

BEFORE THE THIRD SECTION
EUROPEAN COURT OF HUMAN RIGHTS

Semenya v. Switzerland

Application no. 10934/21

WRITTEN SUBMISSIONS ON BEHALF OF THE INTERNATIONAL COMMISSION OF JURISTS (ICJ)

INTERVENER

Pursuant to the Registrar's notifications dated 31 August 2021 that the Court had granted permission under Rule 44 § 3 of the Rules of the European Court of Human Rights

12 October 2021

I. Introduction

1. The International Commission of Jurists (ICJ) presents these submissions pursuant to the President of the Section's leave to intervene granted on 31 August, in response to an application dated 28 June 2021, under Rule 44 § 3 of the Rules of Court.
2. Regulations issued by the International Association of Athletics Federations (IAAF) require international female athletes specializing in middle-distance races (i.e., 800 to 3,000 metres) to, *inter alia*, lower their natural testosterone levels in order to be eligible to compete as "women" in international sporting events.¹ The IAAF does not specify the means by which testosterone levels should be reduced, but does suggest the use of hormonal treatment.
3. Against this background, drawing on international human rights law and standards, including the Court's own jurisprudence, the ICJ's submissions presented in this brief focus on:
 - 3.1 the scope of the protection against discrimination under Article 14 of the Convention in the enjoyment of Convention rights;
 - 3.2 the extent to which discrimination is permissible under international law and standards, including the Convention, in limiting the enjoyment of rights;
 - 3.3 the scope of the rights to access to justice and to a court and the right to an effective remedy under international law and standards, including Articles 6 and 13 of the Convention; and
 - 3.4 the extent to which the rights to access to justice and an effective remedy may be limited justifiably by Contracting parties as regards third parties such as governing bodies of sports councils.
4. Acts that fall within the scope or ambit of other Convention rights are covered by the non-discrimination principle under Article 14 of the Convention; and acts that interfere with the enjoyment of rights under the Convention, but do not necessarily violate such rights, are also covered by the non-discrimination principle. Furthermore, the scope of the non-discrimination principle is not limited to the prohibited discrimination grounds explicitly listed in Article 14 given that the list provided in the latter is open-ended and the Court has interpreted the terms "other status" in Article 14 expansively in light of the Convention's character as a living instrument for the protection of human rights.
5. In addition, differential treatment is permissible only in order to achieve a legitimate purpose through reasonable and objective criteria and in a manner that is proportionate. The Court has explained that "the notion of discrimination within the meaning of Article 14 includes in general cases where a person or group is treated, without proper justification, less favourably than another."²
6. Moreover, access to justice and to the courts, as well as the right to an effective remedy, cannot be limited in ways that render them ineffective. Under Articles 6 and 13 read together, for a remedy provided by a Contract Party to be effective, it must enable applicants to challenge a decision that restricts their rights under the Convention. Taken together, Articles 6 and 13 require that a domestic court examine the facts of a case, including the complaint of a violation of Convention rights, in order to provide an effective

¹ Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development) <https://www.worldathletics.org/news/press-release/eligibility-regulations-for-female-classifica>.

² *Abdulaziz, Cabales, and Balkandali v the United Kingdom* (Application nos. 9214/80; 9473/81; 9474/81) § 82

remedy. Where the judicial review has not examined such facts in full, then such a review cannot be said to have complied with Articles 6 and 13 of the Convention.

II. The scope of the protection against discrimination under Article 14 of Convention in the enjoyment of Convention rights

(a) *Article 14 has to be connected to a substantive right, but is not limited to the existence of a violation of that substantive right*

