Significantly Disadvantaged? Shrinking Access to the European Court of Human Rights

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ABSTRACT

Article 34 of the European Convention on Human Rights lists admissibility criteria that act to filter complaints brought to the European Court of Human Rights. A new criterion, requiring that the applicant has suffered a 'significant disadvantage' from the alleged human rights violation, was added to this list with the aim of reducing even further the number of cases the Court receives and must decide on the merits. The article examines the application of this filter by the Court in the two years after it became operable. It finds that only general and rather subjective criteria were elaborated and that the Court was unable to avoid at least a cursory examination of the merits of the cases in question. A more appropriate method of reducing the Court’s caseload would focus less on the applicants and more on the respondent states, in particular those few who account for nearly two-thirds of the caseload. Failure to comply with judgments of the Court leads to many repetitious cases from these countries and has a far greater impact on judicial administration than does the number of smaller cases the Court deems insignificant.


1. INTRODUCTION

Protocol No 14 to the European Convention for the Protection of Human Rights and Fundamental Freedoms,1 which entered into force on 1 June 2010, added a new criterion to the pre-existing barriers encountered by an individual2 seeking access to the European Court of Human Rights (‘the Court’) to complain about an alleged

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2 The requirement applies only to individual and not to interstate complaints.

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human rights violation. The additional admissibility requirement, contained in Convention Article 35(3)(b), reads as follows:

The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:

(b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.

Protocol No 15 will further restrict access by removing the concluding safeguard about domestic remedies from this provision and will shorten the period of time to apply to the Court from six months to four months. In addition to these treaty amendments, the Court itself made two changes to the individual complaint procedure. First, it added Rule 47 to the Rules of Court, introducing stricter formal requirements for submitting an application. Secondly, one year before Protocol No 14 entered into force, the Court established a policy of ranking cases in seven categories and giving priority consideration to the first three of the seven categories. Until that point, cases had been processed and adjudicated

3 Protocol No 15, 2013 ETS 213 followed the Brighton Declaration of 20 April 2012, issued by a meeting of the States Parties upon the High Level Conference on the Future of the European Court of Human Rights. The Brighton Declaration (at para 15(c)) called for a further amendment to Article 35:

Concludes that Article 35(3)(b) of the Convention should be amended to remove the words ‘and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal'; and invites the Committee of Ministers to adopt the necessary amending instrument by the end of 2013;

4 As of 1 January 2015, Protocol No 15 has received 25 ratifications; all 47 States Parties to the European Convention must ratify the Protocol for it to enter into force.

5 As of 1 January 2014, it is only when applicants submit a properly completed form that the running of the six-month period for bringing an application is deemed to stop running.

6 European Court of Human Rights, The Court’s Priority Policy, at 2, available at: www.echr.coe.int/Documents/Priority_policy_ENG.pdf [last accessed 17 January 2016]. The categories are:

I. Urgent applications (in particular risk to life or health of the applicant, other circumstances linked to the personal or family situation of the applicant, particularly where the well-being of a child is at issue, application of Rule 39 of the Rules of Court).

II. Applications raising questions capable of having an impact on the effectiveness of the Convention system (in particular a structural or endemic situation that the Court has not yet examined, pilot-judgment procedure) or applications raising an important question of general interest (in particular a serious question capable of having major implications for domestic legal systems or for the European system), inter-State cases.

III. Applications which on their face raise as main complaints issues under Articles 2, 3, 4 or 5 § 1 of the Convention (‘core rights’), irrespective of whether they are repetitive, and which have given rise to direct threats to the physical integrity and dignity of human beings.

IV. Potentially well-founded applications based on other Articles.

V. Applications raising issues already dealt with in a pilot/leading judgment (‘repetitive cases’).

VI. Applications identified as giving rise to a problem of admissibility.

VII. Applications which are manifestly inadmissible.
principally on a chronological basis. According to the Court, the old approach meant
that certain very serious allegations of human rights violations were taking too long
to be examined, especially applications coming from countries with the highest vol-
ume of complaints. As a result, the Court reasoned, violations and their causes were
going undetected, which in turn could lead to more applications being filed in an al-
ready overburdened system. Under the new policy, the Court looks to the import-
ance and urgency of the issues raised by the applicant in deciding the order in which
cases are taken up, designating the first three categories as ‘priority cases’. As on 31
December 2014, there were 7,386 applications in the priority group, likely precluding
for the foreseeable future any consideration of cases in the remaining categories.

As was claimed about the Court’s changes to its rules and procedures, the
Explanatory Report to Protocol 14 called its new restrictions ‘urgent’ in order ‘to guar-
antee the long-term effectiveness of the European Court of Human Rights’. The
stated aim was to enable a more rapid disposal of unmeritorious cases, allowing the
Court to concentrate on its ‘central mission’ of providing legal protection to human
rights within Europe, by placing its focus on cases which warrant consideration on the
merits, whether seen from the perspective of the legal interest of the individual appli-
cant or the broader perspective of the law of the Convention and the European public
order to which it contributes. The problem identified indicates that the States
engaged in drafting Protocol No 14 believed many applications lack merit even if a
guaranteed right has been violated. It is not surprising that the Convention’s State
Parties would take this attitude and seek to limit admissibility: between 1959 and 2011,
93 per cent of all judgments on the merits resulted in the finding of at least one viola-
tion. Limiting admissibility means limiting condemnation.

Yet, even before adoption of the new criterion in Protocol 14, the overwhelming
percentage of applications was found to be inadmissible. Many admissible applica-
tions concern matters previously found by the Court to involve rights’ violations,
indicating their merit despite their repetitiveness. In theory, with addition of the
admissibility criterion of ‘significant disadvantage’ even more cases can be excluded.

This article briefly discusses the background and scope of the new admissibility
criterion, then examines the application of it by the Court in more than 150 pub-
ished cases, which includes discussion of the matter to the end of 2014. It attempts
to evaluate the new restriction on access to the Court and the justification given for
it in the light of the number and nature of cases being filed. The analysis finds that
the criterion of ‘significant disadvantage’ did not have a major impact on the Court’s

7 Ibid.
8 Council of Europe, Explanatory Report to Protocol No 14 ETS 194.
9 Ibid. at paras 39 and 77–9.
10 Ibid. at para 77.
11 European Court of Human Rights, Violations by Article and by State 1959-2011.
12 During 2009, the last year before the entry into force of Protocol No 14, 35,460 decisions or judgments
were handed down by the Court. Of these, 33,065 were decisions declaring inadmissibility or striking out
the application. The number of judgments delivered was 2,395: see European Court of Human Rights,
13 For a discussion of the background to Protocol No. 14, see Hioureas, ‘Behind the Scenes of Protocol No.
International Law 718, 719.
caseload during its two-year transition period, when all decisions applying it had to be taken by a Chamber or Grand Chamber. During 2013 and 2014, however, when single judges began evaluating cases for admissibility, the number of rejected applications grew considerably, perhaps suggesting a broader application of the criterion than occurred during the transition period, although the lack of any reporting on inadmissibility decisions by single judges makes it impossible to know the basis for exclusion.

