

The Dawn of Article 18 ECHR: A Safeguard Against European Rule of Law Backsliding?

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Table of Contents

A. Introduction.....	111
B. The Rationale of Article 18 ECHR: Protecting the Rule of Law	114
I. The Notion of the Rule of Law.....	114
II. The Specter of Totalitarianism and Rule of Law Protection in the ECHR	115
III. Article 18 and the Rule of Law.....	118
C. The Defective Application of Article 18 in the Court's Case-Law	121
I. Introduction.....	121
II. An Extremely Narrow Scope of Application	121
III. An Insurmountable Burden and Standard of Proof	125
1. The Burden of Proof.....	125
2. The Standard and Means of Proof	127
3. What Must Be Proven.....	129
IV. Résumé	132
D. A New Dawn for Article 18? <i>Merabishvili v. Georgia</i> and Beyond.....	133
I. Two Steps Forward.....	134
II. ...And One Step Back?	136
III. Résumé	139
E. Conclusion.....	140

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Abstract

This article examines an underexplored avenue for the protection of the rule of law in Europe: Article 18 of the *European Convention on Human Rights*. This provision prohibits States from restricting the rights enshrined in the *European Convention* for any other purpose than provided for in the Convention. In this contribution, the author argues, based on a combination of textual, systematic and purposive interpretations of Article 18, that the provision is meant to safeguard against rule of law backsliding, in particular because governmental restrictions of human rights under false pretenses present a clear danger to the principles of legality and the supremacy of law. Such limitations of rights under the guise of legitimate purposes go against the assumption of good faith underlying the Convention, which presupposes that all States share a common goal of reinforcing human rights and the rule of law. Article 18 could therefore function as an early warning that European States are at risk of becoming an illiberal democracy or even of reverting to totalitarianism and the destruction of the rule of law. The article then goes on to assess the extent to which the European Court's case-law reflects and realizes this aim of rule of law protection, and finds that whereas the Court's earlier case-law left very little room for an effective application of Article 18, the November 2017 Grand Chamber judgment in *Merabishvili v. Georgia* has made large strides in effectuating the provision's *raison d'être*. As the article shows, however, even under this new interpretation, challenges remain.

A. Introduction

On the European level, the rule of law is safeguarded by multiple institutions on various levels. The primary organization engaged with the rule of law is the Council of Europe (CoE), obliging its members to “accept the principles of the rule of law”.¹ Within this system, the *European Convention on Human Rights* (ECHR or Convention) and its Court enjoy most of the limelight, primarily due to the power of the Court to take binding judicial decisions.² Although the protection of human rights is often considered to be only one aspect of the rule of law, and the Convention does not contain a right to be governed by the rule of law as such, the Court has nevertheless read certain rule of law requirements into the Convention. To this end, it held that “[o]ne reason why the signatory Governments decided to ‘take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration’ was their profound belief in the rule of law”.³ This reasoning has led the Court to recognize the rule of law as “a concept inherent in all the Articles of the Convention”,⁴ and to employ it in the interpretation of various Convention rights.⁵

Beyond such interpretations, the Convention also contains a provision that could be considered specifically geared to the protection of the rule of law within the Council of Europe. It concerns the rarely invoked – even more rarely found to be violated⁶ – Article 18 of the Convention which provides

¹ *Statute of the Council of Europe*, 5 May 1949, Art. 3, 87 UNTS 103.

² The Court itself has characterized the Convention as “a constitutional instrument of European public order”, see among other authorities, *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], ECtHR Application No. 5809/08, Judgment of 21 June 2016, para. 145. Further on this subject, see E. A. Alkema, ‘The European Convention as a Constitution and its Court as a Constitutional Court’, in P. Mahoney *et al.* (eds.), *Protection des Droits de l’Homme: La Perspective Européenne/Protecting Human Rights: The European Perspective. Mélanges à la Mémoire de/Studies in Memory of Rolv Ryssdal* (2000), 41, 41-63.

³ *Golder v. The United Kingdom*, ECtHR Application No. 4451/70, Judgment of 21 February 1975, para. 34.

⁴ *Mozer v. The Republic of Moldova and Russia* [GC], ECtHR Application No. 11138/10, Judgment of 23 February 2016, para. 134; *Baka v. Hungary* [GC], ECtHR Application No 20261/12, Judgment of 23 June 2016, para. 117 [Baka v. Hungary [GC]].

⁵ *Baka v. Hungary* [GC], *supra* note 4, for the right to access to court. See also *Brumărescu v. Romania* [GC], ECtHR Application No. 28342/95, Judgment of 28 October 1999, para. 61, pertaining to legal certainty and the finality of judicial decisions.

⁶ Also according to the Court itself, see *Khodorkovskiy and Lebedev v. Russia*, ECtHR Application No. 11082/06 and 13772/05, Judgment of 25 July 2013, para. 898 [Khodorkovskiy and Lebedev v. Russia].

that: “The restrictions permitted [to the rights and freedoms under the ECHR] shall not be applied for any purpose other than those for which they have been prescribed.” At first glance this provision merely reiterates the obvious; when restricting rights, States must comply with the restriction clauses accompanying those rights. However, numerous judges, in separate opinions and invoking the *travaux préparatoires*, have expressed their belief that Article 18 was included in the Convention “as a defence against abusive limitations of Convention rights and freedoms and thus to prevent the resurgence of undemocratic regimes in Europe”⁷ – indicating their view of Article 18 as a bulwark against dictatorial rule and as part of the arsenal of the militant democracy.⁸ Such a view has also been defended in scholarly debate.⁹

The argument in essence provides that Article 18 protects against abuse of power (*détournement de pouvoir*) by outlawing the restriction of rights for any *ulterior purpose* – in other words, where rights are restricted in a way that serves a “hidden agenda”.¹⁰ By way of example, several States have used their criminal justice systems and their powers of detention to take out political dissidents, detaining them under false pretenses – sometimes at tactical moments in order to frustrate their political ambitions.¹¹ Such limitations of rights under the

⁷ Joint Partly Dissenting Opinion of Judges Nicolaou, Keller and Dedov to *Navalnyy and Ofitserov v. Russia*, ECtHR Application No. 46632/13 and 28671/14, Judgment of 23 February 2016, para. 2 [Navalnyy and Ofitserov v. Russia].

⁸ See also R. de Lange, ‘Case Note: *Kasparov v. Russia*’ (2017), 18 *European Human Rights Cases* 2017/31, para. 9. I prefer the term “militant democracy” over the Court’s terminology of a “democracy capable of defending itself” or “démocratie apte à se défendre” for the sake of brevity.

⁹ See H. Satzger, F. Zimmermann & M. Eibach, ‘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’, 4 *European Criminal Law Review* (2014) 2, 91, 106 [Satzger, Zimmermann & Eibach, Art. 18 Part 1]; H. Satzger, F. Zimmermann & M. Eibach, ‘Does Art. 18 ECHR Grant Protection Against Politically Motivated Criminal Proceedings? (Part 2) – Prerequisites, Questions of Evidence and Scope of Application’, 4 *European Criminal Law Review* (2014) 3, 248 [Satzger, Zimmermann & Eibach, Art. 18 Part 2]; H. Keller & C. Heri, ‘Selective Criminal Proceedings and Article 18 ECHR. The European Court of Human Rights’ Untapped Potential to Protect Democracy’, 37 *Human Rights Law Journal* (2016) 1, 1.

¹⁰ See e.g. *Rasul Jafarov v. Azerbaijan*, ECtHR Application No. 69981/14, Judgment of 17 March 2016, para. 153 [Rasul Jafarov v. Azerbaijan].

¹¹ E.g. *Ilgar Mammadov v. Azerbaijan*, ECtHR Application No. 15172/13, Judgment of 22 May 2014 [Ilgar Mammadov v. Azerbaijan]. This appeared to be the case also in a number of Russian cases, although the Court ultimately did not decide this issue under Article 18.

guise of legitimate purposes go against the assumption of good faith underlying the Convention, which presupposes that all States share a common goal of reinforcing human rights and the rule of law. Article 18 could therefore function as an early warning system for European States who are at risk of becoming an illiberal democracy or even of reverting to totalitarianism and the destruction of the rule of law – a function that might prove crucial given the worrisome contemporary developments in a number of Council of Europe States, such as Hungary, Poland, Russia and Turkey.

This potential of Article 18 has not materialized in the Court's case-law thus far.¹² Violations have proved extremely rare, and the burden of proof placed on applicants almost insurmountable. There has been clear dissonance within the Court on this issue, as is exemplified by the numerous separate opinions on this subject in recent years, with judges expressing their, at times, very outspoken and repeated discontent with the line in the Court's jurisprudence.¹³ The landmark Grand Chamber judgment of 28 November 2017 in *Merabishvili v. Georgia* seems to take account of these critiques,¹⁴ but as the issue pertaining to Article 18 was decided with a minimal majority of 9 versus 8 judges, and with the Article 18 case of *Navalnyy* pending before the Grand Chamber,¹⁵ the discussion seems far from being put to bed.

Against this background, this contribution explores Article 18 in light of its purpose of protecting the rule of law and its function as an alarm against rule of law backsliding. In doing so, the article, firstly, sets out how restrictions of human rights under false pretenses present an early warning for a dismantling of the rule of law, and it argues that Article 18 was meant to serve as such a warning based on the *travaux préparatoires*, various separate opinions and legal scholarship (section B). Subsequently it critically assesses the Court's case-law under Article 18 from the perspective of rule of law protection, and maps out

See e.g. *Kasparov v. Russia*, ECtHR Application No. 53659/07, Judgment of 11 October 2016 [Kasparov v. Russia].

¹² See also Keller & Heri, *supra* note 9.

¹³ E.g. Concurring Opinion of Judge Kūris appended to *Tchankotadze v. Georgia*, ECtHR Application No. 15256/05, Judgment of 21 June 2016 [Tchankotadze v. Georgia].

¹⁴ *Merabishvili v. Georgia* [GC], ECtHR Application No. 72508/13, Judgment of 28 November 2017 [Merabishvili v. Georgia [GC]].

