can be ascertained by the ECHR is no minor one, but an essential and potentially very powerful tool in the hands of the Court. Certainly, this interpretation is new and departs from its traditional understanding; nevertheless, the concurring opinion following the ECtHR's decision in the case of Tymoshenko already implied a greater role for Art. 18 ECHR and indicates a rather similar understanding.[142]

Finally, one problematic aspect must not be overlooked. In order to establish a violation of Art. 18 ECHR (alone or in conjunction with any other possible guarantee), the *ECtHR has to inquire into state policies and the government's objectives*. Therefore, the judges in Strasbourg will have to deal with the case in an even more comprehensive manner, which enables citizens to address the Court not only with regard to the violation of a particular Convention guarantee, but also in a more general sense when they face an abuse of power. Obviously, this may entail a wealth of problems which have to be tackled by procedural steps (and which will be treated in detail in the second part of this essay[143]).

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[141] Cf. e. g.: Tymoshenko v. Ukraine, para 294.
[142] Cf. II, 5 in this note.
[143] To be published in EuCLR 2014/3.

3. Summary: A new role for Article 18 ECHR

Regarding the autonomy of Art. 18 ECHR, there is consistent jurisprudence of the Court that recognises: "*Article 18 of the Convention does not have an autonomous role. It can only be applied in conjunction with other Articles*."[144] The same is true for the abovementioned premise that Art. 18 ECHR mirrors the "*assumption that public authorities act in good faith"* and therefore expresses common democratic values.[145] By finding a violation of Art. 18 ECHR, the Court declares that this assumption has been refuted. This also means that the ECtHR ascertains that an intentional misuse of power has taken place which did not occur by accident.[146] Thus, a judgment finding a breach of Art. 18 ECHR entails a considerable *stigmatising effect* as it reveals that the state concerned has acted against the fundamental principles common to all democratic and pluralist societies.

In the Tymoshenko case, the Court found a violation of Art. 18 ECHR (only) with regard to the aim to punish Mrs. Tymoshenko for a lack of respect towards the Ukrainian court. Even if this is not an incorrect finding, this approach neither reflects the importance of Art. 18 ECHR, nor does it correspond to Mrs. Tymoshenko's application. The case in point is raised by the concurring opinion by the judges *Jungwiert*, *Nußberger* and *Potocki* when they rightly state that "*the reasoning of the majority does not address the applicant's main complaint, which concerns the link between human rights violations and democracy, namely that her detention has been used by the authorities to exclude her from political life and to prevent her standing in the parliamentary elections."*[147] Little more can be added to this. It is to be hoped that this interpretation and use of Art.18 ECHR will prevail in future decisions by the ECtHR.

Nevertheless, whether and how often Art. 18 ECHR can be used for provoking a stigmatising effect depends on how easy it is to rebut the aforementioned assumption that public authorities act in good faith. This, however, depends to a large extent on the standard of proof applied. This procedural question deserves an in-depth analysis, which we will tackle in the second part of the essay.[148]

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[144] Gusinskiy v. Russia, para 73;, Cebotari v. Moldava, para 49; Khodorkovskiy v. Russia, para 254; Khodorkovskiy and Lebedev v. Russia, para 892; Tymoshenko v. Ukraine, para 294.

[145] C.f II, 5 in this note.

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

[147] Tymoshenko v. Ukraine (concurring opinion of judges Jungwiert, Nußberger, Potocki), pp. 66 et seq.

[148] To be published in EuCLR 2014/3.