The age of subsidiarity? The ECtHR’s approach to the admissibility requirement that applicants raise their Convention complaint before domestic courts

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Abstract
The Copenhagen Declaration (2018) welcomed European Court of Human Rights (Court) ‘continued strict and consistent’ application of the admissibility criteria, ‘including by requiring applicants to be more diligent in raising their Convention complaints domestically’ when exhausting domestic remedies. This article answers the question whether the Court has indeed required applicants to be more diligent in this respect. The answer contributes to a body of academic research studying to what extent and how the Court has developed the subsidiarity principle. Additionally, the answer is of great practical relevance to applicants and their representatives, because they may have to change how they plead their case before the domestic courts with a view to bringing a complaint in Strasbourg. The case-law analysis performed in this article shows that, in some recent rulings, which mainly hailed from the UK, the Court has indeed required applicants to be more diligent in raising their Convention complaints domestically. However, the Court does not maintain this stricter line consistently.

Keywords
European court of human rights, European convention on human rights, subsidiarity, admissibility, complaint procedure, domestic remedies

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I. INTRODUCTION

In 2018, the fifth in a series of high-level conferences on the European Convention on Human Rights (Constitution or ECHR) was held in Copenhagen. In the resulting Copenhagen Declaration, the participants welcomed ‘the Court’s continued strict and consistent’ application of the admissibility criteria, ‘including by requiring applicants to be more diligent in raising their Convention complaints domestically’ when exhausting domestic remedies. This part of the Declaration could be interpreted as a compliment to the European Court of Human Rights (Court or ECtHR) for taking up the invitation in the Brighton Declaration (2012) to:

develop its case law on the exhaustion of domestic remedies so as to require an applicant […] to have argued before the national courts or tribunals the alleged violation of the Convention rights or an equivalent provision of domestic law, thereby allowing the national courts an opportunity to apply the Convention in light of the case law of the Court.

The requirement to exhaust domestic remedies as laid down in Article 35(1) ECHR is a key expression of the Convention system’s fundamentally subsidiary nature, according to which it is, first and foremost, the responsibility of the States parties to protect the Convention rights at the domestic level. By upholding this rule, the Court prevents the States from having to answer to it before they have had the opportunity to remedy an alleged Convention violation themselves. Playing a subsidiary role is a practical necessity because the Court simply cannot deal with all human rights complaints in the same manner as a court of first instance. Moreover, this role helps to legitimise the Court’s ‘review by providing a measure of deference to national actors in situations where such deference is appropriate’. The Copenhagen Declaration neither substantiates the claim that the Court requires applicants to be more diligent in raising their Convention complaints domestically nor specifies what exactly this means for applicants. A speech by Judge Spano, given at the 2017 High-Level Expert Conference in Kokkedal, gives insight into the source of inspiration for this claim. Spano explained that the Court has in recent years developed its exhaustion of domestic remedies jurisprudence […], in particular with its Grand Chamber judgment in Vučković and Others v. Serbia which […] may be interpreted as requiring

3. Convention on the Protection for Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), Article 35(1); Gherghina v Romania App No 42219/07 (ECHR, 9 July 2015), para 83. Article 35(1) ECHR. As a result of the Brighton Declaration, the subsidiarity principle is now included in the Convention’s Preamble.
applicants to be more diligent in raising their Convention complaints for domestic remedies to be properly exhausted than transpired from previous case-law.6

The emphasised part of the speech bears a similarity to the text of the Copenhagen Declaration, as cited above. Therefore, and because the conference in Kokkedal served to prepare for the Copenhagen Conference, it can be safely assumed that Spano’s speech strongly influenced the final text of the Declaration.7

Although the Copenhagen Declaration and Spano’s speech suggest otherwise, the Court explained that it had decided not to act on the invitation in the Brighton Declaration,8 because the wording9 in the declaration ‘seems very close to the existing case-law, which requires the applicants to have raised their complaint at least in substance’.10 The Court gave this explanation in The Interlaken Process and the Court report, which was published approximately half a year after the adoption of the Brighton Declaration. In the subsequent three reports with the same title, the Court did not address the matter again.11

The claim in the Copenhagen Declaration forms part of a broader claim that the reform process of the Convention system, which started in 2010 with the adoption of the Interlaken Declaration, has led the Court to further develop the subsidiarity principle in its case-law.12 Judge Spano coined the current period in the development of the Convention system the ‘age of subsidiarity’.13 To what extent and how the Court has developed the subsidiarity principle is a topic of research which will be explore in this article.14

This article makes a modest contribution to the existing body of research by answering the question of whether, as is claimed in the Brighton Declaration, the Court has indeed required applicants to be more diligent in raising their Convention complaints domestically when exhausting domestic remedies. This question is answered from three angles of analysis: where do domestic remedies need to be exhausted, who bears responsibility for raising the Convention complaint, and what should the content be of the Convention claim that applicants raise domestically.

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7. See also Leonie Huijbers, ‘The Draft Copenhagen Declaration – Process-based Review and Subsidiarity’ (ECHR Blog, 28 February 2018) <www.echrblog.com/2018/02/the-draft-copenhagen-declaration_28.html> accessed 18 November 2022: ‘perhaps the participation of particular participants in the Kokkedal Conference has had a strong influence on the draft’s authors’, mentioning Spano as an example.


9. That is, ‘alleged violation of the Convention rights or an equivalent provision of domestic law’.

10. ECtHR (n 8) 14.


14. Specifically, this will be explored in Section 2 of this article.
The focus of this article lies on whether applicants have to be more diligent; the requirement that applicants must have complained about the alleged violation that they submit to the Court at the domestic level is not new. In fact, it is one of the ‘basic requirements’ of the exhaustion of domestic remedies rule, together with the requirement that the complaint must be made to the ‘appropriate domestic body’, and in line with domestic law requirements. The applicant is only dispensed from fulfilling these requirements in special circumstances.

The answer to this question does not only contribute to the aforementioned body of research, but is also of great practical relevance to applicants and their representatives. Applicants may have to change how they plead their case before domestic courts with a view to bringing a case before the Strasbourg Court, where they eventually must become more diligent in raising their Convention complaints.

This article is organised as follows. Section 2 gives an account of the means by which the Court can express respect for the subsidiarity principle, which includes upholding the exhaustion of domestic remedies rule. To this end, Section 2 provides the backdrop for the case-law analysis and outlines the body of literature to which this article contributes. Following an explanation of the methodology adopted, Section 3 engages in an elaborate case-law analysis to answer the central question of this article. Finally, the conclusion and answer to the central question is provided in Section 4. This article concludes that, when considering where domestic remedies need to be exhausted and who bears responsibility for raising the Convention complaint, the Court has not become more strict in its approach to the admissibility requirement. However, in regard to what the content of the Convention claim raised domestically should be, it can be argued that the Court has become more strict. This is especially considering that, at least in some cases, the Court has set higher standards for the content of the Convention claim.

2. MEANS TO EXPRESS (INCREASED) RESPECT FOR THE SUBSIDIARITY PRINCIPLE

Requiring applicants to be more diligent in raising their Convention complaints domestically is only one of the tools at the Court’s disposal to express (increased) respect for the subsidiarity principle. These tools can be either of a procedural nature (Section 2.1), relating to, for example, the admissibility of a case or the execution of a judgment, or of a substantive nature, relating to the Court’s consideration of the merits of a case (Section 2.2). This section gives a non-exhaustive account of such means.

