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BAHÇEŞEHİR UNIVERSITY

EXHAUSTION OF DOMESTIC REMEDIES PRINCIPLE IN APPLYING TO EUROPEAN COURT OF HUMAN RIGHTS

Master's Thesis

ULVİ DARENDELİ

İSTANBUL, 2011

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İSTANBUL, 2011 Ulvi DARENDELİ

ÖZET

AVRUPA İNSAN HAKLARI MAHKEMESİ'NE BAŞVURUDA İÇ HUKUK YOLLARININ TÜKETİLMESİ PRENSİBİ

Darendeli, Ulvi

Avrupa Birliği İlişkileri Yönetimi

Tez Danışmanı: Dr. Erdem İlker Mutlu

Şubat, 2011 123 Sayfa

Bu çalışma; Avrupa İnsan Haklari Mahkemesi'ne (AİHM) başvuruda iç hukuk yollarının tüketilmesi prensibini; AİHM nezdinde ve devlet sorumluluğuna atıf yapmakla diğer uluslararası insan hakları kurumları ile karşılıklı olarak, içtihat hukuku çerçevesinde incelemeyi amaçlamaktadır. Bu çalışmada detaylarıyla verildiği üzere, gerek yerel gerekse küresel olsun birçok insan hakları kurumu, iç hukuk yollarını tüketilmesi şartını bir uluslararası kural olarak kabul etmiş bulunmaktadır.

AİHM nezdinde sözkonusu prensip, içtihat hukukunun evrilmesiyle birlikte incelendiğinde çok daha karmaşıklık ve farklılık arz etmektedir. Avrupa İnsan Hakları Sözleşmesi'nin 35. maddesi, prensibi tüm mülahazalarıyla açıkça tanımlamamakla beraber, AİHM tarafından sözkonusu prensibin esneklik karakteri; yeterli olması, etkililiği, ispat külfeti yönlerinden her bir dava bakımından kendi farklılıklarına atıf yapılmak suretiyle ayrı ayrı yorumlanmıştır.

Bu itibarla, bu çalışma yalnızca sözkonusu prensibin genel olarak ilgili hukuki metinler üzerinden incelenmesine değil, aynı zamanda AİHM içtihatları nezdinde yorumlanmasının uluslararası hukuk çerçevesinde değerlendirmesine de odaklanmayı amaçlamaktadır.

Anahtar Kelimeler: İç Hukuk Yolları, Tüketilme Prensibi, Etkililik, Avrupa İnsan Hakları Mahkemesi

ABSTRACT

EXHAUSTION OF DOMESTIC REMEDIES PRINCIPLE IN APPLYING TO EUROPEAN COURT OF HUMAN RIGHTS

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This study concentrates on the exhaustion of domestic remedies principle in of the European Court of Human Rights (ECtHR) under its case law in comparison with the remedies of other International Adjudicatory Bodies with special emphasis to the concept of state responsibility. Moreover, this study lays out various human rights instruments, both global and regional, those have incorporated the general international law rule of exhaustion of local remedies.

From ECtHR perspective, the qualification and provisional scope of the principle is complicated with respect to the evolution process under the case law. While Article 35 of the European Convention for the Protection of Human Rights (The Convention) does not clearify the substantive scope of the principle's application, the flexible character of the principle with its adequacy, effectiveness, burden of proof dimensions are interpreted by the ECtHR from case to case with giving emphasize on their different aspects.

Therefore, the overall prospect for is a broadband legalistic review of the rule not only from the relevant legislation from the international texts, but also focuses on the case law of ECtHR to realize the principle's interpretation within the framework of international law.

Keywords: Domestic Remedies, Exhaustion Rule, Effectiveness, European Court of Human Rights.

TABLE OF CONTENTS

ABBREVIATONS

Committee on the Elimination of Discrimination Against Women	**: CEDAW**
European Court of Human Rights	**: ECtHR**
European Court of Justice	**: ECJ**
European Union	**: EU**
Inter-American Convention on Human Rights	**: IACHR**
International Criminal Court	**: ICC**
International Court of Justice	**: ICJ**
International Criminal Tribunal for Rwanda	**: ICTR**
International Criminal Tribunal for the Former Yugoslavia	**: ICTY**
International Law Commission	**: ILC**
Turkish Republic of Northern Cyprus	**:TRNC**

1.INTRODUCTION

"The field of human rights protection under international law is the mirror image of existing customary and treaty law; and it is here that the rule on local remedies has flourished during the last half-century". (McGovern, 1975, p 119) The application of the exhaustion rule in the context of human rights protection possibly derived some inspiration from earlier experiments in which direct access to international bodies those were recognized by states and, via other instruments granted individually justicable rights to real persons and non-state legal persons, rather than by reference or analogy to state responsibility for injuries to aliens.

The rule of exhaustion of domestic remedies whereby " State should be given the opportunity to redress an alleged wrong within the framework of its own domestic legal system before its international responsibility can be called into question." (Trindade 1983, p 1-6) has undergone significant development from its traditional function as a customary rule in inter-State diplomatic practice to its extended application in the field of human rights protection. With respect to the case-law perspective of this principle, this paper will only analyze **'the rule of exhaustion of domestic remedies'** through a common perception of public international and human rights law.

The local remedies rule, in practice, is, thus, not considered as a mechanically applied tool, leading to systematic rejection of complaints or discending cases in a continuosly pending process. A question may arise as to 'what extent this has been sufficiently recognized or understood in practice'.

However, a literal interpretation of the above-mentioned article does not cover all necesarry considerations for the determination of the principle in question. Consequently, the article under systematical and teleological interpretation has vague and ambigious points. Such a deficit is overcome by ECtHR through the precendential interpretation in a more specific meaning the above-mentioned norm specifies that domestic remedies are to be exhausted in accordance with the general principles of international law. The legal theory correlates the point to a dual polarized preference of theories. There are various elements that need appraisal, which lead to the preferring of the 'procedural' theory over the 'substantive' one. Hence, the short of long story for the practice of 'human rights dispute settlement bodies' renders the ruling of the international wrongful act may also be precedent with respect to the last domestic remedy. Moreover, it may correspond with the moment of the injury itself against the individual; and therefore such case law is in arrangement with the prevailing 'procedural' theory on the nature of the domestic remedies rule.

This study is a product of researching and scanning the case law in international law in public international law and international human rights law in the light of above-mentioned legalistic understanding of Article 35 of the Convention and the exhaustion of domestic remedies rule. The methodology applied has revolved around the precedents of international courts and tribunals and inspirations stemming from an unconstitutionalised nature of international law against the understanding of state sovereignty.

However, unconstitutionalised nature of international law does not permit a researcher to paint a single and substantive picture of the underlying research question to this study. Fortunately, varying characteristics of international human rights law and the strong rethorics back in up the protectionist perception influencing practice of Council of Europe draws guidelines to plant a subjective configuration of a friendly and responsive settlement of my research question.

It is evident that the purpose of this study is not categorizing things black and white. Rather, it remains just as an attempt to underline striking points questionabble for a researcher of law.

2 - THE OBJECTIVE OF THE EXHAUSTION RULE AND GENERAL VIEW

2.1 THE MAIN OBJECTIVES OF THE RULE

2.1.1 The object of preventing violations at the level of national courts

The Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols Nos. 11 and 14[1] (The Convention), which regulates Admissibility Criteria at Article 35/1 of the convention as:

> *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.*

The rule of prior exhaustion of domestic remedies aims to provide national courts to prevent from violations. This rule also refers to Article 13 of the convention. As the Convention`s Article 13 which regulates Right to an effective remedy states:

> *Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.*

On the other hand, this rule also aims to grant the member states which signed the European Convention on Human Rights (The Convention) a circumstance which was stated as "Every member state shall clean their dirty laundry, should clean at their homeland first". (Arlington 1992, p. 400)

This 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. 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.[2] In another other judgment the ECtHR also stated that there

[1] The text of the Convention is presented as amended by the provisions of Protocol No. 14 (CETS no. 194) as from its entry into force on 1 June 2010.
[2] Handyside v. the United Kingdom, Judgment, EctHR, 1976, Series A no. 24, para. 22, *Reports of Judgments and Decisions* 1976-II.

should be an effective remedy available in respect of the alleged breach in the domestic system whether or not the provisions are incorporated in national law.[3]

2.1.2 The rule as a Subsidiary Character For the Convention`s Scope

This rule is a method of permitting states to settle their own internal disputes in accordance with their own national procedures before adopted international mechanisms can be invoked, and is well established in general international law. However, where such internal remedies do not exist or unduly and unreasonably prolonged or unlikely to bring effective relief, the resort to the national remedies will not be required.

The purpose of the 'exhaustion of domestic remedies rule is being a subsidiary character for the Convention`s Scope of competence. As it is stated in Selmouni v. France Case "*States are dispensed from answering for their acts before an international body before they have had an opportunity to put matters right through their own legal system*." [4]

Therefore, The ECtHR affirmed, as in Selmouni v. France Case, that the complaint intended to be made subsequently to the Court must first have been made – at least in substance – to the appropriate domestic body, and in compliance with the formal requirements and time-limits laid down in domestic law.

In this regard, the funciton of national rules in international procedural law should also be considered.The general rule with regard to the position of municipal law within the international sphere is that a state which has omitted an undertaking or broken a stipulation of international law cannot justify itself by referring to its domestic legal complications. It is no defence to a breach of an international obligation to argue that the state acted in such a manner because it was following the dictates of its own municipal laws. The reasons for this inability to put forth internal rules as an excuse to derogate from rules of international law are obvious. Any other situation would permit international law to be 'evaded' by the simple method of domestic legislation. (Shaw 2003, pp. 187 – 190)

[3] Akdivar and Others v. Turkey, Judgment , ECtHR, 1996,para.65, *Reports of Judgments and Decisions* 1996-V.

[4] Selmouni v. France, Judgment, EctHR, 1999, Judgment, para. 74, *Reports of Judgments and Decisions* 1996

In view of that, state practice and institutional settled disputes have established this provision and thereby prevented countries involved in international litigation from pleading municipal law as a method of circumventing international law. As the article 27 of the Vienna Convention on the Law of Treaties regulates that, *"1969 lays down that in so far as treaties are concerned, a party may not invoke the provisions of its internal law as justification for its failure to carry out an international agreement, while article 46-1 provides that a state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent*." This is so unless the violation of its internal law in question was 'manifest and concerned a rule of fundamental importance'. Article 46-2 states that such a violation is manifest where it would be objectively evident to any state conducting itself in the matter in accordance with normal practice and in good faith. The ICJ considered this provision in *Cameroon* v. *Nigeria* in the context of Nigeria's argument that the Maroua Declaration of 1975 signed by the two heads of state was not valid as it had not been ratified.

The Court also took the view that the ICJ Reports assessment (2002, p.265) "there is no general legal obligation for States to keep themselves informed of legislative and constitutional developments in other States which are or may become important for the international relations of these states[5]".

According to some authors Lauterpacht (2002, p. 138) and Combacau (1999, p. 547) :

> *The exhaustion of domestic remedies must never pose a theoretical obstacle to an international dispute settlement (through diplomatic protection or an international court). It is a clear rule of international law that while domestic remedies will normally require to be exhausted before the case is a recourse to international settlement. The above-stated requirement will never need to be satisfied if the domestic remedies are futile, ineffective, theoretical, non-existent or the domestic remedy is inoperative under the settled case-law. The exhaustion of domestic remedies does not come into play either when the remedy is 'manifestly ineffective', that is to say when the competent court does not have effective power to make reparation for the damage sustained. The same theory also applies to judicial practice, which excludes all prospects of success on the merits because the courts consider themselves bound by the 'decisions of the executive' or settled case-law suggests that the remedy will fail.*

[5] However it should also be noted that the view of the Court in the *Anglo-Norwegian Fisheries* case that the UK as a coastal state greatly interested in North Sea fishing 'could not have been ignorant' of a relevant Norwegian decree, despite claiming that Norway's delimitation system was not known to it: ICJ Reports, 1951, p**.** 116; 18 ILR, pp. 86, 101.

2.2 THE SCOPE OF ARTICLE 35-1 OF THE CONVENTION

The rule of exhaustion of domestic remedies while applying to ECtHR is not only recognised in a limited jurisdiction as it is regulated in Article 35-1 of the Convention.

The basic rule of international law providing that states have no right to encroach upon the preserve of other states' internal affairs is a consequence of the equality and sovereignty of states and is mirrored in article 2- 7 of the UN Charter. It has, however, been subject to a process of reinterpretation in the human rights field as this and the succeeding chapter will make apparent, so that states may no longer plead this rule as a bar to international concern and consideration of internal human rights disputes. It is, of course, obvious that where a state adopts the right of individual petition under an international procedure, it cannot thereafter claim that the exercise of such a right constitutes interference with its domestic affairs. (Shaw 2003, p 254)

2.2.1 The Evaluation of the Rule at the Other International Human Rights Treaties and the Case Law:

The Rule is not only in the convention but also regulated at some international laws and institutions.

Customary international law provides that before international proceedings are instituted or claims or representations made, the remedies provided by the local state should have been exhausted. There is a theoretical dispute as to whether the principle of exhaustion of local remedies is a substantive or procedural rule or some form of hybrid concept but the purpose of the rule is both to enable the state to have an opportunity to redress the wrong that has occurred within its own legal order and to reduce the number of international claims that might be brought. Another factor, of course, is the respect that is to be accorded to the sovereignty and jurisdiction of foreign states by not pre-empting the operation of their legal systems. Article 44 of the International Law Commission (ILC) Articles on State Responsibility provides that "*..the responsibility of a state may not be invoked if the claim is*

one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted."[6]

The rule was well illustrated in the *Ambatielos* arbitration between Greece and Britain. Because, the remedies available under English law, the earlier conveyed proceedings coming out of a contract signed by Ambatielos, that were rejected by the tribunal had not been fully utilized. In particular, he had failed to call a vital witness and he had not appealed the House of Lords from the decision of the Court of Appeal.[7]

The requirement to exhaust national remedies rule will not be sufficient to dismiss a claim merely because the person claiming had not taken the matter to appeal, where theappeal would not have affected the basic outcome of the case. This was stressed in the *Finnish Ships* arbitration. . (Shaw 2003, p 1479)

In this regard, ILC draft article 22 provides: (Draft Articles on State Responsibility 2010, p.22)

> *When the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be accorded to aliens, whether natural or juridical persons, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the aliens concerned have exhausted the effective local remedies available to them without obtaining the treatment called for by the obligation or, where that is not possible, an equivalent treatment.*

The most probably reason behind this rule at international law, this rule prevents friendly relations between states being threatened by a vast number of trivial disputes; it is a serious allegation to accuse a state of breaking international law. However, when the injury is inflicted directly on a state (for example, when its warships or its diplomats are attacked), there is probably no need to exhaust local remedies; the damage to friendly relations has already been done, and it is beneath the dignity of a state to be required to sue in the courts of another state. (Malanczuk 1997, p. 234)

[6] ILC Commentary 2001, p. 305.
[7] United Nations Reports of International Arbitral Awards 12 RIAA, p. 83 (1956); 23 ILR, p. 306

The Rule is also referred in Optional Protocol to the Committee on Economic, Social and Cultural Rights at the Office of the United Nations High Commissioner for Human Rights which was adopted at The General Assembly resolution A/RES/63/117, on 10 December 2008.[8] In this protocol the rule is written as the "Admissibility" at Article 3.1 as follows :
"The Committee shall not consider a communication unless it has ascertained that all available domestic remedies have been exhausted. This shall not be the rule where the application of such remedies is unreasonably prolonged."

In the following paragraph Article 3.2; Optional Protocol regulates the admissibility criteria of the rule within the time-limit that the Committee shall declare a communication inadmissible when "It is not submitted within one year after the exhaustion of domestic remedies, except in cases where the author can demonstrate that it had not been possible to submit the communication within that time limit;"

As it is set out, the rule, regarding 6 months time limit at the convention for European Court of Human Rights differs at the Committee on Economic, Social and Cultural Rights at UN. It is interpreted as Committee on Economic, Social and Cultural Rights' preventing of human rights scope is wider than the Convention and grants more time limit to prevent inadmissibility decisions against the applicant.

It will be summarily examine whether the standards as adopted by the European Court are indeed region specific, or rather are shared by other human rights bodies and courts as well. Related to this purpose, certain decisions of the International Court of Justice, International Criminal Court, Committee on the Elimination of Discrimination Against Women and the United Nations' Human Rights Committee, Inter-American Convention on Human Rights and the United Nations Human Right Committee and United Nations International Convention on the Elimination of All Forms of Racial Discrimination which deal specifically with states parties' procedural obligations in case of serious and massive violations of fundamental human rights and their approach for the rule will be examined.

[8] http://www2.ohchr.org/english/bodies/cescr/ Accession Date: 06.08.2010

a) International Court of Justice: *The Interhandel Case*

On October 2nd, 1957, the Swiss Confederation brought the matter to the ICJ relating to a dispute which had arisen between the Swiss Confederation and the United States of America with regard to the claim by Switzerland to the restitution by the United States of the assets of the *Société internationale pour participations industrielles et commerciales S.A.* (Interhandel)

In the *Interhandel* case, the United States seized the American assets of a company owned by the Swiss firm Interhandel, in 1942, which was suspected ofbeing under the control of a German enterprise. In 1958, after nine years of litigation in the US courts regarding the unblocking of the Swiss assets in America, Switzerland took the matter to the International Court of Justice. The Court declared that "The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established principle of customary international law" (ICJ Reports, 1959 pp. 6-27)

The dispute was regarding to The Swiss Federal Council s claims that adjudge and declare, whether the Government of the United States of America appears or not, after considering the contentions of the Parties (ICJ Reports, 1959 pp. 29-31):

> *1. The Government of the United States of America is under an obligation to restore the assets of the Interhandel to that Company;*
> *2. In the alternative, that the dispute is one which is fit for submission for judicial settlement, arbitration or conciliation under the conditions which it will be for the Court to determine.*

In the hearings, the United States party maintained that the rule of the exhaustion of local remedies applies to each of the principal and alternative Submissions which seek "a ruling by this Court to the effect that some other international tribunal now has jurisdiction to determine that very same issue, even though that issue is at the same time being actively litigated in the United States courts". (ICJ Reports, 1959 p.33)

However, before a decision was reached, the US Supreme Court readmitted Interhandel into the legal proceedings, thus disposing of Switzerland's argument that the company's suit had

been finally rejected. The Court dismissed the Swiss government's claim since the local remedies available had not been exhausted.

The court also stated that the grounds on which the rule of the exhaustion of local remedies is based are the same, whether in the case of an international court, arbitral tribunal, or in any conciliation and mediation commission. Further, according to court's determinatıon, in these circumstances, the Court considers that any distinction so far as the rule of the exhaustion of local remedies is concerned between the various claims or between the various tribunals is unfounded.

Criticism has been levelled against this judgment on the ground that litigation extending over practically ten years could hardly be described as constituting an 'effective' remedy. "However, the fact remains that the legal system operating in the United States had still something to offer the Swiss company even after that time." (Shaw, 2003 p.731)

The International Court dismissed the Swiss government's claim on the grounds that local remedies had not been exhausted. The judgment in the *ELSI* case is noteworthy because it confirmed that the rule of exhaustion of local remedies only requires the exhaustion of 'all reasonable' local remedies.[9] The International Court also stated in *ELSI* case that the fact that an act of a public authority may have been unlawful in municipal law did not necessarily mean that the act in question was unlawful in international law.

The International Court, in the *Applicability of the Obligation to Arbitmte* case, (ICJ Reports, 1988, pp**.** 12-34) has underlined 'the fundamental principle of international law that international law prevails over domestic law', while Judge Shahabuddeen emphasised in the *Lockerbie* case that inability under domestic law to act was no defence to non-compliance with an international obligation. This was reinforced in the *LaGrand* case, (ICJ Reports 2001, pp. 90-1) where the Court noted that "the effect of the US procedural default rule", (ICJ Reports 2001, p. 23) "which was to prevent counsel for the LaGrand brothers from raising the violation by the US of its obligations under the Vienna Convention on Consular Relations before the US federal courts system, had no impact upon the responsibility of the US for the breach of the convention "(ILR Reports, 1967 p. 320).