7. Article 14 of the Convention guarantees protection against prohibited discrimination in the enjoyment of the substantive rights enshrined in the Convention on “any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”³
8. As the Court’s jurisprudence confirms,⁴ this provision does not serve as a blanket prohibition of discrimination, and its nature is ancillary, complementing the Convention’s substantive rights and freedoms. Thus, the Court held in *Eweida and Others v. The United Kingdom* that, “Article 14 of the Convention has no independent existence, since it has effect solely in relation to the rights and freedoms safeguarded by the other substantive provisions of the Convention and its Protocols.”⁵ Thus, in practice, the Court will examine the question of prohibited discrimination under Article 14 always in conjunction with the enjoyment of another substantive provision of the Convention, which, in turn, triggers the applicability of Article 14.
9. Nevertheless, the requirement that Article 14 be examined in conjunction with other substantive provisions of the Convention does not mean that the applicability of Article 14 is contingent upon the existence of a violation of another substantive right in the Convention;⁶ thus, insofar as the application of Article 14 is concerned, it is, to this extent, autonomous. Hence, the Court has recognized the applicability of Article 14 in cases where there was no violation of the substantive right itself.⁷ The Court has also found a violation of a substantive right read in conjunction with Article 14, and has not deemed it necessary to examine the violation of the substantive Article alone.⁸ This means that, in a case where the Court found a violation of, for example, Article 8 or 3 read in conjunction with Article 14, it would not necessarily have to find a violation of either of the substantive articles taken alone.
10. Furthermore, where the Contracting Party has voluntarily decided to provide additional rights falling within the scope of the provisions of the Convention, Article 14 will guarantee protection against discriminatory application of these additional rights.⁹ An example of this

³ Council of Europe, European Convention of the Protection of Human Rights and Fundamental Freedoms, as amended by protocols Nos. 11 and 14, 4 November 1950, ETS 5, Article 14

⁴ ECtHR, *Molla Sali v. Greece*, [GC], Application no. 20452/14, 2018, § 123; ECtHR, *Carson and Others v. the United Kingdom* [GC], Application no. 42184/05, 2010, § 63; ECtHR, *E.B. v. France* [GC], Application no. 43546/02, 2008, § 47; ECtHR, *Marckx v. Belgium*, Application no. 6833/74, 13 June 1979, § 32.

⁵ ECtHR, *Eweida v United Kingdom* Application No. nos. [48420/10](#), [59842/10](#), [51671/10](#) and [36516/10](#), 15 January 2013, § 85.

⁶ ECtHR, *Carson and Others v. the United Kingdom* [GC], Application no. 42184/05, 16 March 2010, § 63; ECtHR, *E.B. v. France* [GC], Application no. 43546/02, 22 January 2008 § 47.

⁷ *Sommerfeld v Germany* [GC] 2003.

⁸ *Molla Sali v Greece* [GC], 2018; *Rangelov v Germany*, 2012; *Andrejeva v Latvia* [GC] 2009

⁹ ECtHR, *Fábián v. Hungary* [GC], Application No. 78117/13, 5 September 2017, § 112; *Biao v. Denmark* [GC], Application No. 38590/10, 24 May 2016, § 88; *Izzettin Doğan and Others v. Turkey* [GC], Application No. 62649/10, 26 April 2016, § 158; *Carson and Others v. the United Kingdom* [GC], Application No. 42184/05, 16 March 2010, § 63; *E.B. v. France* [GC], Application no. 43546/02, 22 January 2008, § 48; *X and Others v. Austria* [GC], Application no. 19010/07, 19 February 2013, § 135; *Genovese v. Malta*, Application no.

is in the Belgian Linguistic case where the Court held that where a Contracting Party went beyond its obligations under Article 6 and provided a system of appeal courts, Article 14 read in conjunction with Article 6 would operate to prevent the Contracting Party from debarring a class of persons from the remedial powers of the court while providing it to other classes with respect to the same action without a legitimate reason.¹⁰

11. It is therefore necessary that the right to which the non-discrimination principle applies falls within the ambit of a substantive right guaranteed by the Convention,¹¹ and should not be completely outside of the ambit of a substantive provision.¹²
12. The protection of the non-discrimination principle enshrined in Article 14 will be triggered where it is proved that discrimination occurred in a matter relating to the enjoyment of a right guaranteed by the Convention. It is necessary that the facts of the case under review fall under the wider ambit of one of the Convention provisions for Article 14 to be applicable.¹³
13. The principle of non-discrimination applies to all Convention rights and to all the resulting obligations, including positive obligations.¹⁴ In addition, this principle has a “horizontal effect” and, therefore, applies both to Contracting parties and to non-State actors in purely private circumstances.¹⁵ Accordingly, Contracting parties must ensure that their legal systems do not permit discrimination in relations between private individuals and, where a violation occurs, they must duly sanction it.
14. In light of the above, Contracting parties are required, among other things, to “ensure that women are protected against discrimination committed by public authorities, the judiciary, organizations, enterprises or private individuals, in the public and private spheres.”¹⁶
15. Furthermore, as recalled above, the application of Article 14 does not presuppose a breach of one or more of the Convention’s substantive provisions and, to this extent, it is autonomous. For Article 14 to become applicable it suffices that the facts of a case fall within the ambit of another substantive provision of the Convention or its Protocols. In essence, even if discriminatory treatment against a person was not held to violate another substantive right in the Convention, such as, for example, Article 3 or Article 8, nonetheless, where such treatment effectively interferes with that right, the Court could still find a violation of Article 14 read with the substantive right.