The jurisprudence during the transition period provided some useful guidance, first, in suggesting that certain violations inherently produce a significant disadvantage to the applicant, secondly, in distinguishing between victim status and significant disadvantage, and, thirdly, in elaborating the factors that should determine whether the applicant has or has not experienced the requisite level of disadvantage due to the alleged violation. Examining the case law and the statistics, the article concludes that the European system appears to be in crisis less because of an influx of trivial cases, of which there are undoubtedly some (a crisis of success), than because the contracting parties and the Court have failed to insist on compliance with prior judgments and respect for human rights on the part of the four states that account for approximately 60 per cent of the Court’s caseload (a crisis of failure). If this conclusion is accurate, the focus should shift away from disadvantaging individual applicants to taking measures to improve compliance in those states where it is not occurring.

2. BACKGROUND TO PROTOCOL NO 14
Protocol No 14, adopted by the Committee of Ministers in 2004, is an outcome of the ‘reform of the reform’ process that began in 2001, when it became clear that the creation of a permanent court in 1998 had not significantly reduced the backlog of cases nor stemmed the rising number of applications.14 During the reflection period, numerous proposals were made for lesser or more radical changes in the complaint system, such as setting up regional courts of first instance or empowering the Court to give preliminary rulings at the request of national courts.15 Most of these were rejected for reasons of cost or because they were seen as potentially creating additional work for the Court. The rejected proposals included one that would have given the Court complete discretion to decide whether or not to take up a case; another would have made it compulsory for applicants to be represented by a lawyer or other legal expert from the moment of submitting an application; yet another proposal called for creating a separate filtering body, composed of persons other than the judges of the Court. All of these were rejected in favour of more limited restrictions,

representing a compromise between advocates of a European ‘constitutional court’ with discretion to select its cases and those who stressed the need to maintain individual access.\(^{16}\)

The changes in Protocol 14 are procedural as well as substantive. The procedural changes are, first, a single judge is given competence to declare inadmissible or strike out an individual application, assisted by nonjudicial rapporteurs from the Registry. Secondly, the competence of the committees of three judges is extended to cover repetitive cases where they can decide, in a simplified procedure, not only the admissibility but also the merits of an application, based on well-established case law of the Court. Chambers of five or seven judges continue to decide other cases, with the Grand Chamber of 17 judges allocated the most important matters.

Between 1 June 2010, when Protocol No 14 entered into force, and 31 May 2012, application of the new admissibility criterion was reserved to Chambers and the Grand Chamber,\(^{17}\) with respect to all applications that had not been declared admissible before the entry into force of the Protocol, allowing for the development of interpretive case law.\(^{18}\) The Explanatory Report to Protocol No 14 expressed the drafters’ view that the terms contained in the new criterion are open to interpretation, giving the Court flexibility beyond that inherent in the existing admissibility criteria.\(^{19}\) ‘Significant disadvantage’ being a term not susceptible to exhaustive definition, akin to the pre-existing criterion of ‘manifestly ill-founded’, the Court was required to establish objective criteria for the application of the new rule through development of the case law.\(^{20}\) In 2010, when the Protocol entered into force, the High Contracting Parties that drafted it revealed their concerns by inviting the Court to give full effect to the new admissibility criterion and to consider other possibilities of applying the principle \textit{de minimis non curat praetor}.\(^{21}\) In 2011, the parties again invited the Court to ‘give full effect to the new admissibility criterion in accordance with the \textit{de minimis} principle’.\(^{22}\) As states do not like to be found in violation of their human rights obligations, it is not surprising that they would seek to limit admissibility, even (or especially) in respect to meritorious claims.

Currently, the Registry undertakes an initial evaluation of applications. A nonjudicial rapporteur\(^{23}\) from the Registry decides whether the application should be assigned to a single judge, a Committee or a Chamber, and assists the single judges, transmitting the lists of cases deemed inadmissible to the judges for approval. The President of the Court decides on the number of judges designated to sit as single


\(^{17}\) Article 20(2) Protocol No 14.

\(^{18}\) Explanatory Report to Protocol No 14, CETS 194, at para 106.

\(^{19}\) Ibid. at paras 78 and 80.

\(^{20}\) Ibid. at para 80.


\(^{22}\) Council of Europe’s High Level Conference on the Future of the European Court of Human Rights, held in Izmir from 26 to 27 April 2011.

\(^{23}\) Rule 18A Rules of the European Court of Human Rights (as amended to 1 July 2014) (‘Rules of the Court’).
judges and appoints them to serve for a period of one year. The Rules of Court provide that where the material submitted by the applicant is ‘on its own’ sufficient to disclose that the application is inadmissible or should be struck out of the list, it is to be considered by a single judge unless there is some special reason to act to the contrary. The single judge may declare inadmissible or strike out the application without further examination or appeal, notifying the applicant of the decision by letter. As Cameron has noted and judges on the Court have confirmed in discussions with the author, the lists transmitted electronically to the single judges contain only one or two sentence summaries of each matter recommended for dismissal, identifying the right being invoked; the judges do not see the applications and a few have complained of feeling that they are expected to ‘rubber-stamp’ the decisions of the Registry. Once the application is rejected, the author of it is sent a form letter so indicating, without explanation or reasoned decision, simply stating that ‘taking account of all the elements in its possession, and to the extent that it is able to evaluate the allegations formulated’, the Court sees no reason to proceed.

The new admissibility requirement is a major change to long-standing practice, added to allow the Court to reject applications when it deems the applicant has not suffered sufficient harm due to the alleged violation to make the case worthy of consideration. Prior admissibility criteria were deemed inadequate because their ‘interpretation has become established in the case-law that has developed over several decades and is therefore difficult to change’. The Explanatory Report stressed that the new requirement is not intended to restrict the right of individuals to apply to the Court or alter the principle that all individual applications are examined on their admissibility. Moreover, the Report notes that while the Court alone is competent to interpret the new admissibility requirement and decide on its application, its terms should ensure that rejection of cases requiring an examination on the merits is avoided. The latter will notably include cases which, notwithstanding their trivial nature, raise serious questions affecting the application or the interpretation of the Convention or important questions concerning national law.

