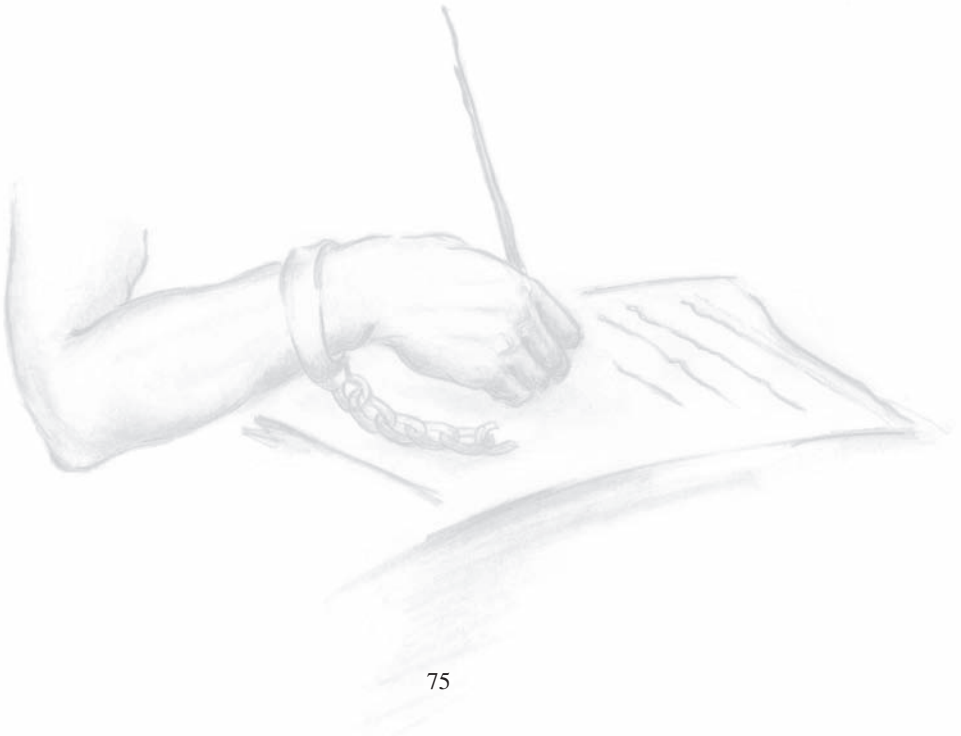
# PART II

# ADMISSIBILITY



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## EUROPEAN CONVENTION ON HUMAN RIGHTS

### *Article 34*

### *Individual applications*

*The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right".*

### *Article 35*

### *Admissibility criteria*

1. *The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.*

2. *The Court shall not deal with any application submitted under Article 34 that:*

   *a. is anonymous; or*

   *b. is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.*

3. *The Court shall declare inadmissible any individual application submitted under Article 34 which it considers incompatible with the provisions of the Convention or the protocols thereto, manifestly ill-founded, or an abuse of the right of application.*

4. *The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.*

## 2.1 Introduction

Before lodging an application with the Court, the applicant must satisfy him or herself that the complaint is admissible. The Court's standing and admissibility rules are contained in Articles 34 and 35 of the Convention respectively. These rules constitute a formidable filtering mechanism by means of which the Court weeds out a large number of cases from its heavily overburdened docket. From the standpoint of the applicant, the admissibility rules therefore constitute the main hurdle to having a case heard in Strasbourg. A total of 26,360 applications were declared inadmissible by Committees of three judges in 2005; this figure represents almost 94% of the cases which were disposed of judicially (i.e. it does not even include cases disposed of administratively before reaching the admissibility stage). Most of the inadmissible cases were declared inadmissible because they did not comply with the exhaustion rule, the six-month rule, or both taken together. A large number of applications were also dismissed as "manifestly ill-founded" because the applicant had failed properly to substantiate his or her allegations. Therefore, the importance of strictly adhering to the Court's admissibility criteria cannot be overemphasised. In this regard, prospective applicants should pay careful attention to the Court's practice and jurisprudence on admissibility issues. Applicants should also consult and comply conscientiously with the Rules of Court[146] and pay careful attention to the Court's Practice Directions,[147] the "Notes for the guidance of persons wishing to apply to the ECHR",[148] and the "Explanatory note for persons completing the application form"[149]

In a nutshell, the Court's rules of admissibility can be expressed as follows: for an application to be considered admissible, the applicant must convince the Court that 1) he or she is a "victim", 2) that the application is "compatible" with the Convention (*ratione temporis*, *ratione loci*, *ratione materie*, and *ratione persone*), 3) that he or she has exhausted domestic remedies, 4) that the application complies with the six-month rule, 5) that the complaints are sufficiently "substantiated" on their face to disclose a violation of the Convention, and finally that the application is not 6) "abusive", 7) "anonymous", or 8) "substantially the same" as one that has been or is being considered by another international procedure of investigation or settlement.

146 See Appendix No. 19.
147 See Appendix No. 3.
148 See Appendix No.17.
149 See Appendix No. 4.

Virtually all of these criteria have been subject of considerable interpretation by the Court and some of them have important exceptions. Some of these exceptions apply specifically in the context of violations of Articles 2 and 3. Because the issue of admissibility is an important and complex one it is treated in some detail in this section.

The Court, through its rules of admissibility, imposes a very high standard of diligence on applicants wishing to have their "day in court" in Strasbourg. However, it is important to note that the obligation of due diligence starts well before proceedings commence in Strasbourg. In fact, due diligence needs to be exercised from the very inception of the case in the national system if it is to have a chance of succeeding before the Court: an applicant who has not presented properly documented complaints to the relevant domestic authorities on a timely basis and in compliance with domestic rules of procedure will have a difficult time convincing the European Court that his or her application merits consideration. To be sure, the principle of subsidiarity *requires* that Contracting Parties be given a proper opportunity to redress complaints through their own domestic system before being held to account internationally.

## 2.2 Victim Status (Article 34)

### 2.2.1 Summary

For purposes of the Convention, a "victim" is a natural or legal person whose Convention rights are *personally or directly affected* by a measure or act of a Contracting Party. A person who is not affected in this manner does not have standing as a victim. A person may lose his or her victim status if the violation is appropriately remedied by the Contracting Party.[151] In certain circumstances arising in the context of violations of Articles 2 and 3, the close relatives of the person affected by an act may have the requisite standing to introduce an application on behalf of that person.[152] Also, in certain circumstances, close relatives can claim to be indirect victims.[153] Subject to the

151 See *Eckle v. Germany*, no. 8130/78, 15 July 1982, § 66.

152 See, for example, *Salman v. Turkey* [GC], no. 21986/93, 27 June 2000, in which the wife of a man killed in police custody was able to bring an application.

153 See, for example, *İpek v. Turkey*, no. 25760/94, 17 February 2004, in which the father of two disappeared men was held by the Court to be an indirect victim on account of the disappearance of his sons. The Court found a violation of Article 3 of the Convention on account of, *inter alia*, the suffering caused to him by the disappearance.

discretion of the Court, the application of a person who dies during the pendency of Strasbourg proceedings can be adopted by a close relative.[154] The Court will not entertain abstract challenges to legislation or governmental measures (*actio popularis*); however, applicants may have standing to challenge legislation or measures which have not been applied to them if they can show that the mere existence of such legislation has a direct effect on the exercise of their Convention rights.[155]

## 2.2.2 Discussion

### a) The General Rule

Article 34 governs the question of standing before the Court. It states that the Court may receive applications from:

> "any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention or the protocols thereto".

The term "person" covers not only natural persons but also legal persons, such as trade unions,[156] political parties,[157] companies[158] or other associations.[159] However, governmental organisations or State-owned companies cannot bring an application to the Court under the theory that a Contracting Party cannot complain about itself before the Court.[160]

The term "victim" denotes a person who is directly affected by a governmental act or omission. To take a clear hypothetical example: a Contracting Party that fails to provide medical assistance to a detainee who is ill, resulting in the deterioration of the detainee's health, has directly affected his or her rights under the Convention. However, there are situations where it is more difficult to establish and prove the relationship between the governmental act

154 See *Aksoy v. Turkey*, no. 21987/93, 18 December 1996, § 7, in which the father of a victim of ill-treatment continued the application lodged by his son who died in the course of the Court's proceedings.

155 See, for example, *Dudgeon v. the United Kingdom* (no. 7525/76, 22 October 1981) and *Norris v. Ireland* (no. 10581/83, 26 October 1988) in which the applicants were able to persuade the Court that the mere existence of legislation criminalising adult homosexual relations caused them to live in constant fear that they would one day be prosecuted and that under such circumstances, they could reasonably claim to be directly affected by the legislation and therefore be considered victims within the meaning of Article 34 of the Convention.

156 *Wilson, National Union of Journalists and Others v. the United Kingdom*, nos. 30668/96, 30671/96 and 30678/96, 2 July 2002.

157 *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003.

158 *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi (Bosphorus Airways) v. Ireland* [GC], no. 45036/98, 30 June 2005.

159 *The Holy Monasteries v. Greece*, nos. 13092/87;13984/88, 9 December 1994.

160 *RENFE v. Spain*, no. 35216/97, Commission decision of 8 September 1997.

and the resultant harm. For instance, in the case of *Tauira and 18 others v. France*, the applicants complained of the decision of the French Government to resume a series of nuclear tests in French Polynesia and alleged a violation of their rights under Articles 2, 3, and 8 of the Convention and Article 1 of Protocol No. 1. The Commission dismissed the applicants' complaints on the grounds that they could not claim to be victims of a violation of the provisions invoked by them because the consequences, if any, of the resumption of the nuclear tests were too remote to affect the applicants' personal situation.[161]

The Convention does not provide for an "*actio popularis*". In other words, individuals cannot complain in the abstract about legislation or governmental acts which have not been applied to them personally through a measure of implementation, for instance, a prosecution. Therefore, if applicants wish to challenge legislation which has not been applied them, they must be able to prove that the mere existence of the legislation has a direct effect on the exercise of their Convention rights. In *Dudgeon v. the United Kingdom*[162] and *Norris v. Ireland*[163] the applicants, who were homosexuals, complained of the legislation in force in their respective countries which criminalised adult homosexual relations. The respondent Governments disputed the applicants' victim status arguing that no criminal prosecution had in fact been brought against them under the impugned legislation and that the applicants could consequently not claim to have been directly affected by the legislation. However, the Court found that the mere existence of this legislation had such a direct effect on the applicants' private lives – not least because the applicants had to live in constant fear that they might one day be prosecuted – and that under such circumstances they could reasonably claim to be directly affected by the legislation. The Court therefore considered them to be victims within the meaning of Article 25 (now Article 34).

The applicant may lose status as a "victim" if he or she has succeeded in obtaining a favourable decision from the domestic courts in respect of his or her Convention complaints. However, a decision or measure favourable to the applicant is not always sufficient to deprive him or her of "victim" status; in order for this to happen, the national authorities must have acknowledged the breach, either expressly or in substance, and then afforded redress for it.[164]

In the context of Article 3 violations, adequate redress will normally include an effective official investigation capable of leading to the identification and

161 *Tauira and 18 others v. France*, no. 28204/95, Commission decision of 4 December 1995.
162 *Dudgeon v. the United Kingdom*, cited above.
163 *Norris v. Ireland*, cited above.
164 *Eckle v. Germany*, cited above, § 66.

punishment of those responsible.[165] Notwithstanding this requirement, there may be situations in which the prosecution and punishment of the perpetrators is insufficient in the eyes of the Court to establish that the applicant has lost victim status. This point is well illustrated by the Court's judgment in the case of *Mikheyev v. Russia*. In *Mikheyev*, the respondent Government notified the Court – after the case had been pending before the Court for a number of years – that the police officers who ill-treated the applicant had been convicted by a domestic court of abuse of official power and sentenced to four years' imprisonment. The Strasbourg Court noted, however, that that domestic decision did not, in the circumstances of the case, affect the applicant's victim status for the following reasons:

> "In the present case, the Court notes firstly that the judgment of 30 November 2005 is not yet final, and may be reversed on appeal. Secondly, although the fact of ill-treatment was recognised by the first-instance court, the applicant has not been afforded any redress in this respect. Thirdly, the judgment of 30 November 2005 dealt only with the ill-treatment itself and did not examine the alleged flaws in the investigation, which is one of the main concerns of the applicant in the present case."[166]

**b) Standing of Next of Kin in Article 2 and 3 Cases**

The Court stated in *İlhan v. Turkey* that "complaints must be brought *by or on behalf of* persons who claim to be victims of a violation of one or more of the provisions of the Convention. Such persons must be able to show that they were 'directly affected' by the measure complained of" (emphasis added).[167] It follows, therefore, that an application can be introduced, for example, by a close relative of the deceased or a close relative of the disappeared. The applicant in such a case will have the requisite standing to bring complaints concerning the events which led to, or which are related to, the disappearance or the death of his or her relative. Indeed, if this was not the case, the protection provided in Article 2 of the Convention would be ineffective because, for obvious reasons, persons who are deceased or disappeared are themselves not capable of bringing complaints to the attention of the Court. Examples of Article 2 and 3 cases brought by family members include *Salman v. Turkey*, where the Court examined the application of the wife of Mr Agit Salman, who died as a result of torture during his detention in police custody.[168] Similarly, in *Timurtaş v. Turkey* the applicant father complained of the disappearance of his son who was taken away by soldiers, and invoked Articles 2,

165 See Section 2.4.2 (d) below.
166 *Mikheyev v. Russia*, no. 77617/01, 30 January 2006, §§ 61 and 89-90.
167 *İlhan v. Turkey* [GC], no. 22277/93, 27 June 2000, § 52.
168 *Salman v. Turkey* [GC], cited above.

5, 13, and 18 of the Convention in respect of his son and Article 3 of the Convention in respect of himself.[169]

Close relatives of deceased persons whom the Court held to have the requisite standing in Article 2 cases have included a wife,[170] a father,[171] a brother,[172] a son,[173] and a nephew.[174]

On the other hand, a close relative of a deceased person will not have the requisite standing to bring an application concerning the deceased person's right to release pending trial under Article 5 § 3 of the Convention, or right to a fair trial under Article 6 of the Convention.[175] According to the Court, the rights guaranteed by Article 5 of the Convention belong to a category of rights which are non-transferable.[176] It must be stressed, however, that complaints under Article 5 of the Convention can be brought on behalf of disappeared persons on account of their disappearance.

In ill-treatment cases, a close relative of the victim may have the requisite standing if the victim is in a particularly vulnerable position as a result of the ill-treatment. In the case of *İlhan v. Turkey*, the brother of the applicant had suffered brain damage and a long-term impairment of function as a result of being severely beaten by Turkish law enforcement officers. The applicant made it clear that he was complaining on behalf of his brother who, considering his state of health, was not in a position to pursue the application himself. The Court held that "it would generally be appropriate for an application to name the injured person as the applicant and for a letter of authority to be provided allowing another member of the family to act on his or her behalf. This would ensure that the application was brought with the consent of the victim of the alleged breach and would avoid *actio popularis* applications".[177] However, having regard to the special circumstances of the case, i.e. the mental impairment of the applicant's brother, the Court concluded that the applicant could be regarded as having validly introduced the application on his brother's behalf.[178]

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169 See *Timurtaş v. Turkey*, cited above, § 60.
170 See *Süheyla Aydın v. Turkey*, no. 25660/94, 24 May 2005.
171 *İpek v. Turkey*, cited above.
172 *Koku v. Turkey*, no. 27305/95, 31 May 2005.
173 *Akkum and Others v. Turkey*, cited above.
174 *Yaşa v. Turkey*, no. 22495/93, 2 September 1998.
175 See *Biç v. Turkey* (dec.), no. 55955/00, 2 February 2006.
176 See *Georgia Makri and Others v. Greece* (dec.), no. 5977/03, 24 March 2005.
177 *İlhan v. Turkey* [GC], cited above, § 53.
178 *Ibid.*, § 55. The fact that an applicant is deemed to be of "unsound mind" on account of brain damage or other reasons and therefore lacks legal capacity for the purposes of national law and procedure, will not prevent him or her from exercising the right of individual application under Article 34 of the Convention; see *Winterwerp v. the Netherlands*, no. 6301/73, 24 October 1979, §§ 65-66.

### c) Indirect Victims

An act or an omission may, in addition to directly victimising one or more persons, also have indirect repercussions on other persons who are closely connected to the direct victim(s). This occurs primarily in cases involving persons who are disappeared by State agents and in some deportation and expulsion cases. In such circumstances, the indirectly affected persons may bring complaints as victims in their own right.

The case of *İpek v. Turkey* concerned the disappearance of the applicant's two sons who were last seen in the hands of State security forces. The applicant alleged that he had suffered acute distress and anguish as a result of his inability to find out what had happened to his sons and because of the way the authorities had responded to his enquiries. The Court held that the question of whether a family member of a "disappeared person" is a victim of treatment in breach of Article 3 depends on the existence of special factors which give the suffering of the applicant a dimension and character distinct from the emotional distress which is inevitably caused to the relatives of a victim of a serious human rights violation. Relevant elements include the proximity of the family tie (a certain weight will attach to the parent-child bond), the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person, and the way in which the authorities responded to those attempts. The Court emphasised that the essence of such a violation did not so much lie in the fact of the "disappearance" of the family member but rather concerned the authorities' reactions and attitudes to the situation when it was brought to their attention. According to the Court, it was especially in respect of the latter that a relative could claim to be a victim of the authorities' conduct. Having found that the applicant had suffered, and continued to suffer distress and anguish as a result of the disappearance of his two sons and of his inability to find out what had happened to them, and in view of the manner in which his complaints had been dealt with by the authorities, the Court concluded that there had been a violation of Article 3 in respect of the applicant.[179]

In *Chahal v. the United Kingdom*, which concerned Mr Chahal's proposed deportation to India, his wife and children also joined the case as applicants and argued that Mr Chahal's deportation would violate their right to respect for family life under Article 8 of the Convention.[180]

179 *İpek v. Turkey*, cited above, §§ 178-183.
180 *Chahal v. the United Kingdom*, no. 22414/93, 15 November 1996.