[9] *Switzerland v. USA, ICJ Rep.* 1959, 6, at 26–9. See L.Weber, Interhandel Case, *EPIL* II (1995),1025–7.

On the other hand, if local remedies are obviously futile, the rule is applied very strictly. For instance, in the *Ambatielos* case, a Greek shipowner, Ambatielos, contracted to buy some ships from the British government and later accused the British government of breaking the contract. In the litigation which followed in the English High Court, Ambatielos failed to call an important witness and lost; his appeal was dismissed by the Court of Appeal."The arbitrators held that Ambatielos had failed to exhaust local remedies because he had failed to call a vital witness and because he had failed to appeal from the Court of Appeal to the House of Lords." (Malanczuk 1997, p. 268)

In essence, the exhaustion of domestic remedies rule conveys the idea that an individual who has been wronged by a state, should, before invoking the legal protection of his home state or an international court, render that state the opportunity to redress the violation by its own means.

b) International Criminal Court

The Rome Statute, establishing the International Criminal Court (ICC), determines that the International Criminal Court shall be principle of complementarity to national criminal jurisdictions.[10]

This requirement refers the situation that, a case is only admissible before the ICC if a state is either 'unwilling' or 'unable' genuinely to carry out investigations and prosecutions. The Rome Statute itself offers some indications as to how to evaluate the notions of 'unwillingness' and 'inability'. Unjustified delays, sham trials which serve to shield the perpetrator from criminal responsibility, or proceedings lacking independence or impartiality are indicative of unwillingness, while 'inability' is more precisely defined as the incapacity to obtain the accused or necessary evidence and testimony, due to a total or substantial collapse or unavailability of the national judicial system.[11] Furthermore, it seems reasonably clear that the whole procedure of admissibility is only initiated if the state at a minimum takes some initial investigative steps.

[10] ICTY-Statute, Article 9(2); ICTR-Statute, Article 8(2); Statute for the SCSL, Article 8(2); Preamble of the Rome Statute.
[11] Rome Statute, Article 17, section 2 and 3.

On the other hand, there is much speculation on how the ICC will apply the relevant standards in practice. The ICC has only pronounced on admissibility in case of 'auto referral' and has agreed to referral of jurisdiction to the ICC in the first place until now.[12]

The ICC, like the ECtHR, has subsidiary jurisdiction which comes to the fore in the requirement that an applicant should first have exhausted local remedies, in order to bring the matter before the ECtHR. This situation implies that the Court has to develop appropriate standards in order to determine when it is allowed to supersede the judgements of national courts. In this regard, the ECtHR and the ICC share the common feature that they are only allowed to exercise jurisdiction if a national state has failed to carry out sufficently in providing legal redress through its courts or legislature. "Rooted in the legal institute of diplomatic protection, the rule has been extended to the area of human rights protection." (Harmen 1999, p 43)

Although the genealogy of the rule is complex, as it seeks to reconcile different interests, its basic rational is recognition of the sovereignty of the host state.[13] The ICC has to authenticate if it should not draw back before a competent domestic jurisdiction when a case is brought to the court. Precondition for the exercise of jurisdiction by the international court seems that a local remedy does not or no longer seems available. Moreover, the whole concept of complementarity is predicated on respect for state sovereignty. (Triffterer 1999 p.48)

The fact that the ECtHR and the ICC functioning in different legal circumstances. These two courts are searching different accomplishment objectives. A first difference is that an applicant who seeks redress for his injured rights has no place in the procedural infrastructure of the Rome Statute of the ICC. Although compensation and redress for victims are the important objective of the ICC, this dilemma has never been translated into a reinforcement of their procedural position. Besides, this problem has not explained in general and in the admissibility procedure in particular.

[12] The case is regarding the situation in the Democratic Republic of Congo (ICC-01/04) and include *the Prosecutor* v. *Thomas Lubanga Dyilo* (ICC-01/04-01/06); *the Prosecutor* v. *Bosco Ntaganda* (ICC- 01/04-02/06); and *the Prosecutor* v. *Germaine Katanga and Mathieu Ngudjolo Chui* (ICC-01/04-01/07).

[13] For detailed monographs on the subject, *see A.A. Cancado Trindade, Th e Application of the Rule of Exhaustion of Local Remedies in International Law* , Cambridge University Press, 1983 and *C.F. Amerasinghe*, *Local Remedies in International Law* , 2 nd ed. Cambridge University Press, 2004.

Another elemental fact for this issue is the rule of exhaustion of local remedies in the context of diplomatic protection and human rights cannot be severed from the concept of state responsibility. The local remedies rule suspends the claim to international redress. However, the assessment of the question whether the local remedies suspend satisfactory results is dependent on for the responsibility of the state. As Amerasinghe (2004, pp. 100-106) maintains the subject convincingly, taking confiscation of property or torture by the state as an example:[14]

> *Local remedies must be exhausted to redress the wrong. If the wrong remains unredressed or inadequately remedied after such exhaustion, a diplomatic or international judicial claim may be made in respect of the original confiscation or torture. No additional denial of justice in the process of exhausting remedies is required. It is sufficient that exhaustion of remedies has resulted in a decision which perpetuates the violation of international law, which was caused by the original confiscation, or act of torture, and does not restore the rights of the alien recognized by international law. If, on the other hand, a private citizen would have destroyed the alien's property, the alien must resort to (...) local remedies and it is only if, in having such recourse, there is some act or omission amounting to what may be described as a denial of justice that an international wrong attributable to the host state will have been committed. (...) While the denial of justice generates international responsibility on the part of the host state, the alien must then exhaust (...) local remedies in respect of that denial of justice up to the highest level before his national state may espouse a diplomatic claim or take international action.*

From these paragraphs, Amerasinghe seems to proposes that the standards for a 'denial of justice' to constitute an international wrong is more rigorous than for legal proceedings. In this case, the process of exhausting remedies would fail to redress a wrong that can directly be attributed to the state.

The involvement of the state is not the 'bone of contention' in the criminal proceedings before the ICC. Therefore, it cannot match the European Court's differentiated appraisal of the question which proposes a local remedy has provided adequate redress to hinder its jurisdiction by definition. Due to the fact that the assessment of the state's involvement in the international crime would be impossible for the ICC to judge the financial compensation for torture decision, which was rendered by a local court. This situation would also meet the requirement that the local remedies have been exhausted. If, in such a case, the crime could be

[14] Amerasinghe,*op.cit*,100.

attributed to the state. In this case, the financial compensation would not match the victim's unhappiness by which the ECtHR would probably conclude in this way.[15]

In general, when the case-law is scanned, it would be said that the ECtHR considers itself unauthorized to question the domestic authorities' assessment of their own national law and the ECtHR is not a criminal tribunal. For this reason, it can be argued that the protection mechanism and jurisdiction of the two courts are mainly different from each other.

In conclusion, the case law of the ECtHR in respect to 'the local remedies rule' does not provide a proper frame of reference for the International Criminal Court.

c) Committee on the Elimination of Discrimination Against Women:

Committee on the Elimination of Discrimination Against Women (CEDAW) was adopted in 1979 by the UN General Assembly, is often described as an international bill of rights for women. Consisting of a preamble and 30 articles, it defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination.

The Convention defines discrimination against women as: (CEDAW Protocol, para. 3-17)

> *Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.By adopting the Convention, States commit themselves to undertake a series of measures to end discrimination against women in all forms, including: to incorporate the principle of equality of men and women in their legal systems, abolish all discriminatory laws and adopt appropriate ones prohibiting discrimination against women; to establish*

[15] In Isayeva and Others v. Russia, Judgment, ECtHR (2005) the Government argued that the applicants had failed to exhaust the domestic remedies available to them due to the possibility of applying to a court at their new place of residence (the applicants had moved from Chechnya to Ingushetia). The Government refered to the case of Khashiyev and Akayeva v. Russia, Judgment, ECtHR, (2005) in which the applicant applied to the Nazran District Court in Ingushetia which awarded pecuniary and non-pecuniary damages for the death of the applicant's relatives. The Court stated that it *"is true that, after receiving the Government's claim that a civil remedy existed, Mr. Khashiyev brought an action before the Nazran District Court in Ingushetia. That court was not able to, and did not, pursue any independent investigation as to the person or persons responsible for the fatal assaults, but it did make an award of damages to him on the basis of the common knowledge of the military superiority of the Russian federal forces in the district in question at the relevant time and the State's general liability for the actions by the military. Despite the positive outcome for Mr. Khashiyev in the form of financial award, it confirms that a civil action is not capable, without the benefit of the conclusions of a criminal investigation, of making any findings as to the identity of the perpetrators of fatal assaults and still less to establish their responsibility".*

tribunals and other public institutions to ensure the effective protection of women against discrimination; and to ensure elimination of all acts of discrimination against women by persons, organizations or enterprises.

The Convention provides the basis for realizing equality between women and men through ensuring women's equal access to, and equal opportunities in, political and public life including the right to vote and to stand for elections as well as education, health and employment. States parties agree to take all appropriate measures, including legislation and temporary special measures, so that women can enjoy all their human rights and fundamental freedoms.

The Convention is the only fundamental rights treaty which affirms the reproductive rights of women and targets culture and tradition as influential forces shaping gender roles and family relations. It affirms women's rights to acquire, change or retain their nationality and the nationality of their children. States parties to the Convention also agree to take appropriate measures against all forms of traffic in women and exploitation of women.

Countries that have ratified or acceded to the Convention are legally bound to put its provisions into practice. They are also committed to submit national reports, at least every four years, on measures they have taken to comply with their treaty obligations.

Regarding the convention on Optional Protocol adopted in 1999 and in force as from December 2000 allows for the right of individual petition provided a number of conditions are met, including the requirement for the exhaustion of domestic remedies. (Shaw 2003, p. 301)

Relavant Case: Rahime Kayhan v. Turkey

CEDAW placed to deal with Rahime Kayhan v. Turkey Case on its thirty-fourth session between 16 January-3 February 2006. [16]

Ms. Rahime Kayhan was born on 3 March 1968 and has a Turkish nationality. She claimed to be a victim of a violation by Turkey of article 11 of the CEDAW. She was a teacher of religion and ethics, is married with two children. She had worn a scarf covering her hair and neck (her face is exposed) since the age of 16, including while studying at a State university.

[16]Rahime Kayhan v. Turkey Case CEDAW/C/34/D/8/2005, http://www.un.org/womenwatch/daw/cedaw/protocol/decisions-views/8_2005.pdf Accession Date: 06.08.2010

After she graduated from university, she began to work as a teacher at various schools.She was arbitrarily dismissed from her position by the Higher Disciplinary Council on 9 June 2000. The Council's decision suggested that the applicant's wearing of a headscarf in the classroom was the equivalent of 'spoiling the peace, quiet and work harmony' of the institution by politic all means in accordance with article 125E/a of the Public Servants Law No. 657.

As a result, she permanently lost her status as a civil servant. The applicant lost, inter alia, her means of subsistence to a great extent, the deductions that would go towards her pension entitlement, interest on her salary and income, her education grant and her health insurance. She would be unable to teach in a private school as well while wearing a headscarf allegedly because the private schools in Turkey depend on the Ministry of National Education. She defended the situation that nobody would want to employ a woman who had been given the gravest of disciplinary penalties.

On 23 October 2000, the applicant appealed to Erzurum Administrative Court demanding that the dismissal be cancelled because she had not violated article 125E/a of the States Officials Act by wearing a headscarf. She claimed that the penalty did not have a legitimate purpose and was not a necessary intervention for a democratic society. However, Erzurum Administrative Court refused the appeal, finding that her punishment did not violate the law on 22 March 2001.

On 15 May 2001, the applicant appealed against the decision of Erzurum Administrative Court to the State Council. She defended in her petition that, a concrete act to upset public order will have had to be committed in order to apply article 125E/a of the Public Servants Law No. 657. According to her, there was no evidence of the applicant for committing such an act.

On 9 April 2003, the Chair of the 12th Department of the State Council rejected this appeal. The 12th Department of the State Council confirmed that the judgement of the Erzurum Administrative Court on grounds that it was justified in procedure and law. The applicant was notified of the final decision on 28 July 2003.

The State party argued that domestic remedies have not been exhausted in that the applicant by the submission of the applicant on 10 May 2005. According to the state party, the applicant did not bring an action against the Regulation on the Complaints and Applications by Civil Servants. Moreover, she did not bring an action before the Grand National Assembly under article 74 of the Constitution. Moreover the State party also concluded that she did not use the remedy provided under section 3, article 54 of the Law on Administrative Judicial Procedures.

The State party submitted that regular remedies are those to which an applicant must exhaust within required time limits to appeal against a decision or take it on 'revision of judgement'. Article 54 of the Administrative Trial Procedure Law No. 2577, allows the parties to request a 'revision of judgement' within a 15 - day time limit. The grounds for the remedy's use include: "If the allegations or objections that impact the merits are not dealt with; if there are contradictory elements; if there is a mistake of law or a procedural irregularity; or for fraud or forgery that impact the merits." (Aslan 2005, p.463) The Divisions of the Council of State, General Assemblies of Administrative Tax Trial Divisions and Regional Administrative Courts, which have issued the decisions that will be reviewed, receive the applications. Those judges who were involved in the decision -making cannot participate when the (same) decision is being reviewed.

The Committee declared the communication inadmissible where the facts that are the subject of the communication occurred prior to the entry into force of the Protocol for the State party. Only exception for this situation is the application would be accepted unless those facts continued after the Protocol came into force. In considering this provision, the Committee noted the State party's argument that the crucial date was 9 June 2000. This date was which the applicant was dismissed from her position as a teacher. This date came first the entry into force of the Optional Protocol for Turkey on 29 January 2003. The Committee noted that as a consequence of her dismissal, the applicant has lost her status as a civil servant in accordance with article 125E/a of the Public Servants Law No. 657. The effects of the loss of her status were including her pension entitlement, interest on her salary and income, her education grant and her health insurance. The Committee therefore considered that the facts continue after the entry into force of Optional Protocol for the State party and justify admissibility of the communication 'ratione temporis'.

The Committee concluded that the applicant should have put forward arguments that raised the matter of discrimination based on sex in substance. Moreover, according to The Committee she should have submitted in accordance with procedural requirements in Turkey before the administrative bodies in Turkey. For this reason, the Committee concluded that domestic remedies have not been exhausted for purposes of admissibility with regard to the applicant's allegations relating to article 11 of the Convention on the Elimination of All Forms of Discrimination against Women. [17]

The Committee noted that the State party drew attention to other remedies that would have been available of which the applicant did not make use 'revision of judgement'. the complaints procedure under article 74 of the Turkish Constitution and a procedure under the Regulation on the Complaints and Applications by Civil Servants. In this regard, the Committee considered that the information provided for the remedies is insufficiently clear to decide on their efficiency in relation to article 4, paragraph 1 of the Optional Protocol. To sum up, the Committee considered it needless to make this determination or whether the application is inadmissible on any other grounds.

The Committee, therefore decided that the communication is inadmissible under article 4, paragraph 1, of the Optional Protocol for failure to exhaust domestic remedies. According to this part of article, which stipulates admissibility criteria of applications for exhaustion principle: (CEDAW protocol para. 47)

> *Before a complaint is considered, the Committee must determine that all available domestic remedies have been exhausted and the complaint is not, nor has been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement. In addition, a complaint will only be admissible provided the complaint is compatible with the provisions of the Convention; is not an abuse of the right to submit a communication; the claimants' allegations can be substantiated, and the facts presented occurred after the State party ratified the Protocol.*

[17] Article 11 of CEDAW regulates that States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights and in order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures.

As it is emphasized in this case, briefly the Committee rejected the Rahime Kayhan's application because she could not raise the matter of discrimination based on sex in substance and in accordance with procedural requirements in Turkey. She submitted her status as a civil servant for wearing a headscarf rather than a sex discrimination matter. Hence, the Committee decided that she should have met the exhaustion of domestic remedies criteria before the administrative bodies in relevant Turkish law.

d) Inter-American Convention on Human Rights and the United Nations' Human Rights Committee

The need for adequate criminal investigations of international crimes is universally accepted when a short revision made of judgements of the Inter-American Court of Human Rights (IACHR) and the decisions of the UN-Human Rights Committee under the Optional Protocol procedure of the International Covenant on Civil and Political Rights.

On the other hand, a provision regarding the need to exhaust domestic remedies before the various international mechanisms may be advanced to appears in all the international and regional human rights instruments. This principle is alco accepted by the Human Rights Committee under the Optional Protocol procedure of the International Covenant on Civil and Political Rights, and within the European Convention and Inter-American Convention human right system by the much consideration.

In this regard, Inter- American Convention on Human Rights Article 46 (IACHR para.46) states as:

> *1. Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements:*
> *a. that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law;*
> *b. that the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment;*
> *c. that the subject of the petition or communication is not pending in another international proceeding for settlement; and*

> *d. that, in the case of Article 44, the petition contains the name, nationality, profession, domicile, and signature of the person or persons or of the legal representative of the entity lodging the petition.*

The IACHR addressed the miserable practice of 'disappearances', which, during the seventies and eighties, was frequently engaged by authoritarian regimes as a tactic to eliminate political opponents in the landmark case of Velasquez Rodriguez.[18] Like its European counterpart, the Inter American Court construed the State's duty to prevent, investigate and punish any violation of the rights recognized by the American Convention on Human Rights from the States Parties' obligation to "ensure" the free and full exercise of the rights recognized by this Convention to every person subject to its jurisdiction. The Court clearly explained how this procedural obligation fitted into the matrix of human rights protection: (IACHR 1988, para. 166)

> *An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.*

The Court noticed a complete inability of the procedures of the State of Honduras, which were theoretically adequate, to carry out an investigation into the disappearance of Manfredo Velasquez' in applying these standards to the case. The investigations did not deserve the criteria of 'seriousness', as they had been carried out by the Armed Forces, indeed the same body accused of direct responsibility for the disappearances. (IACHR 1988, para. 180) The Court hence mentioned at the lack of impartiality and independence. Besides, the Court held that it was convinced that the disappearance of Manfredo Velasquez was carried out by agents who acted under cover of public authority. The Court emphasized in this decision that "even had that fact not been proven, the failure of the State apparatus to act, which is clearly proven, is a failure on the part of Honduras to fulfill the duties it assumed under Article 1(1) of the Convention". (IACHR 1988 para. 182) Although the Human Rights Committee is generally less elaborate in its reasoning, in essence it shares the opinions of the human rights courts in respect of national remedies and states obligations to conduct effective investigations. In the case of *Muteba* v. *Zaire*, the Court evaluated the communication of Mrs Muteba on behalf of her husband, subjected to various forms of torture and had been deprived fundemantal rights.

[18] For detailed explanation, see IACHR, 29 July 1988 (*Velasquez Rodriguez*), IACHR, Series C, No. 4.

Not only, those facts disclosed violations of the International Covenant on Civil and Political Rights, the Committee also stressed the state's obligation to conduct an inquiry into the circumstances of Mr. Muteba's torture, to punish those found guilty of torture and to take steps to ensure that similar violations do not occur in the future. [19]

Interestingly, both the Inter-American Court of Human Rights and the Human Rights Committee have taken the opportunity to express their opinions on Amnesty Laws. These articles intended to prohibit any criminal investigations and punishment of persons involved in human rights violations. In the Barrios Altes case, members of the Peruvian Army who who killed 15 persons that were allegedly connected to the Maoist guerrilla. The courts had made some headway in the investigation of this case, but were excluded from continuing their work by the launching of an Amnesty Law. Because this law absolved members of the army, police force and civilians who had violated human rights or had taken part in such violations from 1980 to 1995.[20] While the new Peruvian government acquiesced to the facts and recognized its internationa responsibility, the Inter-American Court denounced the Amnesty Law in a principled decision, considering that (IACHR 2001 pp. 2-8)

> *All amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law*.