¹⁵ The Grand Chamber handed down its judgment in this case after this GoJIL Special Issue went to press, see *Navalnyy v. Russia*, ECtHR Application No. 29580/12 *et al.*, Judgment of 15 November 2018. For a first reaction, see F. Tan, 'The European Court's Role as Warden of Democracy and the Rule of Law: *Navalnyy v. Russia*' (2018), available at <http://echrblog.blogspot.com/2018/11/guest-blog-on-grand-chamber-judgment-in.html> (last visited 16 December 2018).

several problems preventing the realization of these broader rule of law aspirations (section C). These hindrances to Article 18's effective operation provide the framework for discussion of recent developments in the *Merabishvili* Grand Chamber judgment, analyzing how it potentially improves the workability of Article 18 (section D). Section E concludes.

B. The Rationale of Article 18 ECHR: Protecting the Rule of Law

The aim of my argument is to analyze the case-law of the Court under Article 18 in light of its role in the protection of the rule of law in the Council of Europe. Before turning to the in-depth case-law analysis, I therefore begin here by constructing the link between the rule of law and, briefly, the European Convention as a whole, and Article 18 specifically. A first step in doing so is fleshing out the notion of *rule of law* a little bit further as any meaningful connection between it and Article 18 is contingent on a proper understanding of the rule of law as such.

I. The Notion of the Rule of Law

What is the *rule of law*? Many answers are possible, and it goes well beyond the confines of this article to address or even scratch the surface of the full extent of the discussion. Rather, the point is to address certain commonalities in legal scholarship; the *bare fundamentals* of the rule of law, so to speak.¹⁶

A core commonality appears to be that the concept entails not merely that governments rule *by* law, in the sense that they espouse their orders through legislation, but that there exists a *rule of* law.¹⁷ This entails that State authorities are bound to respect the law, and that their actions must be based in law – also referred to as the principle of legality.¹⁸ This, however, is not all. Legal

¹⁶ This discussion is not strictly speaking limited to the rule of law as it was conceived in common law systems, but borrows also from the French *État de droit*, and the German and Dutch *Rechtsstaat*. Such a *European* rule of law conception corresponds with the Preambular consideration that Council of Europe States have a “common heritage” when it comes to the rule of law (*Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, Preamble, para. 5, ETS 5 [ECHR]).

¹⁷ E.g. M. Krygier, ‘Rule of Law’, in M. Rosenfeld & A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (2012), 233, 234.

¹⁸ C. A. J. M. Kortmann, *Constitutioneel recht*, 7th ed. (2016), edited by P. P. T. Bovend'Eert *et al.*, 51-52.

theorists studying the rule of law usually conceive of the concept in procedural terms,¹⁹ meaning the law must meet a number of formal criteria to be rule of law-compliant. This covers concepts such as those proposed by Lon Fuller: generality, publicity, prospectivity, intelligibility, consistency, practicability, stability, and congruence.²⁰ What these formal requirements have in common is that they provide for *legal certainty*. Or, put negatively, they ensure legislation is not arbitrary. Combined with the principle of legality, if every exercise of State power must be based in legislation and legislation may not be arbitrary, this provides a strong safeguard against the arbitrary exercise of power as such.

The constraint of State power by law, meeting certain formal criteria, is a fundamental tenet of societies governed by the rule of law, and in this respect the restraint of arbitrary exercise of power is not just a means, but an end in itself.²¹ I will argue below that it is precisely this core rule of law value of non-arbitrariness and governance constrained by law, that is at issue in cases concerning Article 18 of the ECHR.

II. The Specter of Totalitarianism and Rule of Law Protection in the ECHR

The European Convention on Human Rights and the rule of law are closely interlinked. Beyond the Preamble reference to the rule of law, the Court has in its case-law repeatedly referenced the importance of the rule of law – most prominently in its assessments of the quality of national legislation and judicial safeguards, tying in with the procedural conception of the rule of law.²² Further, when reading the Convention's preparatory works it becomes abundantly clear that the experiences of the Second World War had impressed on the drafters the paramount importance of a Europe governed by the rule of law and democracy. The drafters tellingly considered

¹⁹ J. Waldron, 'The Rule of Law and the Importance of Procedure', in J. E. Fleming (ed.), *Getting to the Rule of Law* (2011), 4.

²⁰ L. L. Fuller, *The Morality of Law* (1969), as summarized by Waldron, *ibid.*, 5-6.

²¹ Krygier, *supra* note 17, 241-242; more extensively, see C. Brettschneider, 'Of the Rule of Law: Nonarbitrary Treatment and the Limits of Procedure', in J. E. Fleming (ed.), *Getting to the Rule of Law* (2011), 52.

²² D. Kosař & K. Šípulová, 'The Strasbourg Court Meets Abusive Constitutionalism: Baka v. Hungary and the Rule of Law', 10 *Hague Journal on the Rule of Law* (2018) 1, 83, 104. On the function of Article 6 ECHR as a safeguard for the rule of law through protection of judicial independence, see R. A. Lawson, 'Protecting the Independence of the Judiciary: Possibilities and Limits of the European Convention on Human Rights', *Journal of the Brazilian Institute of Human Rights* (forthcoming).

“[d]emocracies do not become Nazi countries in one day. Evil progresses cunningly, with a minority operating, as it were, to remove the levers of control... It is necessary to intervene before it is too late. A conscience must exist somewhere which will sound the alarm to the minds of a nation, menaced by this progressive corruption, to war[n] them of the peril and to show them that they are progressing down a long road which leads far, sometimes even to Buchenwald or Dachau.”²³

When reading this powerful statement, the reader cannot help but feel the strong imprint that totalitarian rule had left upon the drafters, and their commitment to install a “conscience to sound the alarm” when totalitarianism threatened to emerge and overthrow the rule of law. Moreover, the drafters were keenly aware that this threat comes from within, contemplating as they did that “what we must fear today is not the seizure of power by totalitarianism by means of violence, but rather that totalitarianism will attempt to put itself in power by pseudo-legitimate means”.²⁴ In light of such fears, the drafters not only envisioned a Court²⁵ to represent the conscience of Europe, but also attempted to limit any risk of the Convention being used by anti-democratic and totalitarian forces to overthrow the rule of law, and install a repressive government. To this effect, they included two specific provisions in the Convention.

Articles 17 and 18 respectively aim to ensure, first, that individuals and groups cannot invoke the Convention with the aim of overthrowing democracy and destroying fundamental rights, and second, that State authorities cannot themselves act in contravention with the rule of law by restricting human rights

²³ French representative Pierre-Henri Teitgen in a speech for the Consultative Assembly in 1949, in Council of Europe, *Collected Edition of the ‘Travaux Préparatoires’ of the ECHR*, Vol. I. (1975), 266, 292 [TP of the ECHR, Vol. I]. See also E. Bates, *The Evolution of the European Convention on Human Rights*. From its Inception to the Creation of a Permanent Court of Human Rights (2010), 44; and A. C. Buyse, ‘Contested Contours. The Limits of the Freedom of Expression from an Abuse of Rights Perspective – Articles 10 and 17 ECHR’, in E. Brems & J.H. Gerards, *Shaping Rights in the ECHR. The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (2009), 183.

²⁴ L. Benvenuti, in Council of Europe, *Collected Edition of the ‘Travaux Préparatoires’ of the ECHR*, Vol. II. (1975), 136.

²⁵ And before it, the European Commission of Human Rights.

for ulterior purposes. The first aim is embodied by Article 17,²⁶ which militates against any abusive reliance on ECHR rights with the aim of destroying the rights enshrined in the Convention.²⁷ Thus, Article 17 provides a line of defense where groups or individuals attempt to invoke rights such as the freedom of expression and association in order to set up extremist parties propagating Nazism,²⁸ communism,²⁹ or other extremist ideologies that cannot coexist with the rights enshrined in the ECHR,³⁰ or propose a racist regime that allows such rights only for certain groups and not others.³¹ Democratic European States therefore do not need to stand idly by where such groups rise to prominence – if they choose to forbid and criminally prosecute such parties and their adherents, they can successfully invoke Article 17 to deflect claims of a violation of the freedom of expression or association. Article 17 in this respect is therefore part of the toolbox of the militant democracy.³² The second aim is embodied by Article 18, which is discussed in more detail in the next section.

²⁶ As the focus of this contribution is Article 18, I provide only a very cursory and incomplete overview of Article 17. For a comprehensive and in-depth analysis, see P. E. de Morree, *Rights and Wrongs Under the ECHR. The Prohibition of Abuse of Rights in Article 17 of the European Convention on Human Rights* (2016).

²⁷ In the words of the Court, “It cannot be ruled out that a person or group of persons will rely on the rights enshrined in the Convention or its Protocols in order to attempt to derive therefrom the right to conduct what amounts in practice to activities intended to destroy the rights or freedoms set forth in the Convention; any such destruction would put an end to democracy”, *Ždanoka v. Latvia* [GC], ECtHR Application No. 58278/00, Judgment of 16 March 2006, para. 99. See also *Perinçek v. Switzerland* [GC], ECtHR Application No. 27510/08, Judgment of 15 October 2015, para. 113.

²⁸ E.g. *W.P. and Others v. Poland* (dec.), ECtHR Application No. 42264/98, Decision of 2 September 2004.

²⁹ European Commission of Human Rights, *German Communist Party v. Germany* (1957), Application No. 250/57, *Documents and Decisions* (1959), 222-225.

³⁰ E.g. *Belkacem v. Belgium* (dec.), ECtHR Application No. 34367/14, Decision of 27 June 2017, para. 27-37, concerning the leader of *Sharia4Belgium* who propagated the enactment of Sharia law in Belgium.

³¹ E.g. European Commission of Human Rights, *Glimmerveen and Hagenbeek v. The Netherlands* (dec.) (1979), Application No. 8348/78 and 8406/78, DR 18, 187.