#### d) Adoption of Applications of Deceased Applicants

Under certain circumstances, the Court may allow a family member to "adopt" the application of an applicant who dies during the pendency of proceedings. Such a situation arose in the case of *Aksoy v. Turkey*; while the the Court was considering Mr. Aksoy's application – in which he complained of having been tortured in police custody – he was shot and killed by unknown assailants. The Court subsequently allowed the applicant's father to pursue the case.[181]

In cases where no close relative wishes to pursue the application subsequent to the applicant's death, the Court may decide to strike the application out of its list of cases, considering that the demise of the applicant constitutes a fact "of a kind to provide a solution of the matter".[182] However, where the subject matter of the case raises issues of general importance, the Court may continue to examine the case despite the absence of a family member or an heir to adopt the case.[183]

## 2.3 Compatibility of the Application (Article 35 § 3)

### 2.3.1 Summary

Under Article 35 § 3 of the Convention, the Court will declare a complaint inadmissible if it is not compatible with the provisions of the Convention or its Protocols. A complaint may be incompatible for one or more of the following four reasons: *ratione temporis* (time), *ratione loci* (place), *ratione personae* (person) or *ratione materiae* (subject matter). In essence, these requirements mean that a complaint must concern events which took place at the right point in "time" and in the right "place" and must be filed by, and relate to, the right "person" and involve the right "subject matter". Thus, complaints relating to events which took place before entry into force of the Convention in the Contracting Party are inadmissible *ratione temporis*; complaints relating to events over which the Contracting Party has no jurisdiction, such as those occurring outside its territory are inadmissible *ratione loci*; complaints by persons who are not victims or which relate to the acts of entities over which the Contracting Party has no jurisdiction, or against States that are not Contracting Parties are inadmissible *ratione personae*; com-

181 *Aksoy v. Turkey*, cited above, § 7.
182 *Scherer v. Switzerland*, no. 17116/90, 25 March 1994, § 32. See also Section 8.2. below.
183 See *Karner v. Austria*, no. 40016/98, 24 July 2003.

plaints relating to infringement of rights that are not protected by the Convention will be dismissed *ratione materiae*. There are a number of important exceptions to these general rules particularly concerning continuing violations[184] and the liability of Contracting Parties for extraterritorial acts.[185] They are explained below.

### 2.3.2 Discussion

#### a) Incompatibility *Ratione Temporis*

By virtue of a generally recognised rule of international law, a Contracting Party can only be required to answer to facts and events which occurred subsequent to the entry into force of the Convention and Protocols with regard to the Party in question.[186] Accordingly, the Court cannot examine a complaint relating to events that occurred before the ratification of the Convention and Protocols by the respondent State. The case of *Kalashnikov v. Russia*[187] may serve as an example. The applicant complained about his ill-treatment by Russian special forces in July 1996 while in detention on remand. Considering that the Convention entered into force with respect to Russia on 5 May 1998, the Court observed that the applicant's complaint related to a period prior to that date. It therefore declared this complaint inadmissible as being incompatible *ratione temporis* with the provisions of the Convention within the meaning of Article 35 § 3.

Although the Convention can have no retroactive effect, there is an important exception to this general rule. If a complaint relates to a continuing situation, that is to say, a violation of the Convention caused by an act which was committed prior to the entry into force of the Convention in respect of a Contracting Party, but which continues after the entry into force of the Convention owing to the consequences of the original act,[188] then the Court will have jurisdiction to examine the complaint provided that it also complies with the other admissibility criteria. The case of *Loizidou v. Turkey*[189] illustrates the Court's approach to continuing situations. This case concerned the

184 See, for example, *Loizidou v. Turkey* (preliminary objections), no.15318/89, 23 March 1995, which concerned the applicant's inability to use her property in Cyprus since 1974. For dates of entry into force of the Convention and Protocols in Contracting Parties, see *Textbox i.*

185 See, for example, *Issa v. Turkey*, cited above, which concerned the killing of a number of persons in Iraq, allegedly by members of the Turkish security forces.

186 *Nielsen v. Denmark*, judgment of 2 September 1959, Yearbook II (1958-1959), p. 412 (454).

187 *Kalashnikov v. Russia* (dec.), no. 47095/99, 18 September 2001.

188 P. van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights,* Kluwer Law International, 1998 (hereinafter referred to as "Van Dijk & van Hoof"), p. 11.

189 *Loizidou v. Turkey* (preliminary objections), cited above.

applicant's inability to access her property in Turkish controlled northern Cyprus since 1974. Upon ratification of the European Convention, the Turkish Government had accepted the jurisdiction of the Court only in relation to facts and events subsequent to 22 January 1990 and objected to the Court's jurisdiction to examine the application for this reason. But the Court decided that the continuous denial of access to the applicant's property in northern Cyprus and the ensuing loss of all control over it amounted to a continuous violation of the Convention. Therefore, the Turkish Government's objection was rejected.

Similarly, in the case of *Moldovan and Others v. Romania* the Court observed that police officers had been involved in the destruction of houses and belongings of the applicants who were Romanian citizens of Roma ethnic origin. The destruction had taken place before Romania ratified the Convention and for that reason the Court could not examine the applicants' allegations concerning the destruction of their property. However, the Court also noted that:

> "following this incident, having been hounded from their village and homes, the applicants had to live, and some of them still live, in crowded and improper conditions – cellars, hen-houses, stables, etc. – and frequently changed address, moving in with friends or family in extremely overcrowded conditions".[190]

Having regard to the direct repercussions of the acts of State agents on the applicants' rights, and the fact that these repercussions continued after the Convention went into effect in respect of Romania, the Court considered that the Government's responsibility was engaged and found a violation of Article 3 of the Convention.[191]

In *Blečić v. Croatia*, which concerned the applicant's right to respect for her home and to peaceful enjoyment of her possessions under Article 8 of the Convention and Article 1 of Protocol No. 1, a majority of the Grand Chamber (11 judges of the 17) considered that it had no jurisdiction (*ratione temporis*) to examine the case as the termination of the applicant's lease had been finalised when the Supreme Court rejected the applicant's appeal on 15 February 1996, before Croatia ratified the Convention. The applicant's appeal to the Constitutional Court had been rejected on 8 November 1999, after the ratification of the Convention by Croatia. However, the Court held that the interference giving rise to the application was the Supreme Court's judgment of 15 February 1996, and not the Constitutional Court's decision of

190 *Moldovan and Others v. Romania*, nos. 41138/98, 64320/01, 12 July 2005, § 103.
191 *Ibid.*, §§ 104 -114.

8 November 1999. In forceful dissenting opinions the minority judges (i.e. six of the seventeen judges) argued, *inter alia*, that:

> "[a] judgment becomes *res judicata* i.e. a final, unappealable judgment, when it is legally irreversible under the domestic law. This result in the present case was brought about by the above decision of the Constitutional Court… In the present case the interference was the result of a series of judicial proceedings ending with the decision of the Constitutional Court, which was the only final, irreversible judicial decision in these proceedings. [I]t is the final Constitutional Court decision which followed that made the relevant civil action irreversible thus terminating the applicant's tenancy and bringing the problem of the interference complained of by the applicant within the competence of our Court".[192]

and

> "For the sake of argument, we can also imagine the reverse order of the events. The decision of the Supreme Court could have been in favour of the applicant – say on purely non-Conventional grounds – only for the Constitutional Court to reverse it. In that case, presumably, the violation *would* have occurred after the critical date and the Convention would be applicable *ratione temporis*. The Grand Chamber would then delve into the merits of this case and perhaps find that there was a violation. Before that, however, one would have to explain why such a reverse order of events would bring the case within the temporal limits of the Convention…Will the import of this precedent be that the last decision of the national court, which does not reverse the penultimate decision – but merely permits it to "subsist" – may count as a required domestic remedy, but does not count as a real decision bringing the case within the temporal limits of the Convention?"[193]

As will be seen below when examining the issue of exhaustion of domestic remedies, applicants are required to exhaust all relevant domestic remedies before they introduce their applications. For this reason, it is difficult to reconcile the Grand Chamber's judgment in *Blečić* with the Court's established case-law concerning exhaustion of domestic remedies,[194] unless, of course, this judgment amounts to a finding that the constitutional remedy in Croatia is, from now on, to be regarded as an ineffective remedy, and therefore one which applicants do not need to pursue.

192 *Blečić v. Croatia* [GC], no. 59532/00, 8 March 2006, dissenting opinion of Judge Loucaides joined by Judges Rozakis, Zupančič, Cabral Barreto, Pavlovschi, and David Thòr Björgvinssson.

193 Separate opinion of Judge Zupančič joined by Judge Cabral Barreto.

194 See Section 2.4 below for issues concerning exhaustion of domestic remedies.

### b) Incompatibility *Ratione Loci*

According to Article 1 of the Convention:

> "the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention".

Although this Article talks of the "Convention", if a Contracting Party has ratified any of the Protocols Nos. 1, 4, 6, 7, 12, or 13, the obligation mentioned in Article 1 of the Convention also applies to the rights and freedoms laid down in that Protocol. Protocols are considered supplementary Articles of the Convention, to which all the provisions of the Convention apply in a similar manner.[195]

Article 1 is of the utmost importance because it defines the scope of the Convention and of the obligations of the Contracting Parties. These obligations apply, however, only to those within the jurisdiction of the Contracting Party. Accordingly, a person claiming to be the victim of a violation of the Convention must first demonstrate that he or she was within the jurisdiction of the respondent State at the time of the alleged violation of the Convention. It follows that the issue of jurisdiction is a threshold requirement in the Convention; the question of State responsibility or imputability will arise only after the Court is satisfied that the matters complained of are within the jurisdiction of the respondent State.[196]

However, the term "jurisdiction" should not be interpreted as strictly coextensive with the Contracting Parties' "territory". Rather, it is well established in the jurisprudence of the Convention organs that Contracting Parties may be held accountable for certain types of extraterritorial conduct. In the aforementioned *Loizidou* case,[197] the Court ruled that when a State exercises effective control of an area – lawfully or unlawfully – outside its national territory and regardless of whether such control was exercised directly, through its armed forces, or through a subordinate local administration, that State may be considered to be exercising jurisdiction in that area, and its obligation under Article 1 extends to securing the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified, to that area.

Similarly, a Contracting Party is considered to exercise Article 1 jurisdiction wherever its agents – military or civilian – exercise power and authority over

195 See van Dijk and van Hoof, p. 3.
196 M. O'Boyle, "Comment on Life after Bankovic", in F. Coomans and M.T. Kamminga (eds) *Extraterritorial Application of Human Rights Treaties* (Intersentia Antwerp-Oxford 2004).
197 *Loizidou v. Turkey* (preliminary objections), cited above, § 62.

persons on foreign territory. In the case of *Illich Sanchez Ramirez v. France*,[198] the Commission examined the French authorities' arrest and detention of the applicant in Sudan. The Commission ruled that from the moment the applicant was handed over to the French authorities in Sudan, he was effectively under their authority and therefore within the jurisdiction of France.[199]

In the case of *Issa v. Turkey*, which concerned the killing of a number of persons in Iraq allegedly by members of the Turkish security forces, the Court held that a State may be held:

> "accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter State... Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory".[200]

In *Issa* the Court did not exclude the possibility that, as a consequence of a military action, a respondent State could be considered to have exercised temporarily, effective overall control of a particular portion of the territory of northern Iraq:

> "Accordingly, if there is a sufficient factual basis for holding that, at the relevant time, the victims were within that specific area, it would follow logically that they were within the jurisdiction of Turkey".[201]

However, the Court concluded on the basis of all the material before it that it had not been established to the required standard of proof that the Turkish armed forces had conducted operations in the area in question.[202]

198 *Ramirez Sanchez v. France*, no. 28780/95, Commission decision of 24 June 1996.

199 *Ibid.*

200 *Issa v. Turkey*, cited above, § 71 (with references omitted).

201 *Ibid.*, § 74.

202 In its examination of a case concerning the killing of six persons whose deaths had occurred as a result of the UK military operations in Iraq, the Divisional Court in the United Kingdom considered that the conclusion of the Court in *Issa v. Turkey* was *obiter*, i.e. it was not binding as a precedent; see *R. Secretary of State for Defence Ex p. Al Skeini*, 14 December 2004, unreported. However, it must be pointed out that a request for the referral of the *Issa* case to the Grand Chamber was rejected, and the judgment became final on 30 March 2005. This is to be understood as meaning, in effect, that the Panel of the Grand Chamber did not consider that the case raised a serious question affecting the interpretation or application of the Convention and that the Chamber's conclusion was in line with the Court's established case-law. In any event the doctrine of *obiter* is unknown in Convention proceedings. See Nuala Mole, "*Issa v. Turkey*: Delineating the Extra-territorial Effect of the European Convention on Human Rights" (2005) E.H.R.L.R. Issue 1, Sweet & Maxwell, pp. 86-91.

Finally, mention must be made of the decision in the case of *Saddam Hussein v. Albania, Bulgaria, Croatia, the Czech Republic, Denmark, Estonia, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Turkey, Ukraine and the United Kingdom*, in which the applicant complained about his arrest, detention and transfer to the Iraqi authorities and about his ongoing trial and its outcome. According to the applicant, he was within the respondent States' jurisdiction following his transfer to the Iraqi authorities in June 2004 because the respondent States remained in *de facto* control in Iraq. The Court held, however, that the applicant had not addressed each respondent State's role and responsibilities or the division of labour/power between them and the U.S. For the Court, there was:

> "no basis in the Convention's jurisprudence and the applicant had not invoked any established principle of international law which would mean that he fell within the respondent States' jurisdiction on the sole basis that those States allegedly formed part (at varying unspecified levels) of a coalition with the US, when the impugned actions were carried out by the US, when security in the zone in which those actions took place was assigned to the US and when the overall command of the coalition was vested in the US.
>
> Accordingly, the Court does not consider it to be established that there was or is any jurisdictional link between the applicant and the respondent States or therefore that the applicant was capable of falling within the jurisdiction of those States, within the meaning of Article 1 of the Convention".[203]

### c) Incompatibility *Ratione Personae*

Article 35 § 3 of the Convention requires the Court to reject as inadmissible an application that is not compatible *ratione personae* with the provisions of the Convention or its Protocols. This requirement implies that the Court cannot examine an application against a State that is not a party to the Convention or the relevant Protocol. In the case of *Ataman v. Turkey*, the applicant complained under Article 5 of Protocol No. 7 (equality between spouses) that the authorities had refused her and her husband the right to adopt her maiden name as their family name. The Court considered that the applicant's complaint was incompatible *ratione personae* because Turkey was not a party to Protocol No. 7 and it thus rejected this complaint pursuant to Article 35 §§ 3 and 4 of the Convention.[204]

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203 *Saddam Hussein v. Albania, Bulgaria, Croatia, the Czech Republic, Denmark, Estonia, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Turkey, Ukraine and the United Kingdom* (dec.), no. 23276/04, 14 March 2006.

204 *Ataman v. Turkey* (dec.), no. 47738/99, 1 June 2004.

It should be pointed out in this connection that applications brought against States not parties to the Convention, such as the United States, are not even registered by the Court and that the applicants are merely informed by a letter that the Court has no competence to examine their application.

The Court has further declared inadmissible numerous complaints directed against persons for whom the respondent State was not responsible. In the case of *Papon v. France*, the applicant complained of the hostile media campaign to which he had been subjected and the attitude of the civil parties before and during his trial.[205] The Court rejected this complaint as incompatible *ratione personae* holding that the State authorities could not be held responsible for the actions of private persons.

Moreover, according to Article 34 of the Convention, the Court may receive applications

> "from any person ... claiming to be the victim of a violation ... of the rights set forth in the Convention ....".

Pursuant to this provision, the Court dismisses applications as incompatible *ratione personae* where the applicant is not a victim of the events or measures in question. It has done so in a case where one of the applicants complained of the length of proceedings to which she was not a party.[206]

### d) Incompatibility *Ratione Materiae*

The Court is only empowered to examine complaints falling within the scope of the Convention and its Protocols. If a person complains of a violation of a right not guaranteed by the Convention or Protocols, the complaint will be rejected as incompatible *ratione materiae*.

The case of *Maaouia v. France* may illustrate this. The applicant complained under Article 6 of the Convention of unfairness of expulsion proceedings. The Court ruled that decisions regarding the entry, stay, and deportation of aliens do not concern the determination of an applicant's civil rights or obligations or of a criminal charge against him within the meaning of Article 6 § 1 of the Convention, and that, therefore Article 6 did not apply.[207] This finding of the Court does not mean, however, that a person who is subject to expulsion from the territory of a Contracting Party cannot benefit from the protection provided for in Articles 2 and 3 of the Convention. Although domestic proceedings relating to the removal of a person from the territory of a

205 *Papon v. France* (no. 2) (dec.), no. 54210/00, 15 November 2001.
206 *Santos Lda and Fachatas v. Portugal* (dec.), no. 49020/99, 19 September 2000.
207 *Maaouia v. France* [GC], no. 39652/98, 5 October 2000, §§ 40-41.