24 Rule 27A Rules of the Court.
25 Rule 49(1) Rules of the Court.
26 Cameron, ‘The Court and the Member States: Procedural Aspects’ in Andreas Follesdal et al. (eds), Constituting Europe: The European Court of Human Rights in a National, European and Global Context (2013) 25 at 33. Lack of access to the applications is understandable because the single judge is unlikely to comprehend the many different languages of the applications.
27 The problem of a ‘hidden judiciary’ of secretariat lawyers making the actual decisions is not unique to the European system. Cameron notes that this can create problems of integrity when the Registry is partly staffed with temporarily seconded personnel paid for by individual states: see ibid. at 34.
28 Translation from Gagliano Giorgi v Italy Application No 23563/07, Merits and Just Satisfaction, 6 March 2012, at para 40 (‘compte tenu de l’ensemble des éléments en sa possession, et dans la mesure où elle était compétente pour connaître des allégations formulées, la Cour n’a relevé aucune apparence de violation des droits et libertés garantis par la Convention ou les Protocoles’).
29 Explanatory Report, supra n 19 para 78.
30 Ibid. at para 39.
The Report admits that the new criterion may lead to certain cases being declared inadmissible which might have resulted in a judgment without it, but suggests that the new criterion has this purpose, being ‘easier for the Court to apply than some other admissibility criteria, including in cases which would at all events have to be declared inadmissible on another ground’.  

3. THE PROCEDURE AND OUTCOME

During the transition period, the Court often raised the new admissibility criterion of its own motion; in other instances, governments filed an objection to admissibility on this ground. In addition, those governments that invoked ‘no significant disadvantage’ often raised the admissibility objection along with a challenge to jurisdiction rationae personae, asserting that the applicant did not meet the minimum threshold to be considered a victim. Most of the government objections failed, unlike the cases in which the Court applied the criterion of its own motion.

The first mentions of the new criterion came in several dissenting opinions in cases decided before the entry into force of Protocol No 14. In *Debono v Malta*, Judge Borrego Borrego concluded that ‘the case before us would be an obvious candidate for inclusion under the future Article 35(3)(b) of the Convention, once Protocol No 14 has entered into force’ despite the fact that the application *prima facie* concerned a legitimate matter of procedural delay in a dispute involving environmental degradation and an award of compensation of over 13,000 EUR. *Micallef v Malta* concerned the question of applicants pursuing matters that came, at least in the opinion of dissenting judges, close to being an *actio popularis* in light of the underlying ‘trivial’ facts.

Logically, the Court should and sometimes did test for significant disadvantage only after reviewing potential jurisdictional problems such as the failure of the application rationae materiae, and after examining other objections to admissibility. Logic calls for this because it is only if there is an otherwise admissible case presented that the Court should examine whether, despite having a *prima facie* case, the applicant’s claim should be rejected because the alleged violation produced consequences insignificant to the victim and to human rights in general. In some cases, however, the Court has looked at the new criterion before examining

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31 Ibid. at para 78.
32 See, for example, *Adrian Mihai Ionescu v Romania* Application No 36659/04, Admissibility, 1 June 2010, at para 35.
33 See, for example, *Gaglione and Others v Italy* Applications Nos 45867/07 et al., Merits and Just Satisfaction, 21 December 2010.
34 See, for example, *Van Velden v The Netherlands* Application No 30666/08, Merits and Just Satisfaction, 19 July 2011, at para 21.
35 Application No 34539/02, Merits and Just Satisfaction, 7 February 2006, at Dissenting Opinion of Judge Borrego Borrego. See also *Miholapa v Latvia* Application No 61655/00, Merits, 31 May 2007, at Joint Dissenting Opinion of Judges Fura-Sandstrom and Thor Bjørgvinsson, para 15.
36 Application No 17056/06, Merits and Just Satisfaction, 15 October 2009, at Joint Dissenting Opinion of Judges Costa, Jungwiert, Kovler and Fura, para 1.
37 See *Adrian Mihai Ionescu v Romania*, supra n 32; *Holub v Czech Republic* Application No 24880/05, Admissibility, 14 December 2010.
other admissibility requirements.\footnote{Korolev v Russia Application No 25551/05, Admissibility, 1 July 2010; Rinck v France Application No 18774/09, Admissibility, 19 October 2010; Gaftoniuc v Romania Application No 30934/05, Admissibility, 22 February 2011; Burov v Moldova Application No 38875/03, Admissibility, 14 June 2011; Shefer v Russia Application No 45175/04, Admissibility, 13 March 2012.} In rare instances, the Court found that several barriers to admissibility together barred consideration of the matter on the merits.\footnote{In Munier v France Application No 38908/08, Admissibility, 14 February 2012, the Court rejected the applicant’s complaints under Articles 35(1), 35(3)(b), and 35(4). Perhaps because there were other barriers to admissibility, the Court did not discuss the first and second safeguard clauses.}

There are three elements that Protocol No 14 requires the Court to consider in applying the new criterion, the first being an evaluation of whether the applicant has suffered a significant disadvantage. Secondly, if the Court finds no significant disadvantage, it must determine whether respect for human rights nonetheless requires the case to be examined on the merits. Thirdly, it must consider whether the domestic proceedings gave full consideration to the matter, because a failure to do so means the case is admissible despite the absence of significant disadvantage to the applicant. The Court does not necessarily examine these three elements in that particular order. In *Finger v Bulgaria*,\footnote{Application No 37346/05, Merits and Just Satisfaction, 10 May 2011.} for example, the Court considered that the two safeguards required that the case be examined whether or not the applicant suffered a significant disadvantage and thus it did not pronounce on the first prong. Similarly, in *Flisar v Slovenia*,\footnote{Application No 3127/09, Merits and Just Satisfaction, 29 September 2011.} the Government’s objection was rejected because the second safeguard clause was not fulfilled, without assessing whether the applicant had suffered a significant disadvantage. In most of the cases, however, each element of the new criterion has been dealt with in the order mentioned above.

4. WHAT IS A ‘SIGNIFICANT DISADVANTAGE’ AS DETERMINED BY THE COURT

The Court began using the new admissibility criterion on the very date Protocol No 14 entered into force. The applicant in *Ionescu v Romania*\footnote{Supra n 32.} complained about irregularities in national proceedings concerning a dispute he had with a transport company about advertised amenities on a bus trip. The Court began a practice of considering the new criterion on its own motion, holding that the estimated loss of about 90 EUR had had no significant consequences for the applicant’s personal life. The Court expressed its approval of the new criterion as enabling it to focus on its core business: ensuring legal protection of the rights of the Convention and the additional protocols at the European level.

In *Korolev v Russia*, the leading early decision on significant disadvantage, the Court established that the new criterion, inspired as it was by the *de minimis* principle, hinged ‘on the idea that a violation of a right, however real from a purely legal point of view, should attain a minimum level of severity to warrant consideration by an international court.’\footnote{Supra n 38 at para 4.} The Court indicated that it would make a contextual assessment based on two factors: the subjective perception of the applicant and an
objective assessment of what was at stake in the case. The subjective perception should be justified on objective grounds, the Court determined, because although the applicant’s feelings are relevant, those feelings, without being justified objectively in any way, are insufficient to conclude that an applicant has suffered a significant disadvantage.

