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Unilateral declarations: policy and practice

Practice of unilateral declarations

A unilateral declaration constitutes in principle an extension of the friendly-settlement stage provided for by Article 39 of the Convention[1]. If on conclusion of that stage the applicant refuses without justification to accept a reasonable proposal made by the respondent State, the latter may file a unilateral declaration accompanied by a request for the application to be struck out of the list of cases (*Van Houten v. the Netherlands*, 2005, § 37).

Unlike friendly settlements, which are expressly referred to in the Convention, unilateral declarations originated in a practice based on Article 37 § 1 (c) of the Convention, which allows the Court to strike an application out of the list for "any other reason".

The Court made use of this possibility for the first time in 2001, in the case of *Akman v. Turkey*, no. 37453/97, concerning the right to life under Article 2 of the Convention. The practice became much more widespread as of 2007, with more than 1,217 unilateral declarations being accepted by the Court between 2007 and 2011. In 2012 it was codified in Rule 62A of the Rules of Court. Since then, the number of cases resolved through this means of settlement has been constantly growing (Friendly settlements and Unilateral declarations | Tableau Public (ENG).

Thus, unilateral declarations, like friendly settlements, are an effective means of resolving disputes on a non-contentious basis, allowing the Court to focus its resources on examining the most complex cases, known as impact cases. Accordingly, frequent use of unilateral declarations was strongly encouraged at the High Level Conferences on the Future of the European Court of Human Rights held in Interlaken (2010), Izmir (2011) and, most recently, in Copenhagen (2018).

In order to promote more systematic recourse to this practice, the Court introduced a new compulsory stage in the procedure in January 2019, namely a non-contentious phase designed to encourage the parties in most cases to resolve the dispute by means of a friendly settlement or a unilateral declaration.

Extensive scope

As a matter of principle, this practice has been developed mainly in the context of repetitive cases and those that are the subject of well-established case-law. However, it can be applied to any type of case, including those dealt with under the pilot procedure (*Facondis v. Cyprus*, 2010; *Zaluska v. Poland and Rogalska v. Poland and 398 others* (dec.), 2017).

[1] For an example of a unilateral declaration filed outside the friendly-settlement procedure, see Union of Jehovah's Witnesses and Others v. Georgia (dec.), 2015: existence of extensive case-law on the issue, adoption of legislative reform in the respondent State and offer of compensation consistent with the Court's practice.

Likewise, it can be applied at any stage in the procedure. In the great majority of cases it occurs after notice of the application has been given to the Government, but it may also be applied after judgment has been delivered on the merits, where the question of just satisfaction has been reserved (*Racu v. Moldova* (just satisfaction – striking out), 2010, *Megadat.com SRL v. Moldova* (just satisfaction – striking out), 2011).

A unilateral declaration may also concern only a part of the complaints raised in the application and thus give rise to a partial strike-out (*D.D. and I.M. v. Greece*, 2020).

Public and adversarial phase

Unlike the friendly-settlement phase, which is confidential and where a breach of confidentiality may have serious consequences for the applicant (*Miroļubovs and Others v. Latvia*, 2009, § 68; *Eskerkhanov and Others v. Russia*, 2017, § 26-28), the examination of a unilateral declaration is a public and adversarial phase in the proceedings.

The applicant's consent to the terms of the Government's unilateral declaration is not required. In some cases, however, the applicant accepts the Government's offer even if he or she has previously rejected it at the friendly-settlement stage. The application is then struck out on the basis of Article 39 of the Convention as a friendly settlement (*Bilalova and Others v. Poland*, 2020).

Although the applicant's consent is not needed, his or her position is always sought. Where the applicant merely objects to a unilateral declaration and expresses the wish to continue with the contentious procedure before the Court, this cannot be considered sufficient to justify rejecting the unilateral declaration. The applicant is required to state the reasons for disputing the adequacy of the Government's offer, especially if the case in question concerns a legal issue previously determined by the Court and since resolved (*Ryabkin and Volokitin v. Russia*, 2016).

Content of a unilateral declaration

Express acknowledgement of a violation

Firstly, a unilateral declaration must contain an express acknowledgement by the respondent Government that there has been a violation or violations of the Convention. This is a crucial difference compared with a friendly settlement, in which the respondent State usually offers to make an *ex gratia* payment to the applicant if the latter agrees not to proceed with the case[2].