³² I leave aside here the possibility for Article 17 to be invoked against the State, which is rarely assessed on the merits. For an example pertaining to the right to derogate from the Convention, see *The Greek Case – Denmark, Norway, Sweden and the Netherlands v. Greece (Part I)*, Application No. 3321/67 *et al.*, Commission Report of 5 November 1969, para. 222-225. In this case a number of States brought a case against Greece, who under the “Colonels regime” had derogated from the Convention. In the end, the Commission did not find it necessary to rule on the Article 17 issue, as it had already concluded that

III. Article 18 and the Rule of Law

Article 18, contrary to the primary function of Article 17, protects against abuse *by the State* – therefore giving expression to the reality that it is often State authorities themselves who pose the biggest risk to democracy and the rule of law.³³ That Article 18 has a major role to play in safeguarding the rule of law is not self-evident from a cursory reading of the provision, and I will therefore use the remainder of this section to flesh out further the linkages between the two, drawing on the *travaux préparatoires* as well as arguments in separate opinions and legal scholarship. Broadly speaking, the arguments rely on a combination of a textual, systematic and purposive interpretation of Article 18.³⁴

Article 18 provides that “the restrictions permitted under this Convention to the said rights shall not be applied for any purpose other than those for which they have been prescribed”. This somewhat awkwardly phrased provision has led a largely dormant life, and it was not until 2004 that it was found to be violated for the first time.³⁵ This very modest role in the Convention system has everything to do with the text of the provision, that appears to do no more than reiterate what is already clear from the limitation clauses accompanying many ECHR provisions:³⁶ in order for a restriction of a right to be justifiable, it must pursue a legitimate aim. Most rights already provide that restrictions can only be justified when pursuing certain legitimate purposes, such as national security, public safety, to prevent disorder and crime, or the protection of the rights and freedoms of others.³⁷ Article 18 has on this basis often been interpreted to be no more than a *limitation on limitations*,³⁸ lacking autonomous meaning and

the material conditions for a lawful derogation had not been met. Further on Article 17 and militant democracies, see De Morree, *supra* note 26.

³³ For an excellent elaboration, see Keller & Heri, *supra* note 9, 2-3.

³⁴ These are accepted principles of treaty interpretation both in public international law, and under the ECHR. See Art. 31-32 *Vienna Convention on the Law of Treaties*, and e.g. *Golder v. UK*, *supra* note 3, para. 29.

³⁵ *Gusinskiy v. Russia*, ECtHR Application No. 70276/01, Judgment of 19 May 2004 [*Gusinskiy v. Russia*]. For a Commission finding of a violation in 1993, later overturned by the Court, see *Quinn v. France*, ECtHR Application No. 18580/91, Judgment of 22 March 1995.

³⁶ Compare W. A. Schabas, *The European Convention on Human Rights: A Commentary* (2015), 623.

³⁷ See e.g. § 2 of Articles 8, 9, 10, 11 ECHR, as well as Article 4 § 3 of Protocol No. 2 ECHR.

³⁸ E.g. P. Santolaya, ‘Limiting Restrictions on Rights. Art. 18 ECHR (A Generic Limit on Limits According to Purpose)’, in P. Santolaya & J. G. Roca (eds.), *Europe of Rights: A Compendium on the European Convention on Human Rights* (2012), 527.

fulfilling a merely “auxiliary” function.³⁹ Nevertheless, as Bill Schabas rightly notes in his Commentary, Article 18 ECHR is a unique provision, that has no counterpart in other human rights treaties.⁴⁰ To illustrate, whereas the *Universal Declaration of Human Rights*⁴¹ and the *EU Charter of Fundamental Rights*,⁴² contain provisions limiting restrictions to certain aims, these have to be distinguished from the ECHR system because they are *general limitation clauses*. The Universal Declaration and the EU Charter do not set out limitations per right, but contain just one clause that allows for the limitation of the entire catalogue of rights. In lieu of specific limitation clauses, a provision restricting the aims in pursuance of which rights may be limited serves an obvious purpose: preventing the arbitrary interference with, and hollowing-out of, rights. The inclusion of such a clause in the ECHR, already providing as it does for specific limitation clauses that prescribe an exhaustive list of aims, on the contrary, would be devoid of any meaning if interpreted in this way. Granted, this in itself cannot provide the basis for a wholly autonomous meaning for Article 18, but it is, at the very least, a first indication that it was included for some other purpose.

In construing the object and purpose of Article 18 within the Convention system, most judges (in separate opinions to judgments) and scholars have relied on the *travaux préparatoires* of Article 18. They indeed provide a useful tool to discern what the drafters had in mind for the provision.⁴³ Keller and Heri write that the drafters meant for the Court “to prune undemocratic buds from the legal systems of Member States before these can bloom and bear the fruit that represents a larger problem”.⁴⁴ This finding is supported by the drafters’ consideration that the purpose of restricting the aims that can justify limiting

³⁹ Satzger, Zimmermann & Eibach, ‘Art 18. Part 1’, *supra* note 9, 105-109.

⁴⁰ Schabas, *supra* note 36, 623.

⁴¹ Art. 29(2) of the UDHR provides: “In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”

⁴² Art. 52(1) of the EU Charter provides: “Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.”

⁴³ Though some authors find the *travaux* pertaining to Article 18 generally unhelpful, see C. Ovey & R. C. A. White, *Jacobs & White: The European Convention on Human Rights* (2006), 437 and Santolaya, *supra* note 38, 527.

⁴⁴ Keller & Heri, *supra* note 9, 3.

rights, is “to ensure that no State shall in fact aim at suppressing the guaranteed freedoms, by means of minor measures which, while made with the pretext of organising the exercise of these freedoms on its territory, or of safeguarding the letter of the law, have the opposite effect”.⁴⁵ The drafters, in other words, feared that States would at some point attempt to limit human rights merely to bolster their own position of power at the expense of the political opposition.⁴⁶ Further, they were wary of States doing so under a guise of lawfulness, under the *pretext* of some legitimate aim – in other words that States would limit rights under false pretenses, serving ulterior purposes or hidden agendas. Ultimately, Article 18 was included to counter such tendencies.

When States limit human rights under false pretenses, this violates the rule of law. They must conform to the law and act within the confines of the law, and do so in good faith. When they not only contravene the law, but do so deliberately and they in fact attempt to camouflage this – arguing that a restriction of a right pursues a legitimate purpose, when in fact the State pursued another, hidden aim – this exacerbates the mere violation of the law, and strikes at the heart of the rule of law. After all, the State authorities in this situation maliciously attempt to circumvent the principle of legality and the restrictions the law places on their actions, thereby engaging in a classic form of abuse of power.⁴⁷ This is the more so because any effective control of State power is rendered obsolete where the real motivation and purpose behind repressive action is kept secret. In short, this entails a clear disregard of core tenets of the rule of law, legal certainty and non-arbitrariness.

Where States start using the law merely as camouflage for the raw exercise and abuse of power, and thereby prevent individuals from mounting any meaningful legal defense, the rule of law is in clear danger. Article 18 of the ECHR is geared toward situations where States limit rights for ulterior, hidden purposes, and therefore provides a warning signal *par excellence* of rule of law backsliding. It is the hallmark of totalitarianism to misuse the State apparatus and criminal justice system to suppress the opposition, civil society and other voices of dissent. When finding a violation of Article 18, the Court therefore truly acts as the conscience of Europe, sounding the alarm the drafters envisioned in

⁴⁵ French representative Pierre-Henri Teitgen in a speech to the Consultative Assembly on 7 September 1949, in *TP of the ECHR, Vol. I, supra* note 23, 276.

⁴⁶ *Ibid.*

⁴⁷ See G. Palombella, ‘The Abuse of Rights and the Rule of Law’, in A. Sajó (ed.), *Abuse: The Dark Side of Fundamental Rights* (2006), 6, explaining the concept of abuse as follows: “The ‘abuse’ perspective highlights the unlawfulness of infringing an interest on the part of the holder of a right or a power who acts *in apparent compliance with a legal rule*.”

1949.⁴⁸ At least, in theory – practice shows that the Court’s case-law showcases a number of obstacles to fulfilling this function.

C. The Defective Application of Article 18 in the Court’s Case-Law

I. Introduction

Thus far – or at least until very recently – Article 18’s potential as an early warning system for threats to the rule of law has not been realized. This section explains why that has been the case, structuring the discussion of relevant case-law around shortcomings in relation to the effective protection of the rule of law, rather than presenting a chronological case-by-case oversight.⁴⁹ The discussion in this light focuses successively on the very limited scope of application of Article 18 (C. II.), and issues pertaining to the burden and standard of proof (C. III.). Together, these issues have limited the application of Article 18 to such an extent, that the Court’s function as warden for the rule of law has been rendered largely illusory. The following section, section D., then goes on to address recent developments marked by the landmark Grand Chamber judgment in *Merabishvili v. Georgia*, as this has to an extent changed the outlook.

II. An Extremely Narrow Scope of Application

Article 18 pertains to the restrictions of other Convention rights, meaning it can only be applied in conjunction with other Articles of the Convention and has an accessory nature.⁵⁰ It is, however, autonomous in the sense that it can be violated even though the right in conjunction with which it was invoked, was not violated separately.⁵¹ Further, a claim under Article 18 is compatible *ratione*

⁴⁸ See also Satzger, Zimmermann & Eibach, ‘Art. 18 Part 1’, *supra* note 9, 112.

⁴⁹ This has been done before, see *ibid.*, and Keller & Heri, *supra* note 9; for an extensive historical overview of the case-law, see *Merabishvili v. Georgia* [GC], *supra* note 14, para. 265-281. For a comprehensive discussion of the case-law, see also Directorate of the Jurisconsult & F. Tan, ‘Guide on Article 18 of the European Convention on Human Rights, Strasbourg: European Court of Human Rights’ (2018), available at https://www.echr.coe.int/Documents/Guide_Art_18_ENG.pdf (last visited 12 December 2018).

⁵⁰ For the first time, see European Commission of Human Rights, *Kamma v. the Netherlands* (1974), Application No. 4771/71, DR 1, 4; see further e.g. *Gusinskiy v. Russia*, *supra* note 35, para. 73.