In mid-2011, in the judgment of Giusti v Italy, the Court expanded the list of factors it said it would consider to determine significant disadvantage. Those identified are: the nature of the allegedly violated right, the gravity of that alleged violation, and/or the possible consequences of the alleged violation on the personal situation of the applicant. These criteria may imply that violations of certain rights, including non-derogable rights, inherently cause a significant disadvantage to applicants. In Van Velden v The Netherlands the Government argued that the applicant had not suffered a significant disadvantage because the entire period of overly lengthy pretrial detention had been deducted from his prison sentence. The Government’s objection was rejected because, according to the Court:

It is a feature of the criminal procedure of many contracting Parties, if not most, to set periods of detention prior to final conviction and sentencing off against the eventual sentence; for the Court to hold generally that any harm resulting from pre-trial detention was thereby ipso facto nugatory for Convention purposes would remove a large proportion of potential complaints under Article 5 from the scope of its scrutiny.

In 2012, the European Court prepared a Research Report on the application of Article 35(3)(b) of the Convention during the transition period, summing up the principles developed by the Court during these first two years of applying the ‘significant disadvantage’ criterion. The Research Report pointed to the Court’s standard language in the cases, that ‘the requirement of “significant disadvantage” emerges from the idea that a violation of a right, however real from a purely legal point of view, should attain a minimum level of severity to warrant consideration by an international court. Violations which are purely technical and insignificant outside a

44 Ibid.  
45 Flisar v Slovenia, supra n 41.  
46 Ladygin v Russia Application No 35365/05, Admissibility, 30 August 2011, at paras 4–5.  
47 Application No 13175/03, Merits and Just Satisfaction, 18 October 2011.  
48 Van Velden v The Netherlands Application No 30666/08, Merits and Just Satisfaction, 19 July 2011.  
49 Ibid. at para 39. See also Bannikov v Latvia Application No 19279/03, Merits and Just Satisfaction, 11 June 2013, admitting application and finding a violation of Article 5(3). On this point, the Court refers again to the importance of personal liberty in a democratic society. The concurring opinion of Judges de Gaetano and Ziemele go further, stating that it is ‘beyond comprehension’ that a state could assert with a straight face that the applicant suffered no significant disadvantage from nearly two years of pretrial detention. They also indicate that they find it ‘difficult ... to conceive of a situation where a deprivation of liberty in breach of Article 5(1) can ever be regarded as a non-significant violation’. See also X.Y. v Hungary Application No 43888/08, Merits and Just Satisfaction, 19 March 2013 (rejecting Government argument of no significant disadvantage, finding violations of Articles 5(1), 5(2) and 5(3), and awarding 18,000 EUR for one month’s detention).  
formalistic framework thus do not merit European supervision’.\(^{51}\) The assessment of this minimum level is relative and depends on all the circumstances of the case. This summation gives very little guidance to those with claims about the likelihood of meeting the admissibility criterion.

A violation of the Convention may concern important questions of principle and thus cause a significant disadvantage regardless of the pecuniary amount at stake. The question of principle from the individual’s perspective is separate, although obviously overlapping, from the first safeguard that considers the importance of the human rights issue at stake from the perspective of the European public order. In *Giuran v Romania*,\(^{52}\) the Court found that the applicant had suffered a significant disadvantage because the principle involved concerned his right to respect for his possessions and for his home, even though the domestic proceedings which were the subject of the complaint concerned items worth only 350 EUR stolen from the applicant’s apartment.

In many reported cases, the Court examined the applicant’s conduct during domestic proceedings to determine how important the matter appeared to be to the applicant. Failing to appear at hearings, or remaining inactive during domestic proceedings resulted in some findings that the proceedings were not significant to the applicant.\(^{53}\)

A large number of applications where significant disadvantage was discussed involved alleged violations of Article 6(1), due to procedural delays in domestic proceedings or the enforcement of judgments. In these cases, the Court’s consideration of significant disadvantage was often triggered by the low financial amount at stake, ranging between one and 504 EUR. Article 6 has long been the most frequent source of cases before the Court (nearly half of all violations found between 1959 and 2009) and most of the violations have involved procedural delays in civil or criminal cases or failure to transmit the observations of the other party to the applicant during domestic proceedings (equality of arms). These cases were usually decided on the merits in the past, but they are now often excluded where the financial amount at stake unless the applicant can indicate consequential harm from the procedural violation or that the case raises a new or important matter of principle,\(^{54}\) even taking into account the claim for non-pecuniary damages.\(^{55}\)

\(^{51}\) *Shefer v Russia*, supra n 38 at para 18.

\(^{52}\) Application No 24360/04, Merits and Just Satisfaction, 21 June 2011.

\(^{53}\) See, for example, *Shefer v Russia*, supra n 38.

\(^{54}\) *Adrian Mihai Ionescu v Romania*, supra n 32 (90 EUR); *Korolev v Russia*, supra n 38 (1 EUR); *Vasilchenko v Russia* Application No 34784/02, Admissibility, Merits and Just Satisfaction, 23 September 2010 (12 EUR); *Rinck v France*, supra n 38 (a traffic fine of 150 EUR and the endorsement of the applicant’s driving licence with one penalty point); *Gaftonic v Romania*, supra n 38 (delayed payment of 25 EUR); *Ștefănescu v Romania* Application No 11774/04, Admissibility, 12 April 2011 (failure to reimburse 125 EUR); *Fedotov v Moldova* Application No 51838/07, Admissibility, 24 May 2011 (failure by the State authorities to pay the applicant 12 EUR); *Burov v Moldova*, supra n 38 (failure by the State authorities to pay the applicant 107 EUR plus costs and expenses of 121 EUR); *Fernandez v France* Application No 65421/10, Admissibility, 17 January 2012 (a fine of 135 EUR, 22 EUR for costs and one penalty point on the applicant’s driving licence); *Kiousi v Greece* Application No 52036/09, Admissibility, 28 September 2011 (504 EUR); *Havelka v The Czech Republic* Application No 7332/10, Admissibility, 20 September 2011 (99 EUR claim remained after the applicant was awarded the equivalent of 1,515 EUR for the length of the proceedings on the merits); *Šumbera v The Czech Republic* Application No 48228/08, Admissibility, 21 February 2012 (227 EUR in expenses); *Shefer v Russia*, supra n 38 (enforcement of a judgment for 34 EUR).

\(^{55}\) *Kiousi v Greece*, ibid.
Procedural delay cases involving larger amounts usually go forward to a merits determination, but if the sum awarded in the domestic proceedings does not differ significantly from what the Court would normally award as just satisfaction, the applicant may be found not to have suffered a significant disadvantage.

Not every case involving small monetary losses has been rejected; the Court recognizes that even modest pecuniary damage may be significant in the light of a person’s specific situation and the economics of the country or region of residence. However, that was not the case in Fernandez, in which the fact that the applicant was a judge at the administrative appeal court in Marseille was relevant for the Court, which found that a fine of 135 EUR was an insignificant amount for her, in contrast to cases where a pension or salary is at stake for less wealthy individuals. Regardless of the amount at stake, the domestic outcome of a case at national level is relevant; in cases where the applicant claimed a procedural violation because the domestic court failed to communicate to the applicant the observations of the other parties to the proceedings, the Court has found no significant disadvantage if the non-communicated material contained nothing new or relevant to the case and the decision of the domestic court had not been based on the material. In contrast, in 3A.C.Z. s.r.o. v The Czech Republic, the Court found that the non-communicated observations could have contained some new information of which the applicant company was not aware and concluded that the company could have suffered a significant disadvantage.