2.1 PROCEDURAL MEANS

The key procedural means to express respect for the subsidiarity principle in the assessment of a case’s admissibility is by upholding the exhaustion of domestic remedies rule. Requiring applicants to be more diligent in raising their Convention complaints domestically is part of this means and helps to ensure, as Spano explains, that ‘it is the national forum which is the primary

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17. Mowbray (n 4) 312.
18. See also the discussion in Section 1.
arena for resolving Convention disputes, not Strasbourg.\textsuperscript{19} He adds that requiring diligence is facilitated by the process by which the Court has embedded the Convention into national legal systems, meaning that domestic judges can apply the Convention principles themselves.\textsuperscript{20} The Court’s (overly)\textsuperscript{21} strict application of the exhaustion of domestic remedies rule to large numbers of Turkish cases can also be regarded as an example of this means,\textsuperscript{22} and may be motivated by a desire to ‘pacify’ Turkey.\textsuperscript{23}

The pilot-judgment procedure is another procedural means to uphold respect for the subsidiarity principle.\textsuperscript{24} In a pilot judgment, the Court identifies a structural or systemic domestic legal problem that has given or may give rise to similar applications, and orders execution measures to address that problem.\textsuperscript{25} Once the State has solved the problem, the Court refuses to deal with the merits of similar applications.\textsuperscript{26} A successful pilot judgment reinforces respect for the subsidiarity principle, because the State itself (as opposed to the Court) solves individual cases in which a Convention problem arises, as the principle requires it to do.\textsuperscript{27}

In the execution phase, the declaratory nature of the Court’s judgments can be seen as an expression of its subsidiary role.\textsuperscript{28} In its judgments, the Court finds a violation, but leaves it, in the large majority of cases,\textsuperscript{29} to the respondent State to choose the measures needed to execute a judgment in line with Article 46(1) ECHR.\textsuperscript{30} One exception to the declaratory nature of the Court’s judgments is that the Court can grant just satisfaction for the (non-)pecuniary damage that the applicant suffered because of a violation.\textsuperscript{31} However, with reference to its subsidiary role and the need to control its caseload, the Court may call a halt to awarding just satisfaction when the respondent State fails to

\begin{itemize}
  \item \textsuperscript{20} Spano (n 6) 12; Spano (n 19) 477, 486.
  \item \textsuperscript{21} See Emre Turkut, ‘The Köksal Case Before the Strasbourg Court: A Pattern of Violations or a Mere Aberration?’ (Strasbourg Observers, 2 August 2017) \textlangle\textgreater strasbourgobservers.com/2017/08/02/the-koksal-case-before-the-strasbourg-court-a-pattern-of-violations-or-a-mere-aberration/> accessed 18 November 2022; Oleg Soldatov and Gülten Deniz Tokmak, ‘Köksal v. Turkey: Excessive Formalism or Strict Adherence to Admissibility Criteria?’ (Resource Centre on Media Freedom in Europe, 10 January 2018) \textlangle\textgreater www.rmefreedom.eu/Tools/Legal-Resources/Koeksal-v.-Turkey-Excessive-Formalism-or-Strict-Adherence-to-Admissibility-Criteria/ accessed 18 November 2022; Raffaela Kunz, ‘A Further “Constitutionalization” to the Detriment of the Individual?’ (Völkerrechtsblog, 27 August 2018) \textlangle\textgreater voelkerrechtsblog.org/a-further-constitutionalization-to-the-detriment-of-the-individual/> accessed 18 November 2022.
  \item \textsuperscript{22} Harris (n 15); See, for instance, Köksal v. Turkey App No 70478/16 (ECtHR, 6 June 2017), paras 27, 29.
  \item \textsuperscript{23} Soldatov and Tokmak (n 21).
  \item \textsuperscript{25} Rules 61(1) and (3) ECtHR Rules of Court.
  \item \textsuperscript{27} The Association of Real Property Owners in Łódź v Poland App No 3485/02 (ECtHR, 8 March 2011), para 44. The procedure also indicates ‘an increased supervisory role for the Court through giving more robust guidance to states on how to solve the systemic problems’, see Arnardóttir (n 24) 9.
  \item \textsuperscript{28} Assanidze v Georgia App No 71503/01 (ECtHR, 8 April 2004), para 202.
  \item \textsuperscript{29} Exceptions are individual or general measures indicated with reference to Article 46 ECHR. See ECtHR Registry, ‘Guide on Article 46 of the European Convention on Human Rights: Binding Force and Execution of Judgments’, updated on 31 August 2022 \textlangle\textgreater www.echr.coe.int/Documents/Guide_Art_46_ENG.pdf> accessed 18 November 2022.
  \item \textsuperscript{30} Assanidze v Georgia (n 28), para 202.
  \item \textsuperscript{31} Article 41 ECHR.
\end{itemize}
address a domestic problem for an extended period of time and when even a pilot judgment cannot contribute to a solution.32

2.2. SUBSTANTIVE MEANS

One substantive means by which the Court respects the subsidiarity principle is its refusal to deal with errors of fact or law allegedly committed by a national court, unless such errors may have violated a Convention right.33 Whereas this means has been a constant factor in the Court’s case-law, the next means is a newer development. In recent years, several authors have identified a procedural turn in the Court’s case-law. This signifies that the Court concentrates on reviewing the quality of the domestic decisions assessing the necessity of an alleged violation, instead of on the reasonableness of the balancing exercise undertaken by the domestic authorities.34 The Court uses procedural review to assess both parliamentary35 and judicial decision-making36,37 High quality decision-making can be a factor in favour of granting a broad margin of appreciation.38 Consequently, the respondent State has much discretion in choosing how to limit a Convention right and the Court has shown deference when examining whether the limitation is Convention-compliant, restricting itself to establishing whether the State’s choices were manifestly

33. García Ruiz v Spain App No 30544/96 (ECtHR, 21 January 1999), para 28. See also Mowbray (n 4) 321.
34. Janneke Gerards, ‘Procedural Review by the ECtHR – A Typology’ in Janneke Gerards and Eva Brems (eds), Procedural Review in European Fundamental Rights Cases (Cambridge University Press 2017) 127-128. Another aspect of the procedural turn is ‘setting positive obligations of a procedural nature or improving the legitimacy of national procedures’ 129. Since this aspect is not very clearly connected to the subsidiarity principle it is not discussed in this article. See also Arnardóttir (n 24) 5; Spano (n 6) 13; Harris (n 15) v; Spano (n 19) 481-482.
unreasonable. Various authors contend that the Court increasingly uses procedural review to respect the subsidiarity principle and to counter the criticism levelled by some States against the Court’s allegedly overly intrusive judgments that disrespect the primary responsibility of States parties for protecting the Convention rights. Another factor that can help explain the procedural turn is the Court’s enormous caseload, which was, in part, due to the increasing number of States parties to the Convention since the early nineties. The procedural turn is facilitated by, first, the existence in the Court’s – and especially the Grand Chamber’s – case-law of ‘objective

40. Saul (n 35) 772; Spano (n 13) 498; Arnardóttir (n 24) 6-7, 19; Myriam Hunter-Henin, ‘Living Together in an Age of Religious Diversity: Lessons from Baby Loops and SAS’ (2015) 4 Oxford Journal of Law and Religion 94, 116; Harris (n 15) v; Arnardóttir (n 37) 228, 234. Leach and Donald (n 35) 141 are more careful, noting that the ‘Court’s sometimes ambiguous, indeterminate, or inconsistent references to the quality of parliamentary process, and the strength of judicial dissent on the matter in some cases, suggest that it is unlikely to proceed swiftly towards a more explicit articulation of, as Judge Spano puts it, a more ‘robust and coherent’ concept of subsidiarity’.
41. This criticism, which is voiced by parliamentarians and domestic judges alike, has been discussed elaborately elsewhere and will not be repeated here. See, for a description of the criticism, Spyridon Flogaitis, Tom Zwart and Julie Fraser (eds), The European Court Of Human Rights and Its Discontents: Turning Criticism into Strength (Edward Elgar 2013); Spano (n 6) 12; Spano (n 13) 488-490; Spano (n 19) 478-479; Laurence R. Helfer and Erik Voeten, ‘Walking Back Human Rights in Europe?’ (2020) 31 European journal of International Law 797, 798, 809-810.
44. Čali (2016; n 38) 152.
interpretational criteria’, upon which domestic authorities can rely on. And, second, by the embeddedness of the Convention in the national legal systems, which allows the Court to trust that domestic courts apply the Convention standards responsibly.