(b) The scope of Article 14 is not limited to the prohibited discrimination grounds explicitly listed

3124/09, 11 October 2011, § 32; *Beeckman and Others v. Belgium* (dec.), Application no. 34952/07, 18 September 2018, § 19).

¹⁰ ECtHR, *the Belgian Linguistic case*, Application no. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, 23 July 1968, § 9 of “the law” part).

¹¹ ECtHR, *Zarb Adami v. Malta*, Application no. 17209/02, 20 June 2006, § 49.

¹² ECtHR, *Van der Musselle v. Belgium*, Application No. 8919/80, 23 November 1983, § 43.

¹³ ECtHR, *Carson and Others v. the United Kingdom* [GC], Application No. 42184/05, 16 March 2010, § 63; *E.B. v. France* [GC], Application no. 43546/02, 22 January 2008, § 47; *Konstantin Markin v. Russia* [GC], Application No. 30078/06, 22 March 2012, § 124; *Sidabras and Dziãutas v. Lithuania*, Application No. 42184/05, 27 July 2004, § 38.

¹⁴ The case “relating to certain aspects of the laws on the use of languages in education in Belgium” v Belgium (Application no 1474/62; 1677/62; 1691/62; 1769/63; 2126/64).

¹⁵ *Danilenkov and Others v Russia* (Application no. 67336/01) para 136; *Pla and Puncernau v andorra* (Application no. 69498/01).

¹⁶ Committee on the Elimination of Discrimination against Women, General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, para 17.

16. The Court has held that Article 14 guarantees protection against prohibited discrimination on additional grounds, beyond those classes explicitly listed in that provision, through its interpretation of the term "other status", and to give effect to its doctrine that the Convention is a living instrument for the protection of human rights in light of present-day conditions.¹⁷ As a result of the inclusion of "other status" as a basis of prohibited discrimination in the Convention, the list is itself, by design, non-exhaustive. Specifically listed grounds are therefore exemplificatory.¹⁸ Other status has been held to include sexual orientation,¹⁹ "illegitimacy",²⁰ marital status,²¹ trade union membership,²² and "transsexual" status.²³ The term "other status" has also been used to challenge discrimination on the basis of age²⁴ or disability.²⁵
17. In cases where the Court has found discrimination based on "other status", it has underscored that "only differences in treatment based on an identifiable characteristic, or "status" are capable of amounting to discrimination within the meaning of Article 14."²⁶ For example, in the case of *Carson and Others v. United Kingdom* the Court found that 'ordinary residence' (like domicile and nationality), "was to be seen as an aspect of personal status and that place of residence applied as a criterion for the differential treatment of citizens in the granting of State pensions, was a ground falling within the scope of Article 14." The Court has further confirmed that questions related to gender identity are duly covered under Article 14 of the Convention.²⁷
18. In light of the above, "other status" should be held to prohibit discrimination based on "sex characteristics" in line with Article 14. This ground is either implicitly part of existing prohibited grounds under the explicitly listed ground of 'sex' or it is sufficiently analogous to grounds already recognized as falling under "other status", such as sexual orientation. Furthermore, sex characteristics clearly constitutes 'an identifiable characteristic' of a person and, therefore, would fall under Article 14.

III. The extent to which discrimination is permissible under international law and standards, including the Convention, in limiting the enjoyment of rights

- (a) *Discrimination is generally prohibited, but permissible only in order to achieve a legitimate purpose through reasonable and objective criteria, and where the means employed are reasonably proportionate to the aim pursued.*
19. Discrimination is prohibited under international law at virtually every level,²⁸ to the point where the non-discrimination principle has attained the status of a jus cogens norm of

¹⁷ *Carson and Others v the United Kingdom* [GC], 2010 § 70

¹⁸ The list set out in that provision is illustrative and not exhaustive, as is shown by the words "any ground such as" (in French "notamment"). ECtHR, *Engel and Others v. the Netherlands*, 8 June 1976, Series A no. 22, pp. 30-31, § 72.