With other alleged procedural violations, the Court has found no significant disadvantage when it has determined that the violations did not affect the outcome of the case. In Janíčev v The Former Yugoslav Republic of Macedonia, the complaint concerned the non-pronouncement in public of a first instance court decision taken against the applicant’s sister. The Court concluded that the applicant had not suffered any significant disadvantage because he was not the aggrieved party and the judgment did not impose a significant financial burden on him. Similarly, in Savu v Romania, the applicant complained of the non-enforcement of certain judgments in his favour, including the one

56 Gaglione and Others, supra n 33 (delays of between nine and 49 months in enforcing ‘Pinto’ judgments involved sums from 200 to 13,749.99 EUR); Sancho Cruz and 14 other ‘Agrarian Reform’ cases v Portugal Application Nos 8851/07 et al., Merits and Just Satisfaction, 18 January 2011, at paras 32–35 (delays in the payment of compensation for expropriated property in amounts running to tens of thousands of euros); Živić v Serbia Application No 37204/08, Merits and Just Satisfaction, 13 September 2011 (disputed employment rights with the claim being approximately 1,800 EUR); Giusti v Italy, supra n 47 (length of civil proceedings of 15 years and 5 months and the absence of any ‘Pinto’ remedy with the claim being ‘an important amount’); De Ieso v Italy Application No 34383/02, Merits and Just Satisfaction, 24 April 2012 (length of civil proceedings where the sum in question concerned disability allowances which were not insignificant).

57 Havelka v The Czech Republic, supra n 54.

58 Supra n 54.

59 See Holub v Czech Republic, supra n 37; Bráti Zátkové, a.s., v The Czech Republic Application No 20862/06, Admissibility, 8 February 2011; Matousék v The Czech Republic Application No 9965/08, Admissibility, 29 March 2011, Čavajda v The Czech Republic Application No 17696/07, Merits, 29 March 2011; Jirsák v The Czech Republic Application No 8968/08, Admissibility, 5 April 2012. See also Liga Portuguesa de Futebol Profissional v Portugal Application No 49639/09, Merits and Just Satisfaction, 5 April 2012 (failure to communicate prosecutor’s decision caused no significant disadvantage).

60 Application No 21835/06, Merits and Just Satisfaction, 10 February 2011. See also BENet Praha, spol. s r.o., v The Czech Republic Application No 33908/04, Merits and Just Satisfaction, 24 February 2011.

61 Application No 18716/09, Admissibility, 4 October 2011.

62 Application No 29218/05, Admissibility, 11 October 2011.
imposing an obligation to issue a certificate he sought, but the Court found that the applicant had suffered no significant disadvantage from the violation. In Gagliano Giorgi v Italy, the Court examined significant disadvantage in the context of lengthy criminal proceedings. The Court concluded that the applicant was not significantly disadvantaged by the delay, given that his sentence was reduced as a result of the length of the proceedings. By contrast, in another Article 6 case, Luchaninova v Ukraine, the Court observed that the outcome of the proceedings, which the applicant claimed had been unlawful and conducted in an unfair manner, had a particularly negative effect on her professional life and therefore the applicant had suffered a significant disadvantage.

Other judgments indicate that certain rights are subject to stricter scrutiny on the issue of disadvantage, even if they do not inherently preclude an application being declared inadmissible. The Court has seemed unwilling to accept government arguments of no significant disadvantage where the applicants have alleged violations of Article 9 (religious liberty) or Article 10 (freedom of expression). In Krzysztof Sylka v Poland, however, the Court for the first time declared inadmissible an application brought under Article 10 (freedom of expression), on the ground that the applicant had not suffered a significant disadvantage after criminal proceedings against him for insulting a policeman were conditionally dismissed. The applicant complained that his right to freedom of expression had been infringed because the Criminal Code had been applied in an unforeseeable manner and the measures imposed on him had been disproportionate. In an important addition to the jurisprudence, the Court held that the Convention does not limit the application of the new admissibility criterion to any particular right protected under the Convention, but it also stated that it remains mindful of the utmost importance of freedom of expression as one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfillment. Therefore, in cases concerning freedom of expression, the application of the new admissibility criterion ‘should take due account of the importance of this freedom and be subject to careful scrutiny by the Court. This scrutiny should encompass, among others, such elements as contribution to a debate of general interest and whether a case involves the press or other news media.”

63 Supra n 28.
64 Application No 16347/02, Merits and Just Satisfaction, 9 June 2011.
65 Vartic v Romania (No 2) Application No 11770/08, Merits and Just Satisfaction, 17 December 2013 (admitting the case and finding a violation of Article 9, awarding non-pecuniary damages and costs).
66 EON v France Application No 26118/10, Merits and Just Satisfaction, 14 March 2013, admitting the case and finding a violation of Article 10. See also Ojala & Etukeno Oy v Finland Application No 69939/10, Merits and Just Satisfaction, 14 January 2014 (rejecting Government argument of no significant disadvantage, but finding no violation of Article 10 on the merits). See similarly Remulszko v Poland Application No 1562/10, Merits and Just Satisfaction, 16 July 2013.
67 Application No 19219/07, Admissibility, 3 June 2014.
68 Ibid. at para 28.
69 Handyside v United Kingdom Application No 5493/72, Merits and Just Satisfaction, 7 December 1976, at para 49; Axel Springer AG v Germany Application No 39954/08, Merits and Just Satisfaction, 7 February 2012, at para 78; Mouvement raiien suisse v Switzerland Application No 16354/06, Merits and Just Satisfaction, 13 July 2012, at para 48 (extracts); Animal Defenders International v United Kingdom Application No 48876/08, Merits and Just Satisfaction, 22 April 2013, at para 100 (extracts).
70 Sylka, supra n 67.
On the facts of the *Sylka* case, the Court noted that the domestic court conditionally discontinued the criminal proceedings against the applicant for insulting police officers and fixed a probationary period for one year. The local court had further ordered the applicant to pay PLN 500 (125 EUR) to a local fostering service and PLN 100 (25 EUR) in respect of costs. Assessing the seriousness of the alleged violation, the Court took into account the applicant’s subjective perceptions and what was objectively at stake. The Court accepted that the issue at stake was clearly of subjective importance to the applicant, but with regard to the objective aspect the Court noted that the decision to conditionally discontinue the criminal proceedings implied that the applicant committed the offence at issue but the decision did not amount to a conviction, because the local court was satisfied that the applicant’s guilt and the social danger of his act had been insignificant, taking into account mitigating circumstances, in particular the fact the applicant’s remark was only moderately insulting.\(^71\) Also relevant to the European Court was the fact that the information about the criminal proceedings was entered into the National Criminal Register only for a period equal to the probationary period plus six months; after the expiry of this period the information was removed from the Register. As a matter of evidence, the Court observed that the applicant did not submit any fact indicating that the conditionally discontinued proceedings were resumed or that the information on the Register had affected him adversely in any tangible way. Finally, the Court found that the financial implications of the proceedings could not represent a particular hardship for the applicant, given the modest amount at stake (150 EUR in aggregate) and the fact that that he was an entrepreneur. On account of these elements, the Court held it could not discern objective grounds to hold that the applicant suffered important adverse consequences.\(^72\)