Another example of a substantive means to pay respect to the subsidiarity principle is the aforementioned margin of appreciation doctrine. This doctrine is now laid down in the Convention’s Preamble, providing that:

the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation.

A broad margin of appreciation means that the respondent State has much discretion to, for example, decide how to restrict a Convention right and that the Court shows deference when examining whether the restriction complied with the Convention standards, thus playing a subsidiary role. In this scenario, the Court normally only establishes whether the respondent State made a manifestly unreasonable decision. When the margin of appreciation is narrow, the Court scrutinises the decisions of the respondent State more intensely, which reduces its subsidiary role and the room for diverse practices in the domestic courts of States parties.

2.3 General Observations

The foregoing section demonstrates that the claim in the Copenhagen Declaration that the Court has required applicants to be more diligent in raising their Convention complaints is part of a broader phenomenon: the means for the Court to express respect for the subsidiarity principle. On the one hand, these means have been a constant feature of the Convention system since its inception, but, on the other hand, the number of such means, both of a procedural and substantive nature, and the Court’s recourse to them, has increased in recent years, at least according to some authors. This development can be explained by the criticism that the States parties have levelled against the Court, as well as the Court’s desire to lower its caseload, and is facilitated by the embeddedness

45. Spano (n 6) 13. See also Çali (2016; n 38) 153; Arnardóttir (n 37) 236; Gerards (n 39) 509-510; Spano (n 19) 477, 487-488.
46. Helfer (n 5) 130; Arnardóttir (n 24) 21-22; Spano (n 6) 12.
47. Çali (2016; n 38), 153.
48. In its case-law, the Court refers to the primary responsibility of the States parties to justify their recourse to the doctrine, but it also explains that domestic authorities may be better placed to hold an opinion on what, for example, morals require. See, for example, Handyside v the UK App No 5493/72 (ECtHR, 7 December 1976); Sunday Times v the UK App No 6538/74 (ECtHR, 26 April 1979) <http://hudoc.echr.coe.int/eng?id=001-57584> accessed 18 November 2022, para 59. In the literature, the legitimation of the doctrine has been theorised on more elaborately, see, for example, Yutaka Arai-Takahashi, The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR (Intersentia 2002) 232, 249; Janneke Gerards, General Principles of the European Court of Human Rights (Cambridge University Press 2019) 160-162.
50. Gerards (n 48) 48.
of the Convention in the national legal systems and the consolidation of the Court’s (Grand Chamber) case-law.

3. CASE-LAW ANALYSIS

The case-law analysis intends to answer the question whether the claim in the Copenhagen Declaration regarding the exhaustion of domestic remedies rule is correct. The analysis of what is required of the applicants in this respect and whether this has changed over time is presented from three angles. The first angle is where (Section 3.1) domestic remedies need to be exhausted: does the applicant need to raise the Convention complaint before all courts or just before the highest domestic court? And does the applicant need to use the most suitable domestic procedure for this purpose?

The second angle is who (Section 3.2) bears responsibility for raising the Convention complaint. Although the addressee of the exhaustion of domestic remedies rule is the applicant, one may wonder whether it matters whether the applicant is represented by a lawyer, and whether domestic courts have to apply the Convention standards of their own motion in certain circumstances. Furthermore, can it be held against the applicant that the Court, as ‘the master of the characterisation to be given in law to the facts of the case’,\(^{51}\) decides to examine a case under a different provision than the one which the applicant relied on before the domestic courts?

The largest part of this Section is dedicated to the third angle, presenting what (Section 3.3) the content of the applicant’s domestic Convention claim should be. Making this claim can take different forms, depending on how much the Court requires from the applicant. The Court would not be very demanding, for instance, when requiring that the applicants invoke their Convention right in substance, especially when applicants can invoke their right indirectly through another argument – as opposed to invoking the right as the core of their argument. A more demanding approach would be, for instance, obliging the applicant to invoke the Convention right expressly before domestic courts, which would be particularly demanding when this obligation is coupled with the obligation to cite relevant Strasbourg case-law.

The case-law analysis is based on a case-law database consisting of 321 relevant judgments and decisions adopted by the Court and the now-abolished European Commission on Human Rights (Commission) in the years 1961–2022.\(^{52}\) A ruling is relevant when the Court discussed in some detail whether the case should be declared inadmissible on grounds of failure to raise the Convention complaint domestically. Therefore, the ruling is not included in the database when the Court, for example, only reiterates the general rule that ‘the complaint intended to be made subsequently to the Court must first have been made – at least in substance – to the appropriate domestic body’.\(^{53}\) To give another example, when the Court simply, without elaboration, establishes that ‘[t]he applicant complained in substance under Article 6 § 3(d) of the Convention that the court had failed to grant permission to allow a witness to attend the trial’, the ruling was also not included.\(^{54}\)

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51. Aldeguer Tomás v Spain App No 35214/09 (ECtHR, 14 June 2016), para 57.
52. The list is on file with the author.
53. For example, Selmouni v France App No 25803/94 (ECtHR, 28 July 1999), para 74.
54. Truāps v Latvia App No 58497/08 (ECtHR, 20 November 2012). See, for another example of a case that was not included in the case-law database, C v Belgium App No 10957/84 (ECtHR, 13 October 1987).
To compile the case-law database, the search started with consulting handbooks and academic literature discussing the exhaustion of domestic remedies rule. In the rulings found in the literature, the Court referred to other rulings, which were also included in the database when they fulfilled the criteria for relevance. It appeared from the rulings mentioned in the literature and referred to by the Court that the most relevant keywords to search for additional rulings in HUDOC were ‘at least in substance’ or ‘au moins en substance’. A search with these keywords was performed on 8 April 2022 and produced a list of 1130 rulings when using the keywords in English, and 948 rulings when using the keywords in French, of which only the relevant rulings were included in the database. The resulting 321 rulings most probably do not encompass all rulings in which the Court discussed, in some detail, whether the case should be declared inadmissible on grounds of failure to raise the Convention complaint before domestic courts. However, it is submitted that not all relevant rulings need to be identified in order to answer this article’s central question and that the number of 321 rulings suffices for this purpose. Of the 321 rulings, 136 were issued in the years after the adoption of the Brighton Declaration (2013 and later).

3.1 WHERE DO DOMESTIC REMEDIES NEED TO BE EXHAUSTED?

In some cases, applicants raise their Convention complaint only before the highest domestic court (and upon appeal) and not during the initial phase of proceedings. This is not an obstacle to fulfilling the exhaustion of domestic remedies requirement, unless the penultimate court is the last domestic court that substantively reviews the applicant’s Convention complaint. However, when applicants raise the Convention complaint only before lower courts and not before the highest domestic court, they have not fulfilled said requirement. This aspect of the Court’s case-law does not seem to have changed over time.