Contracting Party cannot attract Article 6 guarantees, they are relevant from the standpoint of Articles 2 and 3 of the Convention. Namely, the Court will scrutinise the domestic decision making process with a view to establishing whether the national authorities have adequately assessed the risks of ill-treatment or inhuman or degrading punishment in the receiving country if the applicant has raised such claims.[208]

The Court would also reject complaints which fall outside the scope of a particular provision. As an example, in the case of *Kaplan v. Turkey*, the applicant complained under Article 8 of the Convention that his personal reputation had been damaged on account of his being prosecuted as an alleged terrorist.[209] The Commission observed that Article 8 did not guarantee a right to honour and good reputation and therefore dismissed this complaint for want of subject matter jurisdiction (*ratione materiae*).

## 2.4 Exhaustion of Domestic Remedies (Article 35 § 1)

### 2.4.1 Summary

Applicants must exhaust domestic remedies before they can complain before the Strasbourg Court. This means that applicants must avail themselves of the normal avenues of judicial relief that exist in the national system and they must have appealed their case to the highest instance possible within that system.[210] Applicants cannot raise claims before the Court which were not previously raised with the national authorities during the exhaustion process.[211] In the context of Article 3 violations, the normal remedy consists of an effective official investigation into the allegations of ill-treatment followed by the prosecution and punishment of the perpetrators.[212] Therefore, in order to comply with the exhaustion requirement, applicants in Article 3 cases must have taken all reasonable steps to ensure that their complaints reached the appropriate national authorities, and must have shared relevant evidence with the authorities on a timely basis and diligently pursued their cases at all stages of the national proceedings.

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208 See, *mutatis mutandis, Said v. the Netherlands*, cited above, §§ 48-49. See also Judge Thomassen's concurring opinion in the same judgment where she argued that the lack of rigorous scrutiny of the applicant's allegations by the domestic courts justified the Strasbourg Court's decision not to follow their assessment.

209 *Kaplan v. Turkey*, no. 31830/96, Commission decision of 20 May 1998.

210 See *Akdıvar and Others v. Turkey*, 21893/93, 16 September 1996, § 66.

211 See *Cardot v. France*, no. 11069/84, 19 March 1991, § 34.

212 See *Assenov v. Bulgaria*, no. 24760/94, 28 September 1998, § 102.

A mere doubt as to the effectiveness of domestic remedies, even in circumstances where the national authorities systematically fail to act on complaints of ill-treatment, does not absolve the applicant of the requirement of exhausting remedies.[213] Generally, civil or administrative remedies which are only aimed at monetary compensation of the victim but which are not capable of identifying the perpetrator or establishing individual criminal responsibility are not considered "effective" for purposes of Article 3 and do not need to be exhausted.[214]

As a procedural matter, the applicant has the initial burden of proving exhaustion. If the Court is satisfied that an applicant has made out a *prima facie* case showing that he or she has complied with the exhaustion requirement, then the burden shifts to the Contracting Party to show that an effective remedy was available and not exhausted by the applicant.[215] The applicant will then have an opportunity to comment further on the respondent Government's submission. After this point the Government is estopped from making further arguments on exhaustion or any other admissibility issues.[216] The Court can, however, declare a case inadmissible at any stage of the proceedings.

There are several important exceptions to the exhaustion rule, such as the fact that applicants do not need to exhaust remedies that are unavailable or extraordinary.[217] There may also exist special circumstances absolving the applicant from the exhaustion requirement.[218] Finally, the rule of exhaustion interacts in important ways with the six-month rule, which is discussed in Section 2.5 below.

### 2.4.2 Discussion

According to Article 35 § 1 of the Convention:

> "[t]he Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law…".

The rationale behind this rule lies in the subsidiary character of the Convention machinery: the Contracting Party ought first to be given an opportunity to put matters right through its own legal system before being

213 See *Epözdemir v. Turkey* (dec.), no. 57039/00, 31 January 2002.
214 See *Tepe v. Turkey* (dec.), no. 31247/96, 22 January 2002.
215 See *Akdıvar and Others v. Turkey*, cited above, § 68.
216 See *Savitchi v. Moldova*, no. 11039/02, 11 October 2005, § 28.
217 See *Moyá Alvarez v. Spain* (dec.), no. 44677/98, 23 November 1999.
218 See *Akdıvar and Others v. Turkey*, cited above, § 68.

called to account before the Court in Strasbourg. For example, an applicant who wishes to bring an application against a Contracting Party concerning ill-treatment will be expected to have approached the relevant national authorities and complained about the ill-treatment before lodging an application in Strasbourg. If the applicant receives adequate redress at the national level, for example, when those responsible for the ill-treatment are prosecuted and punished by the domestic authorities, he or she will no longer be able to claim to be a victim within the meaning of Article 34. If, on the other hand, the applicant is unable to obtain adequate redress from the national authorities, for example when those authorities have remained passive in the face of the applicant's allegations, he or she will be deemed to have exhausted domestic remedies as required by Article 35. The foregoing description is an over-simplification of a complex Convention requirement, and as will be seen below, there are a number of other issues that must be taken into account.

The rule of exhaustion of domestic remedies was explained in great detail by the Court in its judgment in the case of *Akdıvar and Others v. Turkey:*[219]

> "The Court recalls that the rule of exhaustion of domestic remedies … obliges those seeking to bring their case against the State before an international judicial or arbitral organ to use first the remedies provided by the national legal system. Consequently, States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system. The rule is based on the assumption, reflected in Article 13 of the Convention – with which it has close affinity – that there is an effective remedy available in respect of the alleged breach in the domestic system whether or not the provisions of the Convention are incorporated in national law. In this way, it is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights…".

The Court further explained in the same judgment that:

> "[i]n the area of the exhaustion of domestic remedies there is a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement…".[220]

219 *Akdıvar and Others v. Turkey*, cited above, § 65.
220 *Ibid.*, § 68.

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As pointed out above, after the burden of proof shifts, respondent Government is expected to prove the existence in practice of a particular remedy as well as its effectiveness. For example, in a case which concerned the deliberate destruction of the applicants' home and possessions by members of the security forces in south-east Turkey, the Turkish Government had submitted to the Court a number of decisions of the Turkish Administrative Courts. In these decisions, the plaintiffs had been awarded compensation for the destruction of their homes and possessions in a non-fault based procedure under Article 125 of the Constitution that did not require them to establish that their property had been destroyed deliberately. Having examined the decisions, the Court found that,

> "…despite the extent of the problem of village destruction, there appears to be no example of compensation being awarded in respect of allegations that property has been purposely destroyed by members of the security forces or of prosecutions having been brought against them in respect of such allegations".[221]

The Court, concluding that the remedy in question was not effective for the purposes of the Convention because it did not establish culpability and therefore it did not lead to the prosecution and punishment of those responsible for the destruction, proceeded to dismiss the Government's objection to the admissibility of the application.

The initial burden of showing that relevant domestic remedies have been exhausted rests with the applicant. In fact, the Court will examine the issue of exhaustion *ex officio* in its first examination of the complaint as contained in the application form. It is therefore imperative that the applicant demonstrate clearly, in the application form, that he or she has exhausted the relevant domestic remedies in relation to the complaints made. Failure to show exhaustion, or to explain why a nominally available remedy was not pursued – for example by providing arguments to the effect that the remedy was ineffective because it was inaccessible, or incapable of providing adequate redress, or that there existed special circumstances which absolved the applicant from exhausting domestic remedies – will most likely result in the complaint being declared inadmissible by a Committee. It must be recalled here that complaints declared inadmissible by Committees never reach the stage of communication to the respondent Government. They are final and cannot be challenged in any way by the applicant as referral to the Grand Chamber is not possible. Moreover, letters informing applicants of the decision of the Committee contain only skeletal reasoning (providing only that the Court has decided the case is inadmissible "because it did not comply

221 *Menteş and Others v. Turkey*, no. 23186/94, 28 November 1997, § 59.

with the requirements set out in Articles 34 and 35 of the Convention", see *Textbox x*) which may leave the applicant wondering about the specific reasons for the inadmissibility finding, unlike inadmissibility decisions taken by the Chambers in which the reasoning of the Court is laid out in greater detail.[222]

The Court has already developed a body of case-law in respect of most Contracting Parties which discusses the domestic remedies that are generally available in those countries. It is important for applicants to refer to this case-law when arguing exhaustion in their application forms. While taking this case-law into account, the Court will nevertheless have regard to the particular circumstances of each case in its findings on whether remedies have been exhausted. Satisfying the Court that relevant domestic remedies have been exhausted will result in the communication of the application to the respondent Contracting Party, provided of course that other grounds of admissibility have also been satisfied and the application is not manifestly ill-founded. The burden will then shift to the respondent Contracting Party to show why remedies were not exhausted.[223]

If the application is communicated and the respondent Government in its observations on the admissibility of the case does not claim that the applicant has failed to exhaust domestic remedies, the Court will not subsequently raise any exhaustion problems of its own motion. Furthermore, a respondent Government that fails to object to the admissibility of an application in its observations on admissibility will be estopped from doing so at subsequent stages of the proceedings.[224]

In *Akdıvar*, the Court further emphasised that:

> "the application of the rule [of exhaustion of domestic remedies] must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting Parties have agreed to set up. Accordingly, it has recognised that Article 35 must be applied with some degree of flexibility and without excessive formalism…. It has further recognised that the rule of exhaustion is neither absolute nor capable of being applied automatically; in reviewing whether it has been observed it is essential to have regard to the particular circumstances of each individual case".[225]

222 See Section 1.7 above.

223 See Harris, O'Boyle and Warbrick, p. 615 *et seq*.

224 See, *Savitchi v. Moldova*, cited above, § 28. See also Rule 55 of the Rules of Court which states that any plea of inadmissibility must be raised by the respondent Contracting Party in its written or oral observations on the admissibility of the application.

225 *Akdivar and Others v. Turkey*, cited above, § 69.

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**a) Only "Available" and "Effective" Remedies Need to be Exhausted**

According to the *Akdıvar* judgment:

> "…normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged…".[226]

For a remedy to be "available", it must exist at the time the application is lodged and must be directly accessible to individuals. If a new and relevant remedy is introduced in the Contracting Party after the application has been lodged, applicants will not normally be required to exhaust that new remedy.[227] Furthermore, "…[t]he existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness…".[228]

The answer to the question whether a particular remedy is "effective", or, in the words of the *Akdıvar* judgment, "sufficient to afford redress" – and therefore requires exhausting – is a more complex one. In the context of complaints concerning ill-treatment the general rule is that "an official investigation capable of leading to the identification and punishment of those responsible"[229] will be regarded by the Court to be an appropriate form of redress. It must be stressed at this juncture that a remedy does not mean "a remedy bound to succeed but simply an accessible remedy before an authority competent to examine the merits of a complaint".[230] The issue of "effectiveness" of a remedy in the Article 3 context is examined below in subsections d(i)-(ii) in more detail.

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226 *Akdivar and Others v. Turkey*, cited above, § 66.

227 However, there have been exceptions, notably in Article 6 cases concerning the alleged unfairness of domestic proceedings due to their excessive length. For example, in the case of *Charzyński v. Poland* ((dec.), no. 15212/03, 1 March 2005), which had been lodged in 2003, the Court held that the possibility of filing a complaint, which had been introduced in Polish legislation in 2004, provided the applicant with an effective remedy in respect of his complaint. It therefore declared the application inadmissible for the applicant's failure to exhaust the remedy created in 2004. Similarly, in the case of *İçyer v. Turkey* (dec.), no. 18888/02, 12 January 2006), which concerned the inability of the applicant to return to his house in his village after having been evicted from there for security reasons, the Court observed that a new remedy had been introduced since the applicant lodged his application and declared the case inadmissible for the applicant's failure to exhaust that new remedy. The new remedy, in the Court's opinion, was capable of providing redress for the applicant as it would compensate for the damage suffered as a result of his inability to gain access to his property. In this connection the Court stressed that the most appropriate strategy to be followed in situations where it identified structural or general deficiencies in national law or practice was to ask the respondent Government to review, and where necessary, set up effective remedies, in order to avoid repetitive cases being brought before the Court. However, it is unlikely that the Court would declare an Article 3 complaint inadmissible for an applicant's failure to exhaust a remedy newly created at the national level after the application was lodged with the Court.

228 *Akdıvar and Others v. Turkey*, cited above, § 66.

229 *Assenov v. Bulgaria*, cited above, § 102. See also Section 10.3 below.

230 See *Lorsé v. the Netherlands*, no. 52750/99, 4 February 2003, § 96.

### b) Extraordinary Remedies do Not Need to be Exhausted

If the remedy is not directly accessible to individuals, it will normally be regarded as an "extraordinary remedy". According to the Court, extraordinary remedies do not satisfy the requirements of "accessibility" and "effectiveness" and therefore do not require exhaustion for purposes of Article 35 § 1 of the Convention.[231] For example, if access to a particular domestic remedy is dependent on the discretionary power of a public authority, it will not be considered an accessible remedy.[232] Examples include applications to the constitutional court in Italy for purposes of challenging a law's constitutionality, because only other courts, and not individuals, are able to refer a case to the Constitutional Court. Therefore, this particular remedy was not directly accessible to individuals.[233] Similarly, applications to the Ministry of Justice in Turkey for requests to issue written orders to public prosecutors requiring them to ask the Court of Cassation to set aside judgments[234] and applications for rectification of decisions of the Turkish Court of Cassation which can only be lodged by public prosecutors but not by individual complainants directly were also held by the Court to be extraordinary remedies.

### c) Special Circumstances

The Court acknowledged in *Akdıvar and Others* that the existence of "special circumstances" may absolve an applicant from the requirement of exhaustion of domestic remedies. Such circumstances may exist, for example, in situations where the national authorities have remained totally passive in the face of serious allegations of misconduct by State agents, for instance where State agents have failed to undertake investigations or offer assistance[235] or where they have failed to execute a court order.[236] Furthermore, in a case which concerned the destruction of the applicants' property by the Turkish security forces, the Court found that the indifference displayed by the investigating authorities to the applicants' complaints, coupled with the applicants' feelings of upheaval and insecurity following the destruction of their homes, constituted special circumstances which absolved them from the obligation to exhaust domestic remedies.[237]

231 *Moyá Alvarez v. Spain* (dec.), cited above.
232 *Kutcherenko v. Ukraine* (dec.), no. 41974/98, 4 May 1999.
233 *Immobiliare Saffi v. Italy* [GC], no. 22774/93, 28 July 1999, § 42; see also Leach p. 137.
234 *Zarakolu v. Turkey* (dec.), no. 37061/97, 5 December 2002.
235 See *Selmouni v. France*, cited above, § 76.
236 *A.B. v. the Netherlands*, no. 37328/97, 29 January 2002, §§ 69 and 73.
237 *Selçuk and Asker v. Turkey*, nos. 23184/94 and 23185/94, 24 September 1998, §§ 70-71.

In *Ayder and Others v. Turkey* the Government argued that the applicants' failure to apply for compensation before the domestic authorities in respect of the destruction of their property by members of the security forces constituted non-exhaustion. The Court, however, observed that a public assurance had been given by the Provincial Governor that all damage sustained would be compensated by the State. In the light of that unqualified undertaking by a senior public official, the Court found that property owners could have legitimately expected that compensation would be paid without the necessity of their commencing administrative proceedings. Thus, the Court concluded that special circumstances existed, absolving the applicants from the requirement of exhausting domestic remedies.[238]

In *Sejdovic v. Italy*, which concerned the conviction *in absentia* of the applicant – a national of the then Federal Republic of Yugoslavia – without providing him the opportunity to present his defence before the Italian courts, the Court found that the fact that the applicant had not been informed of the possibility of reopening the time allowed for appealing against his conviction and of the short time available for attempting such a remedy, constituted "objective obstacles" to the use of that remedy by the applicant. Taking into account "the difficulties which a person detained in a foreign country would probably have encountered in rapidly contacting a lawyer familiar with Italian law in order to enquire about the legal procedure for obtaining the reopening of his trial, while at the same time giving his counsel a precise account of the facts and detailed instructions", the Court concluded that there were special circumstances releasing the applicant from the obligation to avail himself of the remedy in question.[239]

In several cases where the Court has found that the existence of special circumstances absolved the applicants from the exhaustion requirement, it has also stressed that its ruling was confined to the particular circumstances of those cases and was not to be interpreted as a general statement that remedies were ineffective in the respondent Contracting Party or that applicants were absolved from the obligation under Article 35 to have normal recourse to the

238 *Ayder v. Turkey*, no. 23656/94, 8 January 2004, §§ 101-102.

239 *Sejdovic v. Italy* [GC], no. 56581/00, 1 March 2006, §§ 54 -55. This case can be contrasted with the case of *Bahaddar v. the Netherlands* (no. 25894/94, 19 February 1998), which concerned the applicant's proposed expulsion to Bangladesh where, according to the applicant, he would be exposed to a serious risk of being killed or ill-treated. In its admissibility decision the Commission found that the merits of the applicant's case had not been considered by any Netherlands authority in the light of new documentary evidence. Although this evidence had been submitted out of time, the national authorities were not prevented from taking cognisance of it. There were accordingly, in the Commission's view, special circumstances absolving the applicant from exhausting domestic remedies according to the established procedures. However the Court, noting in particular the failure of the applicant's lawyer to ask for an extension of the time limit from the domestic courts to submit the documentary evidence, upheld the Government's preliminary objection and held that, as domestic remedies had not been exhausted, it could not consider the merits of the case.

system of remedies.[240] Furthermore, according to the Court, it is only in exceptional circumstances that it could accept that applicants seek relief before the Court without first having made any attempt to seek redress before the local courts.[241]

Indeed, although the Court has acknowledged in a number of judgments that the application of the rule of exhaustion must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting Parties have agreed to establish and that the rule must be applied with some degree of flexibility and without excessive formalism,[242] the fact remains that a mere doubt as to the effectiveness of domestic remedies does not absolve the applicant of the requirement of exhausting remedies.