⁵¹ See *supra* note 50, and for the first application of this in practice, see *Merabishvili v. Georgia* [GC], *supra* note 14.

materiae with the Convention only where it is invoked in conjunction with a *qualified* right, i.e a right that is subject to restrictions.⁵² As the subject-matter of Article 18 is a situation where State authorities pursued ulterior purposes under the guise of an aim prescribed by the Convention, ill-treatment in contravention with Article 3 for example falls outside the scope of Article 18, as interferences with that right can never be justified, no matter the aim pursued.⁵³

So far so good. A closer look at the case-law, however, reveals that the scope of application of Article 18 is limited in two primary ways that prevent it from being an effective tool for the protection of the rule of law. The first addressed here is the Court's practice of declaring it "unnecessary to examine" an Article 18 claim in a variety of situations. This has effectively limited the application of Article 18, to the point where Judge Keller has argued that it is deprived of any scope of application whatsoever.⁵⁴ The second issue addressed is that the Court has thus far found violations of Article 18 in conjunction with the right to liberty only – effectively limiting its supervision to situations of abusive pre-trial detention. As I will argue below, this insufficiently reflects the often broader context of a fully politically motivated criminal prosecution.

The Court's examination, or lack thereof, of complaints under Article 18 of the Convention has thus far been unpredictable. Early cases, up until as recently as 2004, were hardly ever examined on the merits and were most often dismissed for being unsubstantiated.⁵⁵ Although the case-law shifted when in 2004 the Court for the first time found a violation of Article 18 in the *Gusinskiy* judgment,⁵⁶ the Court's willingness to assess Article 18 complaints on the merits has remained haphazard and inconsistent. First, in a number of cases the Court has found it unnecessary to examine the Article 18 complaint despite ostensibly falling within its purview. By way of example, a number of predominantly Russian cases have featured opposition leaders who have been detained for relatively short periods of time, which prevented them from attending opposition manifestations and protests. In these cases, despite finding in its examination under Article 11 that "the applicant's arrest and administrative detention had [had] the effect of preventing and discouraging him and others from participating in protest rallies

⁵² *Merabishvili v Georgia*, *supra* note 50, para. 287.

⁵³ European Commission of Human Rights, *Timurtaş v. Turkey*, Application No. 23531/94, DR 31, para. 329.

⁵⁴ Writing both on the bench and academically. See the Partly Dissenting Opinion of Judge Keller appended to *Kasparov v. Russia*, *supra* note 11 and Keller & Heri, *supra* note 9, 9.

⁵⁵ See the Court's exposé of its case-law in *Merabishvili v. Georgia* [GC], *supra* note 14, para. 265-269.

⁵⁶ *Gusinskiy v. Russia*, *supra* note 35.

and actively engaging in opposition politics”, the Court nevertheless held it was not necessary to examine the (same) issue under Article 18.⁵⁷ This, moreover, is just an example of a broader practice.⁵⁸ Second, the Court’s practice shows a similar approach in cases where it found no violation of other Convention rights, declaring that as those rights had not been violated, Article 18 was not violated either.⁵⁹ When taking these two practices together, no scope of application for Article 18 effectively remains: when the right in conjunction with which it was invoked was not violated, neither is Article 18; when the right in conjunction with which it was invoked was violated, there is no separate issue under Article 18, even if the case pertains to ulterior purposes. This practice undercuts Article 18’s autonomous meaning and importance for the protection of the rule of law. Numerous judges have acknowledged this problem, with Judge Kūris even writing a 8,500 word dissent to outline the various ways the Court has avoided examining Article 18 on the merits.⁶⁰

When despite the issue outlined above an application *is* examined on the merits, another obstacle arises in cases where applicants allege their prosecution as a whole has been politically motivated, in contravention with the rule of law. Thus far, the Court has found violations of Article 18 only in conjunction with

⁵⁷ *Nemtsov v. Russia*, ECtHR Application No. 1774/11, Judgment of 31 July 2014, para. 129; *Navalnyy and Yashin v. Russia*, ECtHR Application No. 76204/11, Judgment of 4 December 2014, para. 116 [Navalnyy and Yashin v. Russia]; *Frumkin v. Russia*, ECtHR Application No. 74568/12, Judgment of 5 January 2016, para. 172; *Yaroslav Belousov v. Russia*, ECtHR Application Nos. 2653/13 and 60980/14, Judgment of 4 October 2016, para. 188; *Kasparov and Others v. Russia (No. 2)*, ECtHR Application No. 51988/07, Judgment of 13 December 2016, para. 55 [Kasparov and Others (No. 2)].

⁵⁸ E.g. *Bozano v. France*, ECtHR Application No. 9990/82, Judgment of 18 December 1986, para. 61. See also the case-law references in *Merabishvili v. Georgia* [GC], *supra* note 14, para. 296.

⁵⁹ E.g. *Engel and Others v. the Netherlands*, ECtHR Application No. 5100/71 *et al.*, Judgment of 8 June 1976, para. 104; *Handyside v. the United Kingdom*, ECtHR Application No. 5493/72, Judgment of 7 December 1976, para. 52.

⁶⁰ Concurring Opinion of Judge Kūris appended to *Tchankotadze v. Georgia*, *supra* note 13.

the right to liberty,⁶¹ and save for one or two exceptions⁶² all cases where the Court has scrutinized a complaint of misuse of power have similarly related to Article 5. Although pre-trial detention on trumped up charges is certainly an extreme misapplication of power that strikes at the heart of the rule of law, especially when also coinciding with certain important events such as political manifestations or even elections, a finding to that effect nevertheless fails to address the potential political motivation of the criminal proceedings as a whole. That would require applying Article 18 in conjunction with the right to a fair trial enshrined in Article 6, but the Court's case-law has thus far not left much scope for such a complaint. The reasons for this are twofold.

Firstly, the Court has not yet made up its mind when it comes to the question whether Article 6 is subject to restrictions and lends itself to be applied in conjunction with Article 18.⁶³ The Court recently acknowledged its case-law on this issue has been inconsistent and that the question therefore remains open.⁶⁴ This is a significant finding, as on two earlier occasions the Court had declared complaints under Article 18 in conjunction with Article 6 incompatible *ratione materiae* with the Convention – reasoning that as Article 6 is not subject to restrictions, it cannot be restricted for ulterior purposes.⁶⁵ In both these cases three judges dissented on this point, and in the recent case of *Ilgar Mammadov (No. 2) v. Azerbaijan* the Court unanimously held the questions remains open – with a majority of four judges expressing their preference of referring the case

⁶¹ *Gusinskiy v. Russia*, *supra* note 35, para. 78; *Cebotari v. Moldova*, ECtHR Application No. 35615/06, Judgment of 13 November 2007, para. 53; *Lutsenko v. Ukraine*, ECtHR Application No. 6492/11, Judgment of 3 July 2012, para. 110 [*Lutsenko v. Ukraine*]; *Tymoshenko v. Ukraine*, ECtHR Application No. 49872/11, 30 April 2013, para. 301 [*Tymoshenko v. Ukraine*]; *Ilgar Mammadov v. Azerbaijan*, *supra* note 11, para. 144; *Rasul Jafarov v. Azerbaijan*, *supra* note 10, para. 163; *Merabishvili v. Georgia* [GC], *supra* note 14, para. 354; *Mammadli v. Azerbaijan*, ECtHR Application No 47145/14, Judgment of 19 April 2018, para. 105.

⁶² *OAO Neftyanaya Kompaniya Yukos v. Russia*, ECtHR Application No. 14902/04, Judgment of 20 September 2011, para. 663-666 [*OAO Neftyanaya Kompaniya Yukos v. Russia*]. *Khodorkovskiy and Lebedev v. Russia*, *supra* note 6, likely also falls in this category, though the Court in that case oddly did not specify in conjunction with which provision(s) it applied Art. 18.

⁶³ Similarly, see F. Tan, 'Case Note: *Ilgar Mammadov (No. 2)*' (2018), 19 *European Human Rights Cases* 2018/28, 74-79.

⁶⁴ *Ilgar Mammadov v. Azerbaijan (No. 2)*, ECtHR Application No. 919/15, Judgment of 16 November 2017, para. 261 [*Ilgar Mammadov v. Azerbaijan (No. 2)*].

⁶⁵ *Navalnyy and Ofitserov v. Russia*, *supra* note 7, para. 129-130; *Navalnyy v. Russia*, ECtHR Application No. 101/15, Judgment of 17 October 2017, para. 88 [*Navalnyy v. Russia* October 2017].

to the Grand Chamber to remedy the inconsistencies in the case-law, but opting not to as the applicant in this case was still in detention, and the case therefore did not allow for a delay of justice of at least a year.⁶⁶

Secondly, where applicants' complaints as to the political motivation of the criminal proceedings lodged against them have not been declared inadmissible, they have met with an insurmountable burden of proof, rendering it practically impossible to prove their case. This is addressed further in the following section.

III. An Insurmountable Burden and Standard of Proof

Applicants have struggled to prove their allegations of a violation of Article 18. As the Court made clear on many occasions, it applied in this context “a very exacting standard of proof” and “[a]s a consequence, there are only few cases where a breach of that Convention provision has been found”.⁶⁷ The Court's treatment of Article 18 as a provision *sui generis* has made it difficult to rely on it successfully, which has to do with a number of peculiarities. Primary factors have been the one-sided division of the burden of proof, and the “very exacting standard of proof” the Court has until recently used in Article 18 cases.⁶⁸ Another less-explored issue pertains to the distinction in the standards applied by the Court depending on whether the case before it concerned a general allegation of political motivation of the criminal prosecution as a whole – in a sense almost amounting to an *in abstracto* accusation of bad faith on the part of the State – and those cases showcasing certain *distinguishable features*, which permitted zooming in on one specific episode in pre-trial detention indicating a misuse of power by the authorities. These issues are addressed below.

1. The Burden of Proof

A primary reason many applicants have failed to satisfy the Court that their prosecution, detention or restriction of rights had been ordered for ulterior purposes, has been the Court's insistence that it is for the applicant to show convincingly that the real aim of the authorities was not the same as that

⁶⁶ Joint Concurring Opinion of Judges Nußberger, Tsotsoria, O'Leary and Mits, *Ilgar Mammadov v. Azerbaijan* (No. 2), *supra* note 64, .