¹⁹ *Salguero da Silva Mouta v Portugal*, 1999, § 28; *Fretté v France*, 2002, § 32

²⁰ ECtHR, *Marckx v Belgium*, Application No 6833/74, 13 June 1979

²¹ ECtHR, *Marckx v Belgium*, Application No 6833/74, 13 June 1979 § 23.

²² *Danielenkov and Others v Russia*, 2009, Application 6733/01

²³ *A.M and Others v Russia*, Application no. 47220/19

²⁴ *Schwizgebel v Switzerland*, 2010, § 85; *Carvalho Pinto de Saousa Morais v Portugal*, 2017, § 45

²⁵ *Glor v Switzerland*, 2009 § 80; *GN and others v Italy*, 2009, § 126

²⁶ *Carson and Others v The United Kingdom*, Application no. 42184/05, § 61

²⁷ *Identoba and Others v Georgia*, 2015, § 96

²⁸ United Nations Charter; the Universal Declaration of Human Rights; The Convention on the Elimination of All Forms of Racial Discrimination (CERD, 1965); Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, 1950) and the American Convention on Human Rights (ACHR, 1969).

international law.²⁹ Having said that, discrimination is nonetheless permissible under certain conditions. In General Comment No.18, the Human Rights Committee states that, under the International Covenant on Civil and Political Rights (ICCPR), differentiation of treatment is permissible if: (1) the goal is to achieve a legitimate purpose; and (2) the criteria for such differentiation are reasonable and objective.³⁰ The Court has also used this test in discrimination cases.³¹ In particular, the Court tests whether the difference in treatment of persons in analogous or relevantly similar situations³² is objectively justified,³³ pursues a legitimate purpose,³⁴ and whether the means employed are reasonably proportionate to the aim pursued.³⁵

20. Consequently, even differential measures that seemingly serve a legitimate aim would amount to unjustified discrimination if they are not proportionate to the legitimate aim(s) pursued.
21. The Court has also clarified that positive discrimination is permissible where difference in treatment has an objective and reasonable justification with a legitimate aim.³⁶
22. In addition, the Court has held that no difference in treatment based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified.³⁷ Differences in treatment based on gender or sexual orientation need weighty reasons to be justified.³⁸
23. The above requirements are cumulative and must each be present in order for a differentiation not to fall foul of the prohibition of prohibited discrimination. Thus, in the case of *Van Oord v The Netherlands*,³⁹ where the applicants brought a claim of discrimination under Article 26 of the ICCPR (the right to equality before the law and equal protection of the law without discrimination), the Human Rights Committee held that there had been no violation of Article 26, observing that a differentiation in treatment is legitimate if it is based on reasonable and objective criteria. The same principle was applied

²⁹ See *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion, Inter-American Court of Human Rights (ser. A) No. 18 (2003; Andrea Bianchi 'Human rights and the magic of *jus cogens*' (2008) 19 *European Journal of International Law* 491).

³⁰ Human Rights Committee, General comment No. 18, Non-discrimination, para. 13 (1989), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.9 (2008), at 198.

³¹ Differences in treatment which are "devoid of "an objective and reasonable justification" amount to discrimination. *Molla Sali v Greece* [GC], 2018, § 135; *Fabris v France* [GC], 2013, §56; *DH and Others v Czech Republic* [GC], 2007, § 175; *Hoogendijk v the Netherlands*, (dec), 2005)

³² The Applicant must show that they have been treated differently from another person or group of persons placed in a relevantly similar situation, or equally to a group of persons placed in a relevantly different situation. *Carson and Others v the United Kingdom* [GC], 2010, Application no. 42184/05)

³³ Article 14 does not prohibit discrimination in treatment which is founded on an objective assessment of essentially different circumstances and which, being based on the public interest, strike a fair balance between the protection of interests of the community and respect for the rights and freedoms guaranteed by the Convention. *GMB and KM v Switzerland* (dec), Application no. 36797/97, 2001; *Zarb Adami v Malta*, 2006, Application no. 17209/02, §73

³⁴ *Molla Sali v Greece* [GC], Application no, 20452/14, 2018, § 135; *Fabris v France* [GC], Application no. 16574/082013, § 56