#### d) "Effective" Remedies in the Context of Article 3 Violations

The issue of the "effectiveness" of domestic remedies is examined below under separate headings for criminal, civil, and administrative remedies.

##### *i. Criminal Remedies*

As the Court expressly stated in its *Akdıvar and Others* judgment, the rule of exhaustion of domestic remedies is based on the assumption reflected in Article 13 of the Convention, that effective remedies are in fact available in the domestic systems of Contracting Parties in respect of alleged breaches of Convention rights and that this is the case regardless of the specific manner in which the provisions of the Convention have been incorporated into national law. Thus, the issue of effectiveness of criminal remedies in respect of complaints of ill-treatment is closely linked to the Contracting Parties' positive obligation under Article 3 and their obligation under Article 13 to provide an effective remedy.[243] As pointed out earlier, in the context of Article 3 violations adequate redress will include an effective official investigation capable of leading to the identification and punishment of those responsible. Whereas certain rights and freedoms guaranteed in the Convention may not have been incorporated into the national laws of all Contracting Parties, most types of ill-treatment nevertheless constitute criminal offences in all Contracting Parties. Furthermore, in most Contracting

240 See, *inter alia*, *Selçuk and Asker v. Turkey*, cited above, § 71 and *Akdıvar and Others v. Turkey*, cited above, § 77.
241 *Akdıvar and Others v. Turkey*, cited above, § 77.
242 See, *inter alia*, *Ayder v. Turkey*, cited above, § 92.
243 See Sections 6.2 and 10 below; see also *Buldan v. Turkey* (dec.) no. 28298/95, 4 June 2002.

Parties, ill-treatment inflicted by State agents is either classified as a criminal offence separate from the offence of ill-treatment inflicted by private persons, or is considered an aggravating element of ill-treatment offences.

At first sight it would therefore appear that the national laws of the Contracting Parties themselves provide for an effective remedy – as required by Article 13 of the Convention – in respect of complaints of ill-treatment. However, the mere existence of national legislation criminalising acts of ill-treatment is not sufficient in and of itself to guarantee a remedy for victims, and problems often arise in the context of the enforcement of those national laws. One of the most common problems is the reluctance of investigating authorities to investigate allegations of ill-treatment by State agents.[244] In such circumstances, an applicant who has brought his or her complaint of ill-treatment before the relevant investigating authority, which remains passive in the face of those allegations, will be expected to submit his or her application to the Court as soon as he or she becomes aware of the ineffectiveness of the remedy. Failure to do so may result in the application being declared inadmissible for non-compliance with the six-month rule.[245]

The Court has also dealt with applications introduced when criminal investigations continued for long periods of time without yielding any tangible results. In such cases, the respondent Government, who will in all likelihood object to the admissibility of the application on the basis of the applicant's failure to await the conclusion of the proceedings, will be expected to prove that the proceedings in question are being conducted diligently and that they are capable of providing redress to the applicant. For example, in the case of *Batı and others v. Turkey*, the applicants introduced their application with the Court while the criminal proceedings against the police officers suspected of having inflicted ill-treatment on them were still pending. Observing that the proceedings in question – a criminal trial – had continued for eight years during which time the judicial authorities had failed to take a number of important steps such as summoning and questioning the defendants directly and ensuring that the injuries of the applicants were medically examined, the Court held that the applicants had satisfied the obligation to exhaust the relevant remedies and were not required to await the conclusion of the criminal trial.[246]

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244 See for example, *Khashiyev and Akayeva v. Russia*, nos. 57942/00 and 57045/00, 24 February 2005, § 145, in which the Court observed that although the domestic courts had found that the killings of the first applicant's relatives had been perpetrated by servicemen and awarded the first applicant damages against the State, they did not prosecute those servicemen. In the same judgment the Court also found a violation of Article 3 of the Convention on account of a lack of thorough and effective investigation into the applicants' allegations of ill-treatment, see § 180.

245 For further information, see Section 2.5.2 (c) below.

246 *Batı and Others v. Turkey*, nos. 33097/96 and 57834/00, 3 June 2004, § 148. On the basis of those failures the Court also found a violation of Article 13 of the Convention.

According to the Court's established case-law, a mere doubt as to the prospect of success of a particular remedy is not sufficient to exempt an applicant from the requirement of exhausting that remedy.[247] The Court's decision on admissibility in *Epözdemir v. Turkey*[248] provides a good example of this point. The *Epözdemir* case concerned the killing of the applicant's husband by a group of four village guards. An autopsy was carried out and the body was buried. The family of the deceased were not informed of the death of Mr Epözdemir – despite the fact that the applicant had already informed the relevant prosecutor that her husband was missing – and no action was taken by the investigating authorities to investigate the circumstances of the killing notwithstanding an *ex officio* obligation under domestic law to do so. The applicant subsequently – by pure coincidence – found out that her husband had been killed by the village guards and asked the prosecutor to mount a prosecution. Her request was rejected, the prosecutor stating that although it was established that her husband had been killed by the village guards, it was not possible to establish which one of the four village guards had fired the fatal shot. The applicant did not avail herself of the opportunity to appeal the prosecutor's decision and instead applied directly to the Court in Strasbourg. In its decision declaring the application inadmissible, the Court held by a majority, that although the decision not to prosecute the four named village guards suggested that the clear wording of domestic legislation on joint enterprises in the commission of the offence of homicide had been disregarded by the prosecutor, the applicant could have brought this issue to the attention of the appeal judge and thus could have substantially increased her prospects of success. The applicant had not shown, therefore, that an appeal would have been devoid of any chance of success.[249]

In jurisdictions where the commission of the offence of ill-treatment gives rise to an *ex officio* duty of the investigating authorities to investigate the incident without waiting for the victim to lodge a formal complaint, the victim may be required to co-operate with the authorities by assisting them, for example, in identifying and locating eye-witnesses. The conduct of the applicant in exhausting domestic remedies may therefore also play a role in the Court's examination of the question as to whether those remedies have been exhausted.

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247 *Whiteside v. the United Kingdom*, no. 20357/92, Commission decision of 7 March 1994.

248 See *Epözdemir v. Turkey* (dec.), cited above.

249 Compare to *İlhan v. Turkey* [GC], cited above, § 63, where the investigating authorities had remained totally passive in investigating the circumstances of the severe ill-treatment to which soldiers had subjected the applicant's brother. The Grand Chamber, in rejecting the Government's objection to the admissibility of the case, held that the matter had been sufficiently brought to the attention of the relevant domestic authority, which had an *ex officio* obligation to investigate the circumstances of the ill-treatment without waiting for a formal complaint from the applicant.

*ii. Civil and Administrative Remedies*

In its judgment in the case of *Assenov and Others v. Bulgaria* the Court found that the applicant had exhausted all the possibilities available to him within the criminal justice system, as he had made numerous appeals to the prosecuting authorities at all levels, requesting a full criminal investigation into the allegations of ill-treatment carried out by police and requesting that the officers concerned be prosecuted. In the absence of a criminal prosecution in connection with his complaints, the applicant was therefore not required to embark upon another attempt to obtain redress by bringing a civil action for damages.[250] In reaching this conclusion, the Court also considered the fact that under Bulgarian law it was not possible for a complainant to initiate a criminal prosecution in respect of offences allegedly committed by agents of the State in the performance of their duties. The Court went on to state in paragraph 102 of its judgment that:

> "where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in … [the] Convention", requires by implication that there should be an effective official investigation. This investigation, as with that under Article 2, should be capable of leading to the identification and punishment of those responsible... If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity".

It follows, therefore, that in the context of Article 3 complaints, a civil or an administrative action in respect of illegal acts attributable to a State or its agents may only be regarded as an effective remedy where that remedy is capable of establishing the circumstances of the ill-treatment and of leading to the identification and punishment of those responsible. Civil or administrative proceedings aimed solely at awarding damages rather than identifying and punishing those responsible will not be regarded as effective remedies in the context of Article 3 complaints.[251]

**e) Compliance With Rules of Domestic Procedure**

When exhausting domestic remedies, applicants are expected to comply with the relevant procedural rules in their domestic jurisdiction. Thus, when an

250 See, *Assenov and Others v. Bulgaria*, cited above, § 86.
251 See *Tepe v. Turkey* (dec.), cited above.

appeal is dismissed without the national court having examined the substance of the appeal because, for example, the applicant failed to lodge it within the applicable time limit, that applicant will be deemed by the Court not to have complied with the rule of exhaustion of domestic remedies.

The Court further requires that in order for an application to be admissible, complaints made therein must have been raised, at least in substance, before the domestic courts.[252] It is not strictly necessary to refer to the Convention Article(s) in domestic proceedings, provided that the substance of the Convention complaint is adequately brought to the attention of the relevant national authorities.[253]

### 2.4.3 Concluding Remarks

As described above, applicants are expected to show in their application forms that they have exhausted relevant domestic remedies and that in doing so they have complied with the relevant domestic rules of procedure and invoked the substance of the Convention complaint in the course of the domestic proceedings. Readers are referred to the *Model Article 3 Application* in Appendix No. 6 for an example of how this can be done.

In the context of Article 3, identifying the relevant domestic remedy is perhaps easier than is the case with other Articles of the Convention. As pointed out above, the most appropriate domestic remedy for allegations of ill-treatment will be a criminal investigation since such an investigation will be the best means to establish the accuracy of the allegations as well as being potentially capable of leading to the identification and punishment of those responsible. Furthermore, any decision which is not favourable to the applicant, such as a decision to discontinue the investigation or to acquit those responsible for the ill-treatment must be appealed against if and when the national legislation provides for such a course of action. It must be reiterated that according to the Court's established case-law, a mere doubt as to the prospect of success of a particular remedy is not sufficient to exempt an applicant from the requirement of exhausting that remedy.

If the applicant has not exhausted a particular remedy, he or she must explain in the application form the reasons for his or her decision not to do so. Such explanations may include, for example, the fact that the particular remedy has

252 *Cardot v. France*, cited above, § 34.

253 See, for example, *Hudson v. former Yugoslav Republic of Macedonia* (dec.), no. 67128/01, 24 March 2005, in which the applicant's complaint under Article 3 of the Convention arising from the conditions of his detention in prison was declared inadmissible by the Court because of the applicant's failure to bring those complaints to the attention of the national authorities.

already been examined by the Court itself in another case which concerned similar facts and the Court has concluded that the remedy is indeed ineffective. If the remedy in question has not yet been examined by the Court, on the other hand, and if it is the applicant's belief that the particular remedy is not capable of providing redress, he or she should consider providing examples of domestic court decisions demonstrating the ineffectiveness of that remedy. This may be done by showing that the remedy in question has been tried in the past under similar circumstances and provided no relief.

In case of any doubts about the effectiveness of a particular domestic remedy, the applicant should consider exhausting the remedy in question while at the same time introducing his or her application with the Court.[254] Finally, it should be noted that the rule of exhaustion interacts in important ways with the six-month rule. Therefore, applicants are advised to read this section on exhaustion together with the following section describing the six-month rule.

## 2.5 The Six-Month Rule (Article 35 §1)

### 2.5.1 Summary

A complaint must be filed with the Court within six months of the date on which the final domestic decision was taken in the case. The six-month period starts running from 1) the date the domestic judgment is rendered orally in public,[255] 2) the date of service of the written decision if the applicant is entitled to such service[256], or 3) the date when the decision was finalised and signed in situations where judgments are not rendered orally or served.[257] If no domestic remedies are available, the six-month period starts running from the date of the incident or act of which the applicant complains.[258] Where domestic remedies turn out to be ineffective, the period starts running from the moment the applicant became aware, or should have become aware, that remedies were ineffective.[259] For continuing situations the six-month period does not start to run until after the situation ends, but a complaint can be filed prior to the end of the situation.

254 See the Concluding Remarks in Section 2.5.3 below.
255 See *Loveridge v. the United Kingdom* (dec.), no. 39641/98, 23 October 2001.
256 *Worm v. Austria*, no. 2714/93, 29 August 1997, §§ 32-33.
257 *Papachelas v. Greece* [GC], no. 31423/96, 25 March 1999, § 30.
258 See, *inter alia*, *Vayiç v. Turkey* (dec.), no. 18078/02, 28 June 2005.
259 See, *inter alia, Bulut and Yavuz v. Turkey* (dec.), no. 73065/01, 28 May 2002.

The date of introduction of an application with the Court is the date on the letter introducing the application or on the application form itself, unless there is a difference of more than one day between the date of the letter or application form and the date of the postal stamp on the envelope.[260] If there is a risk of missing the six-month deadline, applicants should fax the introductory letter to the registry. Such faxes must be followed up with a signed original within five days.

### 2.5.2 Discussion

#### a) The General Rule

An application must be lodged with the Court within a period of six months from the date on which the final domestic decision was taken in the case concerned (Article 35 § 1 of the Convention). A survey of the Court's case-law reveals a number of reasons for this rule. For instance:

> "[t]he object of the six-month time limit under Article 35 § 1 is to promote legal certainty, by ensuring that cases raising issues under the Convention are dealt with in a reasonable time and that past decisions are not continually open to challenge. The rule also affords the prospective applicant time to consider whether to lodge an application and, if so, to decide on the specific complaints and arguments to be raised".[261]

The Court has also explained that the rule is:

> "designed to facilitate establishment of the facts of the case; otherwise, with the passage of time, this would become more and more difficult, and a fair examination of the issue raised under the Convention would thus become problematic".[262]

Finally,

> "in reflecting the wish of the Contracting Parties to prevent past decisions being called into question after an indefinite lapse of time, the rule marks out the temporal limits of supervision carried out by the organs of the Convention and signals to both individuals and State authorities the period beyond which such supervision is no longer possible".[263]

The six-month period includes weekends and national holidays; e.g. if the starting date of the six-month period is 1 January 2005 the application must

260 *Arslan v. Turkey* (dec.), no. 36747/02, 21 November 2002.
261 *Finucane v. the United Kingdom* (dec.), no. 29178/95, 2 July 2002; see also *Worm v. Austria*, cited above, §§ 32-33.
262 *Alzery v. Sweden* (dec.), no. 10786/04, 26 October 2004.
263 *Walker v. the United Kingdom*, (dec.), no. 34979/97, 25 January 2000.

be introduced by 1 July 2005. If there is a risk of running out of time, an application can be introduced by letter or by fax message[264] provided that certain criteria are complied with in such communications.[265]

### b) The Date of Introduction

The date of introduction of an application will be the date on the letter introducing the application or the application form, unless it differs by more than one day from the date of the postal stamp on the envelope. In the case of *Arslan v. Turkey*, the application form was dated 12 April 2002, however, it had not been posted until 19 April 2002.[266] The Court stated that, assuming that the applicant had completed the form on 12 April, he should have posted it at the latest on the following day, i.e. 13 April 2002. Noting that the applicant had not provided an explanation for the six-day interval between the date on the application form and the date on which it was posted, the Court declared the application inadmissible for failure to observe the six-month time limit which had started to run on 13 October 2001. This case illustrates that the rule is applied strictly by the Court and makes clear that where there is a difference of more than one day between the date on the letter by which the application is introduced and the date of the postal stamp, the date of the postal stamp will be taken as the date of introduction.

If the letter or the application form is not dated, the date of the introduction will in any event be taken as the date of the postal stamp; if that stamp is illegible, the date of receipt at the Court will be considered to be the date of introduction.

It must also be stressed that the six-month rule, together with the rule of exhaustion of domestic remedies, is probably the most frequently used formal ground of inadmissibility; the Court applies it of its own motion[267] and a respondent Government cannot waive it.[268]

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264 If sent by fax message a signed original should also be sent to the Court within 5 days by surface mail. See Article 5 of the Practice Direction on the Institution of Proceedings.

265 See Section 4.1 below. Also, the sample letter drafted on the basis of hypothetical facts, which can be found in *Textbox vii*, may be taken as a starting point.

266 *Arslan v. Turkey* (dec.), cited above.

267 *Soto Sanchez v. Spain* (dec.), no. 66990/01, 20 May 2003.

268 *Walker v. the United Kingdom* (dec), cited above; see also Jacobs & White, p. 411.

### c) The Starting Point of the Six-Month Period

The six-month rule is closely connected with the rule of exhaustion of domestic remedies, and the moment on which the six-month period starts to run depends on the existence, or the lack thereof, of domestic remedies. As a general rule, a complaint must be submitted to the Court within six months from the day following the final domestic court decision rendered in relation to that complaint.[269] However, different practices of the domestic courts in the Contracting Parties – and, indeed, varying practices between different courts within the same Contracting Party – have made it impossible to apply a uniform rule in every case and have led the Commission and the Court to devise the following rules in relation to each scenario with which they have been confronted.

#### *i. Where Domestic Remedies Exist*

The Commission's view,[270] which was also adopted by the Court,[271] was that the six-month period starts to run from the day on which the judgment was rendered orally in public, meaning that the following day is the first day of the six-month period. However, where an applicant is entitled to be served *ex officio* with a written copy of the final domestic decision, the six-month period starts to run on the date of service of the written judgment,[272] irrespective of whether the judgment concerned, or parts thereof, were previously pronounced orally.[273] As seen above, one of the principles underlying the rule is to allow a prospective applicant to refer to the full reasoning set out in the domestic court decision when formulating the complaints he or she wishes to lodge with the Court in Strasbourg. An applicant will obviously be better able to do so when he or she has been provided with the written copy of the judgment.