⁶⁷ Amongst others *Khodorkovskiy v. Russia*, ECtHR Application No. 5829/04, Judgment of 31 May 2011, 66, para. 256 [*Khodorkovskiy v. Russia*]; *Tymoshenko v. Ukraine*, *supra* note 61, 66, para. 295; *Tchankotadze v. Georgia*, *supra* note 13, 27, para. 113.

⁶⁸ See the literature cited *supra*, note 9.

proclaimed.⁶⁹ Indeed, in what it later referred to as a “foundational statement”, the Court held in *Khodorkovskiy* 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. However, an applicant alleging that his rights and freedoms were limited for an improper reason must convincingly show that the real aim of the authorities was not the same as that proclaimed (or as can be reasonably inferred from the context). A mere suspicion that the authorities used their powers for some other purpose than those defined in the Convention is not sufficient to prove that Article 18 was breached.”⁷⁰

The presumption of good faith on the part of the authorities therefore put the burden of proof firmly and irreversibly upon the applicant. In *Khodorkovskiy and Lebedev v. Russia* the Court firmly rejected the applicants’ claim that the burden ought to shift where they made out a *prima facie* case or “arguable claim” of a violation of Article 18.⁷¹ This meant that although the applicants had submitted various views by international NGOs on the targeted destruction of their oil company by the Russian State, and cited foreign courts who had declined to extradite individuals to Russia in this case for fear of politically motivated proceedings, Russia was not required to bring forth any evidence or arguments to debunk the applicants’ claims. After all, the assumption of good faith, similar to a presumption of innocence, was on its side.

⁶⁹ *Khodorkovskiy v. Russia*, *supra* note 67, 66, para. 255; *Lutsenko v. Ukraine*, *supra* note 61, 39, para. 106; *Tymoshenko v. Ukraine*, *supra* note 61, 66, para. 294; *Khodorkovskiy and Lebedev v. Russia*, *supra* note 6, 194, para. 899; *Ilgar Mammadov v. Azerbaijan*, *supra* note 11, 32, para. 137; *Rasul Jafarov v. Azerbaijan*, *supra* note 10, 37, para. 153; *Tchankotadze v. Georgia*, *supra* note 13, 26, para. 113.

⁷⁰ *Khodorkovskiy v. Russia*, *supra* note 67, 66, para. 255.

⁷¹ *Khodorkovskiy and Lebedev v. Russia*, *supra* note 6, 195, para. 903. The Court considered “that even where the appearances speak in favour of the applicant’s claim of improper motives, the burden of proof must remain with him or her. It confirms its position in *Khodorkovskiy v. Russia*, *supra* note 67 that the applicant alleging bad faith of the authorities must ‘convincingly show’ that their actions were driven by improper motives. Thus, the standard of proof in such cases is high.”

Successfully addressing politically motivated proceedings has thus been rendered increasingly difficult. It should be borne in mind that the allegation is that the *purpose* pursued by the authorities in detaining or prosecuting individuals was not the one officially proclaimed, that there was a *hidden* agenda, an ulterior and covert aim – in other words that the authorities had acted in bad faith. This is not unlike the concept of intent or *mens rea* in criminal law, it being for the applicant to show the purpose pursued by the authorities, which is incredibly difficult to attain if the authorities are in no way held to refute allegations by the applicant.⁷² Although there is a case to be made for the heavy burden placed on applicants given the exceptional severity of finding that a State has acted in bad faith,⁷³ requiring applicants to provide all the evidence of the subjective aims of State authorities has prevented Article 18 from fulfilling its potential as a warning for rule of law backsliding. Practice has shown the nigh impossibility for applicants to prove their case,⁷⁴ which is exacerbated further by the evidentiary requirements set by the Court, to which I turn below.

2. The Standard and Means of Proof

In addition to the requirement that applicants prove their allegation in full, the Court also emphasized the (very) high standard of proof in cases concerning Article 18,⁷⁵ and consistently applied a “very exacting standard of proof”.⁷⁶ This high standard of proof meant that for an applicant to rebut the presumption of good faith, he had to “convincingly show” that the real aim of the authorities was not the same as that proclaimed (or as can be reasonably

⁷² See also Satzger, Zimmermann & Eibach, ‘Art. 18 Part 2’, *supra* note 9, 253.

⁷³ *Ibid.*, 253; See also C. Foster, *Science and the Precautionary Principle in International Courts and Tribunals. Expert Evidence, Burden of Proof and Finality* (2011), 189-190, noting that “there is a presumption that all states are committed to the good of the community and all act consistently with the applicable norms (‘presumption of compliance’ as it is known)”.

⁷⁴ Before the Grand Chamber judgment in *Merabishvili v. Georgia* [GC], *supra* note 14, the Court had only found a total of six violations of Article 18.

⁷⁵ *Khodorkovskiy and Lebedev v. Russia*, *supra* note 6, 195, para. 903; *Khodorkovskiy v. Russia*, *supra* note 67, 67, para. 260.

⁷⁶ *Khodorkovskiy and Lebedev v. Russia*, *supra* note 6, 194, para. 899 and 66, para. 256; see further *Lutsenko v. Ukraine*, *supra* note 61, 39, para. 107; *Dochnal v. Poland*, ECtHR Application No. 31622/07, Judgment of 18 September 2012, 18, para. 112 [*Dochnal v. Poland*]; *Tymoshenko v. Ukraine*, *supra* note 61, 66, para. 295; *Ilgar Mammadov v. Azerbaijan*, *supra* note 11, 33, para. 138; *Rasul Jafarov v. Azerbaijan*, *supra* note 10, 37, para. 154; *Tchankotadze v. Georgia*, *supra* note 13, 26, para. 113.

inferred from the context). In this regard, a “mere suspicion” the authorities acted in bad faith and pursued improper motives was not sufficient, “no matter how arguable that suspicion may be”.⁷⁷ The Court in this context reasoned that as the prosecution of anyone in a high political position will necessarily have far-reaching political consequences, from which political opponents and others might directly or indirectly benefit, this could always lead to suspicions that the prosecution was politically motivated. As the Court held, however, “high political status does not grant immunity”.⁷⁸

Adding further to the burden on the applicant, the Court applied special evidentiary standards in Article 18 cases. It found for instance that domestic court findings in extradition procedures to the effect that prosecutions were politically motivated, were insufficient in light of the very high standard of proof applied by the Court.⁷⁹ Further, in a number of cases the Court even required “incontrovertible and direct proof” of the ulterior purpose.⁸⁰ As State authorities limiting individuals’ rights under false pretenses and in pursuit of a hidden agenda do not normally leave such evidence lying around, and since the applicant in obtaining such evidence is completely reliant on the authorities, this has effectively presented a bar to applicants successfully pleading a case before the Court.⁸¹ In other cases the Court was more willing to assess circumstantial evidence,⁸² but the Court never explained on what basis it decided whether

⁷⁷ *Tchankotadze v. Georgia*, *supra* note 13, 27, para. 114.

⁷⁸ *Khodorkovskiy v. Russia*, *supra* note 67, 67, para. 258.

⁷⁹ *Ibid.*, 67, para. 260; referenced with approval in *Khodorkovskiy and Lebedev v. Russia*, *supra* note 6, 195, para. 900.

⁸⁰ *Khodorkovskiy v. Russia*, *supra* note 67, 67, para. 260; *Dochnal v. Poland*, *supra* note 76, 19, para. 116; *Nastase v. Romania*, ECtHR Application No. 80563/12, Decision of 18 November 2014, 21, para. 109 [*Nastase v. Romania*]; *OAO Neftyanaya Kompaniya Yukos v. Russia*, *supra* note 62, 132, para. 663; *Birsan v. Romania*, ECtHR Application No. 79917/13, Decision of 2 February 2016, para. 73.

⁸¹ See also Keller & Heri, *supra* note 9, 8-9; P. Leach, ‘Georgia: Strasbourg’s Scrutiny of the Misuse of Power’ (5 December 2017), available at www.opendemocracy.net/od-russia/philip-leach/georgia-strasbourgs-scrutiny-of-the-misuse-of-power (last visited 12 December 2018), who describes this as the “smoking gun”.

⁸² Such as in the case of *Rasul Jafarov v. Azerbaijan*, where the finding of a violation could even be said to have been based solely on contextual factors: the Court found that the applicant’s arrest and detention were part of a larger campaign to “crack down on human rights defenders in Azerbaijan”, basing itself on (1) “the increasingly harsh and restrictive legislative regulation of NGO activity and funding”; (2) the narrative of high-ranking officials and pro-government media to the effect that NGOs and their leaders (including the applicant) were foreign agents and traitors; and (3) the fact that several notable human rights activists, who had also cooperated with international organisations protecting

direct evidence was required, or whether circumstantial evidence sufficed. Judging from the large number of separate opinions addressing this issue, it may have been a matter of which judges were on the bench in a specific case.⁸³ These separate opinions address the difficulties for applicants to find direct evidence of the purposes pursued by the authorities, and tellingly, in no case where the Court applied this high evidentiary requirement did it find a violation. This again shows the difficulties in bringing successful claims of bad faith rule of law meddling before the Court.

3. What Must Be Proven

A final point that has prevented applicants' hopes of proving a breach of Article 18 from materializing, was the lack of clarity regarding *what* it was they needed to prove. In other words, what does it mean where Article 18 prohibits restrictions being applied "for any other purpose than that for which it has been prescribed"? The above discussion illustrates that the Court in essence required proof of *bad faith* on the part of the authorities, in other words, applicants had to 1) rebut the assumption of good faith on the part of the authorities, and 2) prove that the authorities had moreover been driven by improper motives, showing their bad faith. The Court, however, employed two different formulations of what bad faith entails.

First, the overarching standard entailed "that the real aim of the authorities was not the same as that proclaimed (or as can be reasonably inferred from the context)".⁸⁴ In other words, the applicants had to show that despite

human rights, had been similarly arrested. *Rasul Jafarov v. Azerbaijan*, *supra* note 10, 39-40, para. 158-163.