The Court then examined whether the subject matter of the complaint involved an important matter of principle and found that it did not.\(^73\) The applicant was prosecuted for insulting a public official, an offence common to many legal systems in the Council of Europe Member States, and the matter involved only ‘an unfortunate verbal confrontation with no wider implications or public interest undertones which might raise real concerns under Article 10 of the Convention’.\(^74\) Furthermore, the Regional Court’s decision was consistent with an earlier judgment of the national Constitutional Court which held that the offence of insulting a public official was compatible with the constitutional provision safeguarding freedom of expression only in so far as it had been committed in public and while the officials were carrying...

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\(^71\) When police officers stopped the applicant in his car for not wearing a seat belt, a dispute ensued in which the applicant said to the officers ‘he would not descend to their level’: ibid. at para 3.

\(^72\) Following *Rinck v France*, supra n 38; cf., *Luchaninova v Ukraine* Application No 16347/02, Merits and Just Satisfaction, 9 June 2011, at para 49 (where the applicant’s conviction for a petty theft was relied on as a basis for her dismissal from work).

\(^73\) In contrast to *Berladir and Others v Russia* Application No 34202/06, Merits and Just Satisfaction, 10 July 2012, at para 34, which concerned the operation of the ‘notification-and-endorsement procedure’ for public gatherings.

\(^74\) Ibid. at para 35. The Court distinguished the case from *Eon v France* Application No 26118/10, Merits and Just Satisfaction, 14 March 2013, at paras 34–35, where in rejecting the Government’s objection on the grounds of lack of significant disadvantage, the Court took into account the national debate whether the offence of insulting the Head of State should remain a criminal offence and a wider issue of its compatibility with the Convention.
out their official duties. Such was the situation in the applicant’s case. In sum, the Court concluded that the applicant did not suffer a significant disadvantage as a result of the alleged violation of the Convention.

With regard to the second element contained in Article 35(3)(b), the Court examined whether respect for human rights required further consideration of the case, which it said would apply where a case raises questions of a general character affecting the observance of the Convention, for instance, where there is a need to clarify the States’ obligation under the Convention or to induce the respondent State to resolve a structural deficiency. Applying this test, the Court found no compelling reason to warrant examination of this case on the merits.

Thirdly, Article 35(3)(b) does not allow the rejection of an application under the new admissibility requirement if the case has not been duly considered by a domestic tribunal, to avoid a denial of justice. The Court noted that the case against the applicant was examined on the merits and that the applicant was able to submit his arguments in adversarial proceedings. Consequently, the third element of the new admissibility requirement was satisfied and the applicant’s complaint under Article 10 must be declared inadmissible. As this discussion of the Sylka decision reveals, the Court engaged in a lengthy analysis of the facts and the merits to apply the new criterion, raising the question of whether this additional barrier lightens the burden on the Court.

As noted, the first safeguard clause compels the Court to continue the examination of the application even in the absence of any significant disadvantage suffered by the applicant, if respect for human rights as defined in the Convention and the Protocols thereto so requires, meaning the case may raise questions of a general character affecting the observance of the Convention. Such questions would arise, for example, where there is a need to induce the respondent state to resolve a structural deficiency affecting other persons in the same position as the applicant. In Finger, the Court considered it necessary to examine the case on the merits because it concerned a potential systemic problem of unreasonable length of civil proceedings and the alleged lack of an effective remedy. In Živić, the Court found that the applicant’s financial disadvantage, together with the inconsistent case law of the District Court in Belgrade as regards the right to fair wages and equal pay for equal work, was enough for it to reject the Government’s objection raising the significant disadvantage criterion. In Živić, the Court found that even assuming that the applicant had not suffered a significant disadvantage the case raised issues of general interest which required examination.

Similarly, in Nicoleta Gheorghe v Romania, the Court admitted the application despite the insignificant financial award at stake (17 EUR), because a decision of principle was needed on a question of presumption of innocence and equality of arms in criminal proceedings and was the first application to be considered after a change in national law. In Juhas Đurić v Serbia, the applicant complained of the payment of fees to police-appointed defence counsel in the course of a preliminary

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75 See the Explanatory Report to Protocol No 14, supra n 18 at para 81.
76 Application No 23470/05, Merits and Just Satisfaction, 3 April 2012.
77 Application No 48155/06, Merits and Just Satisfaction, 10 April 2012.
criminal investigation. The Court concluded that the issues complained of could not be considered trivial, because they related to the functioning of the criminal justice system and respect for human rights required examination on the merits.

During the transition period, the Court frequently held that respect for human rights did not require it to continue the examination of an application when the relevant domestic law had changed since the events at issue or when similar issues had been resolved in prior cases. It also rejected cases when the relevant law had been repealed, making the complaint before the Court of historical interest only. According to the Court, respect for human rights does not require the Court to examine an application if the Court and the Committee of Ministers have addressed the issue as a systemic problem, for example, non-enforcement of domestic judgments, and the Court has had numerous opportunities to address the issue in previous judgments.

The second safeguard in Article 35(3)(b) does not allow the rejection of an application under the new admissibility requirement if the case has not been duly considered by a domestic tribunal. This clause is there to ensure that every case receives a judicial examination, either at the national or at the European level. The purpose of the second safeguard clause is thus to avoid a denial of justice for the applicant. The applicant should have had the opportunity of submitting his arguments in adversarial proceedings before at least one level of domestic jurisdiction.