The Court continued that: (IACHR 2001 p.43)

> *Owing to the manifest incompatibility of self-amnesty laws and the American Convention on Human Rights, the said laws lack legal effect and may not continue to obstruct the investigation of the grounds on which this case is based or the identification and punishment of those responsible.*

The Human Rights Committee has essentially taken the same position on amnesty laws. In the case of *Rodriguez* v. *Uruguay*, the complaint was based on that the victim of torture could not claim an effective remedy. The rasoning of the application was based on the alleged

[19] For detailed study, see Human Rights Committee, 24 July 1984 (*Muteba* v. *Zaire*), Communication No.124/1982, p. 13.
[20] IACHR, 14 March 2001 (*Barrios Altes Case*), IACtHR, Series C, No. 75, p. 2.

perpetrators enjoyed the benefits of an amnesty law. Thus, the government contested the obligation to investigate violations by a prior regime. While the Committee disagreed with the government on this point, it referred to its general comment on Article 7 (Human Rights Committee 1988 pp.12-16):

> *Complaints (on torture) must be investigated promptly and impartially so as to make the remedy effective…. The Committee has noted that some States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future.*

The Committee further referred that (Human Rights Committee 1988 pp.16-21)

> *With deep concern that the adoption of the amnesty law effectively excludes in a number of cases the possibility of investigation into past human rights abuses (…) Moreover, the Committee is concerned that, in adopting this law, the State party has contributed to an atmosphere of impunity which may undermine the democratic order and give rise to further human rights violations*.

It could be noted that, the issue is still a matter of controversy in the framework of the ICC while the situation is noteworthy that human rights courts and bodies take a strong stance against amnesties.

A common condemnation of amnesties may thus be considered as evidence of the need for proper investigations in case of international crimes. The absence of similar opinions in the case law of the European Court, does not imply that this court harbours a different position on the topic, but can simply be attributed to the fact that the European Court has not been confronted with the practice of wide spread amnesty legislation.[21] This short expose of relevant decisions of other human rights courts and bodies seems to indicate that the need for adequate criminal investigations of international crimes is universally shared. However, the research is admittedly too succinct and superficial to buttress the assumption that the standards to assess those investigations are similar as well and do not substantially differ from

[21] In respect of the situation in Chechnya, the Russian State Duma adopted Decree no, 4124-III by which an amnesty was granted in respect of criminal acts committed by the participants to the confl ict on both sides in the period between December 1993 and June 2003. The amnesty does not apply to serious international crimes, such as murder and that is probably the reason why the European Court made no critical comments; *Khashiyev and Akayeva* v. *Russia* ,judgment, ECtHR, (2005) para. 98

region to region. It would, though, be an incentive for the International Criminal Court to broadly and open mindedly consider all relevant case law and decisions in this respect.

On the other hand, the limited jurisdictional scope of the European Court has not dissuaded the ICTR from extensively quoting its case law and using it as an authoritative normative source to sustain its own findings.[22] It's assumed that the ICC will follow the ICTR's example.

e) United Nations International Convention on the Elimination of All Forms of Racial Discrimination

In 1963 the U.N. General Assembly requested the ECOSOC (UN Economic and Social Council) to have the Commission on Human Rights prepare a Convention on the Elimination of All Forms of Racial Discrimination.(CONERD)[23] The provisions adopted by the Commission in 1964, draft Article VI of the CONERD stipulated the obligation of State Parties to provide effective local remedies[24] a duty which was not to have too narrow a scope. The Commission thus considered a provision on the exhaustion of domestic remedies (draft Article 11) applicable to inter-state complaints, and to be ascertained by a proposed Committee. The Commission also proposed a "counterpart" duty to the States to provide effective local remedies (draft Article 6). This implication seems to have been that it was intended that the States' internal legal system should conform or be brought into conformity with the provisions of the Convention. This affect would be in practise for only in 'competent national tribunals' be in position to grant the required remedies and protection.

In October 1965, at the General Assembly (G.A.) Third Committtee[25], Article VI was amended by 95 votes to none, with two abstentions. In fact, only in the G.A. Third Committee's debates of 24 November 1965, not less than 26 delegations took the floor and expressed their views on the local remedies rule under the proposed Convention. The rule was

[22] For example: in *Prosecutor* v. *Nahimana, Brayagwiza and Ngeze* ,(Case No. ICTR-99-52-T, Judgement and Sentence, 3 December 2003, §§ 991-999) the Trial Chamber referred to case law of the ECtHR on the proper relationship between the freedom of expression and the prohibition of incitement to racial discrimination.
[23] For detailed explanation, see U.N. General Assembly resolutions 1906 and 1904 of 20 November 1963.
[24] The draft provision thus corresponded to Article 25 of the ECtHR Convention and Article 2 (3) of the U.N. draft Covenant on Civil and Political Rights.
[25] UN docs. E/CN. 4/874, 108-109; E/CN. 4/891, and cf. 80 and 84 on the dradt provisions on the local redress rule. Cf. also ECOSOC

generally upheld, and much attention was devoted to the meaning to be ascribed to 'domestic remedies' (whether exclusive of other remedies) and the methods of ascertaining their exhaustion.

In fact, the provision adopted by the G.A. Third Committee (83 votes to none, with two abstentions) which became Article 11/3 of the CONERD. Indeed, that was largely based upon the model provided by Article 41 of the U.N. draft Covenant on Civil and Political Rights. The insertion of the exception to the local remedies rule for unreasonable delay in the application of remedies was borrowed *ipsis literis* (word for word) from the text of the draft Covenant's provision in particular. Article 11/3 of the Convention was directed to the application of the rule in *inter-state cases:* it was in this particular context that rule was at first debated in the preparatory work of the Convention. However, the application of the rule was *extended to applications from individuals* as well, by meaning of Article 14 (7) (a) of the Convention, later.

This provision was also naturally object of discussion at the G.A. Third Committee. (1356th meeting 1965, para.45) "By arguing that individual petitions were to grant the right of redress to individuals only if other available local remedies had been exhausted."

The U.N. International Convention on the Elimination of All Forms of Racial Discrimination was adopted by G.A. resolution 2106 A (XX), of 21 December 1965, and opened for signature on 7 March 1966. After all these discussions, the Convention entered into force, in accordance with its Article 19, on 4 January 1969[26].

The Committee provided fir by the Convention – the Comittee on the Elimination of Racial Discrimination (CERD) – is in charge, inter alia, of considering States' reports on measures to give effect to the Convention provisions[27], and of receiving and considering communications from individuals within the jurisdiction of State Parties which have

[26] I.e., on the thirtieth day after the date of the deposit with the U.N. Secretary-General of the 27th instrument of ratification or accession. On the urging by the General Assembly, since 1967, of States to become parties to the Convention, cf. G.A. res. 2332 (XXII), 2647 (XXV), 2648 (XXV), 2783 (XXVI), 2921 (XXVII).

[27] Article 9 - On the Covention's reporting system, see, e.g., K. Das, Measures of Implementation of the International Convention on the Elimination of All Forms of Racial Discrimination with Special Reference to the Provisins Concerning Reports from State Parties to the Convention, Revue des droits de l'homme / Human Rights Journal 1971, p. 213-262

recognized the Comittee's competence to this effect (Article 14) . This clause on individual application is therefore optional.

2.3 THE SCOPE OF ARTICLE 35-II OF THE CONVENTION

2.3.1 Particular Remedy`s Structure: National or International

In application of the rule, the question could be arisen whether a particular remedy is domestic or international. If the remedy is domestic, it will normally need to be exhausted before an application is lodged with the court. If the remedy is international, the application may be rejected under Article 35-II (b) of the Covention. The relevant part of as follows:

> *The Court shall not deal with any application submitted under Article 34 that is anonymous or 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.*

As the abovementioned article above, it is for the Court to determine whether a particular body is domestic or international. This determination also includes the character of the remedy which having regard to all relevant factors including the legal character, its founding instrument, its competence and its place in an existing legal system.

2.3.2 The Court`s Appreciation for Determination: Jelicic v. Bosnia-Herzegovina Decision

The applicant, Ms Ruza Jelicic, was a citizen of Bosnia and Herzegovina who was born in 1953 and lives in Bosnia and Herzegovina.[28] From 1965 individuals were allowed to open foreign-currency savings accounts in the former Socialist Federal Republic of Yugoslavia ('the SFRY'). A small number of individuals, including the applicant in this case, have obtained court judgments ordering the release of their "old" foreign-currency savings. While some periods are covered by a statutory moratorium, those judgments have not been enforced for different reasons.

[28] Decision No: 41183/02, ECtHR 2005- XII, p.26 Accession Date: 18.11.2010

The application was based on the applicant's deposition on a certain amount of German marks in two foreign-currency savings accounts at a Bank in SFRY. The applicant attempted to withdraw her savings on several occasions to no interest. The bank explained to her that her money had been re-deposited, prior to the dissolution of the SFRY, therefore she couldn't receive her money back.

At judicial process, the applicant filed several cases at SFRY courts. At the same time, the applicant filed an application with the Human Rights Ombudsman. The Ombudsman referred the application to the Human Rights Chamber (The Chamber). Indeed, these two institutions were set up by the Agreement on Human Rights[29] in order to assist, namely to secure to all persons within their jurisdiction the highest level of internationally recognised human rights at Bosnia and Herzegovina and its entities in practicing their obligations under the Dayton Agreement.

The principle of exhaustion of domestic remedies was raised by the Government as the proceedings before the former Human Rights Chamber were 'international' within the meaning of Article 35 - II (b) of the Convention. Therefore, the Government argued that no relevant new information having been submitted by the applicant. Hence, the Government invited the Court to declare this application inadmissible because of this ground**.**

On the other hand, the applicant submitted that the Chamber having been competent to hear cases only against Bosnia and Herzegovina and its entities. Hence, within the meaning of Article 35 -II -b of the Convention,the Chamber was not an international 'procedure'.

However, the Venice Commission in its written submissions to the Court of 15 June 2005 staed that the 1995 Dayton Agreement was a clearly an international treaty. From this point of view, Venice Commission concluded that the Agreement on Human Rights regardless of having been signed by one State only (Bosnia and Herzegovina) and its entities, was thus also an international treaty.

The Venice Commission continued that, although certain elements which could suggest that the Chamber was an international body, proceedings before the Chamber could not be considered 'international' for the purposes of Article 35 - II (b) of the Convention. On the

[29] Annex 6 to the 1995 Dayton Agreement.

contrary, they should be considered 'domestic' within the meaning of Article 35 -I of the Convention. In the Venice Commission's view, the decisive feature of the Chamber, ruling out its international nature, was that the Chamber exercised its supervision within the national boundaries of Bosnia and Herzegovina only. The legal reasoning of this opinion was based on its mandate did not concern obligations between States. The mandate was only concerning about the obligations undertaken by Bosnia and Herzegovina and its entities.

The International Committee for Human Rights (ICHR) maintained that the Agreement on Human Rights was a unilateral legal text of Bosnia and Herzegovina, rather than an international treaty. Because, as opposed to the 1995 Dayton Agreement itself and several other Annexes thereto, it had not been signed by other States than Bosnia and Herzegovina.

The ICHR concluded that proceedings before the Chamber should be considered 'domestic'for the purposes of Article 35 - I of the Convention.

As noted by the ECtHR, the Convention seems to be reluctant to be a plurality of international proceedings relating to the same cases[30]. Under Article 35 - II (b) of the Convention the Court cannot deal with any application which has already been investigated or is being investigated by an international body.

Therefore, the Court is required to determine whether the Chamber was or was not an 'international' body within the meaning of Article 35 - II (b). In this connection, the Court considered the legal character of the Chamber for its evaluation. The Court considered some spesific factors, to be determinative of the issue: the Chamber's composition, its competence, its place in an existing legal system and its funding.

The Court concluded that, although the Chamber was set up pursuant to an international treaty, the factors in this case was referred an assessment that the applicant's proceedings before the Chamber were not 'international' within the meaning of Article 35 - II b of the Convention. Hence, according to the court, the proceedings before the Chamber should be considered a 'domestic' remedy within the meaning of Article 35 - I of the Convention. The abovementioned reasons the Government's objection of exhaustion of domestic remedies was dismissed.

[30] *Calcerrada Fornieles and Cabeza Mato v. Spain*, no. 17512/90, Commission decision of 6 July 1992, Decisions and Reports (DR) 73, p. 214 and *Cereceda Martin v. Spain*, no. 16358/90, Commission decision of 12 October 1992, DR 73, p. 120

The Government objected the idea that the applicant had failed to exhaust domestic remedies. Indeed, it was not possible either simultaneously or consecutively to pursue a case before both bodies, by submitting her appeal to the Chamber the applicant had exercised her right to appeal to the Constitutional Court of Bosnia and Herzegovina[31]. The applicant maintained that the Chamber was a domestic court. In her opinion, she was thus not obliged to give preference to the Constitutional Court over the Chamber.

Despite its partly international composition, the Constitutional Court considered that it had been devised as a domestic court and not as some international tribunal. In addition, the jurisdiction of the Constitutional Court was limited to the territory of Bosnia and Herzegovina like the jurisdiction of the Chamber.

On the other hand, the Venice Commission concluded that proceedings before the Constitutional Court could not be considered 'international' within the meaning of Article 35 - II (b) of the Convention. They should instead be considered 'domestic' for the purposes of Article 35 - I of the Convention. Therefore, the Venice Commission concluded that this case should be brought to the ECtHR.

In this case, ECtHR reiterated that an applicant is required to make normal use of domestic remedies which are effective, sufficient and accessible. It is also recalled that, a person is entitled to choose a remedy which addresses his or her essential grievance in the event of there being a number of remedies which an individual can pursue [32]**.** In other words, when a remedy has been exercised, exercising of another remedy which has basicly the same objective is not required[33].

In the present case, the applicant pursued an appeal before the Chamber. ECtHR has decided that the appeal was a 'domestic' remedy within the meaning of Article 35 - I of the Convention. The parties did not contest its effectiveness and indeed there is nothing to indicate that it was an ineffective remedy for the applicant. That the Chamber's decision in

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[31] For further information, see the Constitutional Court's decision no. U 7/98 of 26 February 1999 and the Chamber's decision no. CH/00/4441 of 6 June 2000.

[32] see *Croke v. Ireland* (dec.), no. 33267/96, 15 June 1999

[33] see *Moreira Barbosa v. Portugal* (dec.), no. 65681/01, ECtHR 2004-V

the instant case has not been enforced does not render that remedy ineffective: the evidence is that the Chamber's decisions were, in general, enforced and, indeed, that is consistent with the figures provided by the Government in this connection**.**

From the Court's perspective, the principle is briefed as (Airey v. Ireland, 1979 para.23)

> Even assuming that an appeal to the Constitutional Court could be considered to be an effective domestic remedy in the present case within the meaning of Article 35 - 1 of the Convention, for the reasons outlined in detail above[34], the applicant was entitled to choose between two effective domestic remedies and her application cannot be rejected because of that choice.

The applicant disagreed with the Government. She submitted that a failure to enforce a judgment could never be justified given that courts, took into consideration all relevant circumstances when taking their decisions. Lastly, she maintained that the financial difficulties of Bosnia and Herzegovina were not as serious as the Government defended. Indeed, she accused the Bosnia and Herzegovina Government for the weak public-sector management.

Therefore, ECtHR concluded that the present application raises questions of law which are adequate serious for its determination to depend on an examination of the merits. Thus, the objections raised by the Government were dismissed. For these reasons, the Court unanimously declared the application admissible, without investigating the merits of the case**.**

2.4 THE RULE'S PRACTICE IN INTER-STATE CASES UNDER ARTICLE 33 OF THE CONVENTION:

Most applications before the ECtHR are individual applications that are brought by private persons. On the other hand, there is also called an inter-State application which a State may also lodge an application against another State Party to the Convention. There have been few of these to date but, where they have occurred, they have concerned allegations of serious violations of human rights.

According to Rules of Court, Rule 46 which determines the 'Contents of an inter-State application' including the abovementioned requirements: (Rules Of Court July 2006 – para 33-37.)

[34] see also the Constitutional Court's decision no. AP 288/03 of 17 December 2004

Any Contracting Party or Parties intending to bring a case before the Court under Article 33 of the Convention shall file with the Registry an application setting out
(a) the name of the Contracting Party against which the application is made;
(b) a statement of the facts;
(c) a statement of the alleged violation(s) of the Convention and the relevant arguments;
(d) a statement on compliance with the admissibility criteria (exhaustion of domestic
remedies and the six-month rule) laid down in Article 35 § 1 of the Convention;
(e) the object of the application and a general indication of any claims for just satisfaction made under Article 41 of the Convention on behalf of the alleged injured party or
parties; and
(f) the name and address of the person(s) appointed as Agent;
and accompanied by
(g) copies of any relevant documents and in particular the decisions, whether judicial or not, relating to the object of the application.

The exercise of the rule is therefore have the significance also for the inter-state cases. The following cases will be evaluated from this point of view.

2.4.1 The Application of State Regarding the Allegation of the Convention:

Ireland v. The United Kingdom

This judgment is the first judgment given by the ECtHR[35]. The Case was regarding the numerous persons in Northern Ireland that were arrested and taken into custody. The persons arrested for the aiming of determining if they should be interned to be member of IRA terrorist organization. For total, about 3,276 persons were processed by the police at various holding centres from August 1971 until June 1972. The applicants made the allegations of ill-treatment made by Government in relation including arrests and interrogations.

In this judgment, the Commission and the Court evaluated the exhaustion of domestic remedies as the cases can be brought to the Court only if they have previously been before the European Commission[36] . This article referred to the former Article 26 and the third paragraph

[35] European Court of Human Rights (ECtHR), Case of Ireland v. the United Kingdom. Judgement of 18 January 1978 (N° 91). HUDOC - Human Rights Documentation. Accession Date: 20.11.2010

[36] From 1954 to the entry into force of Protocol 11 of the European Convention on Human Rights, individuals did not have direct access to the ECtHR; they had to apply to the Commission first . If the commission found the case to be well-founded, then the individuals would launch a case in the Court on the individual's behalf. Protocol 11 which came into force in 1998 abolished the Commission, enlarged the Court, and allowed individuals to take cases directly to the European Court of Human Rights.

of the former Article 27-3 of the Convention.[37] As it as known, the Commission court only accept a case for substantive consideration if only 'all domestic remedies have been exhausted'. That means that, if all the remedies afforded by the local law or administrative machinery of the defendant State have been tried, it should have proved the remedies are unavailing or ineffective. Indeed, there is no difficulty in applying this rule where the complaint involved is being made by or on behalf of the individual person or persons who are affected by the alleged infractions of the Convention. But the matter is more complex where what is complained of is the existence of a practice in the defendant State contrary to the Convention.

In the present case the Commission found, and the Court has endorsed that finding, that the normal domestic remedies rule does not apply to the 'existence of a practice'. This was crucial to the admissibility of the case because exhaustion of the legal or administrative remedies were not available to them in Northern Ireland or elsewhere in the United Kingdom. Hence, the Commission would, under Article 27 -3 of the Convention, have been obliged to reject it as inadmissible. Although, the non-exhaustion of the domestic remedies that might have been available to the affected persons acting individually, it was only on the basis of a complaint about a practice contrary to the Convention that the Commission and Court could pronounce upon the substance of the allegations involved.

The concept of practice is of particular importance for the operation of the rule of exhaustion of domestic remedies. This rule, as embodied in Article 26 of the Convention at that time, was applying to State applications under Article 24. The same practice was in the same way as it does to 'individual' applications Article 25 , when the applicant State does no more than denounce a violation or violations allegedly suffered by 'individuals' whose place, as it were, is seized by a State.

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[37] The former Articles 26 and 27 are changed into Articles 35-I and 35-II of the Convention. The text of the Convention had been amended according to the provisions of Protocol No. 3 (ETS No. 45), which entered into force on 21 September 1970, of Protocol No. 5 (ETS No. 55), which entered into force on 20 December 1971 and of Protocol No. 8 (ETS No. 118), which entered into force on 1 January 1990, and comprised also the text of Protocol No. 2 (ETS No. 44) which, in accordance with Article 5, paragraph 3 thereof, had been an integral part of the Convention since its entry into force on 21 September 1970. All provisions which had been amended or added by these Protocols are replaced by Protocol No. 11 (ETS No. 155), as from the date of its entry into force on 1 November 1998. As from that date, Protocol No. 9 (ETS No. 140), which entered into force on 1 October 1994, is repealed and Protocol No. 10 (ETS No. 146) has lost its purpose.