Adequate and sufficient redress

The respondent State must then propose adequate and sufficient redress to the applicant, in view of the violation or violations that have been acknowledged.

Just satisfaction

In the great majority of cases, this form of redress will be confined to the payment of a sum corresponding to the amount of just satisfaction determined by the Court in similar cases previously resolved by a judgment, usually in respect of the non-pecuniary damage sustained by the applicant as a result of the violation. The cases in question are "repetitive" or "clone" cases which generally follow a pilot or leading judgment.

A claim in respect of pecuniary damage is still possible if the nature of the violation warrants it (for instance, in cases under Article 1 of Protocol No. 1), provided that the existence of such damage is

[2] However, if the redress offered is nonetheless sufficient in the light of the Court's criteria, the Court may strike the application out of its list for another reason provided for by Article 37 § 1 (c) – *Basra v. Belgium* (dec.), 2018.

proved. Where this is not the case the Court will reject the applicant's objection and hold that the unilateral declaration encompassing non-pecuniary damage is sufficient.

Costs and expenses

If the Court accepts the unilateral declaration, it is endorsed by a strike-out decision or a judgment. If no amount[3] is provided for in respect of costs and expenses the Court may, on an exceptional basis, make such an award under Rule 43 § 4 of the Rules of Court.

Other (individual and/or general) measures of redress

In other cases, the payment of a sum of money, even if the amount is in line with the Court's practice, may not be sufficient to afford appropriate redress to the applicant. The unilateral declaration should then indicate, in addition to this sum, what other specific measures the respondent State proposes to take in order to remedy the applicant's situation (for example, reopening of the proceedings, erasure from the criminal records, publication of a retraction, establishment of visiting rights in cooperation with social services, etc.).

Lastly, the Court may hold, in view of the extent or nature of the problem giving rise to the violation, that other measures, going beyond the applicant's individual situation, are necessary (for instance, legislative amendments, change in the case-law, introduction of a new public policy, etc.).

The Court's assessment and the "safeguard clause"

In order to decide whether a unilateral declaration offers a sufficient basis for striking a case out of the list, the Court checks its content in the light of the "safeguard clause" provided for by Article 37 § 1 *in fine* of the Convention and by Rule 62A § 3 of the Rules of Court. The factors to be taken into consideration in this assessment were set out by the Grand Chamber in the case of *Tahsin Acar v. Turkey*, 2003, §§ 62-64.

The factors to be taken into consideration include the following:

- the nature of the complaints made;
- whether the issues raised are comparable to issues already determined by the Court in previous cases;
- the nature and scope of any measures taken by the respondent State in the context of the execution of judgments delivered by the Court in any such previous cases;
- the impact of those measure on the case at issue;
- the existence of a disagreement between the parties as to the facts[4];
- to what extent any admission has been made by the Government in relation to the alleged violation of the Convention and the manner in which they intend to provide redress to the applicant;
- the general interest in the determination by the Court of issues of public policy which may be of relevance to the community of the Convention States as a whole.

Context of the case and general measures

The Court has had occasion to reject a unilateral declaration because the issue raised was a novel one on which it had not previously ruled (*De Tommaso v. Italy* [GC], 2017, §§ 133-139, relating to the applicability of Article 6 of the Convention to proceedings for the application of preventive measures

[3] Or the amount is insufficient in view of the work carried out by the applicant's representatives.

[4] *Ahkim v. Belgium* (dec.), 2018: no dispute between the parties as to the facts established by the domestic investigation into racially motivated ill-treatment.

concerning individuals). The existence of a structural problem may prompt the Court to reject a unilateral declaration, whether it is a problem previously identified in its judgments which has not been addressed (*Tomov and Others v. Russia*, 2019, §§ 94-100) or a new issue which it has not yet had an opportunity to examine (*Annagi Hajibeyli v. Azerbaijan*, 2015, § 38[5]). Lastly, the seriousness of a problem already reported by other Council of Europe monitoring bodies may also weigh in favour of rejecting a declaration (*Rantsev v. Cyprus and Russia*, 2010, §§ 193-202).

On the other hand, the adoption by the respondent State of measures in response to previous judgments of the Court on the same issue makes it likely that a unilateral declaration will be accepted in subsequent cases (*Goggins and Others v. the United Kingdom* (striking out), 2011, §§ 70-79). In that connection the respondent Government may, for instance, refer to the action plan submitted to the Committee of Ministers or to the final resolution adopted by the latter following its examination of the case (*Maričić v. Croatia* (dec.), 2021, §§ 11-13), demonstrating that the issue giving rise to the violation has been resolved.