⁸³ See the Joint Concurring Opinion of Judges Jungwiert, Nußberger and Potocki, appended to *Tymoshenko v. Ukraine*, *supra* note 61; Partly Dissenting Opinion of Judge Tsotsoria, appended to *Georgia v. Russia (I)* [GC], ECtHR Application No. 13255/07, Judgment of 3 July 2014; Concurring Opinion of Judge Pinto de Albuquerque, appended to *Navalnyy and Yashin v. Russia*, *supra* note 57; Joint Partly Dissenting Opinion of Judges Nicolaou, Keller and Dedov, appended to *Navalnyy and Ofitserov v. Russia*, *supra* note 7; Joint Concurring Opinion of Judges Sajó, Tsotsoria and Pinto de Albuquerque and Concurring Opinion by Judge Kūris, appended to *Tchankotadze v. Georgia*, *supra* note 13; Partly Dissenting Opinion of Judge Keller, appended to *Kasparov v. Russia*, *supra* note 11; Partly Dissenting Opinion of Judge Keller, appended to *Kasparov and Others (No. 2)*, *supra* note 57; and Joint Partly Dissenting Opinion of Judges Lopez Guerra, Keller and Pastor Vilanova, appended to *Navalnyy v. Russia February 2017*, *supra* note 15.

⁸⁴ *Lutsenko v. Ukraine*, *supra* note 61, 39, para. 106; *Tymoshenko v. Ukraine*, *supra* note 61, 66, para. 294; *Khodorkovskiy and Lebedev v. Russia*, *supra* note 6, 194, para. 899; *Ilgar Mammadov v. Azerbaijan*, *supra* note 11, 32, para. 137; *Rasul Jafarov v. Azerbaijan*, *supra*

the authorities' reliance on legitimate grounds for restricting their rights, they in reality acted for ulterior purposes and sought to advance a hidden agenda. The Azeri cases *Ilgar Mammadov* and *Rasul Jafarov* best illustrate how this pans out for cases relating to a deprivation of liberty. In these cases, an opposition politician and a human rights-defender, respectively, had been remanded in pre-trial detention on charges for which the Court could discern no reasonable suspicion, which led to violations of Article 5.⁸⁵ Examining the complaints under Article 18, the Court then found that whereas the finding that there had been no reasonable suspicion undermined the assumption of good faith on the part of the authorities, this was not sufficient for finding a violation of Article 18.⁸⁶ This required further evidence, showing that the authorities had moreover been driven by improper motives, and in these cases such proof of bad faith indeed flowed from various contextual factors.⁸⁷ Although extremely exacting, there have therefore been cases where applicants were able to meet the standards as set by the Court.

In a number of other cases, however, the Court on top of its high standard of proof raised the bar for applicants yet further. In these cases, the Court did not only require them to "convincingly show that the real aim of the authorities was not the same as that proclaimed (or as can be reasonably inferred from the context)", but they had to moreover prove "that the whole legal machinery of the respondent State [...] 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".⁸⁸ No applicant has succeeded in meeting this standard, leading a number of judges to qualify it as "prohibitively high".⁸⁹ Aside from critiques

note 10, 37, para. 153. In the cases pertaining to full political motivation, the Court also refers to this standard, but afterwards formulates the much more demanding standard discussed immediately below.

⁸⁵ *Ilgar Mammadov v. Azerbaijan*, *supra* note 11, 24, para. 100; *Rasul Jafarov v. Azerbaijan*, *supra* note 10, 31-33, para. 130-133.

⁸⁶ *Ilgar Mammadov v. Azerbaijan*, *supra* note 11, 34, para. 141, and *Rasul Jafarov v. Azerbaijan*, *supra* note 10, 39, para. 157.

⁸⁷ *Ilgar Mammadov v. Azerbaijan*, *supra* note 11, 34-35, para. 142-144 and *Rasul Jafarov v. Azerbaijan*, *supra* note 10, 39-40, 158-163.

⁸⁸ *Khodorkovskiy v. Russia*, *supra* note 67, 66, 67, para. 255, 260 [spelling error corrected]; *Khodorkovskiy and Lebedev v. Russia*, *supra* note 6, 169, para. 905; *Dochnal v. Poland*, *supra* note 76, 18, para. 115 (in a slightly modified way); *Nastase v. Romania*, *supra* note 80, 21, para. 109; *Tchankotadze v. Georgia*, *supra* note 13, 27, para. 114.

⁸⁹ Joint Concurring Opinion of Judges Sajó, Tsotsoria and Pinto de Albuquerque, appended to *Tchankotadze v. Georgia*, *supra* note 13, 34, para. 7.

on the standard as such, a clear explanation of when the Court applies which standard has proved elusive.

In my view, an explanation is perhaps best derived from what was at stake in the case at hand. In cases where applicants alleged in general terms that they had become the victims of political persecution, without furnishing this claim with case-specific evidence, the Court has applied the practically unattainable standard that, from the beginning to the end, the authorities must be shown to have been acting with bad faith and in blatant disregard of the Convention.⁹⁰ In cases, however, pertaining to a specific measure or where a specific episode was at stake – either because the applicant had formulated a more narrow complaint or because the Court could itself distinguish this episode from the case as a whole – the somewhat less stringent standard has been employed.⁹¹

By way of illustration, in the Ukrainian cases *Lutsenko* and *Tymoshenko*, although the applicants alleged that the criminal proceedings against them as a whole had been politically motivated, the Court observed “distinguishable features” or “specific features” of the case, allowing it “to look into the matter separately from the more general context of politically motivated prosecution of the opposition leader”.⁹² In both cases it found that the pre-trial detention had been ordered for reasons not permitted by Article 5, basing itself on the written reasoning accompanying the detention orders – from which it was clear that the authorities’ aim had been to punish the applicants for their communications with the media and perceived contemptuous behavior.⁹³ By limiting the case in this way to the arrest of the applicants, the Court was able to steer clear of the question of whether these were instances of political persecution full stop, which of course was the more sensitive as well as simply more complicated issue. Understandable as that may be and as was discussed above, by rendering it practically impossible to prove allegations of political persecution, the Court has limited Article 18’s utility in safeguarding the rule of law. Judges Jungwiert, Nußberger and Potocki noted this in their Joint Concurring Opinion to the case of *Tymoshenko*, setting out “that the reasoning of the majority does not address the applicant’s main complaint, which concerns the link between human rights

⁹⁰ See the case law cited *supra* note 88.

⁹¹ Coming to a similar conclusion, see Satzger, Zimmermann & Eibach, ‘Art. 18 Part 2’, *supra* note 9, 249-252. They have the impression that the Court distinguishes between “first and second degree violations”.

⁹² *Lutsenko v. Ukraine*, *supra* note 61, 39, para. 108; *Tymoshenko v. Ukraine*, *supra* note 61, 67, para. 298.

⁹³ *Lutsenko v. Ukraine*, *supra* note 61, 40, para. 109 and *Tymoshenko v. Ukraine*, *supra* note 61, 67, para. 299-300.

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”.⁹⁴ Despite the extreme seriousness of the findings in these cases, therefore, they still do not address the real heart of the issue.

IV. Résumé

Section B. I. concluded that Article 18 addresses a particularly malicious situation of rule of law circumvention by State authorities, because it is aimed at addressing situations where the State restricts individual rights under false pretenses. Assessing the case-law discussed above in light of the drafters’ ambition of creating a resounding alarm where totalitarian tendencies threaten the rule of law, leads to a somewhat ambiguous outlook. On the one hand, the scope of the provision has been drawn too narrowly, and the threshold for proving a violation has been too high. This has led to a very limited role for Article 18, and it had up until the *Merabishvili* case only been found to be violated a total of six times.⁹⁵ On the other hand, this rarity has added to the special stigma associated with a violation,⁹⁶ and from this perspective, a finding of a violation of Article 18 in conjunction with another Convention provision has surely had added value as compared to the mere violation of a substantive right alone, *enhancing* the finding. Article 18 violations have in this respect constituted qualified violations, carrying a special stigma and conveying a strong message, which can be associated with the sounding of the alarm envisioned by the drafters.

Nevertheless, the practical hurdles in the case-law have downgraded Article 18 to a largely idle provision, as either the Court has not addressed complaints at all, or set the threshold for proving a violation so high that a finding of a violation has been largely impossible.⁹⁷ Moreover, it is precisely the most pertinent cases, where criminal proceedings as a whole were politically motivated, that Article 18 is either not applied, or the evidentiary standard is

⁹⁴ Joint Concurring Opinion of Judges Jungwiert, Nußberger and Potocki, appended to *Tymoshenko v. Ukraine*, *supra* note 61, 69.

⁹⁵ See the case-law cited *supra* note 61.

⁹⁶ Compare Leach, *supra* note 81, where he argues that an Article 18 violation ought to be taken very seriously as it is a very rare occurrence. See also Satzger, Zimmermann & Eibach, ‘Art. 18 Part 2’, *supra* note 9, 253, where they argue that the “special weight” of Article 18 convictions could be diluted when arrived at too easily.

⁹⁷ Compare Keller & Heri, *supra* note 9, 9, arguing that the Azeri cases have showcased a potential lowering of the threshold.

raised even further. This means that the provision must, on balance, be seen as largely ineffective in protecting the rule of law.

The following section assesses whether this outlook changed when the *Merabishvili* Grand Chamber judgment was handed down in November 2017.

D. A New Dawn for Article 18? *Merabishvili v. Georgia* and Beyond

Against the background of the unsatisfactory and inconsistent line in the case-law, many judges have appended separate opinions to Article 18 cases to express their discontent, and the few scholarly contributions on the topic have been equally critical. It was therefore not a question of if, but when a case would come before the Grand Chamber. In the end it was the case of former Georgian Minister for the Interior and Prime-Minster Merabishvili, which was referred to the Grand Chamber after a Chamber had unanimously found a violation of Article 18 in conjunction with Article 5 in 2016.⁹⁸ The Grand Chamber, taking note of the criticisms of the previous case-law, formulated a fresh take on Article 18 and in a closely contended decision held that Georgia had violated Article 18, by nine votes to eight.⁹⁹ In the present section, this new judgment is put to the test: does it manage to better realize the rule of law protection and the alarm function Article 18 was designed for?