On the other hand and in principle, the rule does not apply where the applicant State complains of a practice as such, with the aim of preventing its continuation or recurrence. Hence, the Court agreed with the opinion which the Commission, expressed on the subject in its decision of 1 October 1972 on the admissibility of the Irish Government's original application following its earlier case-law. Furthermore, the Court noted that that decision was not contested by the respondent Government.[38]

From this case's perspective, under the scheme of the European Convention, cases can come to the Court only if they have previously been before the European Commission. These legal grounds were Article 26 and Article 27 -3 of the Convention at this time. The Commission can only accept a case for substantive consideration if, or rather, after, 'all domestic remedies have been exhausted' . That means, according to the court, if all the remedies afforded by the local law or administrative machinery of the defendant State have been tried. However, it should have proved these remedies are unavailing or ineffective.

On the contrary, according to the separate opinion of Judge O'Donoghue; in the present case the Commission found, and the Court has endorsed that finding, that the normal domestic remedies rule does not apply to the 'existence of a practice'. Judge O'Donoghue further mentioned in his seperate opinion that (Ireland v. The United Kingdom 1978, Para. 47)

> *The rationale of any finding upholding the non-applicability of the domestic remedies rule where the complaint is about the existence of a practice, can only be based on the assumption that, normally, domestic forums, whether judicial or administrative, can only deal with concrete claims preferred by individuals on their own behalf, and cannot conduct roving enquiries into the existence of practices, for which special machinery would have to be set up such as (in the United Kingdom) a Royal or Parliamentary Commission, Departmental Committee of Enquiry, or other ad hoc body, examples of which in the present case are afforded by the setting up of the Diplock Commission and the Gardiner, Compton and Parker Committees (see Judgment paragraphs 58, 74, 99 and 100). But of course such bodies are not part of the ordinary domestic forms of recourse available to the individual and whose jurisdiction he can himself invoke: the initiatives and decisions necessary for their creation must be governmental or parliamentary.*

[38] Ireland v. The United Kingdom Op. Cit. Para. 39

In conclusion, the application of state regarding the allegation of the Convention also refers to the exhaustion of domestic rule with the 'interpretation of the remedies' national or international structure.

2.4.2 Broad Consideration of the Rule: *Cyprus v. Turkey*

In its judgment on the Interstate Application of Cyprus v. Turkey, dated 10 May 2001, the Court determined that Turkey violated the European Convention for the Protection of Human Rights with in the articles of 2, 3 and 5 which covers the right to life, liberty and security and the prohibition of inhumane or degrading treatment or punishment. The Court pointed out the continuing failure of the Turkish authorities to conduct any investigation of the fate of the Greek Cypriots who went missing under circumstances endangering their lives and disappeared in Turkish custody.

As to the requirement to exhaust domestic remedies issue; the applicant, Cyprus Government stated before the Court affirmed that the relevant applicable law in northern Cyprus reminded that the Republic of Cyprus and that it was inappropriate to consider other laws. However, if the Court were minded to consider such laws, this should not lead to approval of the Commission's findings and reasoning in relation to Articles 6, 13 and former Article 26 of the Convention. They submitted that, contrary to the Commission's view, it was not a necessary corollary of the Turkish Republic of Northern Cyprus (TRNC) being considered a subordinate local administration of the respondent State that the remedies available before the TRNC had to be regarded as 'domestic remedies' of the respondent State for the purposes of former Article 26 of the Convention. The applicant Government pleaded in this connection that even the respondent State did not consider TRNC remedies to be remedies provided by Turkey as a Contracting Party. Moreover, the Court emphasized that the local administration was subordinated to and controlled by the respondent State not through the principle of legality and democratic rule but through military control and occupation. Hence, TRNC courts could not be considered to be 'established by law' within the meaning of Article 6 of the Convention. The applicant Government claimed that it would be wrong in such circumstances to expect aggrieved individuals to have recourse to remedies for the purposes of the former Article 26 exhaustion requirement when these remedies did not fulfil the standards of either Article 6 or, it must follow, Article 13 of the Convention.

The Commission, for its part, recalled that, with the exception of the respondent State, the TRNC claim to independent statehood was rejected and condemned by the international community. However, it further observed that the fact that the TRNC regime *de facto* existed and exercised *de facto* authority under the overall control of Turkey was not without consequences for the question of whether the remedies This status was also claimed by the respondent State that the remedies were available within the TRNC system required to be exhausted by aggrieved individuals as a precondition to the admissibility of their complaints under the Convention. The Commission noted in this respect, and with reference to the above-mentioned Advisory Opinion of the International Court of Justice in the Namibia case that even if the legitimacy of a State was not recognised by the international community, (International Court of Justice Reports 1971 p. 74)

> *International law recognises the legitimacy of certain legal arrangements and transactions in such a situation, ... the effects of which can be ignored only to the detriment of the inhabitants of the territory* .

On the understanding that the remedies relied on by the respondent State were intended to benefit the entire population of northern Cyprus, and to the extent that such remedies could be considered effective, account must in principle be taken of them for the purposes of former Article 26 of the Convention.

The Commission concluded that, for the purposes of former Article 26 of the Convention, remedies available in northern Cyprus were to be regarded as 'domestic remedies' of the respondent State and that the question of their effectiveness had to be considered in the specific circumstances where it arose.

The Court noted that the Commission avoided making general statements on the validity of the acts of the TRNC authorities from the standpoint of international law. Therefore, the Court confined its considerations to the Convention-specific issue of the application of the exhaustion requirement contained in former Article 26 of the Convention in the context of the 'constitutional' and 'legal' system established within the TRNC.

It is in the very interest of the inhabitants of the TRNC, including Greek Cypriots, to be able to seek the protection of such organs. If the TRNC authorities had not established them, this

could rightly be considered to run counter to the Convention. Accordingly, the inhabitants of the territory may be required to exhaust these remedies, unless their inexistence or ineffectiveness can be proved on a case-by-case basis.

The Court, like the Commission, examined in respect of each of the violations alleged by the applicant Government whether the persons concerned could have availed themselves of effective remedies to secure redress. The court also referred in particular to whether the existence of any remedies is sufficiently certain not only in theory but in practice and whether there are any special circumstances which absolve the persons concerned by the instant application from the obligation to exhaust the remedies. The Court recalled in this latter respect that the exhaustion rule is inapplicable where an administrative practice, if a repetition of acts incompatible with the Convention and official tolerance by the State authorities, has been shown to exist and is of such a nature as to make proceedings futile or ineffective.[39]

Moreover, the Court added that there has been a breach of Article 13 of the Convention: it cannot be asserted, on the one hand, that there has been a violation of that Article because a State has not provided a remedy while asserting, on the other hand, that any such remedy, if provided, would be null and void.

The Court concluded that, for the purposes of former Article 26 (current the Article 35- I) of the Convention, remedies available in the TRNC may be regarded as 'domestic remedies' of the respondent State. Hence, the question of their effectiveness is to be considered in the specific circumstances where it arises.

In the area of the exhaustion of domestic remedies, the court also mentioned that there is a distribution of the burden of proof. In the context of the instant case, it is incumbent on the respondent 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 and being accessible. The remedies should be also scanned for the capability of providing redress in respect of the aggrieved individuals' complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied it falls to the applicant Government to establish that the remedy advanced by the respondent Government was in fact exhausted. It is also burden for

[39] See the detailed explanation of the Akdivar and Others v. Turkey judgment of 16 September 1996, at the Section II-2-c-bb below.

the Government that it was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving the persons concerned from the requirement of exhausting that remedy. One such reason may be constituted by the national authorities remaining totally passive in the face of serious allegations of misconduct or infliction of harm by State agents, for example where they have failed to undertake investigations or offer assistance. In such circumstances it can be said that the burden of proof shifts once again, so that it becomes incumbent on the respondent Government to prove what the authorities have done in response to the scale and seriousness of the complained matters.[40]

When it comes to the merits of the applicant Government's complaints and interpretation of the Article 8 of the Convention[41], The Commission observed that the issue of the persons concerned by the impugned measures could have been expected to use local remedies to seek redress for their grievances did not have to be examined. In the Commission's opinion, the refusal of the TRNC authorities to allow the displaced persons to return to their homes reflected an acknowledged official policy and this s tatus was also subject to an administrative practice. In these circumstances the Court concluded that, there was no Convention requirement to exhaust domestic remedies.

Not only Article 8 but also the determination of Article 1 of Protocol No. 1[42] and Article 13 of the Convention, The Court concluded that no issue arose in respect of the exhaustion requirement because of the fact that the physical exclusion of Greek-Cypriot persons from the territory of northern Cyprus. The Court concluded that the enforcement as a matter of TRNC policy or practice. The exhaustion requirement does not accordingly apply in these circumstances. Like the Commission, the Court also considered that there is no requirement

[40] Op.cit. para. 68

[41] Article 8 of the Convention as follows: 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[42] Article 1 of Protocol No. 1 regulates as follows: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

to examine whether any available domestic remedies have been exhausted in relation to these complaints.

In this judgment, the Court evaluated an extensive consideration of the rule and indicated that, where the complaint concerns legislation as such, rather than a concrete, individual situation, the rule does not apply.

2.4.3. Inappicability of the Rule: *Denmark v. Turkey*

Mr. Kemal Koc, a Danish citizen, was arrested and detained by police during a visit to Turkey, and was subjected to interrogation techniques involving torture and other forms of ill-treatment. Denmark requested the European Court of Human Rights[43] to examine Mr. Koc's treatment, as well as whether the interrogation techniques applied to Mr. Koc are applied in Turkey as a widespread practice. Denmark referred in its request to reports produced by, *inter alia*: the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment; the U.N. Committee on Torture; the U.N. Committee on Human Rights; Amnesty International; and Human Rights Watch.

In the joint declaration by the parties and a separate declaration by the Government of Turkey which the Court received, Turkey agreed *ex gratia* [44] to pay Denmark 450,000 Danish kroner, which included related legal expenses for friendly settlement. Denmark for its part appreciated (Denmark v. Turkey 1997, para. 19) "the acknowledgment and regret expressed by Turkey, concerning occasional and individual cases of torture and ill-treatment in Turkey.." and welcomed the steps taken by Turkey to combat such treatment since the filing of the application in 1997.

In its separate declaration, Turkey regretted (Denmark v. Turkey 1997, para. 32) "the occurrence of occasional and individual cases of torture and ill-treatment despite the resolute action of the Government and existing legislation as well as administrative regulations." Turkey affirmed that both the Turkish Penal Code and the 1998 Regulation on Apprehension, Custody and Interrogation had been amended for preventing torture and ill-treatment in

[43] Application No. 34382/97 (April 5, 2000), Friendly Settlement.
[44] It's a diplomatic mean in state to state contentious cases or international disputes to present a diplomatic gesture in order to submit the friendly approach of one state to another.

accordance with international conventions. These coventions were including: the Convention for the Protection of Torture and Inhuman or Degrading Treatment or Punishment; and the European Convention for the Prevention of Torture.

Regarding the assessment of the rule for this judgment, Mr Koc's lawyer lodged an appeal against the judgment with the Court of Cassation of Turkey. It appears that the case was still pending when the friendly settlment occured. However the Court determined that, the rule does not apply where the applicant State complains of a practice when the aim of preventing its continuation or recurrence was the main objective for the exercise of the rule. Therefore, Mr. Koc didn't have to exhaust domestic remedies within Turkey and could apply directly to the Court which his application concluded on his behalf with friendly settlement.

2.5 THE DOMESTIC REMEDIES THAT SUBJECT TO EXHAUSTION IN TURKISH LEGAL SYSTEM

It will be appropriate to provide some information on the formation of the judiciary and applicable legislation in explaining the current Turkish Legal System. By explaining this, the exhaustion of domestic remedies rule would be more coherent from the Turkish Law side.

Since legal reforms instituted in 1926, Turkey's judicial system has been based on the Swiss Civil Code, the Italian Penal Code, and the Swiss Code of Civil Procedure.

Turkey has 134 High Criminal Courts Centres and in 575 districts totally 708 courthouses, 425 Penitentiary and Detention Houses, 25 Forensic Medicine Units, all in all, 7751 Courts, Public Prosecutor Services and Enforcement Offices. In civil judiciary there are 5951 judges and 3739 public prosecutors and 818 administrative judges in administrative courts.[45]

Judicial power is exercised by independent courts on behalf of the Turkish Nation according to Article 9 of the Constitution. Articles 138-160 of the constitution regulates the basic principles of the independence of courts and security of judges and public prosecutors are arranged and cited separately under the heading of 'Judicial Power' of the Constitution. According to articles 147, 148 of Turkish Code of Criminal Procedure all offences are prosecuted in the name of the People, by public prosecutors who are virtually representatives of the executive branch of Government within judiciary.

[45] http://www.uyap.gov.tr/english/genelbilgiler/judical.pdf Accession Date: 20.11.2010

According to Article 138 of the Constitution, no organ authority, office or individual may give orders or instructions to courts or judges relating to the exercise of judicial power, or send them circulars, make recommendations or suggestions. Moreover, no questions can be asked, debates held, or statements made in the Legislative Assembly relating to the exercise of judicial power concerning a case under trial. Legislative and executive organs and the administration have to comply with court decisions; these organs and the administration shall neither alter them in any respect nor delay their execution.

Article 139 of the Constitution states that judges and public prosecutors shall not be dismissed, or retired before the age described by the Constitution; nor shall they be deprived of their salaries, allowances or other rights relating to their status, even as a result of the abolition of court or post'. As the reading of this article, the security of their terms and other rights of judges and public prosecutors are protected by the constitution.

The Supreme Council of Judges and Public Prosecutors deals with the admission of judges and public prosecutors of courts of justice and administrative courts into the profession, appointments, transfers to other posts, the delegation of temporary powers, Promotion to the first category, the allocation of posts; decisions concerning those whose continuation in the profession is found to be unsuitable; the imposition of disciplinary penalties and removal from office. The Supreme Council of Judges and Public Prosecutors is headed by the Minister of Justice [46]. The constitutional amendments – which came into force on 13 September 2010- increased the number of full members of the High Council of Judges and Prosecutors from seven to twentytwo. In addition to representatives of the Court of Cassation and the Council of State, the new members include representatives of first instance judges, the Justice Academy, law faculties and lawyers. This new membership aims the foundation for making the High Council representative of the judiciary as a whole.

In the Turkish legal system, civil, administrative and military justice is regulated separately.

[46] As the amendments to the Constitution which were adopted by parliament in May and approved in a referendum on 12 September 2010 with a majority of 58% of the votes and high voter turnout (73%), the Supreme Council of Judges and Public Prosecutors and the Constitutional Court's compositions are amended. The former Article 159 regarding The Supreme Council of Judges and Public Prosecutors was followed as: *"...The Undersecretary to the Minister of Justice is an ex-officio member of the Council. Five members of the Council are appointed by the President of the Republic from a list of candidates, 3 of whom nominated by the Plenary Assembly of the High Court of Appeals and 2 by the Plenary Assembly of the Council of State. The substitutes to these regular members are appointed through the aforementioned method..."*

2.5.1 Civilian Justice

The judicial courts form the largest part of the system; they handle most civil and criminal cases involving ordinary citizens. The two supreme courts within the judicial system are the Court of Appeals and the Constitutional Court.

The law relating to the organization of the courts determines the competence and jurisdiction of the different categories of courts. For the civilian justice, there are three types of first instance courts that are organised in Turkish Judicial System. These are:

i) Civil Courts of the Peace: This is the lowest civil court in Turkey with a single judge. There is at least one in every district. Its jurisdiction covers all kinds of claims where the amount does not exceed 7.080.00 Turkish Liras for the time being; claims of support, requests or minors for permission to marry or to shorten the waiting period of marriage, eviction cases for rentals by lease and all cases assigned to the court by the Code of Civil Procedure and other laws.

ii) Civil Courts of First Instance: This is the essential and basic court in Turkey. Its jurisdiction covers all civil cases other than those assigned to the civil Courts of the Peace. There is one in every city and district, and sometimes divided into several branches according to the need and necessity.

iii) Commercial Courts: The Commercial Courts are the specialized branches of all Civil Courts of First Instance, having jurisdiction over all kinds of commercial transactions, acts and affairs relating to any trading firm, factory, or commercially operated establishment. The Commercial Courts consist of three judges, one presiding judge, and two members.

For the criminal cases, there are also three types of first instance courts that are organised in Turkish Judicial System. These are:

i) Penal Courts of the Peace: This is the lowest penal court with a bench of one judge. There is one in every district, but it is sometimes divided into several branches according to the need and population.

ii) Penal Courts of First Instance: Among the penal courts, this Court with a single judge handles the essential local criminal work. Its jurisdiction covers all penal cases excluded from the jurisdiction of the Penal Court of the Peace and the Central Criminal Court. There is one in every city and in every district, sometimes divided into several branches according to the need and population.

iii) Central Criminal Courts: This court consists of a presiding judge and two members with a public prosecutor. Offenses and crimes involving a penalty of over five years of imprisonment, or capital punishment are under the jurisdiction of this Court of which there is one in every city. But it is sometimes divided into several branches according to the need and population.

In addition to the ordinary courts, there are courts in Turkey which handle labor disputes; land registrations and traffic disputes. There are also juvenile courts in Turkey which is regulated by the Criminal Code.

Having adopted the new Code of Criminal Procedure (Law No 5271), which came into force on 1 June 2005 established new standards for the fair trial which Turkey faces thousands of cases before the ECtHR.

In this regard;

- Public Prosecutors are obliged to bring a criminal action if there is satisfactory (reasonable) doubt about the commission of the crime based on evidence gathered (Articles 170-172)
- Once a decision of a non-prosecution is taken, that file will not be reopened unless new evidence against the suspect is found (Article 172/2).
- A non-prosecution decision is open to judicial review by the president of the nearest heavy penal court on complaint of victim of the crime (Article 173).
- Unmeritorious proceedings before the courts will be prevented by Article 174 which gives the court the competence to return unfounded indictments. [47]

[47] For detailed evaluation see "The Functioning of the Judicial System in the Republic of Turkey" Report of an Advisory Visit 13 June – 22 June 2005 by Kjell Björnberg and Ross Cranston European Commission, 2005, Brussels.

a) The Court of Appeals

The Court of Appeals (also known as the Court of Cassation) is the court of last instance for review of decisions and verdicts of lower-level judicial courts, both civil and criminal. Its members are elected by secret ballot by senior judges and public prosecutors. Below the Court of Appeals are the ordinary civil and criminal courts. At the lowest level of the judicial system are justices of the peace, who have jurisdiction over minor civil complaints and offenses. Single-judge criminal courts have jurisdiction over misdemeanors and petty crimes, with penalties ranging from small fines to brief prison sentences. Every organized municipality (a community having a minimum population of 2,000) has at least one single-judge court, with the actual number of courts varying according to the total population. Three-judge courts of first instance have jurisdiction over major civil suits and serious crimes. Either of the parties in civil cases and defendants convicted in criminal cases can request that the Court of Appeals review the lower-court decision. The Turkish courts have no jury system; judges render decisions after establishing the facts in each case based on evidence presented by lawyers and prosecutors.

On the other hand, it should also noted the military court system in Turkish Judicial System in brief. The military court system exercises jurisdiction over all military personnel. The military court system consists of military and security courts of first instance, a Supreme Military Administrative Court, and the Military Court of Appeals, which reviews decisions and verdicts of the military courts. The decisions of the Military Court of Appeals are final.

b) Constitutional Court

The Constitutional Court reviews the constitutionality of laws and decrees at the request of the president or of one-fifth of the members of the National Assembly. Its decisions on the constitutionality of legislation and government decrees are final. Challenges to the constitutionality of a law must be made within sixty days of its promulgation. Decisions of the Constitutional Court require the votes of an absolute majority of all its members, with the exception of decisions to annul a constitutional amendment, which require a two-thirds majority.