If domestic law does not provide for oral pronouncement or service – or if it is not the practice of the domestic courts to serve their decisions notwithstanding legislation to the contrary[274] – the Court will take as the starting point the date on which the decision was finalised and signed, that being the

269 In calculating the six-month time limit, regard must also be had to the explanations in Section 2.4.2 above; the time spent on exhausting an ineffective remedy may result in the six-month time limit being missed.

270 *K.C.M. v. the Netherlands*, no. 21034/92, Commission decision of 9 January 1995.

271 *Loveridge v. the United Kingdom* (dec.), cited above.

272 *Worm v. Austria*, cited above, §§ 32-33.

273 *Worm v. Austria*, no. 22714/93, Commission decision of 27 November 1995.

274 As is the situation in Turkey where decisions of the Criminal Division of the Court of Cassation are not served on defendants despite the clear wording of the domestic legislation requiring the Court of Cassation to serve them; see *Caralan v. Turkey* (dec.), no. 27529/95, 14 November 2002.

date when the parties or their legal representatives were definitely able to discover its content.[275]

### *ii. Where There are no Domestic Remedies*

In cases where there are no domestic remedies, an applicant will be expected to introduce his or her application within six months from the date of the incident or act of which the applicant complains. For example, an applicant who complains about the excessive length of his or her pre-trial detention which is lawful under domestic legislation, will be expected to lodge an application, at the latest, within six months from the date of release, since he or she cannot challenge the lawfulness of the detention before the domestic authorities.[276] Obviously, it is open to an applicant in such a situation to bring the application before he or she is released.

Similarly, where an applicant argues that existing domestic remedies are ineffective or that there are special circumstances which absolve him or her from the obligation to exhaust those remedies, he or she will be expected to introduce the application within six months of the date of the incident complained of, or of the date when he or she first became aware of the ineffectiveness of the remedy or the special circumstances in question.

### *iii. Where Domestic Remedies Turn Out to be Ineffective*

Difficulties arise in the determination of the starting point of the six-month period in cases where domestic authorities remain inactive in the face of complaints of ill-treatment or where domestic criminal investigations continue for long periods of time without yielding any tangible results. According to the Court, if the domestic remedy invoked by the applicant is adequate in theory, but in the course of time proved to be ineffective, the applicant is no longer obliged to exhaust it.[277] The challenge for the applicant is to determine the point in time when it becomes apparent that the remedy is "ineffective" for purposes of the Convention. As described below, the Court imposes a high burden of due diligence on the applicant in this respect: the Court will declare a case inadmissible for non-respect of the six-month rule if it finds that the applicant continued to pursue a domestic remedy for more than six months when it should have been clear to him or her that the remedy was ineffective.

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275 *Papachelas v. Greece* [GC], cited above, § 30.

276 See, *inter alia*, *Vayiç v. Turkey* (dec.), cited above. See also "Continuing Situations" in Section 2.5.2 (c) (iv) below.

277 See *Mikheyev v. Russia*, cited above, § 86.

The Commission addressed the issue of the starting point of the six-month period in such circumstances in the case of *Laçin v. Turkey* where it held the following:[278]

> "[s]pecial considerations could apply in exceptional cases where an applicant first avails himself of a domestic remedy and only at a later stage becomes aware, or should have become aware, of the circumstances which make that remedy ineffective. In such a situation, the six-month period might be calculated from the time when the applicant becomes aware, or should have become aware, of these circumstances".[279]

The Court has followed the Commission's approach in a number of cases[280] and further added in *Bayram and Yıldırım v. Turkey* that if the applicants did not become aware of the ineffectiveness of the domestic remedies for a long period, this "was due to their own negligence".[281]

According to the Court, "the six-month rule is autonomous and must be construed and applied according to the facts of each individual case, so as to ensure the effective exercise of the right to individual application".[282] Nevertheless, the cases in which the Court has expected applicants to have "become aware" of the ineffectiveness of an ongoing domestic remedy at an earlier stage than they did, do not provide uniform guidance from which a potential applicant, in the midst of exhausting a doubtful remedy, may benefit.

It appears from a number of cases introduced against Turkey, for example, that the applicants should not have awaited the outcome of criminal investigations that were marked by long periods of inactivity on the part of the investigating authorities. Thus, in the case of *Bulut and Yavuz v. Turkey*, concerning the killing on 29 July 1994 of the applicants' husband and father allegedly by persons acting with the connivance of the State, the applicants claimed in their application form – submitted to the Court on 1 March 2001 – that they had applied to the office of the public prosecutor in order to obtain information on numerous occasions. On each occasion they had been told that no one had yet been prosecuted for the killing. The final time they checked with the investigating authorities was on 26 October 2000, when they were once again informed that no one had yet been prosecuted for the

278 *Laçin v. Turkey*, no. 23654/94, Commission decision of 15 May 1995.

279 See also *Çelik v. Turkey*, no. 23655/94, Commission decision of 15 May 1995.

280 See, *inter alia*, *Ekinci v. Turkey* (dec.), no. 27602/95, 8 June 1999; *Gündüz v. Turkey* (dec.), no. 36212/97, 12 October 1999; *Hazar and Others v. Turkey* (dec.), nos. 62566/00-62577/00 and 62579-62581/00, 10 January 2002; *Camberrow MM5 AD v. Bulgaria* (dec.), no. 50357/99, 1 April 2004 and *Gongadze v. Ukraine* (dec.), no. 34056/02, 22 March 2005.

281 S*ee Bayram and Yıldırım* v. *Turkey*, (dec.) no. 38587/97, 29 January 2002.

282 *Fernandez-Molina and Others v. Spain* (dec.), no. 64359/01, 8 October 2002.

killing. The applicants argued that the domestic authorities were, nominally at least, still investigating the killing and this investigation would, pursuant to Article 102 of the Turkish Criminal Code, continue until 20 years had elapsed from the date of the killing. They submitted that the six-month time limit did not apply in their case given that there had as yet not been a domestic decision to discontinue the investigation. The Court rejected these arguments holding that the applicants should have displayed greater diligence and initiative in staying abreast of the progress of the investigation, and if, as they alleged, they had not become aware of the ineffectiveness of the investigation until October 2000, that was due to their own negligence.[283]

Reference can similarly be made to the case of *Şükran Aydın and Others v. Turkey*,[284] which concerned the ill-treatment and killing of the first applicant's husband Vedat Aydın following his abduction allegedly by undercover agents of the State in July 1991. The applicants had joined the criminal investigation as an intervening party. On 23 February 1998 they alerted the investigating prosecutor to the conclusion, published in a report,[285] that agents of the State had killed Vedat Aydın. They asked the prosecutor to investigate this fresh information and to inform the family of the results of that investigation. Following a reminder sent to the prosecutor in October 1998, the applicants received a reply in which the prosecutor simply stated that the investigation into the killing was still pending. In their application to the Court, which was introduced on 3 November 1998, the applicants claimed that they had become aware of the ineffectiveness of the domestic remedies following the unsatisfactory reply of the prosecutor. Nevertheless, the Court declared the application inadmissible for non-respect of the six-month rule and held that the applicants must be considered to have been aware of the lack of any effective criminal investigation long before they petitioned the public prosecutor on 23 February 1998. In its decision the Court made no reference to the evidence which had only been made public a month before the applicants brought it to the attention of the investigating authorities. This case illustrates that a long period of inactivity may result in an inadmissibility finding, despite an applicant's demonstrated diligence in assisting the investigating authorities by means of alerting them to fresh evidence.

283 *Bulut and Yavuz v. Turkey* (dec.), cited above.

284 *Şükran Aydın and Others v. Turkey* (dec.), no. 46231/99, 26 May 2005.

285 The Susurluk Report. In another case (*Buldan v. Turkey*, no. 28298/95, 20 April 2004, § 80), the Court considered that that Report, which was drawn up at the request of the Turkish Prime Minister in January 1998 and which he decided should be made public, could not be solely relied upon to meet the required standard of proof that State officials were implicated in any particular incident but that it had to be regarded as a serious attempt to provide information on, and analyse problems associated with, the fight against terrorism from a general perspective and to recommend preventive and investigative measures.

By contrast to the cases discussed above, in the case of *Paul and Audrey Edwards v. the United Kingdom*,[286] the Court held that it was reasonable for the applicants to have awaited for a long period for the outcome of a non-statutory inquiry set up to investigate the circumstances of the death on 29 November 1994 of their son in prison. Although in this case the applicants had waited for a period of over four years before introducing their application they were found by the Court to have been justified in doing so. Had the applicants chosen to introduce their application prior to the publication of the Inquiry Report, there would have been a strong argument for finding that their complaints concerning the substantive and procedural aspects of Article 2 of the Convention were premature. The Court further considered that:

> "the findings reached by the Inquiry could have potentially affected the existence of remedies whether by providing the basis for a criminal prosecution or disclosing facts supporting an action for damages in the civil courts. In those circumstances, it may be considered that the non-availability of any effective remedies finally became apparent on publication of the Inquiry Report on 15 June 1998 and that this date must be regarded as the final decision for the purposes of Article 35 § 1 of the Convention. The application, introduced on 14 December 1998, was therefore introduced within the requisite six months and cannot be rejected pursuant to Article 35 § 4 of the Convention".[287]

Time spent on exhausting a remedy which, according to the Court's case-law, is considered an extraordinary remedy and which therefore need not be exhausted, may result in the application being declared inadmissible for non-respect of the six-month rule. The Court stated in the case of *Berdzenishvili v. Russia* that applications for a retrial made to domestic courts or authorities, or similar extraordinary remedies, cannot, as a general rule, be taken into account for the purposes of Article 35 of the Convention. The proceedings which were held to be extraordinary in *Berdzenishvili* were supervisory reviews of judgments which could be brought at any time after a judgment became enforceable, even years later. The Court considered that if the supervisory-review procedure was considered a remedy to be exhausted, the uncertainty thereby created would have rendered nugatory the six-month rule. In the light of the above, the Court held that the applicant, who had sought a supervisory review of the Supreme Court's judgment convicting him, should have introduced his application with the Court within six months of the Supreme Court judgment.[288]

286 *Paul and Audrey Edwards v. the United Kingdom* (dec.), no. 46477/99, 21 February 2002.
287 *Ibid.*
288 *Berdzenishvili v. Russia* (dec.), no. 31697/03, 29 January 2004. See also Leach pp. 148-151.

*iv. Continuing Situations*

The six-month time limit does not start to run if the Convention complaint stems from a continuing situation. Examples of continuing situations include complaints concerning length of domestic court proceedings, detention, and an inability to enjoy possessions.[289] Such situations are continuing because of the absence of a domestic remedy capable of putting an end to them or because of the ineffectiveness of existing remedies. It follows, therefore, that the six-month time limit will not start running until the end of the situation. As pointed out earlier, this does not mean that an application cannot be lodged before the situation comes to an end. For example, the case of *Assanidze v. Georgia*,[290] concerning the continuing detention of the applicant despite his acquittal by the Supreme Court of Georgia on 29 January 2001 and the order issued by that court for his immediate release, illustrates how absurd it would be if the Court expected a person to continue to suffer indefinitely before he or she is allowed to introduce an application. In *Assanidze*, the Grand Chamber of the Court explained that:

> "to detain a person for an indefinite and unforeseeable period, without such detention being based on a specific statutory provision or judicial decision, is incompatible with the principle of legal certainty … and arbitrary, and runs counter to the fundamental aspects of the rule of law".

Having regard to the fact that the applicant was still in prison when the Court adopted its judgment on 24 March 2004 and "having regard to the particular circumstances of the case and the urgent need to put an end to the violation"[291] the Court considered that the respondent State must secure the applicant's release at the earliest possible date.

## 2.5.3 Concluding Remarks

It is for the applicant to provide the Court with information that enables it to establish whether he or she has complied with the six-month rule. Failure to provide such information may result in the application being declared inadmissible. For this reason, it is recommended that applicants enclose with the application a photocopy of the envelope – with a legible postal stamp – in which the final domestic court decision was sent to them or any other document showing the date of service of the final domestic court decision.

In case of doubt about the effectiveness of a particular remedy, the decisions and the judgments of the Commission and the Court should be consulted to

289 *Loizidou v. Turkey* (preliminary objections), cited above.
290 *Assanidze v. Georgia* [GC], cited above, § 175.
291 *Ibid.,* § 203.

check whether the remedy in question has been examined before. Another possible course of action is to introduce the application while at the same time exhausting the doubtful remedy and keeping the Court informed of developments. Obviously, if the remedy in question has been exhausted before the Court examines the application, it should be informed about the outcome in order to eliminate the risk of the application being declared inadmissible for non-exhaustion.[292] If, on the other hand, the Court examines the application before the remedy is exhausted and declares the case inadmissible for non-exhaustion of that remedy, the applicant may bring a new application once he or she has exhausted the remedy, since the domestic decision obtained will be regarded as relevant new information within the meaning of Article 35 § 2 (b) of the Convention. If an applicant waits to lodge the application until a doubtful remedy has been exhausted, and if the Court subsequently rules that the remedy was in fact an ineffective one which did not require exhaustion, the application may well be declared inadmissible for non-respect of the six-month rule, with no possibility for the applicant to lodge a new application based on the same facts. Proceeding to exhaust the domestic remedy, doubtful though its effectiveness may be, at the same time as introducing an application with the Court will also eliminate the risk that the domestic time limit in respect of that remedy will have expired should the Court consider that the remedy at issue does require exhaustion.

## 2.6 "Well-Foundedness" of the Application (Article 35 § 3)

### 2.6.1 Summary

An application is "well-founded" if the Court is satisfied that there is a case to answer. If the application on its face does not disclose a violation of the Convention, either because 1) the allegations are not sufficiently substantiated by the evidence, or 2) because the complaint, even if substantiated, does not fall within the scope of Convention rights because, for instance, the ill-treatment complained of is not sufficiently severe to constitute a violation of Article 3, then the application will be dismissed as "manifestly ill-founded".

Applications relating to Article 3 violations should be 1) supported by evidence of the ill-treatment such as medical reports, eye-witness affidavits,

292 Obviously, if appropriate redress is obtained from the "doubtful remedy", the applicant can inform the Court of his or her intention to withdraw the application. See Section 8.2 below for further information.

custody records, court transcripts, domestic complaints, and any other documents showing that the ill-treatment occurred *and* that the complaints and relevant evidence were brought to the attention of the national authorities, and 2) applicants must show that the alleged ill-treatment was severe enough to cross the threshold of the Article 3 prohibition. Regarding the latter, the applicant should consult the Court's considerable jurisprudence on the definition of torture and inhuman or degrading treatment or punishment outlined in this section and discussed in more detail in Appendix No. 10.

### 2.6.2 Discussion I: Evidentiary Requirements

According to Article 35 § 3 of the Convention, the Court may declare any individual application inadmissible if it considers it to be "manifestly ill-founded". Applications can be declared inadmissible on this ground both by Committees – i.e. without the application being communicated to the respondent Government – or by Chambers. A Chamber may do so either before or after communication of the case to the respondent Government. This ground of admissibility constitutes an important means for the Court to weed out unmeritorious – indeed also frivolous – applications.

If an application is declared inadmissible by a Committee of three judges[293] as being manifestly ill-founded, the applicant will be informed in a letter which states only that "in the light of all the material in its possession, and in so far as the matters complained of were within its competence, the Court found that they did not establish a violation of the rights and freedoms set out in the Convention or its Protocols".[294]

There are numerous and diverse grounds on which an application may be declared inadmissible as being manifestly ill-founded, but for purposes of the present *Handbook* two of them are of particular relevance: failure to substantiate allegations, and situations where the ill-treatment complained of is not sufficiently severe to amount to a breach of Article 3.

#### a) Substantiation of Allegations[295]

Before the Court can establish whether there has been a violation of the Convention, it must first establish the facts at issue. According to the Court,

293 If the case is declared inadmissible on this ground by a Chamber, on the other hand, a copy of the Chamber's decision, which sets out the reasons for inadmissibility, will be sent to the applicant.

294 See *Textbox x*. The applicant will receive a letter with the same wording if the application has been declared inadmissible on more than one ground; e.g. if the applicant has neither complied with the six-month rule nor exhausted the relevant domestic remedies.

295 See also Section 11 below for evidential issues and for establishment of facts.

Convention proceedings do not in all cases lend themselves to rigorous application of the principle of *affirmanti incumbit probatio* (he who alleges something must prove that allegation).[296] In the cases referred to it, the Court will examine all the material before it, whether originating from the parties or other sources, and if necessary, will obtain material *proprio motu*.[297] Nevertheless, according to the established case-law of the Court, an applicant does bear the initial burden of producing evidence in support of his or her complaints at the time the application is lodged. Once this burden has been discharged and the Court is satisfied that there is a case to answer, the Court will communicate the application – provided, of course, that the other requirements of admissibility are also met. The Court's attitude towards the distribution of the burden of proof is a corollary of the fact that Convention proceedings are distinct from criminal proceedings where the principle of *affirmanti incumbit probatio* does apply and where, therefore, the prosecution bears the legal burden of proving the guilt of the accused party.