³⁵ The Court requires a reasonable relationship of proportionality between the means employed and the aim sought to be realized. *Molla Sali v Greece* [GC], Application no, 20452/14, 2018, § 135; *Fabris v France* [GC], Application no. 16574/082013, § 56

³⁶ *Lindsay v the United Kingdom*, 1986

³⁷ *DH and Others v The Czech Republic* [GC], 2007 § 176

³⁸ *Abdulaziz, Cabales and Balkandali v the United Kingdom* (Application nos. 9214/80; 9473/81; 9474/81) § 78; *Burghartz v Switzerland*, 1994 §27; *Schuler-Zgraggen v Switzerland*, 1993 §67, *Konstantin Markin v Russia*, 2021 127; *JD and A v the United Kingdom* §89.

³⁹ *Van Oord v. The Netherlands.*, Comm. 658/1995, U.N. Doc. A/52/40, Vol. II, at 311 (HRC 1997).

in the *Belgian Linguistic case*,⁴⁰ where the Court held that the non-discrimination principle was only violated where there was no “reasonable and objective justification” for the distinction.

24. In light of the above, the ICJ submits that:

- 24.1 The scope of the non-discrimination principle under Article 14 includes rights falling within the ambit of the Convention substantive rights, such as Articles 3 and 8;
- 24.2 Even where the Court does not find a violation of a substantive right in the Convention, such as, for example, a violation of Article 3 or Article 8, nonetheless, there is scope for the Court to find a violation of Article 14 read with the substantive provision where discriminatory treatment effectively interferes with that right.
- 24.3 Where a Contracting Party has voluntarily decided to provide additional rights falling within the scope of the provisions of the Convention, Article 14 will guarantee protection against discriminatory application of these additional rights;
- 24.4 Contracting Parties have an obligation ensure that their legal systems do not permit discrimination in relations between private individuals, including sports governing bodies; and, where a violation occurs, they must duly sanction it. In this regard, Contracting Parties are also required to ensure that women, of all sex characteristics, are protected against discrimination committed by enterprises or private individuals, in the public and private spheres;
- 24.5 “Other status” creates scope for the Court to find that a measure that discriminates on the basis of “sex characteristics” falls foul of the prohibition against discrimination under article 14;
- 24.6 In any event, ‘sex characteristics’ may be interpreted a prohibited discrimination ground under the expressly listed ground of ‘sex’ or it is sufficiently analogous to grounds already recognized as falling under “other status”;
- 24.7 The test for whether discrimination is justifiable is that it must be objectively justified, it must pursue a legitimate purpose and the means employed must be reasonably proportionate to the aim pursued;
- 24.8 These requirements are cumulative and must each be present in order for a difference in treatment not to amount to prohibited discrimination. Furthermore, the justification for discrimination based on gender or sexual orientation and, *mutatis mutandis*, ‘sex characteristics, need weighty reasons to be justified.

IV. The scope of the rights of access to justice and to a court and the right to an effective remedy under international law and standards, including Articles 6 and 13 of the Convention

(a) *Access to justice is essential to safeguarding every other human right and the Court must satisfy itself that the decision of a professional regulatory body has been subject to an effective judicial review*

25. Access to justice can be broadly defined as “[t]he ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards.”⁴¹

⁴⁰ *Belgian Linguistic case*, Application Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, Judgements of 23 July 1968.

⁴¹ UNDP (2005), *Programming for Justice: Access for All, A practitioner’s guide to a human rights-based approach to access to justice*. p.5.

26. Access to justice is a core principle of the rule of law that enables the redress of a wrong in law.⁴² It provides the avenue for enforcing and protecting rights, correcting wrongs and putting a check on the exercise of administrative and executive power and to ensure that accused persons can defend themselves in criminal proceedings. Access to justice is both a means and an end, and is essential for the enjoyment of any other substantive right. Access to justice has come to be seen as a key element of human rights protection and serves as a procedural means to safeguard the rule of law.⁴³
27. Articles 2(3) and 14 of the ICCPR and Articles 8 and 10 of the Universal Declaration of Human Rights (UDHR) guarantee access to justice. Under the Convention, access to justice is provided for by Articles 6 and 13, which guarantee the right to a fair trial and to an effective remedy, as interpreted by the Court.