Since the adoption of the amendments to the Constitution,which came into force on 13 September 2010, the Constitutional Court will be made up of seventeen members. Ten will be

nominated by the President amongst the candidates nominated by the Court of Cassation, the Council of State, the Military Supreme Administrative Court, the Military Court of Cassation and the High Education Board, and four will be elected directly by the President from among senior administrators, lawyers and rapporteur judges of the Constitutional Court. The Parliament elects three members of the Constitutional Court from amongst the candidates proposed by the Court of Auditors and the Bar Associations. There are three voting rounds in Parliament. In the third voting round the candidates are elected by simple majority. No alternate members are envisaged. The involvement of the Turkish parliament in the election of Constitutional Court judges brings Turkish practice closer to that of EU Member States. However, two of the judges are still military judges. As constitutional jurisprudence in a democratic system is a civilian matter, the presence of military judges is questionable. In addition, the amended Constitution provides that judges should be at least forty-five years of age when elected for a nonrenewable term of twelve years. This implies that military judges might return to the military justice system when their term in the Constitutional Court expires, which could raise questions about their impartiality as Constitutional Court judges.[48]

Among other innovations in the Constitutional amendmendts, which came into force on 13 September 2010 are the introduction of a provision for individual access to constitutional court (constitutional complaint) and the establishment of an Ombudsman**.**

aa) Constitutional Complaint

The amendments of the Constitution initiated "Constitutional Complaint" by adding a new paragraph to Article 148 of the Constitution on the competences of the Constitutional Court. The porpose of constitutional complaint is to provide constitutional review over acts performed by a public power. Constitutional Complaint is practiced in some countries in the EU, such as Austria, Belgium, Germany, Hungary, Poland, Spain and Switzerland. Hence this amendment constitutional justice is expanded by the scope of including in it all public acts, other than laws and by-laws. Because of this reason, the introduction of constitutional complaint was opposed by the Council of State and the Court of Appeals. These courts` top

[48] The former Article 148 regarding the Constitutional Court was followed as: *"The eleven members of the Constitutional Court are appointed by the president from among candidates nominated by lower courts and the High Council of Judges and Public Prosecutors."*

judges argued, this kind of procedure would put the Constitutional Court above all other high courts.[49]

However, the number of rulings of the *ECtHR* represents that Turkey has violated the ECHR continued to increase. During the reporting period the court delivered a total of 553 judgements finding that Turkey had violated the Convention. The number of new applications to the ECtHR went up for the fourth consecutive year. Since October 2009, a total of 5,728 new applications were made to the ECtHR. The majority of them concern the right to a fair trial and protection of property rights. As of September 2010, 16,093 cases were pending before the ECtHR regarding Turkey. The amendment to the Constitution introducing the right to submit individual applications to the Constitutional Court is an important step to reduce the number of applications to the ECtHR.[50]

At the same time, the legal reasoning behind this provision was in parallel with the paragraph below. The legal reasoning of the constitutional compaint also referred the huge number of applications against Turkey and by putting the new provision into constitution; the main purpose is decreasing the individuals' complaints and fixing Turkey's ECtHR negative record.[51]

Furthermore, there was another reference to constitutional complaint in Recommendation Rec(2004)6 of the Committee of Ministers to member states on the improvement of domestic remedies by Council Of Europe[52]

According to the Recommendation[53] most domestic remedies for violations of the ECtHR have been set up with a targeted scope of application. If properly construed and implemented, experience shows that such systems of 'specific remedies' can be very efficient and limit both

[49] The Presidency Council Opinion of the Court of Appeals On the Constitutional Amendments Regarding the Judiciary Section 12.04.2010 - p. 5
http://www.yargitay.gov.tr/dmdocuments/AnayasaDegisikligi.PDF Accession Date: 20.11.2010

[50] Turkey 2010 Progress Report , p. 17, Published by Republic of Turkey – Primeministry – Secretariat General For EU Affairs, Ankara 2010

[51] For detailed legal reasoning articles of the amendments in the Constitution see. http://www.the.org.tr/2010/03/30/akpnin-meclise-sundugu-anayasa-degisikligi-teklifi/ Accession Date: 20.11.2010

[52]Recommendation Rec(2004)6 adopted by the Committee of Ministers on 12 May 2004, at its 114th Session.

[53] For the whole text: https://wcd.coe.int/ViewDoc.jsp?id=743317
Accession Date: 20.11.2010

the number of complaints to the ECtHR. By following this path, the number of cases requiring a time-consuming examination would be subject to decrease as well. On the other hand, some states have also introduced a general remedy, such as constitutional complaint, which can be exercised to deal with complaints that cannot be dealt with through the specific remedies available.[54] In some member states, this general remedy may also be exercised in parallel with or even before other legal remedies are exhausted. Some member states would add another pre-requsitie that the measure being challenged would grossly infringe constitutional rights. When that kind of refusal is dealing with the appeal would have serious and irreparable consequences for the applicant. It should be pointed out that states seems to have fewer cases before the Court which have such a general remedy is properly construed.

The abovesaid recommendation also pointed out that, it is for member states by taking into consideration their constitutional traditions and particular circumstances, to decide which system is most efficient to ensure the necessary protection of Convention rights. Furthermore, experience when the recommendation was published represents that there are still shortcomings in many member states concerning the availability and effectiveness of domestic remedies. Because of these reasons,there is an increasing workload for the Court for the last years.

This being said, constitutional complaint was also referred in draft constitutional amendments with regard to the Constitutional court of Turkey which was prepared by the Constitutional Court of Turkey and transmitted to the Turkish Grand National Assembly in 2004. Draft bill's legal reasoning of article 146 was following: (Venice Commission Report 2004, pp.23-28)

> *The day-by-day increasing workload of the Constitutional Court and in addition to this the introduction of individual application "constitutional complaint" into the existing system make it necessary to re-organize the structure of the Constitutional Court. Especially, after 2001 there was a considerable increase in the number of both the annulment and contention of unconstitutionality files brought before the Constitutional Court. The number of the annulment and contention of unconstitutionality files was yearly around 70-80 till to 2001, since then the number of those files were increased 5 times higher than the average. Besides; the Grand Court files[55], files on dissolution of political parties, financial supervision of political parties, the objections against losses of Parliamentary membership and*

[54] Op cit. Recommendaiton para. 24

[55] The capacity of the Constitutional Court while trying high officials such as the President, the Prime Minister, ministers, members of the High Courts etc. on account of crimes relating to their functions.

parliamentary immunity also fall within the competence of the Constitutional Court. Taking into consideration of such a workload, it became hardly possible for the Court to maintain an efficient and productive functioning with one chamber composed of 11 members and to produce new case-law which will add new dimensions to fundamental rights and freedoms.

In this regard, constitutional complaint was assessed by Venice Commission Opinion in 2004 according to this proposal.[56] According to this, Constitutional Complaint is an important feature of constitutional justice and individual access to constitutional courts has two main ways. The first way is, *actio popularis*, or popular complaint when as a rule a legal provision can be challenged by individuals. The other way is constitutional complaint. A constitutional complaint is an individual remedy against the violation of constitutional rights. Usually it is directed against individual administrative or judicial acts.

Venice Commission Opinion also referred the other state examples such as the institutions of *Verfassungsbeschwerde* in Germany and *recurso de amparó* in Spain which are the most well-known examples of constitutional complaint. Other European countries have also established some procedures for the adjudication of constitutional complaint (among others Russia, Czech Republic, Slovakia, Slovenia, Macedonia, Croatia, Portugal, Hungary, etc.). In this regard, recent tendencies in constitutional adjudication can rightly be described as a path from the review of the constitutionality of laws to the review of the application of laws. This means a shift from the review of legislature to the review of the judiciary. A similar line of development can be outlined in opening up the possibility of individual access to constitutional courts. So far, the constitutional review system in Turkey had not allowed for individual complaints before the September 2010 referenda. The Draft Proposal which came into force in 13th September 2010, introduced a new regulation of individual application procedure (Constitutional complaint, paragraph 6 of article 148):

All individuals, claiming that one of their constitutional rights and freedoms in the scope of the European Convention on Human Rights has been violated by public power, are entitled to apply to the Constitutional

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[56] See the detail: Venice Commission opinion on the draft constitutional amendments with regard to the constitutional court of Turkey, Adopted by the Venice Commission at its 59th Plenary Session-Venice, 18-19 June 2004 - On the basis of comments by Mr Péter PACZOLAY (Substitute Member, Hungary)

Court on condition that they have exhausted legal remedies. The principles and procedures on admissibility of applications of constitutional complaints, on establishment and competence of pre-review commissions and on judgments of the Chambers shall be regulated by law.

There are two tendencies in the European countries regarding the regulation of constitutional complaint. Those countries that do not have in their constitutional system individual complaint, are seriously considering to introduce it (for example Italy). The Turkish amendment would fit into this line. The efforts of those countries that have in their system constitutional complaint tend to reduce the scope of its application, or at least to reduce the 'flood of cases'[57]. It should be examined the proposed regulation in comparison with the regulations of other European countries.[58]

Constitutional complaint provisions occur in very different forms in the jurisdiction of European Constitutional Courts. Nevertheless, its main features can be defined as follows:

a constitutional complaint is

- a legal remedy

- has a subsidiary character which is exercised after exhausting other legal remedies

- it can be exercised on account of violation of fundemantal rights and freedoms

- it can be againsy against individual administrative or judicial decisions.

The function of constitutional complaint is in principle the effective protection of fundamental rights by giving remedy to the individuals in case of violation of their rights by administrative or judicial decisions;this is the main justification for introducing constitutional complaint in Turkey, too. But besides this justification in principle, there is a more practical consideration in this case. According the expectations of the drafters The introduction of constitutional complaint will result in a considerable decrease in the number of files against Turkey brought before the European Court of Human Rights as formulated in the reasoning. Thus the aim of

[57] This is especially the case in Germany where a special commission was set up to deal with the reform.,

[58] PaczolayP.*ConsitutionalComplaint* http://www.anayasa.gov.tr/files/pdf/anayasa_yargisi/anyarg21/venedik.pdf Accession Date: 25.10.2010

the new regulation is to provide domestic remedy for the violation of fundamental rights. In general, constitutional complaint is used to protect the rights defined in the national constitution. In the case of Turkey the constitutional rights and freedoms regulated in the European Convention on Human Rights are protected by this institution. According to the Venice Commission this results in a limited scope of protection compared to the rights specified in the Constitution of Turkey. The Constitution of Turkey differentiates among three groups of rights: individual rights, social and economic rights, and political rights. According to the reasoning of the draft the implementation scope of constitutional complaint should be limited to 'classical rights'. In order to avoid misunderstandings in defining the scope of affected rights, it was decided that the protection to be granted by the constitutional complaint should comprise the rights and freedoms in the European Convention of Human Rights.

As explained by the drafters of the Turkish Constitutional amendment the very broad regulation of fundamental rights made it necessary to restrict the rights that can serve as basis for constitutional complaint to those regulated by the ECtHR. Therefore, constitutional complaint can be filed not against the violation of the rights comprised in the Convention.

There are also other criticisms that the procedure is not regulated in details by the constitutional text. According to these critics the proposed amendment refers only to the application conditions; it mentions the violation by public power as the ground for launching a constitutional complaint and the subsidiary character of the procedure, requiring the exhaustion of legal remedies.

Other admissibility conditions, such as the establishment of pre-review commissions, the scope and content of the judgments are referred to. Probably, they will be regulated by a separate law. According to the constitution's new article no.148, the law regarding the application procedure for the constitutional compalint will be put in force in two years. It would be said that, further problems have to be settled by the law on the Constitutional Court. On the other hand, it seems obvious that regulating such details in the Constitution exceeds the scope of a constitution. However, the evaluation of the newly implemented institution in its entirety requires the knowledge of the detailed rules.

The other types of judicial reviews should be separated from the real constitutional complaint. According to the reasoning, (tbmm/sirasayi/donem23/yil01/ss497 2010, para. 26-34)

> *The constitutional complaint is a way of claiming rights different than the examination of the unconstitutionality of laws or of the illegality of administrative acts, or the cassation and review of judgments. It is a domestic implementation similar to that of individual application brought before the European Court of Human Rights.*

First, it should be asked the main object of this type of review. Although constitutional complaint is not the review of review of judicial decisions nor an administrative act, it is supposed that the constitutional complaint will be directed against administrative and judicial decisions that violate individual rights regulated in the European Convention, similarly to the procedure before the EctHR.

Secondly, the effects of the procedure should be defined. In this regard, several questions remain as to the effects of a successful complaint: will the ECtHR decide on the merits or annul the decision of the ordinary court and send the case back to this court for a new decision? What are the effects of the decision on other cases, e.g. persons who had been imprisoned and sentenced on the basis of a law which has been found to violate the Constitution? This questions still do not have the exact answer, and shold be clarified by the new law which will define the constitutional complaint procedure, that will put in force in two years from the date of amendments' publishment at Official Gazette.[59]

In this context, the law which will define constitutional complaint and be implemented in two years should clarify some contradictions. For giving an example, some constitutional courts having implemented the review of constitutional complaints faced the problem of interference with ordinary courts. There would arise some tensions when the possibility to review the decisions of ordinary courts. And also, there would be conflict between the ordinary courts and the Constitutional Court. The determination of Constitutional Court as a 'Super-Supreme Court' should be avoided.Hence, its relation to 'ordinary' high courts e.g. Court of Cassation, has to be determined in clear terms.

Finally, Venice Commission Opinion also referred two provisions of the amendments that are not related to the two main topics. In this regard the last Paragraph of Article 152 of the Constitution before the amendment in 2010, could be amended providing that no allegation of unconstitutionality can be made with regard to the same legal provision until five years elapse after publication in the Official Gazette of the decision of the Constitutional Court dismissing

[59] http://rega.basbakanlik.gov.tr/eskiler/2010/05/20100513-1.htm , Accession Date: 25.11.2010

the application on its merits. According to the commission ,this cancellation clause was a peculiar provision of the Constitution of Turkey. After the Court has rejected a claim of unconstitutionality on its merits a new petition cannot be filed against the same provision within a certain time limit. This time restriction under the present rules is ten years. The rather long period has been criticised, therefore the the commission adviced that the amendment would reduce it to five years. Secondly, the commission also referred a new provision could be added introducing the 'stay of execution'. Such ruling could temporarily suspend the implementation of a legal provision under review by the Constitutional Court. The commission assessed that this institution aimed at to prevent situations and damages that can not be recovered after implementation of the related provisions. Indeed, there has been never "stay of implementation" provision in the Turkish Constitution system. This implemetation was used in some decisions *de facto* in Turkish constitutuonal justice

At the end of this opinion it was referred the scope of constitutional complaint as limited to protect fundamental rights regulated in the European Convention of Human Rights is unusual. In the conclusion of this opinion, it was advised to widen the scope of protected rights to those regulated in the constitutionshould be considered, at least at a later stage for the political rights and the classical freedoms. As a result, the constitutional complaint was accepted without including the extended scope as mentioned above opinion.

On the other hand, constitutional complaint was also referred in some constitutional projects which were prepared by the TOBB(Union of Turkish Chambers of Commerce and Industry) in 2000, and the TBB (Union of Turkish Bar Associations) in 2001, and 2007 all advised granting such competence to the Constitutional Court. The scope of constitutional complaint competence was limited to the rights recognised by the Convention in all these proposals.

The same critisism is also shared by some authors. According to Kanadoglu[60] this accepted provision will block the Constitutional Court to introduce new rights and freedoms that are unwritten in the constitution. By giving an example from German Constitutional Court, the individual who gave the petition to the Court led to create a new right called ' the integrity of information technology and its privacy'. This right, indeed, was not written in German

[60]Kanadoglu ,K. Anayasa'nin Degistirilemez Maddelerine Aykiri Anayasa Degisiklikleri, Guncel Hukuk Aylik Hukuk Dergisi, Mayis 2010 p.24

Constitution and therefore created by a constitutional complaint and became a case-law as well.[61]

On the other hand, it can be argued that the paragraph added to Article 90 of the Constitution in 2004 grants the same purpose essentially, as constitutional complaint provision in the September 2010 amendment. According to Article 90-V of the Constitution:

> *In cases of conflict between laws and international agreements on fundemantal rights and liberties that were duly put into effect, on the same question, provision, all courts must apply this norm in all cases before them.*

Hence, serving the Constitutional Court constitutional complaint provision, would not bring a new situation, but would only add to the workload of the Constitutional Court . This novel situation delay applications to the EctHR for sure, since such applications are possible only after the exhaustion of all domestic remedies. However, since there is a strong belief for constitutional complaint in some parts of Turkish public opinion, the amendment will probably satisfy the public's expectations in short term.[62]

It would be useful to scan some EU states constitutional complaint provision and the rulings before ECtHR that subject to exhaust domestic remedies - in the eyes of Venice Commission as below:

Venice Commission had observed some rulings before EctHR, which examined the effectiveness of four remedies which existed in German law against the undue length of civil proceedings. In respect of the constitutional complaint, the Court observed that the right to expeditious proceedings was guaranteed by the German Basic Law and that a violation of that right could be alleged before the Federal Constitutional Court. Where that court found that proceedings had taken an excessive time, it declared their length unconstitutional and requested the court concerned to expedite or conclude them. However, the Federal Court was not empowered to set deadlines for the lower court or to order other measures to speed up the proceedings in issue; nor was it able to award compensation. Under these circumstances, the Court found that a constitutional complaint had not been proved to be capable of affording redress for the excessive length of pending civil proceedings. As regards an appeal to a higher

[61] Ibid. P. 24
[62] Yazıcı, S.: Turkey's Constitutional Amendments: Between the status quo and Limited Democratic Reforms, Insight Turkey, Vol. 12 No.2 2010, p.6

authority, the Court noted that the Government had not advanced any relevant reasons to warrant the conclusion that that remedy, provided for in the German Judiciary Act, would have been capable of expediting the proceedings in question. As regards a special complaint alleging inaction, this remedy had no statutory basis in German law. Although a considerable number of courts of appeal had accepted it in principle, the admissibility criteria for it were variable and depended on the circumstances of the case. The Federal Court of Justice, for its part, had yet to give a ruling on the admissibility of such aremedy. Having regard to the uncertainty about the admissibility criteria for this remedy and to its practical effect on the proceedings in question, the Court considered that no particular relevance should be attached to the fact that the Court of Appeal had not ruled out such a remedy in principle. Moreover, the Federal Constitutional Court had not declared the applicant's constitutional complaints inadmissible for failure to exhaust domestic remedies. Accordingly, the Court concluded that a special complaint alleging inaction could not be regarded as an effective remedy in the applicant's case. [63]

The Venice Commission also referred the Slovenian legal system sets out a number of remedies that may be used in respect of delays in court proceedings. In *Lukenda v. Slovenia* the Court had to determine whether an administrative action,[64] a claim for damages in civil proceedings, a request for supervision and a constitutional appeal, taken individually or in aggregate, could be considered effective legal remedies within the meaning of Article 35 of the Convention. According to the Court, the Government failed to show clearly that the judgments and decisions of the administrative courts could speed up unduly protracted proceedings or award reparation for violations that had already occurred. The absence of specific measures (for example to decide a case or take specific procedural measures within a fixed time-limit) to expedite the procedures was also emphasized by the Court in *Belinger v. Slovenia*.[65]

[63] Venice Commission – Study on the effectiveness of national remedies in respect of excessive length of proceedings Study no. 316/ 2004 - Strasbourg, 22 December 2006 p.25

[64] However, the court dealt with the length of proceedings before administrative organs in Sirc v. Slovenia case (decision of 16.05.2002) .The Court found that in the event of lack of reply from the administrative authority, the applicant can and should seek a decision directly from the Administrative Court. before administrative authorities. This remedy was hence found effective for proceedings.

[65] ECtHR, *Belinger v. Slovenia*, Decision, 2.10.2001, para.19, Accession Date: 02.12.2010

As for the claim for tort the Court considered that it could only provide redress when the main proceedings had already been ended. Even in these cases the Government failed to show that compensation for non-pecuniary damage could be awarded.

The Court held that the request for supervision was a measure in the framework of judicial administration and not within the judicial system as regards the remedy under section 72 of the Judicature Act. The remedy did not provide for a guarantee to accelerate procedures, or provide redress in the form of compensation. At the same time the measure did not have any legally binding effect on the court concerned. Moreover no right of appeal was provided by the legislation.

Finally, in respect of the constitutional complaint the Court stressed that a constitutional appeal, in principle, could only be lodged after domestic remedies[66] had been exhausted. In the *Belinger* case the Court found that the efficiency of the constitutional appeal was already problematic in view of the probable length of the combined proceedings. The opinion was confirmed in *Lukenda v. Slovenia*[67]

bb) Ombudsman

Another amendment, which came into force on 13 September 2010, in the Constitution is the Ombudsman provision. In general, the aim is for establishing the Ombudsman, is providing a link between the State administrations and citizens.