The required standard of proof to convince the Court that there is a case to answer – i.e. that the allegations are not manifestly ill-founded – depends on the nature of the allegation. In cases concerning ill-treatment for example, it appears from the case-law of the Court that an applicant is required to make out a *prima facie* case at the time of introduction of the application in order to discharge this initial burden.[298] In the context of Article 3 of the Convention, a *prima facie* case may be loosely defined as an arguable case or a case in which there is some evidence in support of the allegations. Such evidence may include medical records and other medical documents such as x-rays, photographs, eye-witness accounts, custody records and any documents showing that the complaints have been brought to the attention of the national authorities.

In order to avoid any risk of an inadmissibility finding at the initial stages, it is imperative that allegations of ill-treatment be adequately supported by documents and argumentation at the time the application is lodged.[299] Where an applicant is not in a position to provide such documentation, for example because the documents are in the possession of the national authorities or because the applicant is unable to obtain the evidence without the assistance of the national authorities, the Court should be informed of this. Depending on the persuasiveness of the explanations and other material submitted by the applicant, the Court may seek to obtain the documents from the national

296 See, *inter alia*, *Timurtaş v. Turkey*, cited above, § 66.

297 *Ireland v. the United Kingdom*, no. 5310/71, 18 January 1978, § 160.

298 See, *inter alia*, *Birutis and Others v. Lithuania* (dec.), nos. 47698/99, 48115/99, 7 November 2000; see also *Artico v. Italy*, no. 6694/74, 13 May 1980, § 30; Harris, O'Boyle and Warbrick, pp. 627-628.

299 See also Leach, p. 35.

authorities with the help of the respondent Government. It may do so either by communicating the application to the respondent Government or by requesting the Government, pursuant to Rule 54 § 2 (a) of the Rules of Court, to submit the documents in question.[300]

**b) Special Evidential Considerations in Expulsion Cases**

According to the well established case-law of the Court, expulsion by a Contracting Party may give rise to an issue under Articles 2 or 3, or both, and hence engage the responsibility of that State where substantial grounds have been shown for believing that the person, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 or would be deprived of his or her life in violation of Article 2 in the receiving country (for example, by falling victim to an extrajudicial killing). In these circumstances, Articles 2 and 3 imply the obligation not to expel the applicant to that country.[301]

The Court has developed the following standard in expulsion cases: the applicant must show that "substantial grounds" exist for believing that, if expelled, he or she would face "a real risk of being subject to treatment contrary to Article 3".[302] It is evident from this language that the applicant must show more than a *mere possibility* of ill-treatment.[303]

Applicants may face particular evidential challenges in expulsion cases. Although the general conditions in the country of destination constitute a relevant factor in the Court's risk assessment, it is insufficient to show that the general situation in the country of destination is dangerous; rather, an applicant must also establish that he or she personally runs a real risk of being subjected to treatment contrary to Articles 2 and 3 of the Convention, for example by showing that he or she has previously been subjected to ill-treatment, or that he or she is a member of a group which is known to be targeted by the authorities of the country of destination,[304] or that he or she is actively being sought by the authorities.[305]

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300 See Section 5 below.

301 See, *inter alia*, *Soering v. the United Kingdom*, no. 14038/88, 7 July 1989, §§ 90-91; *Cruz Varas and Others v. Sweden*, no. 15576/89, 20 March 1991, §§ 69-70; and, *Chahal v. the United Kingdom*, cited above, §§ 73-74.

302 See, *inter alia*, *Chahal v. the United Kingdom,* cited above, § 74.

303 See *Vilvarajah and Others v. the United Kingdom*, nos. 13163/87, 13164/87, 13165/87, 13447/87, and 13448/87, 30 October 1991, §§ 107 and 111; *H.L.R. v. France*, no. 24573/94, 29 April 1997, § 37; *Hilal v. the United Kingdom*, no. 45276/99, 6 March 2001, § 60.

304 See, *mutatis mutantis*, *N. v. Finland*, no. 38885/02, 26 July 2005, §§ 161-167.

305 See "Short Survey of Cases Examined by the Court in 2004" at http://www.echr.coe.int/NR/rdonlyres/94484030-2547-4FFC-9F91-8E96A87C7D74/0/2004analysisofcaselaw.pdf

In assessing whether "substantial grounds" exist, the Court will examine all the circumstances of the case.[306] The types of evidence that may be adduced to prove such substantial grounds can vary from one case to another; they will be examined in more detail in Section 11 below. However, it suffices to say here that the Court acknowledges the difficulties that applicants in this type of case will face in submitting evidence. It should be noted that if the receiving country is not a Contracting Party to the Convention,[307] the Court has no powers to ask that receiving country to submit any material that may be in the possession of that country's national authorities and which supports the applicant's allegations.

Aware of the difficulties of proving the existence of a real risk of ill-treatment in receiving countries, the Court has expressed its readiness to lower the high standard of proof in such cases. In its decision in the case of *Mawajedi Shikpokht and Mahkamat Shole v. the Netherlands*, the Court noted the following:

> "the case hinges on whether there is a real risk that the applicants will suffer treatment contrary to Article 3 if forced to return to Iran. Neither applicant has submitted any direct documentary evidence proving that they themselves are wanted for any reason by the Iranian authorities. That, however, cannot be decisive *per se*: the Court has recognised that in cases of this nature such evidence may well be difficult to obtain (*Bahaddar v. the Netherlands*, judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I, p. 263, § 45). To demand proof to such a high standard may well present even an applicant whose fears are well-founded with a *probatio diabolica*" .[308]

It then added:

> "[e]ven so, as regards Ms Mahkamat Sholeh, it would have been helpful had the Court been provided with, for example, the written threat that caused her to go into hiding – or at least, plausible information which would enable the Court to assess *prima facie* the nature and seriousness of the threat which it represented to Ms Mahkamat Sholeh herself".[309]

Whether the Court will follow this reasoning in similar cases is an open question. For a discussion of the standard and burden of proof in expulsion cases, applicants may find it useful to look at the *amicus* brief in the case of *Ramzy v. The Netherlands* (no. 25424/05) in Appendix No. 9. This *amicus*, submitted by a coalition of NGOs, contains a comparative examination of the

306 See *D. v. the United Kingdom*, no. 30240/96, 2 May 1997, § 49.

307 If the receiving country is a Contracting Party, on the other hand, the Court may, pursuant to Rule 44A of the Rules of Court, ask that Party to cooperate fully in the proceedings and to take such action within its power as the Court considers necessary for the proper administration of justice. This duty applies also to a Contracting Party not party to the proceedings where such cooperation is necessary.

308 See *Mawajedi Shikpokht and Mahkamat Shole v. the Netherlands* (dec.), no. 39349/03, 27 January 2005.

309 *Ibid.*

standard and burden of proof on applicants in expulsion cases in the jurisprudence of international bodies, primarily the European Court and the United Nations Committee against Torture.

Another challenge applicants might face in the expulsion context is the use of so-called "diplomatic assurances" (variously referred to as "diplomatic guarantees", "diplomatic contacts", "memoranda of understanding"). These concern assurances that the country of destination provides to the expelling respondent Government that the applicant will not be subjected to ill-treatment if expelled. The use of such assurances to expel persons in the face of a risk of torture or other ill-treatment has become increasingly common albeit also increasingly controversial. In numerous instances since September 11, States have relied on diplomatic assurances asserting that they effectively mitigated the risk of torture and ill-treatment to the expelled person. However, applicants faced with this issue should note that a growing number of international authorities have explicitly rejected the use of diplomatic assurances including, in particular, the Parliamentary Assembly of the Council of Europe,[309bis] the Council of Europe Commissioner for Human Rights,[310] United Nations Special Rapporteur on Torture,[311] and the United Nations High Commissioner for Human Rights.[312]

The UN Committee against Torture has also explicitly rejected the use of diplomatic assurances in its case-law. Specifically, in *Agiza v. Sweden* the Committee against Torture considered the issue in relation to the expulsion by Sweden of an Egyptian national and found that "… the State party's expulsion of the complainant was in breach of Article 3 of the Convention. The procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk."[313] Indeed, in *Chahal v. the United Kingdom*, the European Court itself found that the diplomatic assurances provided by the Government of India were not sufficient to mitigate the risk of ill-treatment to the applicant and that his expulsion would therefore put the UK in breach of its obligations under Article 3.

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309bis Relevant parts of Article 20 of the Parliamentary Assembly Resolution, adopted on 27 June 2006, provides as follows: "The Assembly also calls on the United States of America, which is an Observer State to the Council of Europe and Europe's long-standing ally in resisting tyranny and defending human rights and the rule of law, to prohibit the extralegal transfer of persons suspected of involvement in terrorism and all forcible transfers of persons from any country to countries that practise torture or that fail to guarantee the right to a fair trial, regardless of any assurances received"

310 Report of Mr. Alvaro Gil-Robles, Council of Europe Commissioner for Human Rights, on his visit to Sweden, 21-23 April 2004, Strasbourg, 8 July 2004, CommDH(2004) 13, para.19.

311 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/60/316, 30 August 2005.

312 Protection of human rights and fundamental freedoms while countering terrorism, Report of the High Commissioner for Human Rights, E/CN.4/2006/94, 16 February 2006.

313 *Agiza v. Sweden*, CAT/C/34/D/233/2003, para. 13.4.

Regarding diplomatic assurances, the United Nations Special Rapporteur on Torture has stated the following:

> "[D]iplomatic assurances are unreliable and ineffective in the protection against torture and ill-treatment: such assurances are sought usually from States where the practice of torture is systematic; post-return monitoring mechanisms have proven to be no guarantee against torture; diplomatic assurances are not legally binding, therefore they carry no legal effect and no accountability if breached; and the person whom the assurances aim to protect has no recourse if the assurances are violated. The Special Rapporteur is therefore of the opinion that States cannot resort to diplomatic assurances as a safeguard against torture and cruel, inhuman or degrading treatment or punishment where there are substantial grounds for believing that a person would be in danger of being subjected to torture or cruel, inhuman or degrading treatment or punishment upon return."[314]

NGOs have also argued that reliance on diplomatic assurances is incompatible with States' obligations to prevent torture,[315] and that there is a growing body of evidence that such assurances are ineffective in practice, are not capable of being monitored adequately, and have actually resulted in the torture and ill-treatment of persons subject to expulsion.[316]

#### c) Concluding Remarks on Substantiation

The Court uses the following standard text when declaring an application admissible:

> "The Court considers, in the light of the parties' submissions, that this complaint raises complex issues of law and of fact under the Convention, the determination of which should depend on an examination of the merits of the application. The Court concludes, therefore, that [the application] or [this part of the application] is not manifestly ill-founded, within the meaning of Article 35 § 3 of the Convention. No other grounds for declaring it inadmissible have been established".

However, although an admissible complaint implies that the applicant has proved his or her allegations with adequate evidence to the extent necessary to show that his or her complaint is not manifestly ill-founded, it does not necessarily follow that the same evidence will be sufficient to establish a violation of the Convention. This is because of the different standards of proof

314 A/60/316, para. 51.

315 See for instance, *Reject rather then regulate: Call on Council of Europe member states not to establish minimum standards for the use of diplomatic assurances in transfers to risk of torture and other ill-treatment.* Amnesty International, Human Rights Watch and the International Commission of Jurists, 2 December 2005.

316 See Human Rights Watch, *Still at Risk: Diplomatic Assurances No Safeguard against Torture*, April 2005; *Empty Promises: Diplomatic Assurances No Safeguard against Torture*, April 2004; See also, Amnesty International, *Memorandums of Understanding and NGO Monitoring: a challenge to fundamental human rights*, 19 February 2006.

required by the Court at different stages of the proceedings. For example, the Court unanimously concluded in its decision on admissibility in the case of *Bensaid v. the United Kingdom* that the applicant's complaint under Article 3 of the Convention was not manifestly ill-founded. However, in its judgment in the same case the Court was also unanimous in deciding that there had not been a violation of Article 3.[317]

An admissible Article 3 complaint which is not manifestly ill-founded but which ultimately does not lead to a finding of a violation of that Article, is not necessarily devoid of substance. It may still, if the applicant is held to have had an arguable claim[318] of a violation of that provision, give rise to a breach of Article 13 of the Convention[319] if the applicant was not afforded an effective remedy at the national level in respect of that complaint. Support for this can be found in the judgment in the case of *D.P. and J.C. v. the United Kingdom* in which the Court held the following:

> "The Court has not found it established in this case that there has been a violation of Article 3, or Article 8, of the Convention in respect of the applicants' claims that the authorities failed in a positive obligation to protect them from the abuse of their stepfather, N.C. This does not however mean, for the purposes of Article 13, that their complaints fall outside the scope of its protection. These complaints were not declared inadmissible as manifestly ill-founded and necessitated an examination on the merits".[320]

### 2.6.3 Discussion II: Severity of Ill-Treatment

Substantiation of the accuracy and veracity of allegations of ill-treatment is not on its own sufficient for the Court to conclude that the complaint is "well founded" (or, if the complaint gets beyond the admissibility stage, that there has been a violation of Article 3). This is because Article 3 does not prohibit every form of ill-treatment but only ill-treatment that crosses a minimum level of severity. In its judgment in the inter-state case of *Ireland v. the United Kingdom*, adopted in 1978, the Court established a test to determine whether a particular form of ill-treatment violated Article 3. According to this test:

> "ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of

317 *Bensaid v. the United Kingdom* (dec.), no. 44599/98, 25 January 2000, and *Bensaid v. the United Kingdom*, no. 44599/98, 6 February 2001.

318 See *Boyle and Rice v. the United Kingdom*, nos. 9659/82 and 9658/82, 27 April 1998, §§ 54-55.

319 And sometimes to a procedural violation of Article 3 of the Convention; see Section 10.2.2 (a) below.

320 *D.P. and J.C. v. the United Kingdom*, no. 38719/97, 10 October 2002, § 136; see also *Çelik and İmret v. Turkey,* 44093/98, 26 October 2004, § 57.

> things, relative; it depends on all the circumstances of the case such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim".[321]

This threshold, which was set by the Court in 1978, is a difficult one to attain and was perhaps set high because of a "sentiment that to find a State in violation of [Article 3 of the Convention] was particularly serious and not to be taken lightly".[322] Nevertheless, since the Convention is a living instrument which must be interpreted in the light of present-day conditions, certain acts previously falling outside the scope of Article 3 might today (or in future) attain the required level of severity to be considered a violation of the article.[323] The Court explained in *Selmouni* that:

> "the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies".[324]

Some examples are given below to illustrate the Court's examination of, and its approach to, the question of what minimum level of severity is required in order for the Court to find a violation of Article 3. The examples given below are drawn from a series of situations which have been examined by the Court and which involve typical "severity threshold" questions. It should be noted, however, that this list of categories is not exhaustive but merely illustrative. For a more extensive discussion of the Court's jurisprudence, readers are referred to Appendix No. 10.

#### a) Inhuman or Degrading Treatment or Punishment

The Convention prohibits both inhuman or degrading *treatment* and inhuman or degrading *punishment*. As regards the latter, the Court has held that in order for a judicially sanctioned punishment to violate Article 3, it must be a type of punishment which causes suffering and humiliation which *go beyond* the inevitable element of suffering and humiliation which is inherent in any form of legitimate criminal punishment. Examples of punishment which violate this prong of the prohibition include flogging, stoning, etc. For instance, Article 3 has been invoked in the *non-refoulement* context where the applicant faces *Sharia* punishment in his or her country of origin. In *Jabari v. Turkey*, the applicant had committed adultery in Iran, a crime under Iranian law for which she was liable to be sentenced to death by stoning. The Court

321 *Ireland v. the United Kingdom*, cited above, § 162.
322 See Reid p. 518.
323 See *Henaf v. France*, no. 65436/01, 27 November 2003, § 55.
324 *Selmouni v. France*, cited above, § 100.

found that type of punishment to be clearly contrary to Article 3 and found that her return would therefore constitute a violation of that article.[325]

In addition to the severity and proportionality of the punishment, the Court will also consider the purpose of the punishment and whether such a purpose involves the gratuitous humiliation or debasement of the victim. This was a factor in *Tyrer v. the United Kingdom* where the Court found that the judicial corporal punishment which the applicant complained of (in this case, birching) amounted to inhuman and degrading punishment.[326] In its judgment, the Court stated in relevant part that:

> "… although the applicant did not suffer any severe or long-lasting physical effects, his punishment – whereby he was treated as an object in the power of the authorities – constituted an assault on precisely that which it is one of the main purposes of Article 3 to protect, namely a person's dignity and physical integrity".[327]

The Court will also look to the purpose of the acts complained of in determining whether there is a violation of the prohibition of inhuman or degrading *treatment*.[328] *T. v. the United Kingdom* affords an illustration in this regard. This case concerned an applicant who, at the age of ten, was convicted of the killing of a two year old boy. The applicant argued that the cumulative effect of a number of factors associated with his criminal trial amounted to inhuman and degrading treatment contrary to Article 3, including the following: the low age of criminal responsibility, the accusatorial nature of the trial, the adult proceedings in a public court, the length of the trial, the jury of twelve adult strangers, the physical layout of the courtroom, the overwhelming presence of the media and public, the attacks by the public on the prison van which brought him to court, and the disclosure of his identity, together with a number of other factors linked to his sentence. The Court found, however, that the criminal proceedings against the applicant had not been motivated by any intention on the part of the State authorities to humiliate him or cause him suffering.[329] Furthermore, while the public nature of the proceedings may have exacerbated to a certain extent the applicant's feelings of guilt, distress, anguish and fear, the Court was not convinced that the particular features of the trial process as applied to the applicant caused, to a significant degree, suffering beyond that which would inevitably have been engendered by any attempt by the authorities to deal with the applicant following his commission of the offence in question.[330]

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325 *Jabari v. Turkey*, no. 40035/98, 11 July 2000, §§ 33 - 42
326 *Tyrer v. the United Kingdom*, no. 5856/72, 25 April 1978.
327 *Ibid.*, § 33.
328 See, for example, *Raninen v. Finland*, no. 20972/92, 16 December 1997, § 55.
329 *T. v. the United Kingdom* [GC], 24724/94, 16 December 1999, § 69.
330 *Ibid.,* § 77.