(b) Right to Access to a Court

28. In interpreting Article 6 of the Convention, the Court has held that the application of the provisions of the Article are autonomous and can be read independently of the status of the parties or the nature of the domestic law.⁴⁴ Furthermore, Article 6 is applicable where there is a dispute present in respect of a right that is recognized by domestic law. The dispute in question must have the character of being serious and a resolution by the courts must be able to fully determine the civil rights.⁴⁵
29. The right to access to a court is subject to implied limitations;⁴⁶ however, such limitations must not restrict the exercise of the right in such a way or to such an extent that the very essence of the right is impaired. Limitation on the right to access a court must pursue a legitimate aim and there must be reasonable proportionality between the means employed and the aim sought to be achieved.⁴⁷
30. Where courts of appeal or cassation exist within a Contracting Party, such courts must comply with the guarantees under Article 6.⁴⁸ Accordingly, in an instance where a professional regulatory body has made an adjudication on a dispute, it is critical that either: (i) the professional regulatory body itself complies with the full requirements of Article 6(1), including being an “independent and impartial tribunal established by law” or (ii) the decision of the professional regulatory body is subject to the subsequent control of a judicial body that has full jurisdiction and that provides the guarantees of Article 6.⁴⁹
31. The right to a fair trial under Article 6 § 1 requires that a case be heard by an independent and impartial tribunal established by law.

(c) Right to an effective remedy:

32. The objective of Article 13 is to provide a means by which persons can obtain relief at national level for violations of their Convention rights before having to seek relief from the

⁴² ECtHR, *Golder v. United Kingdom*, Application no. 4451/70, 21 February 1975.

⁴³ United Nations (UN), Committee on Human Rights, General Comment No. 32 (2007).

⁴⁴ ECtHR, *Georgiadis v. Greece*, Application no. 21522/93, 29 May 1997, § 34; *Bochan v. Ukraine* (no. 2) [GC], Application no. 22251/08, 5 February 2015, § 43.

⁴⁵ ECtHR, *Denisov v. Ukraine* [GC], Application no. 76639/11, 25 September 2018, § 44; *Regner v. the Czech Republic* [GC], Application no. 35289/11, 19 September 2017, § 99; *Károly Nagy v. Hungary* [GC], Application no. 56665/09, 14 September 2017, § 60; *Nait-Liman v. Switzerland* [GC], Application no. 51357/07, 15 March 2018, § 106.

⁴⁶ *Deweere v Belgium* § 49; *Kart v Turkey* [GC] § 67

⁴⁷ *Guerin v France* [GC], § 37; *Omar v France* [GC], § 34

⁴⁸ *Maresti v Croatia*, § 3; *Reichman v France*, § 29

⁴⁹ ECtHR, *Albert and Le Compte v. Belgium*, Application no. 7299/75; 7496/76, 10 February 1983, §29.

Court.⁵⁰ Article 13 therefore deals with violations of substantive rights in the Convention within the Contracting Party. Therefore, this Article deals with the Contracting Party's duty to protect human rights.

33. Article 13 of the Convention provides a right to an effective remedy for violations of Convention rights. To be effective, the remedy must be capable of directly remedying the impugned situation.⁵¹ While Contracting Parties can decide on the nature of the remedy they will provide under Article 13, such remedy must take into account the nature of the right at stake in determining the kind of remedy to grant.⁵² Accordingly, the effectiveness of a remedy will be assessed on a case-by-case basis.
34. In its case-law, the Court has interpreted and construed the right to an effective national remedy under Article 13 of the Convention as requiring that individuals must be able to assert and subject to real review the substance of their Convention rights and freedoms before a national authority; and, when the latter finds in their favour, as entitling them to an appropriate relief.⁵³ Thus, as early as 1978, in *Klass v. Germany*, the ECtHR had clarified that Article 13 "must be interpreted as guaranteeing an "effective remedy before a national authority" to everyone who claims that his rights and freedoms under the Convention have been violated".⁵⁴
35. As the Grand Chamber of the Court held, inter alia, in *Kudla v. Poland*, "the remedy required by Article 13 must be "effective" in practice as well as in law".⁵⁵ In this context, effectiveness means either a remedy capable of "preventing the alleged violation or its continuation, or of providing adequate redress for any violation that had already occurred".⁵⁶
36. In this context, the effectiveness of the national remedy should be gauged and construed in the light of the relationship between Article 35 of the Convention, which, inter alia, addresses the obligation to exhaust domestic remedies, and the obligations of Contracting Parties under Article 13. In this respect, the Court in *Kudla* emphasized that:
"[t]he purpose of Article 35 § 1, which sets out the rule on exhaustion of domestic remedies, is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court.... The object of Article 13, as emerges from the travaux préparatoires (see the Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights, vol. II, pp. 485 and 490, and vol. III, p. 651), is to provide a means whereby individuals can obtain relief at national level for violations of their Convention rights before having to set in motion the international machinery of complaint before the Court."⁵⁷