By way of brief introduction: *Merabishvili* was not a low-profile case. It pertained to a former Head of Government who alleged that he had become the victim of a political prosecution, and the case was moreover linked with some other highly sensitive issues in Georgian politics. Mr. Merabishvili was arrested for numerous offences, amongst which abuse of power, shortly after leaving office due to losing the elections in 2012. He was held in pre-trial detention for almost seven months, when one day he was removed from his cell in the dead of night, and questioned by two high-ranked officials on the death of a former Prime-Minister and crimes allegedly committed by the former President.¹⁰⁰ He was moreover offered to have the charges against him dropped should he cooperate, but was threatened with worsening prison conditions should he decline. He

⁹⁸ *Merabishvili v. Georgia*, ECtHR Application No. 72508/13, Judgment of 14 June 2016 [Merabishvili v. Georgia].

⁹⁹ *Merabishvili v. Georgia* [GC], *supra* note 14.

¹⁰⁰ *Ibid.*, see 79-83, para. 333-350 for the Court's considerations as to the applicant's removal from his cell. All facts in the case were contested by the State, but the Court found the applicant's statements to be proven.

chose the latter, and in Strasbourg he alleged that the incident showed that the authorities' purpose in remanding him in pre-trial detention had not been the allegations against him, but rather had served ulterior, hidden, motives, namely to remove him from the political scene and to gather information in unrelated cases. The potential rule of law implications then, were clear; the stage was set, but the case-law up until 2017 left recourse to Article 18 dubious at best. How did the Grand Chamber proceed?

I. Two Steps Forward...

As I argued extensively above, an effective interpretation of Article 18 requires a widening of its scope, and even more so a clear delineation of its autonomous function as a rule of law safeguard. The Grand Chamber takes up the gauntlet in this respect. By setting out more clearly the purpose of Article 18 and emphasizing its application even if other rights have not been violated, it sets out the margins for Article 18's operation. Moreover, it seems to do away with the "not necessary to examine"-approach by finding that ulterior purpose claims must be addressed when they are a "fundamental aspect" of a case,¹⁰¹ which will presumably be so at least in cases of politically motivated rights restrictions.¹⁰²

In setting out the role of Article 18 within the Convention system, the Court finds the added value of the provision in its *detournement de pouvoir*-function, explicitly forbidding States from misusing their power to restrict rights.¹⁰³ This entails a move-away from the focus on *bad faith* on the part of the authorities as such, and a stronger emphasis on the question of whether the authorities have pursued any ulterior purposes – purposes that do not provide a lawful basis for restricting rights, and that were not the ones officially cited. The Court however recognizes that often State authorities pursue more than one purpose, and that when States pursue both legitimate and illegitimate (ulterior) purposes, Article 18 may be violated even if substantive rights are not. By thus carving out a distinct territory for Article 18, I would expect it to be applied more often, and thereby to become a more feasible avenue for redress when States suppress individual rights in pursuance of a hidden agenda. Whether this

¹⁰¹ *Ibid.*, 69, para. 291.

¹⁰² Nevertheless, only the future will tell how the Court interprets the "fundamental aspect"-criterion. It has formulated the same criterion in Article 14 (non-discrimination) cases, but application has proved unpredictable. Explaining the complex applicability of Article 14 ECHR, see J.H. Gerards, '*Commentaar op art. 14 EVRM*', Sdu Commentaar EVRM, C.1.2 (online, last revised on 15 June 2015).

¹⁰³ *Ibid.*, 67, para. 283 and 74, 306. It does so with reference to the *travaux préparatoires*.

also goes for wholly politically motivated criminal proceedings (as opposed to e.g. restrictions of liberty) remains to be seen, as *Merabishvili* did not address the question of whether Article 18 can be applied in conjunction with the right to a fair trial under Article 6. This issue therefore remains, for now, undecided.

When it comes to issues of proof, the Grand Chamber – noting the earlier inconsistencies – firmly moves away from previous case-law. It significantly lowers the applicable standard of proof and no longer adheres to the one-sided allocation of the burden of proof, thereby greatly increasing the practicability of Article 18 and applicants' chances of actually convincing the Court that a violation has taken place. The Court held that there is no reason to apply any special approach to proof as compared to other Convention provisions,¹⁰⁴ meaning all issues regarding burden of proof,¹⁰⁵ standard of proof,¹⁰⁶ and types of evidence¹⁰⁷ are normalized and therefore no longer raise issues particular to Article 18.

Undoubtedly it will remain challenging for applicants to sufficiently furnish claims of improperly motivated restrictions of their rights, as the knowledge of what has driven the authorities remains within the exclusive purview of the authorities themselves, but at least the overly restrictive demands have been downscaled.¹⁰⁸ Furthermore, because the Court emphasizes the importance of the authorities' response to allegations and also references the relevance of circumstantial evidence such as reports from NGOs and international observers to shed light on the facts, it appears large steps have been made to remedy the evidentiary problems outlined above.¹⁰⁹ This is not to say of course that all criticisms are hereby stifled, as the Court's adoption of a standard of "beyond reasonable doubt", despite its long pedigree,¹¹⁰ is itself not free from

¹⁰⁴ *Merabishvili v. Georgia* [GC], *supra* note 14, 74, para. 310.

¹⁰⁵ *Ibid.*, 74, para. 311.

¹⁰⁶ *Ibid.*, 75, para. 314.

¹⁰⁷ *Ibid.*, 76, para. 316-317.

¹⁰⁸ See also C. Heri, 'Merabishvili, Mammadov and Targeted Criminal Proceedings: Recent Developments under Article 18 ECHR' (15 December 2017), available at <https://strasbourgobservers.com/2017/12/15/merabishvili-mammadov-and-targeted-criminal-proceedings-recent-developments-under-article-18-echr/> (last visited 12 December 2018).

¹⁰⁹ Further on this, see J. Mačkić, 'Case Note: *Merabishvili v. Georgia*' (2018), 19 *European Human Rights Cases* 2018/41, 109-121.

¹¹⁰ See *Ireland v. The United Kingdom*, ECtHR Application No. 5310/71, Judgment of 18 January 1978, 38, para. 161.

controversy.¹¹¹ As this point is a more general critique of the Court's approach to evidence as such, I leave it aside.

II. ...And One Step Back?

In *Merabishvili*, the Grand Chamber clearly takes two leaps forward. In clearing up the scope of application and downscaling the evidentiary requirements, the practicability of Article 18 is sure to increase. The most ferocious critiques on the old case-law had moreover been targeted at precisely those two issues. Then why was the Grand Chamber so deeply divided in handing down its judgment?

As was mentioned above, the focus in what must be proven under Article 18 shifts in *Merabishvili* from bad faith to a more objective assessment of ulterior purpose. This shift entails two important changes. First, the Court accounts for the eventuality where authorities pursued multiple aims when restricting rights, and where they for example detained an individual on a reasonable suspicion of having committed an offence, but simultaneously served a covert purpose – such as preventing him from attending a political manifestation or, as was the case in *Merabishvili*, to obtain information into unrelated investigations.¹¹² Second, the Court no longer applies a separate standard for allegations of political persecution, thereby departing from its previous requirement that the authorities misused the entirety of their legal machinery from beginning to end in blatant disregard of the Convention. The Grand Chamber aims to simplify the case-law by formulating a two-step approach: the examination must first focus on whether it can be proven that the authorities pursued an ulterior purpose, and second, if there was also a legitimate aim, whether the ulterior purpose was predominant.¹¹³ This approach certainly clarifies what is required, but it also raises new issues, and indeed the four concurring judges and the eight dissenting judges all focused their critiques on this point. Early responses to the judgment similarly target this aspect of the case.¹¹⁴

¹¹¹ G. Bonello, 'Evidentiary Rules of the ECHR in Proceedings Relating to Articles 2, 3 and 14 – A Critique', 2 *Inter-American and European Human Rights Journal* (2009) 1-2, 66.

¹¹² *Merabishvili v. Georgia* [GC], *supra* note 14, 79-84, para. 333-353.

¹¹³ *Ibid.*, 74, para. 309.

¹¹⁴ See Leach, *supra* note 81; B. Çalı, 'Merabishvili v. Georgia: Has the Mountain Given Birth to a Mouse?' (3 December 2017), available at <http://verfassungsblog.de/merabishvili-v-georgia-has-the-mountain-given-birth-to-a-mouse/> (last visited 12 December 2018); Heri 2018, *supra* note 108. See also F. Tan, 'Case Note: *Merabishvili v. Georgia*' (2018), 19 *European Human Rights Cases* 2018/41, 109-121.

Zooming in on the new predominant purpose-test, what is clear is that whenever authorities have pursued both legitimate and illegitimate aims, Article 18 is only violated where the illegitimate aim was predominant. Further, where a restriction is of a continuing nature such as in the case of detention, if at any moment in time an ulterior purpose was predominant, this violates Article 18.¹¹⁵ Most enlightening regarding what the new approach entails, is the Court's consideration that

“[t]here is a considerable difference between cases in which the prescribed purpose was the one that truly actuated the authorities, though they also wanted to gain some other advantage, and cases in which the prescribed purpose, while present, was in reality simply a cover enabling the authorities to attain an extraneous purpose, which was the overriding focus of their efforts.”¹¹⁶

This approach to Article 18 has attracted fundamental criticisms from the four concurring judges,¹¹⁷ as well as academic commentators.¹¹⁸ They argue that because a restriction will only fall foul of Article 18 if it served a predominantly illegitimate purpose, the Convention thereby provides legitimacy to States limiting human rights for ulterior purposes, so long as those purposes were not predominant. In the words of Başak Çalı, “the plurality of purposes presumption turns bad faith into a banal state of affairs. It normalises its occurrence so long as it is not a predominant reason for restricting rights”.¹¹⁹ This was not the majority's intention, and in fact the Grand Chamber no longer sees Article 18 as pertaining only to cases of “bad faith”; its aim seems to have been precisely to normalize and objectify the provision by moving away from bad faith and towards a more neutral assessment of purposes.¹²⁰ From the perspective of the protection of the rule of law, my concern is therefore not so much that “bad faith” cases will fall outside of the new approach, but rather that the objectivization brings situations

¹¹⁵ *Merabishvili v. Georgia* [GC], *supra* note 14, 74, para. 308 and 83, para. 351.