However, it must be stressed that although the question whether the purpose of the treatment or punishment was to humiliate or debase the victim is a factor to be taken into account, the absence of such a purpose cannot conclusively rule out a finding that Article 3 was violated.[331]

### b) Prison Conditions

Virtually any form of lawful detention (arrest, pre-trial detention, imprisonment, administrative custody, etc.) involves an inevitable element of suffering or humiliation. According to the Court, the imposition of a sentence of detention in itself does not raise issues under Article 3 of the Convention. Furthermore, Article 3 cannot be interpreted as laying down a general obligation to release a detainee on health grounds or to place him or her in a civil hospital to enable the detainee to obtain a particular kind of medical treatment.[332] Nevertheless, the Court requires the State to ensure that any person who is detained is held under conditions that are compatible with respect for human dignity, that the manner and method of the detention do not subject the detainee to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention, and that given the practical demands of imprisonment, the detainee's health and well-being are adequately secured by, among other things, providing him or her with the requisite medical assistance.[333]

When examining complaints of prison conditions that are alleged to constitute ill-treatment, the Court refers to reports published by the CPT. Furthermore, the Court will take into account the cumulative effects of those conditions, as well as the specific allegations made by the applicant.[334] For example, in the case of *Labzov v. Russia*, the Court observed that the applicant was detained at a remand facility where he was afforded less than 1 square metre of personal space and shared a sleeping place with other inmates, taking turns with them to rest. Except for one hour of daily outside exercise, the applicant was confined to his cell for 23 hours a day. The Court considered that the conditions in the prison cell were:

> "sufficient to cause distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention, and arouse in [the applicant] the feelings of fear, anguish and inferiority capable of humiliating and debasing him".[335]

331 See, for example, *Van der Ven v. the Netherlands*, cited above, § 48.
332 *Kudła v. Poland* [GC], no. 30210/96, 26 October 2000, § 93.
333 *Ibid.,* § 94 and the cases cited therein.
334 *Dougoz v. Greece*, no. 40907/98, 6 March 2001, § 46.
335 *Labzov v. Russia*, no. 62208/00, 28 February 2002, § 46.

By contrast, in its judgment in the case of *Valašinas v. Lithuania*,[336] in which the applicant complained of the conditions in the two prison cells where he was detained and which measured between 2.7 and 3.2 square metres, the Court found that the conditions of the applicant's detention did not attain the minimum level of severity because the restricted space in the sleeping facilities was compensated for by the freedom of movement enjoyed by the detainees during the daytime.

Therefore, applicants arguing a violation of Article 3 based on conditions of detention are advised to consult the Court's extensive case-law on this issue, and in particular, to distinguish the applicant's situation from the facts of cases where the Court has found no violation.

**c) Solitary Confinement**

Prohibiting contact with other prisoners for security, disciplinary, or other protective reasons does not in itself amount to inhuman treatment or punishment.[337] However, the Court has found that complete sensory deprivation coupled with total social isolation can destroy the personality of a detainee and may constitute a form of inhuman treatment contrary to Article 3.[338] One factor that the Court will examine in these cases is whether the special regime imposed on the detainee is reasonably tailored to, and proportionate with, the legitimate interest – security, disciplinary, etc. – which the State is seeking to advance through the particular measure.

In the case of *Mathew v. the Netherlands* the detention in solitary confinement for a period of approximately 19 months of an applicant with health problems was considered excessive and in violation of Article 3.[339] Firstly, the applicant was detained for at least seven of those months in a cell in which there was a large opening in the roof exposing him to rain and extreme heat. Further, the location of his cell on the second floor prevented his access to outdoor exercise: because of his serious spinal condition and the absence of an elevator in the building, the applicant could only gain access to outdoor exercise at the expense of unnecessary and avoidable physical suffering. On the other hand, in *Rohde v. Denmark* the Court found that the applicant's pre-trial solitary confinement for a period in excess of eleven months did not in itself amount to treatment contrary to Article 3 of the

336 *Valašinas v. Lithuania,* no. 44558/98, 24 July 2001, §§ 103-111.
337 See *Öcalan v. Turkey* [GC], no. 46221/99, 12 May 2005, § 191.
338 See *Van der Ven v. the Netherlands*, cited above, § 51.
339 *Mathew v. the Netherlands*, no. 24919/03, 29 September 2005, § 217.

Convention.[340] In reaching this conclusion the Court examined the conditions of detention including the extent of the social isolation. The Court observed that:

> "[t]he applicant was detained in a cell which had an area of about eight square metres and in which there was a television. Also, he had access to newspapers. He was totally excluded from association with other inmates, but during the day he had regular contact with prison staff, e.g. when food was delivered; when he made use of the outdoor exercise option or the fitness room; when he borrowed books in the library or bought goods in the shop. In addition, every week he received lessons in English and French from the prison teacher and he visited the prison chaplain. Also, every week he received a visit from his counsel. Furthermore, during the segregation period in solitary confinement the applicant had contact twelve times with a welfare worker; and he was attended to thirty-two times by a physiotherapist, twenty-seven times by a doctor; and forty-three times by a nurse. Visits from the applicant's family and friends were allowed under supervision. The applicant's mother visited the applicant approximately one hour every week. In the beginning friends came along with her, up to five persons at a time, but the police eventually limited the visits to two persons at a time in order to be able to check that the conversations did not concern the charge against the applicant. Also, the applicant's father along with a cousin visited the applicant every two weeks".[341]

In the case of *Ramirez Sanchez v. France*, in which the applicant – better known as "Carlos the Jackal" – had been detained in solitary confinement for over eight years in a cell measuring 6.84 square metres, the Court found that

> "the general and very special conditions in which the applicant was being held in solitary confinement and the length of that confinement had not reached the minimum level of severity necessary to constitute inhuman or degrading treatment within the meaning of Article 3 of the Convention, having regard to his character and the unprecedented danger he poses".[342]

The three cases referred to above illustrate that the period of solitary confinement is not on its own dispositive for purposes of Article 3. Other factors such as the identity of the victim, his or her health, the threat he or she poses, the conditions of the detention and whether the regime imposed by the Contracting Party is reasonably tailored to legitimate security interests will also be taken into account.

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340 *Rohde v. Denmark*, no. 69332/01, 21 July 2005, § 98. See also the dissenting opinion of Judges Rozakis, Loucaides and Tulkens in which they argued that "a distinction needs to be made between, on the one hand, social isolation or a special regime imposed after a conviction by a court and, on the other, pre-trial detention in solitary confinement, as in the present case".

341 § 97.

342 *Ramirez Sanchez v. France*, no. 59450/00, 27 January 2005, § 120. It must be noted that on 15 June 2005 the case was referred to the Grand Chamber at the applicant's request, and the Grand Chamber had not yet decided the case at the time of writing.

**d) Strip Searches**

Other conditions of detention which the Court has had occasion to examine include strip searches of applicants. The Court considers that while strip searches may be necessary on occasion to ensure prison security or prevent disorder or crime, they must be conducted in an appropriate manner. It found that no such appropriateness was present in a case in which the (male) applicant was obliged to strip naked in the presence of a woman, and his sexual organs and the food he had received from a visitor were examined by guards who were not wearing gloves. This, in the words of the Court, showed "a clear lack of respect for the applicant, and diminished in effect his human dignity".[343] Furthermore, in the case of *Van der Ven v. the Netherlands*, the Court considered that the practice of weekly strip searches applied to the applicant over a period of approximately three and a half years, in the absence of convincing security needs and on top of a great number of surveillance measures to which he was already subjected, diminished his human dignity and must have given rise to feelings of anguish and inferiority capable of humiliating and debasing him.[344]

In another case, the Court appreciated that the fact that the applicant was permanently observed by a camera for a period of about four and a half months in his prison cell may have caused him feelings of distress on account of being deprived of any form of privacy. However:

> "it did not find it sufficiently established on the basis of objective and concrete elements that the application of this measure had in fact subjected the applicant to mental pain and suffering of a level which could be regarded as attaining the minimum level of severity which constitutes inhuman or degrading treatment within the meaning of Article 3 of the Convention".[345]

**e) Prisoner Transport**

In a number of cases, the Court has considered complaints concerning the manner in which detainees are transported to and from places of detention. As with prison conditions, the Court will look to whether the conditions under which the detainee is being transported are consistent with respect for human dignity, and if additional restraint measures are imposed during the transportation process such as blindfolding, handcuffing, etc., the Court will assess these complaints in relation to whether such measures are reasonably

343 *Valašinas v. Lithuania*, cited above, § 117.

344 *Van der Ven v. the Netherlands*, cited above, § 62; see also *Lorsé v. the Netherlands*, cited above, § 74. The respondent Government's observations in the case of *Van der Ven* are found in Appendix No.14.

345 *Van der Graaf v. the Netherlands* (dec.), no. 8704/03, 1 June 2004.

necessary under the circumstances. In situations where the impugned treatment is not made necessary by the applicant's own conduct or "dangerousness" and where it consequently results in the humiliation of the detainee in a manner which exceeds the normal level of humiliation inherent in any lawful detention or arrest, the Court will find that the minimum level of severity will have been reached in violation of Article 3.

In *Khudoyorov v. Russia*, the applicant claimed that the conditions of his transportation between his detention facility and the court where he was being tried were inhuman and degrading. In particular, he complained that to attend court hearings he was transported to the courthouse in a prison van in which he shared a 1 $m^2$ individual compartment with another prisoner, forcing the two of them to take turns sitting on each other's lap. He received no food during the entire day and was deprived of outdoor exercise and even, on occasion, the chance to take a shower. The Court observed that the applicant had to endure these crammed conditions twice a day, on the way to and from the courthouse, and that he had been transported in that van no fewer than 200 times in four years of detention. Also, the Court noted that he was subjected to this treatment precisely on the occasions when he most needed his powers of concentration and mental alertness, i.e. during his trial and during the hearings on his detention status. Concluding that the treatment to which the applicant was subjected during his transport to and from the trial court exceeded the minimum level of severity, the Court found a violation of Article 3 of the Convention.[346] In reaching its conclusion the Court also examined the CPT's observations on transport facilities in various Council of Europe Member States.[347]

In *Raninen v. Finland*, the applicant complained of being handcuffed when transported between a prison and a hospital and argued that such measures constituted "degrading treatment" in violation of Article 3. The applicant stressed that the handcuffing occurred in the context of unlawful deprivation of liberty and thus possessed an element of arbitrariness causing him particular distress. He further argued that there had been nothing in his conduct when arrested and detained nor in the past suggesting that he might resist the authorities' measures, nor were any reasons given to him at the time of the handcuffing. According to him, the sole purpose of the handcuffing was to degrade, humiliate, and frighten him in order to discourage him from objecting to military service and substitute service. The two hours' duration of the treatment was significant because a few months after the event, he was diagnosed with an undefined psychosocial problem and was declared unfit for

346 *Khudoyorov v. Russia*, cited above, §§ 110-120.
347 *Ibid.*, § 117.

military service. According to the applicant, this clearly indicated that the unlawful detention and handcuffing had had adverse mental effects on him. In the opinion of the Commission, the Contracting Party's recourse to physical force by handcuffing the applicant for some two hours had not been made strictly necessary by his own conduct or by any other legitimate consideration and had been imposed while the applicant could be seen in public, including by his own supporters. In sum, the measure had diminished his human dignity and amounted to "degrading treatment" in violation of Article 3.[348]

The Court, however, disagreed. Unlike the Commission, it was not convinced that the applicant's handcuffing had adversely affected his mental state. There was nothing in the evidence to suggest a causal link between the impugned treatment and his "undefined psychosocial problem" which in any event had been diagnosed only several months later. Nor had the applicant substantiated his allegation that the handcuffing had been aimed at debasing or humiliating him. Finally, it had not been contended that the handcuffing had affected the applicant physically. In the light of these considerations, the Court concluded that the treatment in issue had not attained the minimum level of severity required by Article 3 of the Convention.[349]

In *Öcalan v. Turkey*, the Grand Chamber of the Court examined the applicant's allegations that his being handcuffed and blindfolded from the moment of his arrest in Kenya until his arrival at the prison on the island of İmralı in Turkey amounted to a violation of Article 3. The Grand Chamber held that artificially depriving prisoners of their sight by blindfolding them for lengthy periods spread over several days may, when combined with other ill-treatment, subject them to strong psychological and physical pressure and raise an issue under Article 3. However, it endorsed the findings of the Chamber and held that the applicant, who was suspected of being the leader of an armed separatist movement that was engaged in an armed struggle against the Turkish security forces, was considered dangerous. It accepted the Government's submission that the sole purpose of requiring the applicant to wear handcuffs was to prevent him from attempting to abscond or cause injury or damage to himself or others. As regards to the blindfolding of the applicant during his journey from Kenya to Turkey, the Court observed that this was a measure taken by the members of the security forces in order to avoid being recognised by the applicant. They also considered that it was a means of preventing the applicant from attempting to escape or injuring himself or others. The Court accepted the Government's explanation that the

348 *Raninen v. Finland*, no. 20972/92, Commission Report of 24 October 1996, § 59.
349 *Raninen v. Finland*, cited above, §§ 52-59.

purpose of that precaution was not to humiliate or debase the applicant but to ensure that the transfer proceeded smoothly; in view of the applicant's character and the reactions to his arrest, considerable care and proper precautions were necessary if the operation was to be a success. The Court concluded that it had not been established beyond reasonable doubt that the applicant's arrest and the conditions under which he was transferred from Kenya to Turkey exceeded the usual degree of humiliation inherent in every arrest and detention or attained the minimum level of severity required for Article 3 to apply.[350]

**f) Force-Feeding**

The case of *Nevmerzhitsky v. Ukraine* concerned the force-feeding of an applicant who was on hunger strike. In order to force-feed him, the authorities used handcuffs, a mouth-widener, and a special rubber tube inserted into the mouth. The Court held that:

> "the force-feeding of the applicant, without any medical justification having been shown by the Government, using the equipment foreseen in the decree, but resisted by the applicant, constituted treatment of such a severe character warranting the characterisation of torture within the meaning of Article 3 of the Convention".[351]

It must be stressed that this conclusion does not necessarily mean that a Contracting Party will breach its obligations under Article 3 of the Convention each time its agents force-feed persons on hunger strike. As the Court noted in the same judgment,

> "a measure which is of therapeutic necessity from the point of view of established principles of medicine cannot in principle be regarded as inhuman and degrading. The same can be said about force-feeding that is aimed at saving the life of a particular detainee who consciously refuses to take food. The Convention organs must nevertheless satisfy themselves that the medical necessity has been convincingly shown to exist... Furthermore, the Court must ascertain that the procedural guarantees for the decision to force-feed are complied with. Moreover, the manner in which the applicant is subjected to force-feeding during the hunger strike shall not trespass the threshold of a minimum level of severity envisaged by the Court's case-law under Article 3 of the Convention".[352]

350 *Öcalan v. Turkey* [GC], cited above, §§ 176-185.
351 *Nevmerzhitsky v. Ukraine*, no. 54825/00, 5 April 2005, § 98.
352 *Ibid.*, § 94.

**g) Racial Discrimination**

According to the Commission, discrimination based on race can in itself amount to degrading treatment within the meaning of Article 3.[353] The Commission's view was adopted by the Court in *Cyprus v. Turkey*, in which it found:

> "it is an inescapable conclusion that the interferences at issue were directed at the Karpas Greek-Cypriot community for the very reason that they belonged to this class of persons. The treatment to which they were subjected during the period under consideration can only be explained in terms of the features which distinguish them from the Turkish-Cypriot population, namely their ethnic origin, race and religion. The Court would further note that it is the policy of the respondent State to pursue discussions within the framework of the inter-communal talks on the basis of bizonal and bi-communal principles... The respondent State's attachment to these principles must be considered to be reflected in the situation in which the Karpas Greek Cypriots live and are compelled to live: isolated, restricted in their movements, controlled and with no prospect of renewing or developing their community. The conditions under which that population is condemned to live are debasing and violate the very notion of respect for the human dignity of its members… In the Court's opinion, and with reference to the period under consideration, the discriminatory treatment attained a level of severity which amounted to degrading treatment".[354]

More recently, and with reference to the *East African Asians* case, the Court has held in *Moldovan and Others v. Romania* that discrimination based on race can in itself amount to degrading treatment within the meaning of Article 3 and that racist remarks should therefore be taken into account as an aggravating factor in the examination of applicants' complaints under this Article. On the basis of the circumstances of the case, the Court found that the racial discrimination to which the applicants had been publicly subjected and the way in which their grievances were dealt with by the various authorities constituted interference with their human dignity which, in the special circumstances of this case, amounted to "degrading treatment" within the meaning of Article 3 of the Convention.[355]

In the vast majority of cases, allegations of racial discrimination have been examined from the standpoint of Article 14 of the Convention which prohibits discriminatory treatment. In a landmark judgment the Court considered that

> "any evidence of racist verbal abuse being uttered by law enforcement agents in connection with an operation involving the use of force against

353 See *East African Asians v. the United Kingdom*, nos. 4403/70 et seq., Commission Report of 14 December 1973.

354 *Cyprus v. Turkey,* cited above, §§ 309-311.