Indeed, the political and societal debate on constitutional reform had been continuing since 2009 in Turkey. According to EU-Turkey Progress Report 2009 there had been a growing awareness in the country that Turkey's Constitution which was drafted in the aftermath of the

[66] Refers an administrative action or a claim for tort.

[67] The Venice Commission stresses however that members States of the Council of Europe have obligations in respect of the length of proceedings stemming not only from Article 6 – I but also from Article 13 of the European Convention on Human Rights. As the European Court of Human Rights put it in ECtHR, Lukenda v. Slovenia, Judgment, 6.10.2005, para. 94 and 95 stated: "*by becoming a High Contracting Party to the European Convention on Human Rights the respondent State assumed the obligation to secure to everyone within its jurisdiction the rights and freedoms defined in Section 1 of the Convention. In fact, the Stateshave a general obligation to solve the problems that have led to the Court finding a violation of the Convention. This should therefore be the primary goal of the respondent State. Should violations of the Convention rights still occur, the respondent States must provide mechanisms within their respective legal systems for the effective redress of violations of the Convention rights."*

1980 military coup. Therefore, the Europan Commission stated in ts report that the constitution needs to be amended in order to allow further democratisation in a number of areas and give stronger guarantees of fundamental freedoms in line with EU standards. These include, for example, rules on political parties, institution of an Ombudsman, use of languages other than Turkish and enhancement of trade union rights.[68]

On the other hand, the Ombudsman Law adopted in 2006 was annulled by the Constitutional Court in December 2008. The legal reasoning behind this decision was that the Constitution does not allow such an institution to be affiliated to parliament. Establishment of the Ombudsman therefore required a new amendment to the Turkish Constitution.

However; the approach regarding the Ombudsman institution, as being an effective domestic remedy that subject to exhaust is debatable. In general, the procedures that involve the vindication of a right must be tried. Normally, but not necessarily, these will judicial procedures.

Compaints to ombudsman or other organs which supervise the administration are also, in principle, inadequate[69] as are administrative remedies which betray a lack of independence such as internal police complaints procedures.[70] However, in light of the growing powers awarded to national ombudsman and a strong custom of national authorities abiding by the decisions of ombudsman in future case law, it may be that the Court will have occasion to allow exception to thia general principle.

2.5.2 Administrative Justice

According to Article 125 of the Constitution, recourse to judicial review is open against all actions and acts of the administration. The administrative court system consists of the The administrative justice system consists of Council of State, Administrative Courts, Audit Courts, and Regional Administrative Courts. The administrative decisions and judgments of courts can be appealed to the Council of State. The Council of State also reviews decisions of the lower administrative courts, considers original administrative disputes, and, if requested,

[68]Turkey 2009 Progress Report p. 17
http://ec.europa.eu/enlargement/pdf/key_documents/2009/tr_rapport_2009_en.pdf
Accession Date: 23.11.2010
[69] Leander v Sweden A 116 1987 paras 80 – 4, Essex Human Rights Rewiev 433,1987
[70] Khan v UK 2000-V; 31, para. 24, Essex Human Rights Rewiev 1016, 2000

gives its opinion on draft legislation submitted by the prime minister and the Council of Ministers.

The judicial remedies for the administrative justice is consist of action for annulment and full remedy action. the principal remedy is the action for annulment which is sued to illegal acts for the parties who claimed their interests are violated.[71] An individual may also request a particular action to be reversed.

A full remedy action permits a demand for affirmative action by the administration by claimants who demands that their rights have been violated. This kind of action is exercised for to recover damages,over payments or for other pecuniary claims.

Before administrative courts, the actions can be initiated within 60 days, unless the law provides otherwise for a spesific class of case. In administrative justice it is also designated the appeal which is the against the decisions of the subordinate administrative courts to the Council of State within 30 days. Remedy of correction is only possible for these decisions within 15 days.

An administrative act is not automatically suspended by a submitting of a judicial action, except in Taxation Court`s decisions. However, the court may suspend the execution of such administrative act, upon request.

The written submission system is the principle at administrative courts proceedings. Exceptionally, oral hearings are possible if the court grants this kind of request upon the parties' request.

3.THE EXHAUSTION RULE`S FLEXIBILITY AND NON-EXAGGERATED CHARACTER

3.1 The Exhaustion Rule's Flexibility and Non-exaggerated Character

3.1.2 Ringeisen v. Austria

This case has its origin in an application against the Republic ofAustria submitted to the Comission in 1965 by an Austrian national,Mr. Michael Ringeisen. This was the first case in which the Court awarded monetary compensation. After the Court held that Austria had

[71] For detailed study, see "Introduction to Turkish Law", Tugrul Ansay, Don Wallace, Ankara, 1966.

violated Article 5-3 of the Convention due to excessive length of proceedings of Reingeisen's detention on demand, the Court awarded 20.000 German Marks for the damage he suffered because of the detention that he faced.[72]

When it is considered as to the substance of the submission of inadmissibility on the ground of non-exhaustion of domestic remedies, there are unique approaches for this principle at the Court's determination.

The Austrian Government figured out that all domestic remedies had not been exhausted at the time when the application was made and that, therefore, the Court by the European Commission of Human Rights (hereinafter 'the Commission') Commission was not competent to deal with the complaint. From this perspective, the representatives of the Government and the delegates of the Commission made lengthy submissions on the interpretation to be given to the first part of Article 26 which regulates exhaustion principle. The representatives of the Government stated that all domestic remedies had to be exhausted before the Commission .

From the Austrian Government's view, the second condition laid down by this Article 26 confirmed, moreover, the necessity to keep to a strict interpretation of the words 'the Commission may only deal ...'. Indeed, it isclear that 'the period of six months from the date on which the final decision was taken' put a limit to the time within which an application may validly be lodged and not to that within which the Commission may deal with the cases submitted to it. On the contrary , the Commission's delegates, maintained that in the English text, which is equally authentic with the French text, the phrase 'the Commission may only deal with' showed that non-exhaustion of domestic remedies principle did not prevent the lodging of the application, but only its examination by the Commission.

According to the Court, even without referring to the English text, Article 26 cannot oblige the applicant to do more than exercise all the remedies available to him. Because, before petitioning the international organs, he was bound to await the final domestic decision given at the close of a procedure. Thus, the length of which they did not depend exclusively on

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[72] Shelton D, Remedies in International Human Rights Law, Oxford University Press, 2001, p.192

him.[73] According to applicant`s submission, that situation could be hard for him. As this interpretation was the only one in conformity with the *ratio legis* of the rule of exhaustion of domestic remedies. From the court's view, the aim of the rule is the protection of the States against any decision holding them responsible for a violation of an international obligation without the competent national authorities having been seized of the complaint in order to remedy the situation where necessary. This concern implied that no international verdict should be given before the final decision of the national courts. However, but such a final decision must be prior in point of time to the lodging of the international application. For applicant`s submission, according to the Court, it was wrong to argue against this wide interpretation by relying on the six-months rule laid down in the last part of Article 26. The sole purpose of this provision was to fix clearly a time-limit beyond which matters finally decided by the domestic courts cannot again be brought to the Commission.

However, The Court did not regard as of these extreme positions that it could adopt either. The Court observed that, it would certainly be going too far and contrary to the logic of the rule of exhaustion of domestic remedies to allow that a person may properly lodge an application with the Commission before exercising any domestic remedies. However, the court also referred that, international law cannot be applied with the same regard for matters of form as is sometimes necessary in the application of national law. Hence, Article 26 of the Convention refers expressly to the generally recognised rules of international law. The Commission was therefore quite right in declaring in various circumstances that there was a need for a certain flexibility in the application of the rule.[74]

In the Court`s determination, it could not find any reason why this supplement to the initial application should not relate in particular to the proof that the applicant has complied with the conditions of Article 26, even if he has done so after the submitting the application. The Comission's examination was directed necessarily to the application and the supporting documents considered as a whole, when it decided whether or not a case is inadmissible. Hence, while it was fully upheld that the applicant is, as a rule, in duty to exercise the

[73] Ringeisen v. Austria,Judgment, App. No: 2614/65 ,16 July 1971, para 88, All-European Human Rights Yearbook Vol.1, European Council, Straousburg, 1972

[74] The same flexibility rule was also referred in Lawless v. Ireland Decision App. No. 332/57 which was rendered on 30th August 1957 on the admissibility of application. See the detailed explanation: Yearbook of the Convention, Council of Europe, Strausburg, 1957, Vol. 2, pp. 324-326

different domestic remedies before he applied to the Commission. The Commission must have left open to the Commission to accept the fact that the last stage of such remedies may have been reached shortly after the submitting the application. However, this application should have made before the Commission, which was called upon to pronounce itself on admissibility. The Court further noted that individual applications often come from unemployed people who, in more than nine cases out of ten, address themselves to the Commission without legal assistance. Therefore, a formalistic interpretation of Article 26 would lead to unjust and unfair consequences.

As it is observed the abovementioned proceedings, it is clear that Ringeisen exercised, before he lodged his application with the Commission, every domestic remedy which was available to him; nor is it contested that a final domestic decision was taken.

When it is observed the internal proceedings , it seems that the Constitutional Court delivered its judgment only after the application had been made to the Commission. On the other hand, reference to these facts are enough to show that no legitimate interest of the respondent State. It could have been prejudicial in the present case, through the fact that the application was lodged and registered a short time before the final decision of the Constitutional Court.

The Court therefore rejected as unfounded the submission of inadmissibility grounded which was defined in Article 26 and accepted a flexibility character for the rule. Indeed; the same flexibility and non-exegerated character was also mentioned in Vagrancy case[75] that if the victim after exhausting in vain the domestic remedies before complaining at Strasbourg of a violation of his rights, he was obliged to do so for thesecond time before being able to obtain from the court just satisfaction. The total length of the procedures which were instituted by the convention scarcely be in keeping with the idea of the effective protection of human rights. The Court determined that such a requirement would led to a situation incompatible with the aim and objection of the Convention.

[75] Vagrancy Cases, Article 50, 1972, ECHR, ser A, para 16.

3.1.2 Lehtinen v. Finland

A Finnish national, Mr Kenneth Lehtinen lodged an application against the Republic of Finland lodged with the the Commission under former Article 25 of the the Convention.[76]

The Court noted that the case has been delimited by the decision of Finnish courts on admissibility. According to the court, this situation is related to the alleged violation of Articles 6 - 1 and 13 of the Convention on the grounds of the excessive length of the proceedings. The court also observed that the lack of effective domestic remedies against the delay in those proceedings was also occured for the applicant. The court limited its examination to these complaints because of the lack of effective domestic remedies against the delay in those proceedings.

The applicant emphasised that he could not be blamed for fully using domestic procedures and remedies before the national courts. On the other hand, Mr. Lehtinen also contested the Government's argument that the delay was in his interest. To this end, The Court concluded that there has been a violation of Article 13 of the Convention for the applicant who had no domestic remedy in respect of the violation of his right. And also it is concluded that he couldn`t have a hearing within a reasonable time as guaranteed by Article 6 – 1, which covers fair trial- of the Convention.

As it is seen from this judgment, The Court considered that the question of exhaustion of domestic remedies is so closely linked to the merits of the case, spesifically with the applicants' complaint under Article 13 of the Convention. Therefore, the Court concluded that it is inappropriate to determine it at the present stage of the proceedings and confirmed the flexibility and non-exegerated character of the exhaustion rule. Moreover, the Court

[76] For the whole text, see Case Of Lehtinen v. Finland (No. 2) Application no. 41585/98, judgment, 8 June 2006, Press Releases of the European Court of Human Rights, 20 May-19 June 2006.

confirmed that the exhaustion of domestic remedies rule could be ignored when the case has close affinity with Article 13 which covers right to have an effective remedy.[77]

3.2 Conformity with the Domestic Rules

3.2.1 Burden of Observation of Applicants via Applicable Rules and Procedures of Domestic Law

a)Ben Salah, Adraqui and Dhaime v. Spain

The applicants Mrs Habida Bent Abderrahmane Ben Salah Adraqui, Mr Jamal Dhaime, Mr Tarik Dhaime, Mr Bedrine Dhaime and Mr Hakime Dhaime were Moroccan nationals who were born and live in France.

For the present case, the application lodged in the alternative by the applicants was dismissed, because the law did not provide for such a remedy where a judgment had become final. The Court noted that the applicants several times requested copies of documents from the file. After their requests were granted on 8 November 1994, they lodged another appeal against the defendant's acquittal. However, the Spanish Constitutional Court dismissed the applicants appeal as being out of time. The legal reasoning was that the time allowed for lodging that appeal could only have begun to run on the date on which the applicants had been aware of the existence of the judgment. In other words, the date on which notice of the judgment had been given, the applicants did not receive notice as it had only been published in the Official Gazette of the province of Málaga. As it is understood from applicants petition, the applicants lived in France so they would not have learned this publication in time as this time there was no internet technology. In this judgment, the defendant had been acquitted, the notice that had been given of that judgment,the judgment had become final and the proceedings had been terminated. The Court further noted that the Constitutional Court held that the applicants should have applied to it direct. This application should be an *amparo* appeal[78] lodged within

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[77] The Court appreciated a similar judgment in very recent case called Mackay & BBC Scotland v. The United Kingdom, Application no. 10734/05, 7 December 2010. Press Releases of the European Court of Human Rights, 12 November-18 December 2010.

[78] "Amparo Appeal" term is originally coming from "Recurso de amparo" as means the appeal for protection of human rights. It is a remedy for the protection of constitutional rights, found in certain jurisdictions. In some

twenty days of the *terminus a quo*[79], to have the final judgment in the impugned proceedings declared void. The Court further observed that the investigating judge had already pointed out in his decisions that the relavant judgments were final and thus, the judgment was not subject to appeal. The Court considered that it cannot in any event be left to applicants to determine the *terminus a quo* for themselves as they pleased. Because, this situation would give them a very wide scope for extending indefinitely for their right to submitting constitutional proceedings and to apply for their own convenience.

In its decision emphasised that by the time the applicants had finally applied to it to protect their constitutional rights in which was assisted by a lawyer. the Constitutional Court highlighted that their right of appeal had already lapsed. It added that they should have lodged an *amparo* appeal within the statutory period of twenty days from the date on which they had been informed of the existence. According to the Constitutional Court, they should have also lodged the application with the content of the judgment which had brought the proceedings in the ordinary courts to an end. The Constitutional Court came into the conclusion as; submitting an application to set aside once a judgment had already become final did not extend the time allowed by the Constitutional Court Act for lodging an *amparo* appeal. This situation indeed also did not cause time to cease to run for that purpose. It also reached that in the same judgment, it could not be left to the appellants to determine the *terminus a quo* for themselves as they pleased.

As the case brought before ECtHR, the Court reiterated that under Article 35 of the Convention, it may only deal with applications after all domestic remedies have been exhausted. It noted that the Convention institutions have consistently taken the view that that condition is not satisfied if a remedy has been declared inadmissible for failure to comply with a formal requirement. ECtHR futher noted that the *amparo appeal* lodged with the Constitutional Court was dismissed as being out of time since the applicants had let the assigned time expire by having recourse to inappropriate remedies.

As a result, ECtHR concluded that, the applicants had not exhausted the domestic remedies available to them in Spanish law, as required by Article 35 - 1 of the Convention. ECtHR also

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legal systems “Recurso de amparo” is an effective and inexpensive instrument for the protection of individual rights. Generally it is granted and solved by a supreme or a constitutional court. It protects the citizen and his basic garantees and also protects the constitution itself.

[79] This term refers the earliest plausible date at which a fact could have occurred or an application could have been lodged in this case.

referred that the application must be rejected, pursuant to Article 35 - 4 of the Convention, which covers the court shall reject any application which it considered inadmissible under this article. As it is determined in this article, ECtHR may do so at any stage of proceedings. Therefore, ECtHR dismissed the applicants' petitions even at the merits stage where it concluded that it should have been declared inadmissible, including that of incompatibility with the provisions of the Convention. As it has reached in this judgment, ECtHR reiterated that it can evaluate Article 35-3 together with Article 34.

b) MPP Golub v. Ukraine

'MPP Golub', was a Ukrainian company that was registered in Ternopil, Ukraine which was the name of the applicant. The company's owner was a private entrepreneur Mr Ivan Mikheyevich Golub who was born in 1947 and residing in Ternopil.[80]

Between the years of 1996-2001 the applicant was a respondent and plaintiff in unsuccessful litigation before different courts about the building which his company was constructing. However, it did not provide a full account of the litigation, and submitted that the only proceedings of which it complained were the proceedings initiated by it Regional Commercial Court. The applicant also requested *restitutio in integrum*[81] for his situation. Proceedings with regard to the merits of the applicant's complaints and the proceedings related to the admission of the applicant's appeal in cassation were both refused according to the relevant domestic law of Ukraine.

After these remedies were exhausted in Ukraine courts, the application was brought before ECtHR. Before this, the application should be assessed regarding the remedies in Ukrainian law. First, The Court noted that a fourth level of jurisdiction was introduced into Ukrainian commercial procedure. According to the relevant provisions of the Code of Commercial Procedure, a cassation appeal to the Higher Commercial Court, similar to the one found in other member States of the Council of Europe. In Ukrainian law a second cassation appeal to the Supreme Court was also available to the parties in a commercial case.

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[80] For the whole text, see MPP Golub v. Ukraine Case, Application no. 6778/05 , Decision, 18 October 2005, Press Releases of the European Court of Human Rights, 20 September-19 November 2005.

[81] The Latin term *Restitutio in Integrum* means restoration to the original position where in a breach of contract case, the injured party may ask the court to restore the parties to the positions they were in before the contract was signed.

The Court also observed that the second cassation appeal is dependent upon whether the case was heard by the Higher Commercial Court. The second cassation appeal to the Supreme Court should have been lodged with the Higher Commercial Court. This appeal shall be transferred to the Supreme Court within ten days from the moment of its receipt by the Higher Commercial Court according to the relevant procedure. On the other hand, the Supreme Court has the power to quash the decision of the Higher Commercial Court and to remitted the case for reconsideration or to terminate the proceedings in the case. The resolution of the Supreme Court given upon the cassation appeal was final and not subject to appeal.

The Court further noted that decisions of the lower court can not be challenged in cassation, but only within the time-limits laid down in the Code of Commercial Procedure. The new cassation procedures did not therefore undermine the principle of legal certainty, one of the fundamental aspects of the rule of law, which requires, *inter alia*, that where a court has given a final decision on a matter, that ruling should not be capable of being called into question[82]

When it comes to the EctHR's assessment, first it should be noted that the applicant's complaints as to the refusal to admit the appeal in cassation lodged by the applicant with the Higher Commercial Court. As to the question of access to court, the EctHR recalled that the procedural guarantees laid down in Article 6 secure to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal; in this way it embodies the 'right to a court', of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect[83] .

The EctHR noted that the applicant lodged a cassation appeal directly with the Higher Commercial Court. However, the applicaiton should have been lodged with the first instance court or the court of appeal. The Higher Commercial Court rejected the applicant's re-lodged appeals in cassation as they were lodged out of time. It further ruled that the applicant's appeal in cassation lodged directly with the Higher Commercial Court did not interrupt this time-limit. The Court considered, therefore the refusal to the cassation appeal was based on the relevant law and discloses no element of arbitrariness.

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[82] The same approached was also recognized *Brumărescu v. Romania* [GC] Case, Application No. 28342/95, ECHR 1999-VII, para 61.

[83] In a similar judgment it also referred a close appreciation from the Court: *Golder v. the United Kingdom*, judgment of 21 February 1975, Series A no. 18, pp. 13-18, para 28-36.

The Court further considered that the regulations concerning the lodging of cassation appeals, serve the purpose of assuring a proper administration of justice. The parties concerned may have reasonably expected those rules to be applied. Moreover, from the materials of the case-file it can be seen that the applicant was aware of this rule, but intentionally failed to abide by it, as it is alleged a lack of impartiality and independence of the court of appeal judges. However, the Court considered that the applicant has failed to provide any evidence to support his allegations of the theft of documents from the case. Moreover, it had not proved that the reasons for lodging its appeal directly with the Higher Commercial Court was adequate.

In the light of these considerations, the Court found that the applicant had not shown that the three rulings of the Higher Commercial Court which were arbitrary or unjustified in the circumstances of his case. An examination of this complaint did not therefore disclose any appearance of a violation of Article 6 - 1 of the Convention. The court followed its decision that this complaint was manifestly ill-founded and must be rejected in accordance with Article 35 - 3 and 4 of the Convention.