⁵⁰ *Kudla* § 152

⁵¹ *Pine Valley Developments Ltd and Others v Ireland*, 1989

⁵² *Kaya v Turkey*, 1998 § 106; *Budayeva and Others v Russia*, 2008 § 191

⁵³ See, inter alia, *M.S.S. v. Belgium and Greece*, Application no. 30696/09, § 288.

⁵⁴ *Klass v. Germany*, Application no. 5029/71, § 64. In particular, in *Klass* the Court clarified that Article 13 must not be construed literally; there is no prerequisite for its application that the Convention be in fact violated. That means that individuals are not only entitled to a national remedy when a violation of their rights has already occurred, but also, that Article 13 entitles those who consider that they are, or would be prejudiced by certain measures in breach of the Convention, to a remedy before a national authority so that they can have their claim determined and, if appropriate, obtain redress (paragraph 64). See also *Silver v. the United Kingdom* where the Court held that Article 13 requires that, "where an individual has an arguable claim to be the victim of a violation of the rights set forth in the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress", *Silver v. the United Kingdom*, Application no. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, §113, recalling the judgment in *Klass*.

⁵⁵ *Kudla v. Poland*, Application no. 30210/96, § 157.

⁵⁶ *Kudla*, § 158.

⁵⁷ *Kudla*, § 152.

37. The scope of the Article 13 obligation to provide an effective national remedy varies depending on the nature of the complaint under the Convention.⁵⁸ At a minimum, however, the Convention requires the availability of national remedies to enforce the substance of the rights and freedoms that the Convention guarantees in whatever form they may be secured within the domestic legal order. In order for the national remedy required by Article 13 to be “effective”, it must be available in practice as well as in law.⁵⁹ Further, the requirement under Article 13 that the domestic remedy be available in theory and in practice necessitates, in turn, that it be accessible, capable of providing redress and capable of offering reasonable prospects of success.⁶⁰
38. Article 13 of the Convention requires Contracting Parties to make available domestically, in law and in practice, a domestic remedy endowed with the abovementioned characteristics so as to ensure that the protection of the rights enshrined in the Convention be practical and effective. Anything less would render these rights theoretical and illusory.⁶¹
39. While Contracting Parties are afforded some discretion as to the manner in which they conform to their Convention obligations under Article 13, they are obliged to ensure that domestic remedies be capable of dealing with the substance of an “arguable complaint” under the Convention and, if so warranted, “to grant appropriate relief”.⁶²
40. In its interpretation and application of Article 13 rights in the present case, this Court may find it instructive to have regard to the United Nations Human Rights Committee’s authoritative interpretation of the nature of the general legal obligation imposed on State Parties to the ICCPR by Article 2 of the Covenant, which includes the requirement to ensure accessible and effective remedies to vindicate Covenant rights.⁶³ The Human Rights Committee has stressed that even where a State’s legal system is formally endowed with what may seem on the surface to be appropriate avenues for seeking a remedy, such remedies must “function effectively in practice.” In other words, such remedies must be “accessible, effective and enforceable”⁶⁴ if they are to satisfy the requirements of Article 2(3) of the Covenant.
41. Importantly, if a remedy fails to take into account considerations on essential elements of the alleged violation of the Convention, the remedy will be insufficient.⁶⁵ Therefore, if a complaint is about the violation of, for example, Article 8 of the Convention, a domestic court that provides a remedy that does not address such a violation could be found to be insufficient. For example, the Court found a remedy insufficient, where a local court refused to examine the merits of a complaint under Article 9 of the Convention but only made a

⁵⁸ *Ilhan v. Turkey* [GC], Application no. 22277/93, paragraph 97, ECHR 2000-VII.