The question of whether the applicant needs to use the most suitable domestic procedure in order to complain about a Convention violation arose in two cases in the case-law database. Answering this question conclusively is difficult, because the Court took two different stances and because the facts of both cases are rather different. In the older case, the Court was rather lenient. Before the Court, the applicant complained that his detention was in violation of Article 5(1) ECHR (right to liberty and security), even though he had not instituted domestic proceedings to challenge the lawfulness of his detention as such. Instead, he had lodged a complaint against the police and the public prosecutor, complaining

55. And, in particular, the cases mentioned under the heading ‘Complaint raised in substance’, see ECtHR, Admissibility Guide (Updated on 1 February 2022), para 94.
56. Searching for judgments and decisions, regardless of the formation that adopted the ruling, and with the filter ‘English’ when using the keywords in English and with the filter ‘French’ when using the French keywords.
57. This is not just because there is neither one (set of) keyword(s) that can be used nor a box that can be ticked in HUDOC to find these judgments, but also because potentially relevant single-judge decisions and summarily reasoned Committee inadmissibility decisions have not been published. See Rule 104A ECtHR Rules of Court.
58. See, for example, Castillo Algar v Spain App No 28194/95 (ECtHR, 28 October 1998), paras 34-35; Erdoğlu v Turkey App No 25723/94 (ECtHR, 16 June 2000), paras 39-40.
59. Nak Naftogaz Ukrainy v the UK App No 62976/12 (ECtHR, 23 May 2017), paras 51, 53.
60. H v France App No 11105/84 (Commission dec., 15 October 1987); Hajiyeva v Azerbaijan App No 20700/03 (ECtHR, 22 September 2005); Virolainen v Finland App No 29172/02 (ECtHR, 7 February 2006); l’Association Les Témoins de Jéhovah v France App No 8916/05 (ECtHR, 21 September 2010); Kok v The Netherlands App No 43149/98 (ECtHR, 4 July 2020).
about false imprisonment, coercion and insults. Still, the Court concluded that the applicant had exhausted domestic remedies because he had mentioned that his arrest and detention had been unlawful and that his fundamental rights had been violated. In the second case, the applicant complained in Strasbourg that the State had not protected her against treatment contrary to Article 3 ECHR (prohibition of torture), as performed by a doctor. Because the applicant had only brought a civil claim for damages against the hospital, without including the State as a defendant to the claim, the applicant had not exhausted domestic remedies.

3.2 WHO BEARS RESPONSIBILITY FOR RAISING THE CONVENTION COMPLAINT?

It is clear that the applicant bears responsibility for raising the Convention complaint. The Commission has emphasised that the lack of legal representation does not absolve the applicant from this responsibility. In the opposite situation, where the applicant was represented by counsel, the Court has stressed that the applicant was represented. Either way, the applicant must, therefore, exhaust domestic remedies. Regardless of whether domestic law obliges the domestic courts to examine a case under the Convention of their own motion or to interpret domestic legislation in a Convention-respecting manner, the applicants’ conduct alone determines whether domestic remedies have been exhausted. This approach still stands, despite the Court recently upholding that domestic courts must ‘apply the established and general interpretations given by the Court to avoid further violations from occurring’. The Court shifts (part of) the responsibility for flagging a Convention problem to domestic authorities only when a positive obli-

61. K-F v Germany App No 25629/94 (ECtHR, 27 November 1997), paras 20, 44.
62. ibid, para 47.
63. K.O’s v Ireland App No 61836/17 (ECtHR, 10 November 2020), paras 28, 31.
64. K.P. v Finland App No 25653/94 (Commission dec., 16 October 1996); See also Kemal Çetin v Turkey App No 3704/13 (ECtHR, 26 May 2020), para 29, where the Court seems to attach some weight to the lack of representation. See also Buchs v Switzerland App No 9929/12 (ECtHR, 27 May 2014), paras 35-38, where the Court emphasised the fact that the Applicant was a layman, when recalling that he had not invoked any Convention provisions before the domestic courts.
65. X v Switzerland App No 8257/78 (Commission dec., 10 July 1987); Sireyjol v France App No 28249/02 (ECtHR, 30 May 2006); Kaiser v Switzerland App No 17073/04 (ECtHR, 15 March 2007); Carlson v Switzerland App No 49492/06 (ECtHR, 6 November 2008), para 46; Jendrowiak v Germany App No 30060/04 (ECtHR, 14 April 2011); Siebenhaar v Germany App No 18136/02 (ECtHR, 3 February 2011); Zürcher v Switzerland App No 12498/08 (ECtHR, 4 September 2012), para 29; Petschulies v Germany App No 6281/13 (ECtHR, 2 June 2016), para 95; Nak Naftogaz Ukrainy (n 59) para 53.
66. Van Oosterwijck v Belgium App No 7654/76 (ECtHR, 6 November 1980), para 39. See also Back v Finland App No 23773/94 (Commission dec., 9 April 1996); Karara v Finland App No 40900/98 (Commission dec., 29 May 1998); Saltuk v Turkey App No 31135/96 (ECtHR, 24 August 1999); Zürcher v Switzerland (n 65), para 29; Karakaya v Turkey App No 62619/00 (ECtHR, 4 May 2004); Peacock v the UK App No 52335/12 (ECtHR, 5 January 2016), para 39. The Inter-American system takes a different approach, see Helena De Vylde, ‘Fuckovic and Others v Serbia: Is the Court Getting Stricter on the Requirement to Invoke the Substance of the Complaint Domestically’ (Strasbourg Observers, 10 April 2014) <strasbourgobservers.com/2014/04/10/fuckovic-and-others-v-serbia-is-the-court-getting-stricter-on-the-requirement-to-invoke-the-substance-of-the-complaint-domestically/> accessed 18 November 2022.
67. Janneke Gerards, ‘Diverging Fundamental Rights Standards and the Role of the European Court of Human Rights’ in Monica Claes and Maartje de Visser (eds) Constructing European Constitutional Order (Hart 2014), Section III.B. See also Gerards (n 42) 26-27. See, for an example, Fabris v France App No 16574/08 (ECtHR, 7 February 2013), para 75.
gation is at stake. To illustrate, in an Article 3 ECHR case, the State argued that the applicants had not exhausted domestic remedies because they had not lodged a criminal complaint against police officers for alleged ill-treatment. The Court dismissed this objection, pointing out that the authorities had a positive obligation to investigate the applicants’ ill-treatment of their own motion, provided that there were sufficiently clear indications that such treatment had occurred.

Overall, when there is no positive obligation at stake, the applicants are responsible for raising the Convention complaint. This is regardless of whether they are represented by counsel or whether domestic courts can or must apply the Convention of their own motion. This has been a constant feature of the Strasbourg case-law since at least 1987. The Court, however, seems to be somewhat less strict when it examines a case under a different provision than the one on which the applicant relied domestically. The Court can decide to do so, because it is the ‘the master of the characterisation to be given in law to the facts of the case’. In other words, when circumstances beyond the applicants’ control influence whether they raised their Convention complaint, the Court is not overly stringent.

3.3 What Should the Content of the Convention Complaint Be?

The answer to the question in the title of this section is given in three parts. First, the requirement to raise the Convention complaint before domestic courts is examined (Section 3.3.1). Then, this Section discusses the Vučković and Others v Serbia judgment to establish whether the Court required more of these applicants when exhausting domestic remedies than of applicants who brought previous cases (Section 3.3.2). Finally, upon concluding that the Court did not require more of Vučković and his fellow applicants, the last section considers whether the Court has maintained a stricter stance on the content of the complaint in other recent rulings (Section 3.3.3).

3.3.1 Exhausting Domestic Remedies in Substance

As was explained in the introduction to Section 3, the Court can either require that the applicants raise the Convention complaint in substance or that they rely on the relevant Convention rights expressly before the domestic courts.

In a decision of 1963, the Commission noted that the applicant should have invoked the same Convention provisions before the domestic courts as in Strasbourg, taking into consideration that the Convention formed an integral part of Belgian law. However, the Commission did not declare the case inadmissible because the applicant failed to do so, rather the case was inadmissible for a separate reason. In another early case from 1977, the applicant had exhausted domestic

68. See, for example, Fonseca Mendes v Spain App No 43991/02 (ECtHR, 1 February 2005); Trampevski v the FYRM App No 4570/07 (ECtHR, 10 July 2012), para 37; Lazu v Moldova App No 46182/08 (ECtHR, 5 July 2016), paras 28, 42.
69. Tsurayev and Others v Russia App No 8372/07 (ECtHR, 8 June 2021), para 57.
70. Ibid, paras 69, 71, 76, 80.
71. Pirotte v Belgium App No 11244/84 (Commission dec., 2 March 1987).
72. See, for example, Aldeguer Tomás (n 51), para 56-57, 61; Zehentner v Austria App No 20082/02 (ECtHR, 16 July 2009), paras 33-34, 44-45; Gatt v Malta App No 28221/08 (ECtHR, 27 July 2010), paras 18-19, 21, 24-25; Nikolić v Serbia App No 15352/11 (ECtHR, 19 October 2021), paras 36-37, 47.
73. Aldeguer Tomás (n 51) para 56-57.
74. X v Belgium App No 1488/62 (Commission dec., 18 December 1963), paras 93-98.
remedies, in spite of not invoking the Convention rights before domestic courts expressly, because the Convention did not bind British courts. These two decisions could be interpreted as requiring applicants to raise their Convention rights expressly before domestic courts, provided that domestic law allows for this.