355 *Moldovan and Others v. Romania*, cited above, § 113.

> persons from an ethnic or other minority is highly relevant to the question whether or not unlawful, hatred-induced violence has taken place. Where such evidence comes to light in the investigation, it must be verified and – if confirmed – a thorough examination of all the facts should be undertaken in order to uncover any possible racist motives".[356]

It follows from this judgment that the Contracting Parties are now under an obligation to carry out investigations into allegations of use of force triggered by racial motives. Although in the facts of the *Nachova* case the issue of racial discrimination was examined from the standpoint of Article 2 as it concerned the killing of a person, it can by no means be ruled out that the Contracting Parties' positive obligation in this area extends to ensuring that allegations of ill-treatment triggered by racial motives are also properly investigated.

#### h) Expulsion of Persons with Health Problems

The Court has further dealt with a number of cases in which applicants with health problems complained that their expulsion to a particular country, where there was a lack of health care and/or support, would exacerbate their health problems to such an extent as to amount to ill-treatment within the meaning of Article 3 of the Convention. The fact that an applicant's circumstances in the receiving country will be less favourable than those enjoyed by him or her in the host country cannot be regarded as decisive from the point of view of Article 3.[357] According to the Court's established case-law:

> "aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance provided by the expelling State".[358]

According to the Court's judgment in the case of *D. v. the United Kingdom*, it is only in exceptional circumstances, and owing to compelling humanitarian considerations, that the implementation of a decision to remove an alien may result in a violation of Article 3. This case concerned the impending removal from the United Kingdom to the Caribbean island of St Kitts of the applicant who was in the advanced stages of a terminal and incurable illness (AIDS). The Court noted that the removal of the applicant and the resulting abrupt loss of access to a number of health and comforting facilities afforded to him in the United Kingdom would hasten his death. The Court held that

> "in view of these exceptional circumstances and bearing in mind the critical stage now reached in the applicant's fatal illness, the implementation

356 *Nachova v. Bulgaria* [GC], cited above, §§ 162-168.
357 *Bensaid v. the United Kingdom*, cited above, § 38.
358 See, *inter alia*, *Salkic and Others v. Sweden* (dec.), no. 7702/04, 29 June 2004.

> of the decision to remove him to St Kitts would amount to inhuman treatment by the respondent State in violation of Article 3".[359]

The *D. v. the United Kingdom* judgment remains, however, the only case in which the Court has accepted that "exceptional circumstances" existed such that a State should refrain from removing an alien from its territory. The case of *Bensaid v. the United Kingdom*, for instance, concerned the removal of the applicant – a long-term sufferer of schizophrenia – from the United Kingdom to Algeria where he would not be able to continue taking, as an outpatient and free of charge, a particular course of medication. While the Court accepted the seriousness of the applicant's medical condition, it did not find that there was a sufficiently real risk that the applicant's removal, under the circumstances of the case, would be contrary to the standards of Article 3, noting the high threshold set by Article 3 and particularly the fact that the case did not concern the direct responsibility of the Contracting Party for the infliction of harm.[360]

The case of *Ndangoya v. Sweden* concerned the removal of the applicant back to his native Tanzania. He was infected with HIV, but while in Sweden had been receiving treatment such that the HIV levels in his blood were no longer detectable. The doctor who had treated the applicant estimated that he would develop AIDS within 1 to 2 years if the treatment were discontinued. The Court observed that adequate treatment was available in Tanzania, albeit at a considerable cost and difficult to come by in the countryside where the applicant apparently would prefer to live upon return. Noting that it had not appeared that the applicant's illness had attained an advanced or terminal stage, or that he had no prospect of medical care or family support in his country of origin, the Court found that the circumstances of his situation were not of such an exceptional nature that his expulsion would amount to treatment proscribed by Article 3 of the Convention.[361]

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359 *D. v. the United Kingdom*, cited above, § 53.

360 *Bensaid v. the United Kingdom*, cited above, § 40. See also the separate opinion of Judge Sir Nicolas Bratza, the national judge in the case, joined by judges Costa and Greve, in which he stated that "…the present case does not disclose exceptional circumstances similar to those of *D. v. the United Kingdom*… Nevertheless, on the evidence before the Court, there exist in my view powerful and compelling humanitarian considerations in the present case which would justify and merit reconsideration by the national authorities of the decision to remove the applicant to Algeria".

361 *Ndangoya v. Sweden* (dec.), no. 17868/03, 22 June 2004. See also *Nasimi v. Sweden* (dec.), no. 38865/02, 16 March 2004 in which the considerable stress caused to the applicant by the national authorities' decision to expel him was not sufficient to attract the protection under Article 3 of the Convention.

### 2.6.4 Concluding Remarks

If the Court concludes that the applicant has failed to support his or her case with adequate evidence and has failed, therefore, to make out a *prima facie* case, the application will be declared inadmissible as being manifestly ill-founded. Similarly, if the Court concludes that the treatment of which the applicant complains has not reached the minimum level of severity to constitute a breach of Article 3, the application will be declared inadmissible as being manifestly ill-founded.

In order to avoid having an application fail for lack of substantiation, the applicant should make out the strongest possible case from the beginning by submitting all relevant evidence which can support the allegations with the completed application form. If the evidence submitted by the applicant is rebutted or challenged by the respondent Government, the applicant will have the opportunity to counter the Government's allegations[362] by adducing further evidence and/or arguments. Such additional evidence may take the form of additional medical reports confirming the applicants' earlier medical submissions or challenging the submissions of the Government.[363]

Similarly, persuading the Court that the treatment in question has reached the required minimum level of severity may also be achieved by resorting to medical reports. In order to tip the scales, applicants should consider obtaining detailed medical reports describing the physical and mental effects of the ill-treatment to which they were subjected. If the applicant is suffering from psychological disturbances as a result of the ill-treatment, it is particularly important that these effects be documented since the finding of such effects requires the Court to make an assessment of a number of subjective elements. A psychological assessment, carried out by a trained specialist, preferably a psychiatrist, "linking" the applicant's psychological problems to his or her allegations will assist the Court in its examination and is strongly recommended.

The Court's assessment of the severity of the treatment will take into account all the circumstances of the case such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age, and state of health of the victim. Consequently, in some cases the Court might consider a particular form of treatment severe enough to cross the severity threshold, where the applicant can show characteristics which make him or her particularly vulnerable to such treatment. Thus in some cases, ill-treatment of a

362 See Section 11 for a discussion of the evidential issues in the Court's proceedings.

363 See, as an example, the applicant's observations in the case of *Kişmir v. Turkey*, cited above, (in Appendix No. 13) in which the applicant enclosed a report prepared by a consultant pathologist.

child, pregnant woman, or elderly or infirm person might constitute a breach of Article 3 while the same treatment, when meted out to a healthy adult, might not be sufficient to constitute prohibited ill-treatment.[364] If relevant to the case, applicants are therefore advised to call to the attention of the Court, through argument and evidence, any particular characteristic which exacerbates their suffering.

Applicants whose health condition has deteriorated because of the ill-treatment should prove this by submitting medical evidence showing their state of health before and after the ill-treatment.

Finally, applicants should support their arguments that the treatment in question reaches the required minimum by referring to the Court's case-law in which similar allegations have been examined. This is particularly appropriate for complaints relating to prison conditions and other circumstances where the threshold level of severity might be an issue. For example, an applicant who has been detained in a prison in conditions similar to that of the applicant in the above mentioned case of *Labzov v. Russia*, may parallel the facts of that case or other similar cases.

## 2.7 Abuse of the Right of Application (Article 35 § 3)

According to Article 35 § 3 of the Convention, the Court will declare inadmissible an application if it considers the application to be an abuse of the right of application. What constitutes an abuse within the meaning of this Article has not been defined by the Convention institutions, which preferred, as the Court continues to do, to deal with the issue on a case-by-case basis.

This ground of inadmissibility has been used by the Court as a tool to weed out vexatious applications which hinder it in carrying out its duty under Article 19 of the Convention to ensure observance of the obligations undertaken by the Contracting Parties in the Convention.

It must be stressed at the outset that any attempt to mislead the Court in its examination of the application, for example by forging documents or by deliberately concealing relevant facts, may result in the Court's conclusion that there has been an abuse of the right of application.

364 See, for example, *Mathew v. the Netherlands*, cited above, § 203, where the Court observed that the applicant with health problems was not a person fit to be detained in the conditions of which he complained.

The Court – as did the Commission – receives a considerable number of applications that concern frivolous and repeated complaints by vexatious applicants. In the case of *Philis v. Greece* the Commission observed that the applicant had already introduced five applications with the Commission concerning the same complaint, all of which had been declared inadmissible. Apart from finding that the latest application constituted an abuse of the right of application, the Commission added:

> "[i]t cannot be the task of the Commission, a body set up under the Convention to ensure the observance of the engagements undertaken by the High Contracting Parties in the present Convention, to deal with a succession of ill-founded and querulous complaints, creating unnecessary work which is incompatible with its real functions, and which hinders it in carrying them out".[365]

The Court has adopted the same approach. Applicants receive prior warning that if the new application is rejected for amounting to an abuse of the right of application, no further correspondence will be entertained with them regarding future similar complaints.

Furthermore, in a number of cases the Court has examined whether the use of offensive language in proceedings before the Court – language that was directed either against the respondent Government or its agents,[366] the regime in the respondent Contracting Party,[367] or the Court and its Registry,[368] constituted an abuse of the right of application.[369] Finding that the use of offensive language in proceedings is undoubtedly inappropriate, the Court also held that, except in extraordinary cases, an application may only be rejected as abusive if it was knowingly based on untrue facts.[370]

Finally, in a number of cases the Commission and the Court have rejected claims made by respondent Governments that applications constituted an abuse of the right of application because they had been made for political purposes. For example, in the case of *Aslan v. Turkey* the respondent Government argued that the application, being devoid of any sound legal basis, had been lodged for purposes of political propaganda against the Turkish Government. The Commission concluded that the Government's

365 *Philis v. Greece*, no. 28970/95, Commission decision of 17 October 1996.

366 See *Manoussos v. the Czech Republic and Germany* (dec.), no. 46468/99, 9 July 2002.

367 See *Iordachi and Others v. Moldova* (dec.) no. 25198/02, 5 April 2005.

368 See *Řehák v. the Czech Republic* (dec.), no. 67208/01, 18 May 2004.

369 See also Rule 44D according to which, "[i]f the representative of a party makes abusive, frivolous, vexatious, misleading or prolix submissions, the President of the Chamber may exclude that representative from the proceedings, refuse to accept all or part of the submissions or make any other order which he or she considers it appropriate to make, without prejudice to Article 35 § 3 of the Convention".

370 See *Varbanov v. Bulgaria*, no. 31365/96, 5 October 2000, § 36.

argument could only be accepted if it was clear that the application was based on untrue facts. However, as this was far from clear at that stage of the proceedings, the Commission found it impossible to reject the application on this ground.[371]

## 2.8 Anonymous Applications (Article 35 § 2 (a))

The Court will not accept anonymous applications.[372] Rule 47 § 1 (a) of the Rules of Court requires that the name, date of birth, nationality, sex, occupation, and address of the applicant be set out in the application form.

The public nature of the Convention proceedings entails that the Court's decisions and judgments list the name, the year of birth, and the place of residence of the applicants. However, some applicants do not wish that their identity be disclosed to the public. In such circumstances, they may ask the Court to refer to them in public documents by their initials or by a single letter such as "X", "Y", "Z", etc.[373] Any such requests, however, must be supported by a statement of the reasons justifying such a departure from the rule of public access to information in proceedings before the Court. The President of the Chamber may authorise anonymity in exceptional and duly justified cases.[374]

Applicants should note that even where the Court grants a request for anonymity, their identities will always be disclosed to the concerned Contracting Party because the Contracting Party cannot, for obvious reasons, be expected to respond to anonymous complaints. In other words, an applicant can be anonymous *vis-à-vis* the general public but not *vis-à-vis* the other party to the complaint.

371 *Aslan v. Turkey*, no. 22497/93, Commission decision of 20 February 1995.

372 Article 35 § 2 (a) of the Convention.

373 See paragraph 17 of the Practice Direction on the "Institution of Proceedings" which can be found in Appendix No. 3.

374 Rule 47 § 3 of the Rules of Court.

## 2.9 Applications Substantially the Same (Article 35 § 2 (b))

A complaint which has already been examined either by the Court itself or which has already been submitted to another procedure of international investigation or settlement, and which contains no new information, will be declared inadmissible.[375] According to the Court:

> "this provision is intended to avoid the situation where several international bodies would be simultaneously dealing with applications which are substantially the same. A situation of this type would be incompatible with the spirit and the letter of the Convention, which seeks to avoid a plurality of international proceedings relating to the same cases".[376]

Two of the terms mentioned in this provision, namely "another international investigation or settlement" and "new information", necessitate further examination. The Commission has held that the word "another" suggests that that provision is concerned with a procedure similar to that provided by the Commission".[377] Both the Commission[378] and the United Nations' Human Rights Committee[379] have been held by the Court to be capable of providing "international investigations or settlements" within the meaning of this provision. Examination of an allegation of ill-treatment by the CPT, on the other hand, will not prevent the Court from examining the same allegation.[380] Furthermore, in its admissibility decision in the case of *Jeličić v. Bosnia and Herzegovina*, the Court also found that the Human Rights Chamber of Bosnia and Herzegovina was not an international tribunal within the meaning of Article 35 § 2 (b) of the Convention. In reaching its conclusion the Court observed, *inter alia*, that the Human Rights Chamber's mandate did not concern obligations between States but strictly those undertaken by Bosnia and Herzegovina and its constituent entities.[381]

Secondly, the Court will not declare a complaint inadmissible on this ground if it is based on facts which have been examined by one of the above mentioned international organisations or by the Court itself, if the complaint

375 Article 35 § 2 (b) of the Convention.

376 See *Smirnova and Smirnova v. Russia* (dec.), nos. 46133/99 and 48183/99, 3 October 2002.

377 *Council of Civil Service Unions and Others v. the United Kingdom*, no. 11603/85, Commission decision of 20 January 1987.

378 See, *inter alia*, *Vogl and Vogl v. Austria* (dec.), no. 50171/99, 23 October 2001.

379 *Pauger v. Austria*, no. 24872/94, Commission decision of 9 January 1995.

380 Paragraph 92 of the Explanatory Report to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment expressly addresses this issue. According to this paragraph, "it is not envisaged that a person whose case has been examined by the committee would be met with a plea based on Article [35 § 2 (b) of the Convention] if he subsequently lodges a petition with the European [Court] of Human Rights alleging that he has been the victim of a violation of that Convention".

381 See *Jeličić v. Bosnia and Herzegovina* (dec.), no. 41183/02, 15 November 2005.

raised in relation to those facts is a different one. It thus appears that the Court interprets the concept of "substantially the same application" very restrictively.[382]

Unless the new application contains "relevant new information", it will be declared inadmissible by the Court. "Relevant new information" within the meaning of this provision may include a domestic court decision obtained by an applicant whose previous application was declared inadmissible by the Court for non-exhaustion of that particular remedy. However, this happens rarely in practice because, as pointed out elsewhere in this section, it is very likely that by the time the Court declares an application inadmissible for non-exhaustion of a particular domestic remedy, the applicant will have missed the time limit in national system to make use of that remedy. A domestic court decision in which the applicant's appeal was rejected for non-respect of the time limit under the national legislation will not constitute a "relevant new fact".

## 2.10 The New Admissibility Criterion in Protocol No. 14

Following the entry into force of Protocol No. 14, Article 35 § 3 of the Convention will include a new admissibility criterion according to which an application will be declared inadmissible if:

> "the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case maybe rejected on this ground which has not been duly considered by a domestic tribunal".[383]

According to the Explanatory Report to Protocol No. 14:

> "the purpose of this amendment is to provide the Court with an additional tool which should assist it in its filtering work and allow it to devote more time to cases which warrant examination on the merits, whether seen from the perspective of the legal interest of the individual applicant or considered from the broader perspective of the law of the Convention and the European public order to which it contributes. The introduction of this criterion was considered necessary in view of the ever increasing case load of the Court".

382 See *Kovačić and Others v. Slovenia* (dec.), nos. 44574/98, 45133/98, and 48316/99, 9 October 2003.
383 Article 12 of Protocol No. 14.

As acknowledged in the Explanatory Report, it is intended that the new admissibility criterion lead to the rejection of complaints in respect of which, under the current practice, violations of the Convention would be found.[384] It is for the Court to interpret the rather ambiguous term "significant disadvantage", and in the two years following the entry into force of Protocol No. 14, the new admissibility criterion will only be applied by Chambers and the Grand Chamber and not by Committees, in order that reasoned and publicly accessible case-law is created.

The new criterion allows the Court to exercise its discretion when deciding whether "respect for human rights" requires an examination of the application on the merits.[385] Furthermore, the new criterion aims to ensure that all Convention complaints are examined either at the national level or by the Court.

It must be stressed, however, that even before Protocol No. 14 has been ratified by the Contracting Parties to the Convention, serious doubts are already being expressed as to the capacity of this new criterion to reduce the case load of the Court.[386]

384 See paragraph 79 of the Explanatory Report in Appendix No.18.

385 This 'safeguard clause' was adopted from Article 37 § 1 of the Convention which allows the Court to continue the examination of a case even if the applicant does not intend to pursue his or her application or even if the parties want to settle the case; see Section 8 below for further information.

386 See Leach p. 8 *et seq.* and the references cited therein.