The court added that the existence of mere doubts as to the prospects of success of a spesific domestic remedy, which was not obviously futile, was not a valid reason for failing to exhaust it[84]. Accordingly, the Court rejected the applicant's reasons for not availing itself of the aforementioned remedies. It followed that this part of the application must be rejected under Article 35 - 1 and 4 of the Convention.

When it is trying to determination of the exhaustion of domestic remedies rule for this case, the Court reached to the conclusion that, the applicant failed to lodge an appeal in cassation with the Higher Commercial Court and the Supreme Court of Ukraine. Indeed, they sould have lodged their respectively, against the decisions of the first-instance court and the court of appeal in accordance with the requirements of the domestic law. The Court recalled that, according to Article 35 - 1 of the Convention, "it may only deal with a matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law". To this end, the Court reiterated in this connection that this rule only required normal recourse by an applicant to such remedies which are likely to be effective,

[84] The same reasoning was also used in the *Van Oosterwijck v. Belgium* judgment of 6 November 1980, Series A no. 40, p. 18, § 37, and *A.B. v. the Netherlands*, no. 37328/97, 29 January 2002, para.72. This judgment will be evaluated at the later section.

sufficient and available. According to the Court, a remedy must exist with a sufficient degree of certainty to be regarded as effective[85]. The Court considered it is necessary to clarify the issue of exhaustion of domestic remedies in relation to the commercial cases. For these reasons, the Court unanimously declared the application inadmissible.

3.2.2 Necessity of Exhaustion of Procedural Remedies

a) Cardot v. France

This case was originated in an application against the French Republic lodged with the Commission under Article 25 by a national of France called Mr Jean-Claude Cardot, on 12 December 1983.[86]

The determination of exhaustion of domestic remedies principle raised in a different manner in this case. The Government's main submission, which was the same as that made before the Commission, was that Mr Cardot had not exhausted domestic remedies as he had failed to raise in the French courts.

The Delegate of the Commission submitted, that Mr Cardot had satisfied the requirements of Article 26 of the Convention by appealing on points of law on the contrary. Therefore, The Delegate of the Commission concluded that the applicant exhausted the all necessary domestic remedies.

However, The Court did not accept this argument. Admittedly, Article 26 must be applied with some degree of flexibility and without excessive formalism[87]. For the Court's determination, it normally requires also that the complaints intended to be made subsequently at Strasbourg should have been made to those same courts, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law[88].

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[85] The effectiveness of the rule will be examined in the next chapter. Besides, the same approach was accepted in other decisions as referred to *mutatis mutandis* principle. These cases are *Vorobyeva v. Ukraine* (dec.), no. 27517/02, 17 December 2002; *Arkhipov v. Ukraine* (dec.), no. 25660/02, 18 May 2000.

[86]For the whole text Cardot v. France Case, Application no. 68864/01, Decision, 11 March 2004, Press Releases of the European Court of Human Rights, 19 February-24 March 2004.

[87] see, among other authorities, the Guzzardi judgment of 6 November 1980, Series A no. 39, p. 26, para. 72

[88] Practice in international arbitration would appear to reflect a similar approach. As it is referred in previous secrion, an example is to be found in the award of 6 March 1956 in the Ambatielos case. The British

Moreover, that any procedural means which might prevent a breach of the Convention should have been used according to the ECtHR[89].

In conclusion, as the Court's determination, Mr Cardot did not provide the French courts with the opportunity which is in principle intended to be afforded to Contracting States by Article 26, namely the opportunity of preventing or putting right the violations alleged against them. The objection that domestic remedies have not been exhausted is therefore well founded. Hence, EctHR holded by six votes to three that by reason of the failure to exhaust domestic remedies. Therefore, EctHR concluded that it is unable to take cognisance of the merits of the case.

It should also referred to dissenting opinion of Judge Macdonald in this case stating that, this provision must be applied with some degree of flexibility and without excessive formalism[90]. In the instant case, the ground of appeal based on a breach of the rights of the defence, although perhaps drawn in terms lacking in clarity and precision, expressly referred to the 'hearing which had preceded' the judgment of the Grenoble Court of Appeal. In so doing, Mr Cardot provided the Court of Cassation with the opportunity which is in principle intended to be afforded to Contracting States by Article 26 , namely the opportunity of putting right the violations alleged against them[91]. It follows that, in his opinion, the objection that domestic remedies have not been exhausted is unfounded.

On the other hand dissenting opinion of Judge Martens represented that the applicant did provide the French courts to a sufficient degree with the opportunity which the rule of exhaustion of domestic remedies is designed in principle to afford, namely 'the opportunity of preventing or putting right the violations alleged ...' If the applicant's interpretation of Article

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Government argued that legal remedies had not been exhausted, on the ground that the claimant, a Greek shipowner, had not called a witness during proceedings in an English court. The Commission of Arbitration allowed the objection in the following terms: *"The rule [of exhaustion] requires that 'local remedies' shall have been exhausted before an international action can be brought. These 'local remedies' include not only reference to the courts and tribunals, but also the use of the procedural facilities which municipal law makes available to litigants before such courts and tribunals. ...It would be wrong to hold that a party who, by failing to exhaust his opportunities in the Court of first instance, has caused an appeal to become futile should be allowed to rely on this fact in order to rid himself of the rule of exhaustion of local remedies."* Reports of International Arbitral Awards, United Nations,1957, vol. XII, pp. 120 and 122.

[89] See the Barberà, Messegué and Jabardo judgment of 6 December 1988, Series A no. 146, pp. 28-29, para. 58-59.

[90] see, among other authorities, the Guzzardi judgment of 6 November 1980, Series A no. 39, p. 26, para. 72

[91] Ibid, p. 27, para. 72.

6 is assumed to be correct, the Court of Cassation should have rendered *ex officio* because it was evident from the Court of Appeal's judgment that his conviction was based on 'unlawful' evidence. According to the Judge Martens, this situation conflicts with what the European Court held in paragraph 39 of its Van Oosterwijck judgment but, according to his opinion, it was unnecessarily disregarded the protection which a national law that requires its judiciary to apply the Convention *ex officio* intends to afford to those who for present purposes should be assumed to be victims of a violation of that instrument.

b) Michalak v. Poland

The applicant was a Polish national called Mr. Tadeusz Michalak ,who was born in 1930 and was living in Warsaw, Poland. The compaint was regarding the applicant's application under Article 6 - 1 of the Convention about the length of civil proceedings in Polish law. Furthermore, he also complained under Article 13 that he did not have an effective domestic remedy to complain about the excessive length of the proceedings.[92]

The arguments of the parties was based on the Government's plea on non-exhaustion of domestic remedies and the applicant's submissions. From the Government side, it argued that the applicant had failed to exhaust domestic remedies by maintaining that the applicant had not lodged a complaint about the breach of the right to a trial within a reasonable time under the 2004 Act. And also, he had not claimed for compensation under the relevant provisions of the Polish Civil Code (Article 417).[93] Therefore, the Government invited the Court to reject the application as being inadmissible.

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[92] For the whole text, see Michalak v. Poland, Application no. 24549/03, judgment, 1 March 2005, Press Releases of the European Court of Human Rights, 11 February -16 March 2005.

[93] Civil Code provisions in Polish law concerning the State's liability for a tort is put in order of Articles 417 of the Civil Code which provides for the State's liability in tort. While the version applicable until 1 September 2004, Article 417 - 1, which lays down a general rule, was following as: *"1. The State Treasury shall be liable for damage caused by a State official in the course of carrying out the duties entrusted to him."* On the other hand, on 1 September 2004 the Law of 17 June 2004 on amendments to the Civil Code and other statutes called "the 2004 Amendment" entered into force. Article 417 was added following the 2004 Amendment, which was following as *"3. If damage has been caused by failure to give a ruling or decision where there is a statutory duty to give them, reparation for the damage may be sought after it has been established in the relevant proceedings that the failure to give a ruling or decision was contrary to the law, unless otherwise provided for by other specific provisions."* Indeed, under the transitional provision of section 5 of the 2004 Amendment, Article 417 as applicable before 1 September 2004 which could be applied to all events and legal situations that subsisted before that date.

When the case was brought to Supreme Court of Poland, it adopted a resolution on 18 January 2005, in which it ruled that while the 2004 Act produced legal effects as from the date of its date of entry into force which was

The Government took into account that the complaint was accessible to the applicant about the breach of the right to a trial within a reasonable time. Furthermore, he could obtain further redress through a compensatory remedy, namely by bringing a civil action under Article 417 of the Civil Code, pursuant to section 15 of the 2004 Act.

There are many factors in the instant case as the Government justified the departure from the general principle that the exhaustion requirement must be assessed with reference to the date on which the application was lodged with the Court. This clarification would have helped to the Court that which time that remedy had become accessible. They contended that the *ratio legis* of the 2004 Act was to enable the Polish authorities to remedy. On the other hand, a redress at domestic level the violations of the right to a hearing within a reasonable time is aiming to reduce the number of the applications lodged with the ECtHR.

From the applicant side, Mr. Michalak replied that he should not be required to exhaust the remedy introduced by the 2004 Act because of the effectiveness of the new law had not yet been established by the domestic courts. Furthermore, the applicant stressed that, according to the 2004 Act, the ordinary courts were competent to examine the complaints. In his opinion, the Supreme Court or the Constitutional Court would have given better guarantees of independence and impartiality. It was supported by a finding that the complaint was justified would not necessarily result in just satisfaction being awarded. And also, the remedy in question was not effective. In any event, the award could not exceed 10,000 Polish currency called PLN, a much lower sum than normally be awarded by ECtHR. In the applicant's opinion. This sitıation also represents that the early practice of the domestic courts proved their reluctance to award just satisfaction.

When the rule was evaluated by the EctHR assessment, it first referred to general principles of law and needed to explain the purpose of the exhaustion rule. The Court reiterated the main *ratio legis* of the rule contained in Article 35 - 1 of the Convention, is to afford the Contracting States the opportunity of prevyenting or putting right the violations alleged against them, before those allegations are submitted to the Court. Indeed, that rule is based on the assumption, reflected in Article 13 of the Convention – with which it has close affinity –

17 September 2004. Hence, its provisions applied retroactively to all proceedings in which delays had occurred before that date and had not yet been remedied.

that there is an effective remedy available in respect of the alleged breach in the domestic system.[94]

In the same decision. The Court stated that the only remedies which Article 35 of the Convention requires to be exhausted are those that relate to the breaches alleged and at the same time are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness.[95] Furthermore, in the context of Article 13 of the Convention, in the *Kudła* judgment, the Court has held that remedies available to a litigant at the domestic level for raising a complaint about a length of proceedings are "effective" if they prevent the alleged violation or its continuation, or provide adequate redress for any violation that has already occurred.

The Court confirmed in its decision it is true that, according to the 'generally recognised principles of international law', there may be special circumstances which absolve the applicant from the obligation to exhaust the domestic remedies at his side. However, the Court pointed out that the existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust domestic remedies.

The assessment of whether domestic remedies have been exhausted is normally carried out with reference to the date on which the application was lodged with it. However, as the Court has held on many occasions, this rule is subject to exceptions, which may be justified by the particular circumstances of each case. In particular, the Court had previously departed from this general rule in cases against Italy, Croatia and Slovakia concerning remedies against the excessive length of the proceedings.

The application of the general principles to the instant case is to the Court determine whether the Government's objection that domestic remedies have not been exhausted is well-founded in the instant case. In that regard, the Court observed that, pursuant to section 2 of the 2004 Act, a party to the judicial proceedings is entitled to lodge a complaint about a breach of the right to a trial within a reasonable time. Under section 5 of the 2004 Act, such a complaint

[94] The same approach is also accepted in *Kudła v. Poland* Grand Chamber Judgment, no. 30210/96, para. 152, ECHR 2000-XI Reports.

[95] see, among many authorities, *Mifsud v. France* ,Decision, Grand Chamber, no. 57220/00, ECHR 2002-VIII.

must be lodged while the proceedings are still pending before the domestic courts. A party may seek, under section 12, a finding that there was an unreasonable delay and ask for just satisfaction and acceleration of the impugned proceedings. Under the transitional provision of section 18, the remedy under the 2004 Act is available to those complainants who, as the applicant in the present case, lodged an application with the Court in Strasbourg alleging violation of Article 6 of the Convention on account of the unreasonable length of the proceedings.

In this connection, the Court observed that the civil proceedings to which the applicant was a party are pending before the domestic courts and that the Court had not yet adopted a decision concerning the admissibility of the case. Accordingly, the Court found that the applicant is entitled to lodge under the 2004 Act a complaint about the breach of the right to a trial within a reasonable time.

As regards the effectiveness of the remedy, ECtHR noted that, in accordance with section 12, the purpose of the complaint about the unreasonable length of the proceedings is twofold. Firstly, the applicant may have obtained a finding of an infringement of the 'reasonable-time'principle and, where appropriate, may be awarded just satisfaction in the amount not exceeding PLN 10,000. Secondly, he could request the court to instruct the court which examines the merits of the case to take certain measures within a fixed time-limit and thus to accelerate the impugned proceedings according to EctHR's determination. In this connection, the Court took note of the Polish Supreme Court's resolution which strengthened the application of the 2004 Act and provided that its provisions were applicable retroactively to the delays that had occurred before the date of its entry into force and had not yet been remedied .

ECtHR evaluated the applicant's argument that the remedy in question could not be regarded as effective. In particular, he stressed that the amount of just satisfaction which could be awarded to the complainant was limited to PLN 10,000. He also considered that the fact that the ordinary courts were competent to examine the complaints did not give sufficient appearances of independence and impartiality. However, the Court noted that, as explained above, in addition to the just-satisfaction which can be awarded under section 12 of the 2004 Act, Hence, the complainant has a right to lodge a civil claim and thus seek full compensation. In this connection the Court reiterated that the effectiveness of a remedy within the meaning of Articles 13 and 35 - 1 do not depend on the certainty of a favourable outcome

for the applicant. Indeed, the authority referred to in that provision necessarily have no to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective. The fact that in Poland it is for the ordinary courts of law, not for the Supreme or Constitutional Court, to entertain complaints under the 2004 Act cannot itself be considered an element capable of undermining the effectiveness of the remedy pleaded by the Government.

In the light of the abovementioned reasons, ECtHR was not persuaded by the arguments submitted by the applicant. ECtHR concluded that he has failed to adduce any particular circumstances that would indicate that the remedy in question would have no reasonable prospect of success.

Based on this opinion, ECtHR based its conclusions on the assessment of the provisions of the 2004 Act as they stand. ECtHR considered that the complaint about a breach of the right to a trial within a reasonable time is capable of preventing the alleged violation of the right to a hearing within a reasonable time or its continuation. Moreover, this status is also accepted in providing adequate redress for any violation that has already occurred. When it comes to the question whether the applicant should be required to exhaust the above mentioned remedy notwithstanding that the 2004 Act entered into force after he had lodged the present application with the Court, ECtHR acknowledged that, the assessment of whether domestic remedies have been exhausted is normally made with reference to the date of the introduction of the application. ECtHR considered that there are several elements which favour an exception from this rule in the present case. As explained above, under section 5 of the 2004 Act, a complaint about the excessive length of the proceedings should be lodged when the proceedings are still pending. According to EctHR's determination, section 18 of the Polish Civil Law extended the applicability of the remedy to the proceedings that might meanwhile have ended. Actually, that section refers explicitly to the applications already lodged with ECtHR and is therefore designed to bring within the jurisdiction of the national courts, within 6 months after the entry into force of the 2004 Act. Hence, all applications currently pending before the Court that have not yet been declared admissible.

In that decision, ECtHR once again reiterated what it already stated in a number of its previous rulings, namely that the growing frequency with which violations of the right to a hearing within a reasonable time are being found against many Contracting States. This list of the state is including Poland, and the accumulation of such breaches constitute a practice

that is incompatible with the Convention. And also, excessive delays in the administration of justice amount to an important danger to the rule of law. Moreover, ECtHR also recalled that the lack of an effective remedy in respect of the excessive length of the proceedings has forced individuals to apply systematically to ECtHR when their complaints might have been dealt with more appropriately, in the first place, within the national legal system. According to ECtHR in the long term, that situation is likely to affect the operation, at both national and international level, of the system of human-rights protection set up by the Convention.

When the case is scanned under Polish law, it is true that the 2004 Act came into force on 17 September 2004 and that the long-term practice of the domestic courts could not yet be established. However, the wording of the 2004 Act clearly indicated that it is specifically designed to address the issue of excessive length of proceedings before the domestic courts. ECtHR had previously adopted the same position and had examined the effectiveness of remedy before the practice of the domestic courts in similar judgments. In the light of the foregoing, ECtHR considered that the applicant was required by Article 35 - 1 of the Convention to lodge a complaint about a breach of the right to a trial within a reasonable time with the domestic court, under the 2004 Act. Moreover the applicant should have asked for expedition of the proceedings and just-satisfaction.

In conclusion, the Court found no exceptional circumstances capable of exempting him from the obligation to exhaust domestic remedies. Therefore, this complaint was rejected under Article 35 - 1 and 4 of the Convention for non-exhaustion of domestic remedies. As it is seen from this judgment, the applicants must also use any procedural means that may prevent a breach of the Convention. Otherwise, there could be a serious risk for applicants to get rejected via their applications

3.2.3 Non-Requirement of Exhaustion Rule of All Effective Remedies

a) Moreira Barbosa v. Portugal

The applicant, Mr Joaquim Moreira Barbosa was a Portuguese national who was born in 1942 and has lived in Maia in Portugal[96]. The facts of the case and the compaint of the applicant

[96] For the whole text, see Moreira Barbosa v. Portugal Case, 29 April 2004, Application No. 65681/01, Decision, Press Releases of the European Court of Human Rights, 28 March-14 May 2004.

were relying on Article 6 - 1 of the Convention, which the applicant complained of the length of the proceedings. [97]

Regarding the application of the exhaustion of domestic remedies rule, the Government objected that the applicant had failed to exhaust domestic remedies. The Government submitted, firstly, that the State incurred non-contractual liability for an infringement of the right to obtain a decision within a reasonable time and was therefore under an obligation to pay compensation to victims. To that end, the applicant could avail himself of an action to establish non-contractual liability, as provided for in Portugese legislation, which was an accessible, sufficient and effective means of remedying the situation he complained of.

On the contrary, the applicant submitted that none of the remedies referred to by the Government provided effective or sufficient redress in respect of his complaint. The action to establish non-contractual liability provided for in Legislative Decree of Portugese legislation did not have a sufficient degree of legal certainty to be used for the purposes of Article 35 - 1 of the Convention which defines the general concept of exhaustion rule.

For the determination of the rule, the Court observed that Articles 108 and 109 of the Portuguese Code of Criminal Procedure afford defendants the opportunity to apply for an order to expedite the proceedings. It pointed out that such an application has been held to be a remedy that must be used in respect of the length of criminal proceedings. [98] The Court also noted that in the instant case, the applicant made such an application but without success. In this case, for the Court, it should be determined whether he should also have brought an action to establish non-contractual liability on the part of the State. According to the court, such an action has likewise been held to be a remedy that must be used in respect of the length of proceedings.[99]

On the other hand, the Court reiterated that in this connection that applicants must have made normal use of those domestic remedies which are likely to be effective and sufficient. The

[97] Article 6 - 1 of the Convention, which provides, *inter alia*:"*In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing within a reasonable time by [a]... tribunal ...*"

[98] see *Tomé Mota v. Portugal* (dec.), no. 32082/96, ECHR 1999-IX, para 32.

[99] see *Paulino Tomás v. Portugal* (dec.), no. 58698/00, ECHR 2003-VIII, para 16.

Court observed that, when a remedy has been attempted, use of another remedy which has essentially the same objective is not required[100].

The Court considered that it would be unreasonable to argue that the applicant should have brought an action of the kind referred to by the Government Having regard to the circumstances of the case. In the course of the proceedings, he availed himself of a remedy ' an application for an order to expedite the proceedings' which the Court had previously found to be adequate and sufficient[101]. Therefore, the Court dismissed this ground of the Government's objection.