Yet, in (somewhat) more recent rulings, this requirement did not apply. The Court and the Commission only referred to the requirement to exhaust domestic remedies in substance, including when the Convention played a prominent role in domestic law. The Commission even recalled that the applicants do not need to make ‘a particular reference’ to the Convention. This approach applies, unless express reliance on the Convention is the ‘sole appropriate manner’ to obtain the domestic redress sought. For example, to exhaust an Article 5 ECHR claim in substance, it suffices to adduce arguments to the effect that the application of domestic legislation to the applicant restricted his liberty. In another case, the Court accepted that a domestic complaint raising issues ‘concerning release from a duty of medical confidentiality’ meant that the applicant had invoked Article 8 ECHR (right to respect for private and family life) in substance, since respect ‘for the confidentiality of medical data is of fundamental importance to the protection of a patient’s privacy’. When the applicant complained domestically that, because of the proximity of a suspension bridge, her house could no longer be used as a home, she had raised an Article 8 ECHR complaint in substance. Additionally, in cases in which the applicants challenged an expropriation before the domestic courts, the Court assumed that they had invoked the right to the protection of property under Article 1 Protocol (P) 1 ECHR in substance.

It is clear that the applicant needs to invoke the Convention rights in substance. Consequently, it is neither sufficient that a Convention violation ‘is evident’ from the facts of the case or the applicants’ submissions, nor is it necessary to refer to specific Convention provisions. Still, it is open to question what raising a complaint in substance requires of the applicant, ‘because the notion “in substance” is so vague as to leave ample room for differences of opinion’.

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75. Arrowsmith v UK App No 7050/75 (Commission dec., 16 May 1977), paras 130.
76. See, for example, X (n 65); Glasenapp v Germany App No 9228/80 (ECtHR, 28 August 1986), paras 44, 47, 51; J.S.H. v Austria App No 4340/69 (Commission dec., 2 February 1971); Djaid v France App No 38687/97 (ECtHR, 9 March 1999); Skalka v Poland App No 43425/98 (ECtHR, 3 October 2022).
77. Guchez v Belgium App No 10027/82 (Commission dec., 5 December 1984); Ahmet Sadik v Greece App No 18877/91 (ECtHR, 15 November 1996), paras 31-32 (the Court referred to ‘arguments to the same or like effect based on domestic law’).
79. Van Oosterwijck (n 66), para 33.
80. Lakatos and Others v Serbia App No 3363/08 (ECtHR, 7 January 2014), para 106.
81. Guzzardi v Italy App No 7367/76 (ECtHR, 6 November 1980), para 72.
82. L.L. v France App No 7508/02 (ECtHR 10 October 2006). See also Nada v Switzerland App No 10593/08 (ECtHR, 12 September 2012), para 146.
83. Ouzounoglou v Greece App No 32730/03 (ECtHR, 24 November 2005), para 39.
84. Platakou v Greece App No 38460/97 (ECtHR, 25 May 1999); Yagtzilar and Others v Greece App No 41727/98 (ECtHR, 29 June 2004); Panagiotou v Greece App No 38361/03 (ECtHR, 3 November 2005); Galtieri v Italy App No 72864/01 (ECtHR, 24 January 2006); Etoile Promotions C v Luxembourg App No 29591/05 (ECtHR, 24 June 2008). See also Jumpy v France App No 48281/99 (ECtHR, 18 June 2002).
85. Merot d.o.o. and Storitive Tir d.o.o. v Croatia App No 29426/08 (ECtHR, 10 December 2013), para 36.
86. Ahmet Sadik (n 77) Partly Dissenting Opinion of Mr Martens, Joined by Mr Foighel, para 6.
The case-law reveals that exhausting domestic remedies may mean relying on ‘equivalent provisions of domestic law’ or on ‘domestic law arguments “to the same or like effect”’ as the Convention complaint. Therefore, a complaint about the length of civil proceedings under Article 6(1) ECHR (right to a fair trial) is made in substance by complaining before the domestic courts about it taking almost ten years before the domestic authorities made a relevant decision. This prolonged proceeding resulted in the applicant, in his own words, being ‘held off for nearly ten years’. To give another example, when the core of the domestic proceedings concerned the allegedly discriminatory nature of a domestic court’s decision to reduce the applicant’s pension, this was a complaint in substance under Article 14 ECHR (prohibition of discrimination). The complaint before domestic courts cannot be overly general: when complaining before the Court about the lack of effective defence, one cannot simply complain ‘generally of the unfairness of the proceedings held’ in one’s absence. Whether the domestic law arguments must be concise or elaborate depends on the Convention provision at stake. The Court held that complaints about the length of domestic proceedings ‘normally do not require much elaboration’, whereas discrimination complaints are relatively complex, requiring more elaboration than just stating that ‘citizens and non-citizens were subject to different rules when their pensions were calculated.’

The Court’s approach to the requirement that remedies need to be exhausted in substance has been rather lenient at times. The Court has permitted applicants to indirectly invoke the right that they rely on before it, or implicitly through another (domestic law) argument before domestic courts. Put differently, the ‘main thrust’ of the applicants’ arguments does not need to concern their Convention complaint. A case was admissible, for example, when the applicant complained about a violation of the right to the protection of property before the Court, whereas he had complained that he had been discriminated against before the domestic courts. It was sufficient that the applicant invoked Article 1 P 1 ECHR ‘in support of his argument that the obligation at issue concerned a right set forth in the Convention’ and that the ‘Supreme Court considered the issue when finding that the obligation at issue did not concern any of the rights and freedoms guaranteed by the Convention’. One may also only invoke a relevant Strasbourg judgment before domestic courts, without invoking any Convention provision. However, the Court’s leniency is not boundless