⁵⁹ *de Souza Ribeiro v. France* [GC], Application no. 22689/07, § 80.

⁶⁰ *McFarlane v. Ireland* [GC], Application no. 31333/06, § 114.

⁶¹ In *El-Masri v. “the former Yugoslav Republic of Macedonia”* [GC], Application No. 39630/09, the Grand Chamber of the ECtHR reiterated that “the Convention is an instrument for the protection of human rights and that it is of crucial importance that it is interpreted and applied in a manner that renders these rights practical and effective, not theoretical and illusory”, § 134.

⁶² *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], Application no. 47848/08, § 148.

⁶³ Human Rights Committee, General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add. 13, 26 May 2004, §§ 15 to 20.

⁶⁴ See e.g., *George Kazantzis v. Cyprus*, Comm. No. 972/2001, UN Doc CCPR/C/78/D/972/2001, paragraph 6.6 (Aug. 7, 2003); *Yasoda Sharma v. Nepal*, Comm. No. 1469/2006, UN Doc CCPR/C/94/D/1469/2006, paragraph 9.6. (Oct. 28, 2008).

⁶⁵ *Glas Nadzhada EOOD and Elenkov v Bulgaria*, 2007, § 69

finding on the administrative powers of the relevant body.⁶⁶ To be effective, the remedy must be capable of directly providing redress for the situation complained of.⁶⁷

42. Articles 6 and 13 read together require that a Contracting Party provide access to justice and to courts, as well as the right to an effective remedy. These rights cannot be limited in ways that render them ineffective. Articles 6 and 13 read together require that a remedy provided by a Contracting Party, in order to be effective, must enable applicants to challenge a decision that restricts their rights under the Convention.⁶⁸ Taken together, the provisions of Articles 6 and 13 require that a domestic court examine the facts of a case, including the complaint of a violation of Convention rights, in order to provide an effective remedy. Where the judicial review has not examined such facts in full, then such a review cannot be said to have complied with Articles 6 and 13 of the Convention.

V. The extent to which the rights to access to justice and an effective remedy may be limited justifiably by Contracting Parties as regards third parties such as governing bodies of sports councils

(a) *Access to a court and to an effective remedy can be justifiably limited by Contracting Parties or third parties but must still be effective under the Convention.*

43. The Court has held that access to a court, under Article 6 of the Convention, is not an absolute right and may vary "in time and place according to the needs and resources of the community and of individuals".⁶⁹

44. However, limitations to Article 6 must not restrict or reduce the access left to the individual as to impair the essence of the right to access to court.⁷⁰ Furthermore, any limitation of the right of access to court must pursue a legitimate aim, and must be proportionate to the aim pursued.⁷¹

45. Regardless of whatever limitations exist within the regulatory or domestic law process, the scope of the judicial review must be sufficient to guarantee an effective remedy under Article 13. As such, an insufficient exercise of the power of judicial review may constitute a violation of Article 13 and will not be considered an effective remedy.⁷² This will be the case where the judicial review does not consider all of the issues of law and fact, including the independence and impartiality of the adjudicatory process, raised before the professional regulatory body.

46. It is accordingly submitted that while Articles 6 and 13 are not absolute rights in their application, a judicial review must not be exercised in a way that nullifies the application of these Convention rights.

⁶⁶ Hasan and Chaush v Bulgaria [GC], 2000(§ 100)

⁶⁷ Pine Valley Developments and Others v Ireland, 1989

⁶⁸ Csullog v Hungary, 2011, § 46

⁶⁹ ECtHR, *Golder v. United Kingdom*, App no. 4451/70, 21 February 1975.

⁷⁰ ECtHR, *Philis v. Greece* (no. 1), Application no. 12750/87; 13780/88; 14003/88, 27 August 1991, § 59; *De Geouffre de la Pradelle v. France*, Application no. 12964/87, 16 December 1992, § 28.

⁷¹ ECtHR, *Ashingdane v. the United Kingdom*, Application no. 8225/78, 28 May 1985, § 57; *Fayed v. the United Kingdom*, Application no. 17101/90 21 September 1990, § 65.

⁷² ECtHR, *Smith and Grady v. the United Kingdom*, Applications nos. 33985/96 and 33986/96, 27 September 1999 §§ 136-139; *Hatton and Others v. the United Kingdom* [GC], Application no. 36022/97, 8 July 2003 §§ 141-142.