In Dudek v Germany, a complaint about the excessive length of civil proceedings under German law had not been duly considered by a domestic tribunal because there was no effective remedy yet enacted and the case therefore had to be admitted. In Finger, the Court found that the chief point raised by the case was precisely whether the applicant’s grievance concerning the alleged unreasonable length of the proceedings could be duly considered at the domestic level. Therefore, the case could not be regarded as complying with the second safeguard clause. The same approach was adopted in Flisar. The Court noted that the applicant complained about not having his case properly examined by the domestic courts. It also noted that the Constitutional Court did not deal with the applicant’s complaints concerning an alleged breach of the guarantees of Article 6 of the Convention. Accordingly, the Court rejected the Government’s objection under the new criterion. In Fomin v Moldova, the applicant complained under Article 6 that the courts had not given sufficient reasons for their decisions convicting her of an administrative offence. The Court joined the issue of whether her complaint had been duly considered by a

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78 Léger v France Application No 19324/02, Strike Out, 30 March 2009, at para 51; Rinck v France, supra n 38; and Fedotov v Moldova, supra n 54 at para 23.
79 Adrian Mihai Ionescu v Romania, supra n 32.
80 Such is the situation with respect to non-enforcement of judgments in the Russian Federation (Vasilchenko), Romania (Gaftoniuc and Savu), the Republic of Moldova (Barov) and Armenia (Garuryan v Armenia Application No 11456/05, Admissibility, 24 January 2012). The Court has also indicated this where the issue involves length of proceedings cases from Greece (Kiousi) and the Czech Republic (Havelka).
81 Korolev v Russia, supra n 38; Gaftoniuc v Romania, supra n 38; and Fedotov v Moldova, supra n 54.
82 Adrian Mihai Ionescu v Romania, supra n 32 and Ţeţeşescu v Romania, supra n 54.
83 Applications Nos 12977/09 et al., Admissibility, 23 November 2010.
84 Application No 36755/06, Merits and Just Satisfaction, 11 October 2011.
domestic tribunal to the merits of the complaints, ultimately admitting the claim and finding a violation of Article 6.

The domestic remedies safeguard is not interpreted as strictly as the requirements of a fair hearing under Article 6\(^85\) although, as clarified in Šumbera,\(^86\) some failures in the fairness of the proceedings could, by reason of their nature and intensity, impact on whether the case has been ‘duly’ considered. Finally, the notion ‘duly examined’ does not require the State to examine the merits of each and every claim brought before the national courts, however frivolous it may be.\(^87\)

Over the two-year transition period, the Court’s Chambers applied the significant disadvantage mostly to complaints made under Articles 6 and 13 of the Convention and Article 1 of Protocol No. 1, with the majority of cases falling under Article 6. Statistics since the end of the transition period may indicate more frequent application of the new criterion, but it is almost impossible to determine from information the Court provides. In 2014, the applications allocated to a judicial formation declined by 15 per cent compared to 2013, but this may be because more are being disposed of by the Registry without being communicated to a judge; 25,100 applications were disposed of by the Registry in 2014, an 84 per cent increase of those not sent to any judicial formation. Of the 56,250 allocated to a judicial formation, 43,450 or more than 77 per cent were identified as single judge cases likely to be declared inadmissible. During the year single judges decided 78,660\(^88\) cases including ones allocated before 2014. This certainly reduced the pending caseload, which declined from its high point of 151,600 at the end of 2010, the year Protocol No 14 entered into force, to 69,900 at the end of 2014. In fact, from 2000 to 2014, the percentage of applications deemed inadmissible compared to those communicated to governments and judgments delivered has steadily grown;\(^89\) it is hard to assume that all of that growth is due to an increase in frivolous complaints, although there undoubtedly are those that clearly could be categorized as such.\(^90\)

5. ANALYSIS AND CRITIQUE

The European Court dismisses the overwhelming percentage of all applications. Even before reaching the admissibility requirements, the Court can exclude cases that fall outside subject matter jurisdiction,\(^91\) such as those seeking vindication of

\(^{85}\) Adrian Mihai Ionescu v Romania, supra n 32; and Liga Portuguesa de Futebol Profissional v Portugal, supra n 59.

\(^{86}\) Supra n 45 at 6.

\(^{87}\) Ladygin v Russia, supra n 46 at 5.

\(^{88}\) The Court has published two different figures for the number of single judge dispositions: 78,660 in the Analysis of Statistics 2014 and 78,700 in the Annual Report 2014. This article has opted to use the lower figure.

\(^{89}\) In 2000, about one-third of applications were communicated or had judgments delivered and two-thirds were declared inadmissible or struck out. By 2014, the comparable percentages were 12 per cent and 78 per cent.

\(^{90}\) Among the applications discussing significant disadvantage, the Court notes in Komanicky v Slovakia Application No 53364/07, Admissibility, 18 June 2013, that the applicant had already filed 124 matters with the Court; the applicant in Havelka v The Czech Republic, supra n 54, had filed 13 prior matters. Both applications were declared inadmissible on the basis of no significant disadvantage.

\(^{91}\) In practice, however, the Court examines jurisdiction as part of the admissibility requirement that an application not be incompatible with the Convention.
rights not contained in the European Convention\textsuperscript{92} or those where the applicant does not qualify as the ‘victim’ of a violation. Moreover, since its debut the Court has had the ability to eliminate trivial matters through application of the admissibility criterion of ‘manifestly ill-founded’, applied when the facts fail to indicate a violation of the Convention, if the facts are demonstrably false or in error, or if the claims fall clearly outside the scope of the right as interpreted by the Court.\textsuperscript{93}

The applicant is required to give \textit{prima facie} evidence of the facts alleged.\textsuperscript{94} An application may relate to a right protected by the Convention, bringing it within the jurisdiction \textit{ratione materiae}, without the facts disclosing a possible violation. The case law is inconsistent, however, on how this factual deficiency should be categorized. The Court sometimes analyses the situation under the criterion of manifestly ill-founded, in other decisions as a question of significant disadvantage, and at other times as an issue of incompatibility with the Convention. To be manifest, the lack of foundation should be one on which there is no rational disagreement; a divided Court would seem to preclude this result. In effect, the Court undertakes a truncated merits determination.

Reviews of the reported decisions suggest that the new admissibility criterion did not work as anticipated in its first two (public) years. One review found that of all admissibility decisions during the first year, those applications excluded for lack of a significant disadvantage constituted 0.34 per cent of the total.\textsuperscript{95} Moreover, at least in the initial cases, the length of time to reach a decision and the amount of analysis required and undertaken suggests that determining whether a case involves a ‘significant disadvantage’ to the applicant, or to the contrary should be rejected, involves detailed substantive consideration including on the merits. It does not appear from the published decisions that the Court succeeded in reducing its workload through application of the significant disadvantage admissibility criterion. Statistics on single judge dismissals may indicate to the contrary, however.

It is impossible to know on what basis the single judges declared inadmissible or struck out the 78,660 applications they rejected in 2014, because such information is not reported.\textsuperscript{96} The new criterion assumes that there is a \textit{prima facie} case made out

\textsuperscript{92} See Zechnalova and Zehnal v The Czech Republic Application No 38621/97, Admissibility, 14 May 2002 (finding an application asserting violations of the European Social Charter incompatible \textit{ratione materiae} with the ECHR).

\textsuperscript{93} For example, Garaudy v France Application No 65831/01, Admissibility, 24 June 2003 (freedom of expression does not extend to any remark ‘directed against the Convention’s underlying values’. In particular, ‘the justification of a pro-Nazi policy could not be allowed to enjoy the protection afforded under Article 10’. There is a ‘category of clearly established historical facts—such as the Holocaust—whose negation or revision would be removed from the protection of Article 10 by Article 17’.