87.  Paulet v the UK App No 6219/08 (ECtHR, 13 May 2014), para 49. See also N.M.T., J.B.B and L.B.A v Spain App No 17437/90 (Commissoin dec., 8 January 1993).
88.  Kiefer v Switzerland App No 27353/95 (ECtHR, 28 March 2000), para 23. See, for another Article 6 ECHR complaint, Koroniatis v Germany App No 66046/01 (ECtHR, 16 September 2004).
89.  Wessels-Bergervoet v the Netherlands App No 34462/97 (ECtHR, 3 October 2000).
90.  Casandra v Romania App No 36066/12 (ECtHR, 13 November 2018), paras 39-40.
91.  Šacićirović and Others v Serbia App No 54001/15 (ECtHR, 24 June 2022), para 12. See also Stanivuković and Others v Serbia App No 10921/16 (ECtHR, 27 November 2018), para 12.
92.  Soročinskis v Latvia App No 21698/08 (ECtHR, 22 May 2018), para 30.
93.  See also Boddaert v Belgium App No 12919/87 (Commission dec., 2 July 1990), where it did not matter that the applicant had only pleaded, before domestic courts, his complaint from one of the two angles that he raised in Strasbourg; Agit Demir v Turkey App No 36475/10 (ECtHR, 27 February 2018), paras 66-68.
94.  For example, Castells v Spain App No 11798/85 (ECtHR, 23 April 1992), para 30 (see also Castells v Spain App No 11798/85 (Commission dec., 7 November 1989)); Fressoz and Roire v France App No 29183/95 (ECtHR, 21 January 1999), paras 38-39; Kyprianou v Cyprus App No 73797/01 (ECtHR, 8 April 2003); Soller v The Czech Republic App No 48577/99 (ECtHR, 25 May 2004); Trocellier v France App No 75725/01 (ECtHR, 5 October 2006); Berkovich and Others v Serbia App No 5871/07 (ECtHR, 27 March 2018), paras 3, 70-71.
95.  Finucane v the UK App No 29178/95 (ECtHR, 2 July 2002).
96.  A.G.F.R. v The Netherlands App No 20060/92 (ECtHR, 10 April 1995).
97.  Tsalkizis v Greece (No 2) App No 72624/10 (ECtHR, 19 October 2017), para 35; Buchs v Switzerland (n 64).
when it comes to raising the relevant Convention complaints and connected factual elements.\(^9\) When complaining before the Court under Article 6(1) and Article 6(3)(d) ECHR about the failure to hear the applicant’s former co-defendants as witnesses during his trial, it did not suffice that one of the grounds for appeal ‘related to the proceedings in respect of the former co-defendants who had been heard in that capacity at the time’.\(^9\) As the Court explained, the ground did not refer to the statements by the former co-defendants to the investigating judge.\(^10\) In another instance, when complaining about a violation of Articles 14 and 1 P1 ECHR, it was not enough that the reference to the seizure of the applicant’s property was ‘purely incidental to his main arguments’.\(^11\) In addition to raising the relevant Convention arguments, one cannot be overly selective when it comes to including relevant factual elements in one’s domestic complaint.\(^12\) Consequently, applicants cannot complain about the length of proceedings as a whole before the ECtHR and, in regard to the domestic courts, about the length of proceedings before the Supreme Court only.\(^13\) Comparably, when complaining before the Court about ill-treatment in police custody and in prison, it does not suffice to only complain about ill-treatment in police custody domestically.\(^14\)

### 3.3.2 A Stricter Line in Vučković and Others v Serbia?

The picture painted of the requirement to exhaust domestic remedies by raising a Convention complaint domestically is fairly clear: the Court is rather lenient, in part because raising the complaint in substance is enough, but its leniency is not boundless. The question is now whether the Court, as the Copenhagen Declaration claims, has become more strict and, if so, what this means for applicants. An appropriate starting point for answering this question is the judgment Vučković, which the Court delivered in 2014. As was explained in Section 1, according to Judge Spano, this judgment ‘may be interpreted as requiring applicants to be more diligent in raising their Convention complaints for domestic remedies to be properly exhausted than transpired from previous case-law’.\(^15\)

In Vučković, the applicants claimed that they were entitled to per diem allowances for the military service that they had performed as reservists for the Yugoslav army. Before the ECtHR, they complained of discrimination stemming from an agreement between the government and some reservists, whereby the latter were guaranteed payments of the allowances. The applicants relied on Articles 14, 1 P1 and 1 P12 (prohibition of discrimination) ECHR.\(^16\) The applicants

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98. See for example Tais v France App No 39922/03 (ECtHR, 6 October 2005); Zakharova v France App No 57306/00 (ECtHR, 13 December 2005); Blaj v Romania App No 36259/04 (ECtHR, 8 April 2014), paras 118-119; Vogt v Switzerland App No 45553/06 (ECtHR, 3 March 2014), paras 34-35; Madonia v Italy (ECtHR, 13 September 2016), paras 36-37; Lingurar and Others v Romania App No 5886/15 (ECtHR, 16 October 2018), paras 104-106.
100. Cardot v France (n 99), para 35.
102. Marković v Serbia App No 53661/13 (ECtHR, 17 September 2019), paras 39, 44. See, for example, Jendrowiak v Germany App No 30060/04 (ECtHR, 14 April 2011), para 53; Pozaić v Croatia App No 5901/13 (ECtHR, 4 December 2014), paras 40-41; Segalat v Switzerland App No 10122/14 (ECtHR, 16 December 2014), para 33.
103. Sallam v The Netherlands App No 20328/08 (ECtHR, 11 December 2021), paras 16-17.
104. Aslan v Turkey App No 38940/02 (ECtHR, 1 June 2006).
105. Spano (n 6) 13.
did not benefit from this agreement, because it only applied to residents in certain municipalities. At the domestic level, the applicants expressly complained about discrimination only before a court of first instance. Since applicants must raise their Convention complaint before the highest domestic court in order to exhaust domestic remedies, it is logical that Vučković and his fellow applicants did not exhaust domestic remedies in their complaint before the court of first instance.

The question remains whether the applicants exhausted domestic remedies in substance before the Constitutional Court, even though they did not complain about discrimination resulting from the agreement. Before that court, the applicants neither relied on domestic-law provisions equivalent to the provisions invoked in Strasbourg, nor elaborated on the ‘substance and/or impact’ of the agreement, only mentioning it. Moreover, the Constitutional Court ‘made no mention’ of the agreement. Considering the content of the proceedings before the Constitutional Court, it is not surprising, in the light of previous case-law, that the ECtHR ruled that the applicants had not exhausted domestic remedies in substance. They did not complain about discrimination resulting from the agreement in any way and, as was explained above, it is not sufficient that a violation is ‘evident’ from the facts. This conclusion is supported by the fact that the applicants did not even argue that they had exhausted domestic remedies in substance before the Constitutional Court. Instead, they argued that they had done so before the lower courts and that special circumstances dispensed them from having to exhaust domestic remedies before the highest court.

In short, and as De Vylder concluded, Vučković ‘does not add much to the existing case law’ and, unlike Judge Spano suggested, the Court does not require the applicants to be more diligent in raising their Convention complaint domestically. The dissenting judges also suggested this, explaining that the complaint before the Constitutional Court was, in substance, a complaint about discrimination. Before the Constitutional Court, the applicants complained, *inter alia*, about the erroneous application of applicable prescription periods by the court of first instance, which contradicted with longer prescription periods applied by other courts. Even if this complaint concerned discrimination, this would only concern discrimination resulting from the case-law on prescription periods, which is a separate matter from the agreement, about which the applicants complained in Strasbourg. Since these are two separate matters, it is hard to follow why arguing that the one constitutes discrimination necessarily implies that the other does so too. As was explained in the previous Section, it is well established that the Court’s leniency is not boundless and that one cannot be overly selective when it comes to raising the relevant factual elements.

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108. See Section 3.1.
109. Vučković and Others (n 106), paras 19, 21
110. Ibid, paras 21, 32.
111. Ibid, paras 21-22.
112. Ibid.
113. Merot d.o.o. and Storitve Tir d.o.o. (n 85), para 36.
114. Vučković and Others (n 106), paras 63, 64, 66.
115. De Vylder (n 66).
117. Vučković and Others (n 106) paras 19, 21.
3.3.3 A Stricter Line in Other Case-Law?

After having taken a closer look at Vuc̆kovic, it turns out that the Court did not maintain a stricter line in this judgment. This section shows, however, that this stricter line is visible in other recent rulings, which mainly concerned the UK, and were adopted after 2009. The Court, however, does not apply this stricter line consistently. This line manifests itself in five ways and this section is structured around these five ways.

One such way is that the Court accepted that the applicant had exhausted domestic remedies in substance before domestic courts in the UK, only because the applicable domestic law test was ‘almost identical’ to the applicable Convention test. This is a new and relatively high standard for exhausting domestic remedies in substance, considering that relying on ‘equivalent provisions of domestic law’ or on ‘domestic law arguments “to the same or like effect”’ as the Convention complaint used to suffice. In Lee v the UK, the applicant argued that he had invoked his Convention rights in substance by relying on domestic laws that, according to him, were enacted to protect the Convention rights that he invoked in Strasbourg. The Court agreed that these laws implemented the Convention rights, but ‘only in a very limited way’. Consequently, the domestic laws did not protect the relevant substantive Convention rights. By critically examining the extent to which the domestic laws implemented the Convention, the Court once again sets a relatively high standard for exhausting domestic remedies in substance.