Likewise, an absence of undertakings to adopt general measures does not preclude the striking-out of the application if the Court has not previously identified a structural problem or indicated general measures under Article 46 of the Convention (*Armeni v. Italy* (dec.), 2023, § 14).

Individual redress

Most commonly, where the Court rejects a unilateral declaration it is because the Government's proposal concerning individual measures is not adequate and sufficient:

- the compensation proposed is insufficient compared with the amounts awarded by the Court in similar cases (*Gorfunkel v. Russia*, 2013, §§ 25-28);
- a strike-out decision by the Court would not afford the applicants "certain access" to the procedure for reopening the proceedings on the same basis as applicants who were victims of the same violation but had the benefit of a judgment (*Šarić and Others v. Croatia*, 2011, §§ 26-30; *Aviakompaniya A.T.I., ZAT v. Ukraine*, 2017, §§ 27-33; *Romić and Others v. Croatia*, 2020, §§ 80-87). Following such findings, numerous States have extended the possibility of requesting reopening of the proceedings to include strike-out decisions by the Court, either through legislation (*Tabagari v. Georgia*, 2013, § 26) or through judicial rulings (*Stassart v. France* (dec.), 2023).

With regard to violations of Articles 2 or 3, a refusal by the authorities to give an undertaking to reopen the domestic investigation into the violations is apt to act as a bar to the Court's acceptance of the unilateral declaration (*Jeronovičs v. Latvia* [GC], 2016). Consequently, some States have extended the possibility of requesting the reopening of the investigation to include strike-out decisions based on a unilateral declaration (*Kutlu and Others v. Turkey* (dec.), 2019, §§ 15-16[6]) if reopening is still possible.

Reopening may however not be possible, either *de jure* or *de facto*. This is the case, for instance, where the alleged perpetrators have been acquitted and can no longer be prosecuted for the same offence, or where the criminal proceedings have become time-barred under domestic law. Indeed, the reopening of criminal proceedings that were terminated on account of the expiry of the statute of limitation may raise issues concerning legal certainty and thus have a bearing on a defendant's rights under Article 7 of the Convention. Similarly, putting the same defendant on trial for an offence for which he or she has already been finally acquitted or convicted may raise issues concerning that

[5] Once the matter has been referred to the Committee of Ministers following a judgment by the Court, the latter may accept unilateral declarations in subsequent similar cases.

[6] Some further examples of such mechanisms: *Ahkim v. Belgium* (dec.), 2018, *Şeker and Others v. Turkey* (dec.), 2018, *Bocu v. Romania*, 2020.

defendant's right not to be tried or punished twice within the meaning of Article 4 of Protocol No. 7 (*Mustafa Karaca v. Turkey* (dec.), 2019, and *Bayram Tasdemir v. Turkey* (dec.), 2019).

In situations of this kind the Court may accept a unilateral declaration even where no undertaking has been given to reopen the criminal proceedings, in view of the specific circumstances of the case, including the nature and seriousness of the alleged violation, the identity of the alleged perpetrator, whether other persons not involved in the proceedings may have been implicated, the reason why the criminal proceedings were terminated, any shortcomings and defects in the criminal proceedings prior to the decision to bring them to an end, and whether the alleged perpetrator contributed to the shortcomings and defects that led to the criminal proceedings being brought to an end (*Mustafa Karaca v. Turkey* (dec.), § 15)[7].

Failure by the State to comply with the undertakings given in a unilateral declaration

Strike-out decisions by the Court following the acceptance of a unilateral declaration are not transmitted to the Committee of Ministers for supervision, unlike those taking note of a friendly settlement.

Where the State fails to comply with its undertakings in the context of the execution of a unilateral declaration the Court may in "exceptional circumstances" decide to restore the case to the list and resume its examination in contentious proceedings (*Jeronovičs v. Latvia* [GC], 2016, §§ 69-70 and 116).

[7] See also, as regards the Convention requirements concerning the application of statutes of limitation to cases involving allegations of torture, *Advisory opinion on the applicability of statutes of limitation to prosecution, conviction and punishment in respect of an offence constituting, in substance, an act of torture* [GC], request no. P16-2021-001, Armenian Court of Cassation, 26 April 2022.