\textsuperscript{94} X. v Austria Application No 556/59, European Commission on Human Rights, 4 August 1960.

\textsuperscript{95} See Steering Committee for Human Rights (CDDH), CDDH Report containing elements to contribute to the evaluation of the effects of Protocol No 14 to the Convention and the implementation of the Interlaken and Izmir Declarations on the Court’s situation, CDDH H(2012)R 76 Addendum II, 30 November 2012.

\textsuperscript{96} See Tickell, ‘Dismantling the Iron-Cage: The Discursive Persistence and Legal Failure of a “Bureaucratic Rational” Construction of the Admissibility Decision-Making of the European Court of Human Rights’ (2011) 12 \textit{German Law Journal} 1786 at 1800, observing that it is ‘exceedingly difficult to reconstruct a properly representative account of the totality of the Court’s admissibility jurisprudence’ because of the lack of publication and destruction of files of inadmissible applications after one year. Buyse indicates that a communication from the press office claimed 127 applications were rejected by a single judge based on
that a violation of a guaranteed right has occurred, but that it is not a ‘serious’ violation. As such, it should be applied only after other admissibility criterion have been examined and implies an evaluation of the merits of the claim. There are certainly applicants that abuse the process through excessive filings or who demonstrated a lack of interest in domestic proceedings, but a clear danger with the new criterion is that judges, or more accurately the Registry, will increasingly quantify human rights violations or constantly raise the threshold of what is considered significant to reduce the caseload. Moreover, the priority status for certain rights means that in practice there will be a double standard, with certain states condemned more regularly than others whose cases are on the back-burner. The states being ignored will probably not object, while those against which cases are consistently taken up may assert that the Court employs the double standard to exempt certain states from scrutiny.

Perhaps the most important criticism of the new criterion is that it addresses the wrong problem. The crisis in the European system is largely due to four states not complying with their obligations and judgments taken against them and doing so with impunity. Of the 69,900 cases pending at the beginning of 2015, 43,200 concerned just four states: Italy, Russia, Turkey and Ukraine. It is also of concern that the subject matter of cases appears to have shifted. While one-quarter of the applications in 2014 continued to concern the right to a fair trial (Article 6), especially procedural delays, to which may be added the related complaints of the lack of an effective remedy under Article 13 (10.25 per cent), a growing number of applications concern the prohibition of torture and inhuman or degrading treatment (Article 3), which now accounts for nearly 20 per cent of the pending matters.

The Council of Europe has not seriously considered sanctioning a state since the Greek case, despite the fact that at the end of 2014, the Court reported that 34,000 of the pending 69,900 cases were repetitive ones—that is, nearly half of all cases stem from failing to cure a problem previously identified and judged against the state. The Parliamentary Assembly (PACE) has noted such problems for years. In a report from 2010, it referred to the situation in nine states where major structural problems had led to many repeat violations. The Report called these problems a matter for grave concern and suggested that if they were not addressed, the future of the
Constitution system was in jeopardy. In the absence of strong action by the Committee of Ministers, the PACE decided to give priority to the examination of major structural problems in those nine states\(^{101}\) and six other states\(^{102}\) where the issue of non-compliance was cause for concern. The Report urged the Committee of Ministers to increase pressure and take firmer measures in cases of dilatory and continuous non-compliance with the Court’s judgments, because in the Assembly’s view this is the cause of numerous ‘clone’ petitions that threaten the effectiveness of the European human rights system. Were those problems redressed, there probably would be no need to limit further access to the Court by individuals whose applications make a case that their rights have been violated.

The pilot judgment procedure has helped in a few instances to conclude large numbers of cases and Court recommendations under the Article 46 heading in its judgments may also serve to address repetitive cases, but the real problem is a lack of political will to ensure enforcement of judgments and the changing nature and growing number of violations resulting from the admission of states as Council of Europe members and parties to the Convention that probably did not meet Council of Europe standards from the beginning.\(^{103}\) Everyone’s human rights are suffering as a consequence. Disadvantaging applicants by limiting access to the Court does not resolve any of these problems.

Fundamentally, the inclusion of the new admissibility criterion reflects the larger debate over the character of the court and whether it must choose between offering individual justice or espousing constitutional judgments.\(^{104}\) There are problems with considering the choices from an either/or perspective, but it must be noted that the European system fundamentally changed in 1998 when the permanent Court was established and the right of individual petition was made compulsory. The original model of the system was one in which the victim or victims played a minor role and enforcement was envisaged as occurring through the filing of interstate cases handled through a less adversarial procedure. The dearth of interstate cases became obvious at an early stage. Lacking a periodic reporting system like that utilized to monitor compliance in the United Nations, cases filed by individuals became the essential monitoring mechanism, both for purposes of individual redress and to indicate more widespread failures in implementation and compliance by States Parties. This remains the case in 2015, despite an increase in interstate cases of a highly political nature.\(^{105}\) Without examining, if only through a summary procedure, the large number of small cases submitted through individual applications, the Court is unlikely to

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101 Bulgaria, Greece, Italy, Moldova, Poland, Romania, the Russian Federation, Turkey and Ukraine.
102 Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Georgia and Serbia.
103 Article 3 of the Statute of the Council of Europe provides: ‘Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realization of the aims of the Council as specified in Chapter 1.’
104 See the contributions to Christoffersen and Madsen (eds), The European Court of Human Rights Between Law and Politics (2011).
105 Ukraine filed four applications against Russia by October 2015, of which three remained pending, one having been discontinued, and Georgia also filed two pending interstate cases against Russia.
become aware of structural problems that may be much more serious than any single case taken on its own.106

Some argue that more applications should be rejected because the Court does not have the resources to consider them properly107 and it has rarely afforded necessary redress for the violations it has found. The Court’s conclusion in a case that a domestic trial was unfair, for example, may not result in a reopening of domestic proceedings. While this is true, it is a problem of the relationship between the European system and those of the States Parties; defects in the system and the Court’s jurisprudence are not the responsibility of the victims, who are being asked to bear the burden. Clearly there is a problem with the political will of states to which the Court is responding, but the problem of compliance is not likely to be solved by focusing on more serious cases; just the reverse. If states do not fix problems in the smaller cases, resulting in more repetitive applications, it is hardly to be expected that they will respond positively when the violations touch on larger cases of greater import. The vast number of procedural delay cases and those concerning failure to execute domestic judgments exemplify structural problems that have not been remedied despite repeated judgments against the states concerned. Those applicants now arriving are as meritorious as those who came before and there is no principled reason why the later in time should suffer additional harm from the failure of the system to insist on compliance. One suggestion that has been made and supported by some judges on the Court is that these later in time case should be dealt with in proceedings at the Committee of Ministers as an execution problem,108 but it is precisely the failure of the Committee of Ministers to insist on execution that has created the problem in the first place, leaving applicants to the Court significantly disadvantaged.

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108 See Greer and Wildhaber, supra n 16 at 678–9.