Going one step further, the Court held that applicants should expressly rely on the Convention, which is a clear departure from previous case-law, in which the Court settled for reliance in substance. The Court declared Hickey v the UK inadmissible for failure to exhaust domestic remedies because the applicants had neither ‘expressly relied’ on any Convention provision nor ‘made any reference to the Convention itself’, even though the Convention was directly applicable due to the Human Rights Act 1998 (HRA). However, the Court did not take this step in other, subsequent rulings (against the UK), not even when the Convention was directly applicable domestically, or when the applicant invoked different rights before domestic courts than before the Strasbourg Court. In another case against the UK, the Court remarked that the applicant ‘failed to explain’ why he invoked his Convention rights in substance only. Although this remark falls short of requiring the applicant to expressly rely on the Convention, such a failure

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118. S.M.M. v the UK App No 77450/12 (ECHR, 22 June 2017), paras 58-59.
119. Paulet (n 87), para 49. See also Section 3.3.1.
120. Lee v the UK App No 18860/19 (ECHR, 7 December 2021), para 56.
121. Ibid, para 70.
122. Ibid.
123. See Section 3.3.1.
124. Hickey v the UK App No 39492/07 (ECHR, 4 May 2010).
125. Merot d.o.o. and Storitve Tir d.o.o. (n 85), para 34; Negrepontis-Giannisis v Greece App No 56759/08 (ECHR, 3 May 2011), paras 43-45; Saleck Bardiv Spain App No 66167/09 (ECHR, 24 May 2011), para 37; V.O. v the UK App No 54781/07 (ECHR, 19 September 2012), para 40; Mesut Yurtsever and Others v Turkey App No 14946/08 (ECHR, 20 January 2015), para 86; Wolter and Sarfert v Germany App No 59752/13 (ECHR, 23 March 2017), para 47; Valant v Slovenia App No 23912/12 (ECHR, 24 January 2017), para 54.
126. This was the case in Croatia, see Vbrosv Croatia App No 15739/04 (ECHR, 9 November 2006).
127. Piškin v Turkey App No 33399/18 (ECHR, 15 December 2020), paras 162-163. See also para 164, the Court observed that the Applicant ‘drew on domestic law to put forward arguments tantamount to complaining of an infringement of the right secured under Article 8’.
128. Peacock (n 66), para 38.
was not held against an applicant previously. The strict line adopted in *Hickey* re-surfaced in *Lee v the UK*. Whereas the part of that decision that was discussed above implies that invoking the Convention rights in substance would have sufficed, it turns out that, when one continues to read the decision, the Court did require applicants to expressly invoke the Convention. Both the domestic and the Strasbourg case concerned (*inter alia*) alleged discrimination of the applicant based on his sexual orientation and political opinion.\(^{129}\) However, one aspect of the domestic-law test was different from the Convention test: under domestic law, protection against discrimination law is free-standing, whereas Article 14 ECHR is an ancillary provision.\(^{130}\) The Court thereby concluded that, by relying on domestic law exclusively, the applicant deprived the domestic courts of the opportunity to determine whether Article 14 ECHR was applicable to the facts of the case.\(^{131}\) The Court also reached this conclusion because it was not ‘self-evident’ that the facts of the case fell within the ambit of another Convention provision.\(^{132}\) This conclusion implies that the Court required that the applicant expressly invoked Article 14 ECHR before the domestic courts. The Court removed all doubt about this requirement towards the end of its decision, stating that it was ‘axiomatic that the applicant’s Convention rights should also have been invoked expressly before the domestic courts’.\(^{133}\) This was both possible, due to the HRA, and axiomatic because the applicant complained before the Court that the domestic courts ‘failed properly to balance his Convention rights against those of another private individual, who had expressly advanced his or her Convention rights’.\(^{134}\)

In a different manner, the Court was relatively strict by requiring in two cases, again against the UK, that the applicants raise two connected matters equally clearly before the domestic courts. In the first case, the Court qualified the ban on assisted suicide as distinct from the ban on voluntary euthanasia; complaining about one ban did not imply complaining about the other.\(^{135}\) The Court reached this conclusion despite bills on assisted suicide and voluntary euthanasia being introduced in the House of Lords (unsuccessfully), and although the applicants’ case focused on one ban before the lower domestic courts, and on the other before the Supreme Court;\(^{136}\) this arguably shows the strong connection between the two bans. In the other case, the Court qualified discrimination based on race and on nationality as two distinct matters, for the purpose of exhausting domestic remedies. Nonetheless, the Court did admit that the two may be ‘strongly connected’ in a given case.\(^{137}\) Considering that the Court permitted applicants to invoke the right that they rely on in Strasbourg indirectly or implicitly through another (domestic law) argument before the domestic courts in other cases,\(^{138}\) the approach adopted in the two UK cases is demonstrably relatively strict. To illustrate, the Court did accept (in cases against Austria and Italy) that, by raising the issue of alternative legal recognition of one’s relationship, the applicants also raised the issue of

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\(^{129}\) *Lee* (n 120), paras 36, 51,71.

\(^{130}\) ibid, para 72, meaning that there can be no room for Article 14’s application ‘unless the facts at issue fall within the ambit of one or more substantive Convention rights’, see ibid.

\(^{131}\) ibid, para 74.

\(^{132}\) ibid, para 73.

\(^{133}\) ibid, para 77.

\(^{134}\) ibid.

\(^{135}\) *Nicklinson and Lamb v the UK* App No 2478/15 (23 June 2015), paras 94-95.

\(^{136}\) ibid, paras 24, 54, 68.

\(^{137}\) *British Gurkha Welfare Society and Others v UK* App No 44818/11 (ECtHR, 15 September 2016), para 58.

\(^{138}\) Section 3.3.1. See also *Si Amer v France* App No 29137/06 (ECtHR, 29 October 2009), para 22, in which it did not matter that the applicant did not invoke the prohibition against discrimination provision of the ECHR.
the lack of access to marriage before domestic courts. In a case against Croatia, the applicant – who complained before the Court about a violation of Article 1 P1 taken alone and in conjunction with Article 14 ECHR – relied before the Constitutional Court only on the constitutional provision guaranteeing protection from discrimination. Still, he had exhausted domestic remedies, considering that the discrimination complaint ‘was in substance related to his property rights’.140

In yet another case against the UK, the Court was rather strict by observing that the applicant could have cited relevant Strasbourg case-law, albeit without indeed requiring this.141 In most other cases, the Court did not hold this against the applicant. The Court was even stricter from this perspective in R.A. v the UK. Before the Court, the applicant invoked Article 8 ECHR and complained that her conviction for making false retractions of the crime of rape violated her right to respect for her private and family life, considering that she was a victim of domestic violence.142 In her written submissions to the domestic courts, the applicant summarised a number of Strasbourg judgments and concluded based thereon that domestic violence could engage Article 8 ECHR.143 The Court criticised the applicant for citing case-law, of which the facts and the legal issues were ‘far removed’ from the case pending before it, whereas she ‘could have cited relevant case-law’.144