¹¹⁶ *Ibid.*, para. 303.

¹¹⁷ Joint Concurring Opinion of Judges Yudkivska, Tsotsoria and Vehabović, appended to *Merabishvili v. Georgia* [GC], *supra* note 14, 90, para. 1; Concurring Opinion of Judge Serghides, appended to *Merabishvili v. Georgia* [GC], *supra* note 14, 109, para. 3; Joint Concurring Opinion of Judges Sajó, Tsotsoria and Pinto de Albuquerque, appended to *Tchankotadze v. Georgia*, *supra* note 13, 33, para 1.

¹¹⁸ Çalı, *supra* note 114; Heri, *supra* note 108.

¹¹⁹ Çalı, *supra* note 114.

¹²⁰ More extensively, see Tan, *supra* note 114.

under Article 18's scope that do *not* pertain to core bad faith cases, and therefore have less bearing on the rule of law. This may dilute the finding of a violation of Article 18, as it will be more mundane and not every violation will be equally serious. Of course, the concurring judges' concerns cannot be discounted, and a normalization of bad faith human rights restrictions is a bleak outlook, but it would appear to me that the risk is greater that the normalization of Article 18 makes violations of the provision lose their edge, as an extremely serious, qualified breach that signifies a complete disregard for the rule of law. This would put the added value of the provision at risk.

More practical problems also arise under the predominant purpose-test. First, it will be very difficult for applicants to prove that the ulterior purpose pursued by the authorities, was predominant.¹²¹ Second, the test for determining predominance is vague and difficult to apply, as is illustrated by the eight dissenters who were in fact in favor of introducing the test but disagreed with the application to the facts of the case. The test as formulated by the Court, though ambiguous, does provide opportunities for rule of law protection. Which purpose was predominant in the Grand Chamber's view depends on all the circumstances of the case, in addition to which "the Court will have regard to the nature and degree of reprehensibility of the alleged ulterior purpose, and bear in mind that the Convention was designed to maintain and promote the ideals and values of a democratic society governed by the rule of law".¹²² That is a rather indeterminate criterion and appears to take onboard the concurring judges' criticisms that wherever there was a political aim to a prosecution, this ought to constitute directly a violation of Article 18. After all, against the background of maintaining democracy and the rule of law, the purpose of getting rid of political dissidents seems to me to be on top of the list of reprehensibility. Problematic in this approach, however, is that how reprehensible the ulterior purpose was seems to have little or nothing to do with what purpose was *predominant* – in other words what purpose drove the authorities to take action. Whereas the criterion therefore provides very little practical guidance, it does appear to provide room to find Article 18 violations more easily in cases where the rule of law is under threat.

¹²¹ Çalı, *supra* note 114; Heri 2018, *supra* note 108.

¹²² *Merabishvili v. Georgia* [GC], *supra* note 14, 74, para. 307.

III. Résumé

Reflecting on the *Merabishvili* case, it is a clear landmark case that has significantly developed the case-law on Article 18. We are left with one question though. How did Mr. Merabishvili fare in Strasbourg? The Grand Chamber considered his account of the facts sufficiently proven, and nine judges were equally convinced that the predominant aim of Mr. Merabishvili's detention following his removal from his cell had shifted to garnering information for other proceedings. The Grand Chamber was not satisfied, however, that the authorities' aim in arresting the applicant had been predominantly to remove him from the political scene. Meanwhile, at the time of writing, Mr. Merabishvili remains in jail, and Georgian authorities claim the European Court confirmed he is not a political prisoner.¹²³

State reactions to Article 18 violations have more broadly speaking been ambivalent. As a clear positive example, the case of former Prime-Minister Tymoshenko springs to mind. In this case, the Court found that Article 18 had been violated in conjunction with Article 5 because Tymoshenko's detention had been ordered to punish her for perceived contemptuous behavior rather than for the purpose of the trial against her.¹²⁴ In a separate case, Tymoshenko complained that beyond her pre-trial detention, her criminal proceedings as a whole had been politically motivated. After the Court had decided the first case, Ukraine decided to settle the second, admitting it had violated Article 18 in conjunction with Articles 6, 8 and 10.¹²⁵ In addition to, and in line with this admission, Ukraine further gave notice to the Committee of Ministers that Tymoshenko had been released from prison following a parliamentary resolution.¹²⁶ The combination of a judicial decision finding a violation of Article 18 and the political supervision by the Committee of Ministers therefore led to the favorable result of Ukraine both admitting to having had political motives in prosecuting Tymoshenko, and releasing her from prison.

¹²³ G. Gabekhadze, 'President Says Ex-Interior Minister's Rights Were Violated in Prison' The Messenger Online (10 May 2018), available at http://www.messenger.com.ge/issues/4137_may_10_2018/4137_margvelashvili.html (last visited 12 December 2018).

¹²⁴ *Tymoshenko v. Ukraine*, *supra* note 61.

¹²⁵ *Tymoshenko v. Ukraine* (No. 2), ECtHR Application No. 65656/12, Decision of 16 December 2014 [*Tymoshenko v. Ukraine* (No. 2)].

¹²⁶ See the database of the Department for the Execution of Judgments of the ECHR, HUDOC-EXEC, available at <https://hudoc.exec.coe.int/eng#%7B%22EXECDocumentTypeCollection%22:%5B%22CEC%22%5D%7D> (last visited 17 December 2018), *Tymoshenko v. Ukraine*, ECtHR Application No. 49872/11.

On the other side of the spectrum, there is the case of *Ilgar Mammadov v. Azerbaijan*. In this case, opposition politician Mammadov had been detained in order to silence him and punish him for spreading information revealing that the cause for Azerbaijani riots had been concealed by the authorities – leading the Court to find a violation of Article 18 in conjunction with Article 5. Despite this ruling in 2014, Mammadov has yet to be released. The Committee of Ministers has continuously kept this case on its agenda,¹²⁷ calling for his release but to no avail. The Committee has now for the first time in history initiated infringement proceedings, requesting the Court to decide whether Azerbaijan has given effect to its judgment.¹²⁸ Meanwhile, two weeks before the Committee's decision, the Court decided in *Ilgar Mammadov (No. 2)* that Azerbaijan had not only violated Article 18 in conjunction with Article 5, but had also manifestly failed to provide Mammadov with a fair trial.¹²⁹ Despite the dialogue first at the Court, then at the Committee of Ministers with further Court proceedings having been brought, and the discussion now flowing back to the Court, there appears to be no clear solution to the *Ilgar Mammadov v. Azerbaijan*-saga. This goes to show that even with Article 18's alarm sounding, and immense political pressure, the Council of Europe system for rule of law and human rights protection remains dependent on the good will of States, and their willingness to comply with binding Court judgments. That, however, is of course precisely what is at stake in States who no longer strictly adhere to the rule of law. Whereas a finding of a breach of Article 18 may therefore be a clear sounding of the alarm for the rule of law, the real litmus test may be in how a State executes that judgment.

E. Conclusion

Human rights restrictions under false pretenses present a clear danger to the rule of law, and Article 18 presents a powerful tool to address such backslides. The European Court has struggled to get a grip on such pernicious practices, but has shown a willingness to develop its case-law to better deal with such situations and offer applicants a real chance of addressing these

¹²⁷ See L. R. Glas, 'The Committee of Ministers Goes Nuclear: Infringement Proceedings Against Azerbaijan in the Case of Ilgar Mammadov' (20 December 2017), available at <https://strasbourgobservers.com/2017/12/20/the-committee-of-ministers-goes-nuclear-infringement-proceedings-against-azerbaijan-in-the-case-of-ilgar-mammadov/> (last visited 12 December 2018).

¹²⁸ Interim Resolution of 7 December 2017, CM/ResDH(2017)429.

¹²⁹ *Ilgar Mammadov v. Azerbaijan (No. 2)*, *supra* note 64.

issues. The Grand Chamber case of *Merabishvili* presents a turning point in this regard, offering some realistic chance for victims of politically motivated repression to bring their claims to Strasbourg, and even if applicants remain in a difficult position to successfully complain of an Article 18 violation given the authorities' sole knowledge of their intentions and the difficulty of finding evidence indicating such intentions, dialogue will at least increase as States can no longer remain passive. Further, the Court's finding to the effect that it will address complaints of authorities being driven by ulterior purposes whenever that complaint constitutes a fundamental aspect of the case, at least in theory ensures that it will no longer declare serious cases unnecessary to examine. Test case and the next trial for the Court in this context will be the Grand Chamber case of Alexei Navalny,¹³⁰ the Russian opposition leader who is regularly arrested when he attempts to take part in political manifestations, but whose Article 18 complaints the Court has consistently refused to address.¹³¹

Despite the developments in *Merabishvili*, the case-law under Article 18 remains complex and challenges endure. In particular, the Court will need to somehow strike a balance between an interpretation that renders Article 18 a realistic avenue for proceedings where the rule of law is at stake, while at the same time safeguarding its exceptional status as a "qualified violation". After all, it may no longer connote the same clear and unequivocal ruling of bad faith – that "the foundation of trust that normally exists between all signatory States is shattered".¹³² A further threat looming is that States acting in bad faith may get away with their malicious rights restrictions because it cannot be proved that their ulterior purpose was "predominant". Because all information regarding the authorities' purposes is necessarily within the exclusive knowledge of the State, the Court will need to be sufficiently vigilant in requiring it to furnish the necessary evidence, or to draw adverse inferences from the State's unwillingness to do so. All in all, the Court needs to walk a fine line if Article 18 is to function as the alarm bell that the drafters envisioned, whilst safeguarding the legitimacy of its decisions.

¹³⁰ *Navalnyy v. Russia February 2017*, *supra* note 15. A Grand Chamber hearing was held in January 2018.

¹³¹ See *Navalnyy and Yashin v. Russia*, *supra* note 57; *Navalnyy and Ofitserov v. Russia*, *supra* note 7; *Navalnyy v. Russia February 2017*, *supra* note 15; *Navalnyy v. Russia October 2017*, *supra* note 65.

¹³² Satzger, Zimmermann & Eibach, 'Art. 18 Part 2', *supra* note 9, 249.