By requiring the applicant to cite relevant Strasbourg case-law, the Court sets a certain standard for the quality of the domestic complaint. It also set such a standard in another way in R.A., by noting that ‘the applicant could have done far more to put her complaint of an alleged violation of Article 8 ECHR squarely before the Court of Appeal’;145 her argument that her human rights had been breached was ‘underdeveloped’.146 Similarly, in Peacock v the UK, the Court commented that the applicant had only made a ‘passing reference’ to the relevant Convention rights, which did not suffice for the purpose of exhausting domestic remedies.147 In a Bulgarian judgment, the Court also concluded that domestic remedies had not been exhausted because of the low quality of the complaint before the domestic courts. Since that complaint ‘was initially chaotic and even after clarification remained unclear and unstructured’, the domestic courts did not have the opportunity to remedy the violations.148 In previous cases, the Court did not comment on the quality of the applicant’s submissions before the domestic courts. In a case that the Court declared inadmissible for failure to exhaust domestic remedies, it even noted that the applicant did not raise the substance of the Convention complaint ‘even in passing’, thus implying that raising the complaint in passing may be

139. Schalk and Kopf v Austria App No 30141/04 (ECtHR, 24 June 2010), para 70; Oliari and Others v Italy App No 18766/11 (ECtHR, 21 July 2015), paras 84-85.
140. Guberina v Croatia App No 23682/13 (ECtHR, 22 March 2016), paras 43, 52.
141. Peacock (n 66), para 37.
142. R.A. v the UK App No 73521/12 (ECtHR, 3 May 2016), para 39.
143. ibid, para 54.
144. ibid, paras 55-56.
145. ibid, paras 55 (emphasis added).
146. ibid, paras 57. See also Gard and Others v the UK App No 39793/17 (ECtHR, 27 June 2017), paras 73-75, where the Court seemed to be rather strict, but eventually did not have to reach a final conclusion on the point of the exhaustion of domestic remedies because the application was manifestly ill-founded. See also N.K. v Germany App No 59549/12 (ECtHR, 26 July 2018), para 48, which the Court distinguished from R.A., because the applicant made clear and substantiated arguments before the domestic courts, thus reaffirming the strict line in R.A.
147. Peacock (n 66), paras 36, 41.
148. Dimitrova and Others v Bulgaria App No 39084/10 (ECtHR, 11 July 2017), paras 75-76.
Moreover, in cases adopted around the same period, the Court sometimes accepted a fairly low-quality domestic complaint: a complaint that ‘could have been somewhat more specific’,\(^{150}\) a ‘succinct’ complaint,\(^{151}\) and complaints that ‘lacked the appropriate legal references’\(^{152}\).

4. CONCLUSION

The answer to the central question of this article – whether the Court has required applicants to become more diligent in raising their Convention complaints when exhausting domestic remedies – depends on the angle of analysis adopted. The Court has not become stricter from the perspective of the first two angles (where do domestic remedies need to be exhausted and who bears responsibility for raising the Convention complaint?). The applicants used to, and still need to, make their Convention claim in substance before the highest domestic court in order to ensure that they allow this court – and not just lower domestic courts – to remedy any Convention violation found. Additionally, it has been the applicant who is responsible for raising the Convention complaint, including when domestic law obliges domestic courts to examine a case under the Convention proprio motu, and regardless of whether the applicant is represented by counsel. The Court only shifts the responsibility for this to the State (to some extent) when the State bears a positive obligation.

The answer from the third angle (what should the content of the Convention claim that applicants raise domestically be?) was rather clear until 2009. The applicant had to raise the Convention complaint in substance and the Court’s approach to this element of the requirement to exhaust domestic remedies was not very strict. A stricter line is now visible in the Court’s case-law, even though the Court affirmed that it had decided not to act on the invitation made in the Brighton Declaration.\(^{153}\) However, it must be emphasised that this relatively strict line has manifested itself only in a couple of cases, which mainly hail from the UK, and that the Court does not maintain this line consistently in all rulings (including against the UK). The Court has become stricter in a few cases, but not across the board. This stricter line requires the applicants to be more diligent in raising their Convention complaints domestically, by bringing a high-quality complaint, by expressly relying on Convention provisions,\(^{154}\) by raising two fairly connected matters both equally clearly, or by citing relevant Strasbourg case-law before the domestic courts.

The development that this article identified is part of a broader trend that was discussed in Section 2: the Court developing the subsidiarity principle in its case-law. As the Court explained in Lee v the UK, because the applicant did not rely on the Convention before domestic courts, the domestic courts did not have the opportunity to consider his Convention complaint. According to the Court, it would ‘usurp the role of domestic courts by addressing these issues itself’, which would go against the subsidiarity principle.\(^ {155}\) The specific development that was the subject of this article can probably, just like part of the broader trend, be explained by the

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152. Farzaliyev v Azerbaijan App No 29620/07 (ECHR, 28 May 2020), para 56; Hasanov and Majidli v Azerbaijan App No 9626/14 (ECHR, 7 October 2021), para 47.
153. See Section 1.
154. See also Harris (n 15) 46.
155. Lee (n 120), paras 77-78. See also Section 3.3.3.
responsiveness of the Court to the criticism of the State parties about the Court. By requiring applicants to be more diligent when raising their Convention complaint domestically, the Court stresses the importance of the domestic proceedings and in particular the role of domestic courts in examining a Convention complaint. Additionally, the development is likely facilitated by the embeddedness of the Convention in the national legal systems, since embeddedness facilitates the applicants’ reliance on the Convention’s provisions in their legal systems.

Another matter is how the striking finding that the stricter line has surfaced mainly in cases against the UK can be explained. This leads to, to borrow the words of Çali, “human rights jurisprudence of a variable geometry, recognising differentiation in the individual circumstances of states as a basis for human rights review.” In the case of the exhaustion of domestic remedies rule, the relevant circumstance is probably not just the embeddedness of the Convention in the UK’s legal system as a result of the HRA, since the Convention is firmly embedded in other domestic legal systems as well. Another relevant circumstance may be that the UK is, together with Russia, the ‘most outspoken’ critic of the Court, up to the point where politicians have repeatedly proposed leaving the Convention system altogether. In part, this finding may also be explained by the database used for the case-law analysis in Section 3, although there is no reason to assume that the way in which cases were selected favoured cases from the UK.

The development that this article identified is also part of another trend: that of the Court increasingly distancing itself from certain applications, which decreases individual applicants’ access to the Court. Applicants who do not plead their case ‘correctly’ before the domestic courts, may no longer have access to the Strasbourg Court because of the development. Consequently, applicants may have to change the way in which they plead their case domestically, in the event that their case is brought to Strasbourg. However, because the stricter line has only manifested itself in a few cases but not in others, it is difficult for applicants to know what is currently required of them when exhausting domestic remedies. Changing the way they plead their case domestically may also be problematic, because, as the Court admitted previously, the Convention may only be a ‘supplementary ground of argument’ in domestic proceedings, and ‘to be prayed in aid if judged

156. See Section 2.3.
158. See, for example, Gerards and Fleuren (n 42).
159. Madsen (2016; 42), 170. See also Øyvind Stiansen and Erik Voeten, ‘Backlash and Judicial Restraint: Evidence from the European Court of Human Rights’ (2020) 64 International Studies Quarterly 770, 771, who found ‘strong evidence of the Court exercising more restraint towards consolidated democracies that have publicly criticized’ the Court.
161. See the introduction to Section 3.
163. See also Ryan (n 157).
suitable for achieving an objective which is in principle rendered possible by other legal arguments.\footnote{164} Considering the foregoing, there is room for the Court to clarify what is currently required of applicants when exhausting domestic remedies and, in particular, how far the stricter line extends. A more principled question that the Court may want to ponder is whether ensuring that it (increasingly) respects the subsidiarity principle is really something that should be facilitated by the individual applicant, or whether domestic courts have a certain responsibility as well, based on their primary duty to protect the Convention rights.\footnote{165} Nonetheless, based on the findings in Section 3.2, the answer to this question is probably in the affirmative.

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\footnote{164} Van Oosterwijck (n 66), para 33.
\footnote{165} Ahmet Sadik (n 77) Partly Dissenting Opinion of Mr Martens, Joined by Mr Foighel, paras 11-12; Cardot v France (n 99) Dissenting Opinion of Judge Martens.