From this decision's perspective, with the Court's determination seem quite correct for the exhaustion of domestic remedies rule. Indeed, the applicant could facilitate the proceedings by using the domestic remedies. However, he abstained from these processes. Hence, The Court gave the right decision for urging the prospective applicants to use effective remedies if these rules can really apply fort he Court's determination.

bb) Akdivar v. Turkey

The case was referred to the Court by the Government of Turkey 'the Government' on 4 December 1995 and by the the Commission on 11 December 1995, within the three-month period laid down by Article 32 para. 1 and Article 47 of the Convention for the Protection of the Convention[102]. It originated in an application (no. 21893/93) against the Turkish Republic lodged with the Commission under Article 25 on 3 May 1993 by eight Turkish nationals, Mr Abdurrahman Akdivar, Mr Ahmet Akdivar, Mr Ali Akdivar, Mr Zulfuikar Cicek, Mr Ahmet Cicek, Mr Abdurrahman Aktas, Mr Mehmet Karabulut and Mr Huseyin Akdivar. The facts

[100] see *Wójcik v. Poland*, no. 26757/95, Commission decision of 7 July 1997, Decisions and Reports 90, p. 24, and *Günaydin v. Turkey* (dec.), no. 27526/95, 25 April 2002.
[101] see *Quiles Gonzalez v. Spain* (dec.), no. 71752/01, 7 October 2003.
[102] The case is numbered 99/1995/605/693. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications. to the Commission. The judgment was taken in 30 August 1996.

Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

were based on the situation in the South-East of Turkey including the destruction of the applicants' houses.

For the detailed study of the domestic remedies, if the alleged person of a crime is an agent of the State, permission to prosecute must be obtained from local administrative councils which is the 'Executive Committee of the Provincial Assembly'. The local council decisions may be appealed to the Supreme Administrative Court 'Danıştay' a refusal to prosecute is subject to an automatic appeal of this kind. The Commission declared the application admissible on 19 October 1994.

The final submissions to the court should be mentioned here to address exhaust to domestic remedies rule. The Government requested the Court to accept the preliminary objection concerning the exhaustion of domestic remedies. In the alternative they submitted that there was no violation of the Convention.

The applicants maintained that the Court should reject the Government's preliminary objections and address the merits of their complaints. The government's preliminary objections were based on the alleged Abuse of process. Prior to the filing of their memorial, the Government requested that a separate hearing be held concerning the preliminary objection under Article 26 and again in their oral pleadings before the Court, they submitted that the present application amounted to an abuse of the right of petition. They claimed that the failure of the applicants to avail themselves of remedies available in South-East Turkey. Furthermore, it was part of the general policy of the PKK to denigrate Turkey and its judicial institutions and to promote the idea of the legitimacy of their terrorist activities. As part of this strategy it was necessary to prove that the Turkish judicial system was ineffective in general and unable to cope with such complaints and to distance the population in South-East Turkey from the institutions of the Republic. Moreover, the applicants' failure to exhaust remedies in this case had thus a political objective.

On the other hand, the applicants denied that the application had been made for the purposes of political propaganda against the Government of Turkey. They had brought their case to obtain redress for the violations of the Convention which they had suffered and with a concern to secure the return of the rule of law to that part of Turkey.

The Commission in its admissibility decision of 19 October 1994 considered that the Government's argument could only be accepted if it was clear that the application was based on untrue facts which, at that stage of the proceeding. In this regard, ECtHR shared the Commission's opinion. It recalls that the Commission in its findings of fact has substantially upheld the applicants' allegations concerning the destruction of their property. Under these circumstances, the Government's plea must be rejected.

Exhaustion of domestic remedies issue was raised in another aspect in this case. The Government submitted that the application should be rejected for failure to exhaust domestic remedies as required by Article 26. They stressed in this context that not only did the applicants fail to exhaust relevant domestic remedies but they did not even make the slightest attempt to do so. It is submitted that no allegation or claim for compensation was ever submitted to the Turkish courts. The judicial authorities were thus deprived of the opportunity of implementing the procedural and substantive provisions regarding compensation which are available under Turkish law. The Government further contended that the applicants could have addressed themselves to the administrative courts and sought compensation for the alleged damage pursuant to Article 125 of the Turkish Constitution. The government pointed out that there will be no limits on the right to challenge acts or decisions of the administration, even in a state of emergency, a state of siege or war. With reference to numerous decided cases, they demonstrated that the administrative courts had granted compensation in many cases involving death, injuries or damage to property arising out of the emergency situation on the basis of the theory of social risk and that in these proceedings it was unnecessary to prove these facts.

Moreover, the burden of proof had been simplified by the courts to the point where it was enough to show the existence of a causal link between what was done and the harm sustained.

The Government also emphasised, again with reference to decided cases, that the applicants could have sought damages under the ordinary civil law. The Code of Obligations provided for a right to damages in cases where servants of the administration committed unlawful acts. In particular, the case-law established that the civil courts are not bound by acquittals of administrative officials obtained before the criminal courts.

Referring to a number of leading judgments of international tribunals in this area, the Government maintained that the exhaustion requirement applied unless the applicant could show that the remedy provided was manifestly ineffective or that there was no remedy at all[103]. According to the Government side, the applicants had failed to provide any evidence that there were insurmountable obstacles to taking proceedings before the Turkish courts. Although the numerous judgments submitted by the Government did not cover the precise complaints made by the applicants, they demonstrated beyond doubt the reality and effectiveness of proceedings before the Turkish courts.

Finally the Government asserted that the applicants had not substantiated in any way their allegations concerning a fear of reprisals for having recourse to the Turkish courts. They and a large number of applicants in other cases pending before the Commission had been able to bring their cases to ECtHR without harassment. If they had been able to consult the lawyers of the Human Rights Association with a view to bringing proceedings in, it must also have been open to them to enforce their rights before the administrative courts.

From the applicants side, the Turkish Government's policy, in their submission, was tolerated, condoned and possibly ordered by the highest authorities in the State and aimed at massive population displacement in the emergency region of South-East Turkey. There was thus an administrative practice which rendered any remedies inadequate and ineffective. Since there were no signs that the Government was willing to take steps to put an end to the practice, victims could have no effective remedy.

In the alternative, the applicants argued that the remedy before the administrative courts in respect of their allegations was ineffective. In the first place the Government had not been able to produce a single case in which the administrative courts had considered a claim such as the applicants', namely that the gendarmes had burned down their homes. In the second place, as a matter of Turkish law, the administrative court is not competent to deal with cases such as that of the applicants which concerns acts of arson and intimidation. Such serious criminal offences fell clearly outside the duties of public officials and were thus beyond the

[103] see, inter alia, the Interhandel case, International Court of Justice Reports (1959), the Finnish Ships Arbitration (1934), Reports of International Arbitral Awards, United Nations, vol. 3; the Ambatielos Claim, ibid., vol. 12

competence of the administrative courts. The question of accountability and compensation in respect of such matters fell within the province of the civil and criminal courts.

The applicants further submitted that in practice there was no civil-law remedy open to them. The Regional Governor was immune from suit in so far as it is claimed that he personally ordered the evacuation of the applicants' village under Article 8 of Decree no. 430 of Turkish law. Furthermore, there was no prospect of success in a civil suit for damages against the State unless there had been a finding by a criminal court that an offence had occurred even if there had been no conviction in respect of it. Such a criminal verdict represents that there had been an investigation followed by a prosecution. However, no investigation had taken place in their case.

The Commission found that the applicants did not have at their disposal adequate remedies to deal effectively with their complaints. The Delegate of the Commission pointed out that, if the remedies were effective, it should have been possible to show examples of court judgments from which it appeared that compensation had been granted or responsible officers had been punished, or at least prosecuted, for deliberate destruction of houses in villages. However, the respondent Government had not been able to furnish such a judgment. Moreover, it was at least doubtful whether an administrative court judgment which would grant compensation but leave open and undecided the question of the responsibility for the destruction. This position could be considered to provide adequate and sufficient redress and whether such a remedy was effective in relation to the specific complaint.

The Delegate submitted that it might, in practice, be impossible for villagers such as the applicants to institute and pursue such proceedings. In the first place, there would be considerable practical difficulties. For example, it was unlikely that a villager whose property had been destroyed would be able to pay for the services of a lawyer himself. Secondly, the success of proceedings based on accusations of this kind depended on an impartial investigation being made by the authorities. In the prevailing circumstances it was highly doubtful whether such an investigation would be made.

When the rule was brought to The Court's assessment, it first referred to the general principles of the rule. The Court recalled that the rule of exhaustion of domestic remedies referred to in Article 26 of the Convention 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 occasion to put subjects right through their own legal system.

From the Court's perspective, under Article 26 normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. (Vernillo v. France 1991, para.66) "The 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." Furthermore, the Court also found that the Article 26 also requires that the complaints intended to be made subsequently at ECtHR should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law. Furthermore, any procedural means that might prevent a breach of the Convention should have been used.[104]

According to ECtHR however, there is no obligation to have recourse to remedies which are inadequate or ineffective. In addition, according to the 'generally recognised rules of international law' there may be special circumstances which release the applicant from the obligation to exhaust the domestic remedies at his disposal.[105] The Court emphasized that the rule is also inapplicable where an administrative practice consisting of a repetition of acts incompatible with the Convention and official tolerance by the State authorities has been shown to exist, and is of such a nature as to make proceedings pointless or ineffective.[106]

The Court's determination was based in the area of the exhaustion of domestic remedies tha there shall be 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, accessible and 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

[104] see the Cardot v. France judgment of 19 March 1991, Series A no. 200,ibid, p. 18, para. 34
[105] see the Van Oosterwijck v. Belgium judgment of 6 November 1980, Series A no. 40, pp. 18-19, paras. 36-40
[106] see the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 64, para. 159, and the report of the Commission in the same case, Series B no. 23-I, pp. 394-97).

special circumstances absolving him or her from the requirement [107]. One such reason may be constituted by the national authorities remaining totally passive in the face of serious allegations of misconduct or infliction of harm by State agents, for example where they have failed to carried out investigations. In such circumstances it can be said that the burden of proof shifts once again, so that it becomes incumbent on the respondent Government to show what they have done in response to the scale and seriousness of the matters complained of.

The Court emphasised that the application of the rule must be made 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 26 must be applied with some degree of flexibility and without excessive formalism. The Court 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. This means amongst other things that it must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate as well as the personal circumstances of the applicants.

As regards the application of Article 26 to the facts of the present case, the Court noted at the outset that the situation existing in South-East Turkey at the time of the applicants' complaints was characterised by significant civil strife due to the campaign of terrorist violence waged by the PKK. In such a situation, for the Court it must be recognised that there may be obstacles to the proper functioning of the system of the administration of justice. In particular, the difficulties in securing probative evidence for the purposes of domestic legal proceedings may make the pursuit of judicial remedies futile and the administrative inquiries, which these remedies depend may be prevented from taking place.

Remedy before the administrative courts was also evaluated by ECtHR. ECtHR observed that the large number of court decisions submitted by the Government demonstrate the existence

[107] see, inter alia, the Commission's decision on the admissibility of application no. 788/60, Austria v. Italy, 11 January 1961, Yearbook,Strausburg vol. 4, pp. 166-168; application no. 5577-5583/72, Donnelly and Others v. the United Kingdom (first decision), 5 April 1973, Yearbook, vol. 16, p. 264; also the judgment of 26 June 1987 of the Inter-American Court of Human Rights in the Velásquez Rodríguez case, Preliminary Objections, Series C no. 1, para. 88, and that Court's Advisory Opinion of 10 August 1990 on "Exceptions to the Exhaustion of Domestic Remedies" (Article 46 (1), 46 (2) (a) and 46 (2) (b) of the American Convention on Human Rights), Series A no. 11, p. 32, para. 41.

of an innovative remedy in damages before the administrative courts which is not dependent on proof of fault. According to EctHR, these decisions illustrate the real possibility of obtaining compensation before these courts in respect of injuries or damage to property arising out of the disturbances or acts of terrorism.

The applicants, on the other hand, have suggested that this remedy is not available in respect of the criminal acts of members of the security forces. However, they have not tested this assumption by commencing proceedings before the administrative courts.

In the Court's view, the existence of mere doubts as to the prospects of success of a particular remedy which is not obviously ineffective is not a valid reason for failing to exhaust domestic remedies[108]. Nevertheless, like the Commission, ECtHR considered it is significant that the Government had not been able to point to examples of compensation being awarded in respect of allegations that property has been purposely destroyed by members of the security forces despite the extent of the problem of village destruction. In this connection, ECtHR noted the evidence referred to by the Delegate of the Commission as regards the general reluctance of the authorities to admit that this type of illegal behaviour by members of the security forces had occured. ECtHR further noted the lack of any unbiased investigation, any offer to cooperate with a view to obtaining evidence or any *ex gratia* payments made by the authorities to the applicants.

Moreover, ECtHR did not consider that a remedy before the administrative courts can be regarded as adequate and sufficient in respect of the applicants' complaints. Because ECtHR was not satisfied that a determination can be made in the course of such proceedings concerning the claim that their property was destroyed by members of the gendarmerie.

Remedy before the civil courts was also referred by The Court. As regards the civil remedy invoked by the respondent Government, ECtHR attached particular significance to the absence of any meaningful investigation by the authorities into the applicants' allegations. From ECtHR perspective, it appears to have taken two years before statements were taken from the applicants by the authorities about the events complained of, probably in response to the communication of the complaint by the Commission to the Government.

[108] see the Van Oosterwijck judgment, p. 18, para. 37

In assessing this remedy was also taken into account by EctHR. Therefore, it concluded that the events complained of took place in an area of Turkey subject to martial law and characterised by severe civil strife. It must also bear in mind the insecurity and vulnerability of the applicants' position following the destruction of their homes and the fact that they must have become dependent on the authorities in respect of their basic needs. Against such a background the prospects of success of civil proceedings based on allegations against the security forces must be considered to be negligible in the absence of any official inquiry into their allegations, even assuming that they would have been able to secure the services of lawyers willing to press their claims before the courts. In this context, the Court found particularly striking the Commission's observation that the statements made by villagers following the events of 6 April 1993 gave the impression of having been prepared by the gendarmes.

Therefore, the Court did not exclude from its considerations the risk of revenge against the applicants or their lawyers if they had sought to introduce legal proceedings alleging that the security forces were responsible for burning down their houses.

Accordingly, for the possibility of pursuing civil remedies, the Court considered that, the applicants had demonstrated the existence of special circumstances which dispensed them at the time of the events complained of from the obligation to exhaust this remedy.

In conclusion, the Court therefore concluded that the application cannot be rejected for failure to exhaust domestic remedies. The Court further emphasised that its ruling is confined to the particular circumstances of the present case. It should not to be interpreted as a general statement that remedies are ineffective in this area of Turkey or that applicants are absolved from the obligation under Article 26 to have normal remedy to the system of remedies which are available and functioning. It can only be in exceptional circumstances such as those which have been shown to exist in the present case that it could accept that applicants address themselves to the ECtHR institutions for a remedy in respect of their grievances without having made any attempt to seek redress before the local courts.

For these reasons, the court dismissed by nineteen votes to two the preliminary objection concerning the exhaustion of domestic remedies; and holded by nineteen votes to two that there has been a violation of Article 8 of the Convention and Article 1 of Protocol No. 1

The applicants suggested that the administrative court protection was not available when the damage was the result of criminal acts of members of the security forces. In this respect it is true that, amongst the decisions produced by the Government, none concerned such a situation. For this reason the Court concluded that there had been existed a doubt as to the effectiveness of the judicial remedy before the administrative courts.

On the other hand, according to the dissenting opinion of Judge Gölcüklü, the meaning and requirements of the 'exhaustion' rule is somehow different. According to him, the applicant has a duty to exhaust all remedies that are available and sufficient. Judge Gölcüklü emphasized in his dissenting opinion that, in the context of compliance with the rule in question this concept cannot be interpreted so as to permit 'suppositions' to be taken for 'facts' which prove the lack of effective and sufficient domestic remedies.[109] This judgment was surprising for Mr. Gölcüklü, because the Court which was so strict and meticulous in the way it applied the exhaustion rule in the Van Oosterwijck and Cardot cases should be so tolerant in the present case. In his view, he gave the example of the Finnish Ships Arbitration case that it had been established that the exhaustion rule was applicable 'unless there is an obvious futility or inefficacity which is manifest', and that in the Panavezys-Saldutiskis case concerning Lithuania 'the argument was put forward that it was absolutely uncertain in Lithuanian law whether it was possible to take proceedings in the Lithuanian courts against the Government where the Government had carried out acts iuris imperii.' The court in The Hague replied: `This does not dispense you from taking proceedings. Similarly, the Commission has said: (Florentino Garcia v. Switzerland 1982, p. 98) *"*If there is doubt as to the effectiveness of a domestic remedy, the point must be taken before the domestic courts*"*.

For the instant case Mr. Gölcüklü, stated that what is going on in South-East Turkey is no different from what has been happening for years in other Council of Europe countries (in Northern Ireland, the Basque country, Corsica, etc.) and there are not two types of terrorism. The administrative authorities in the strict sense may well be adversely affected, but the

[109] Judge Gölcüklü's dissenting opinion, Translation para.125, ibid. Akdivar v. Turkey Case.

situation does not in any way affect the administration of justice, especially as regards the independence and impartiality of the courts. Mr. Gölcüklü also asserted that it was going too far to hold that the situation inSouth-East Turkey constitutes 'special circumstances' such as to dispense the applicants from the obligation to have recourse to existing remedies. Therefore , he also observed that if the fear of reprisals necessarily led them to avoid domestic remedies , the same fear also exists when they apply to the international institutions.

Although the Court did not say so expressly in the judgment, it appears to be criticising the inactivity of the administrative authorities in such a situation and to deduce therefrom that the existing domestic remedies were of no assistance. This situation does not seem true. The witness evidence taken during the Commission's investigation[110] shows that inquiries were made by the public prosecutor at the Diyarbakir National Security Court and that the applicants - and the other villagers - were not able at the time to identify any member of the security forces as being responsible for the acts complained of. In addition, ECtHR referring explicitly to the allegations made by the Delegate of the Commission, noted the lack of any impartial investigation, any offer to cooperate with a view to obtaining evidence, or any *ex gratia* payments made by the authorities. Mr. Gölcüklü emphasised that the Turkish judiciary perform their duties with as much independence and impartiality as the judges of the other States party to the Convention throughout Turkish territory.

From Mr. Gölcüklü's perspective, it is clear that the applicants took every precaution to keep their distance from the authorities of the country in order not to have any contact with them so that they could claim in the final analysis that domestic remedies were inadequate and ineffective. This situation would give them an excuse they needed in order to be able to apply to ECtHR.

Consequently, he defended that the applicants did not give the Turkish courts the opportunity, which Article 26 is intended to afford to Contracting States, of putting right the violations alleged against them. Hence, the objection of non-exhaustion is accordingly well-founded for the Turkish Government side. Therefore, he concluded that ECtHR cannot deal with the merits of the case, for failure toexhaust domestic remedies.

[110] see the Commission's report of 26 October 1995, paragraphs 40 et seq.

3. 3 Accessibility and Effectiveness of the Exhaustion Rule

3.3.1 Implied Confidence Approach

a) Sadık Ahmet v. Greece

Mr Ahmet Sadık was a Greek national of the Muslim faith and born in 1949 and lived in Komotini (Western Thrace). He was a doctor and publisher of the weekly newspaper Guven . Mr. Sadık was also a member of the Greek Parliament. Mr. Sadık died on 24 July 1995 in a suspicious road accident in Greece. This date was also the anniversary of Lousanne Treaty.

When the background of the case is examined, the applicant was the sole candidate of the political party which is called Güven[111]. This party was representing part of the Muslim population of Western Thrace to win a seat in the parliamentary election of June 1989. From that election, no government emerged a fresh poll was planned for November 1989, which the applicant intended to stand as a candidate for the general elections. Between the dates of 16 October and 17 November 1989, Mr Ahmet Sadik on various dates published in the newspaper Güven and circulated in the region a number of articles, including various opinions regarding young Turkish population in Greece.

Following these applicants, the applicant was then accused of contravening Articles 162 and 192 of the Greek Criminal Code. Mr. Sadik was accused on 18 December 1989 by the public prosecutor fot the disturbuting the public peace. Consequently, he was convicted for the Articles of 162 and 192 of the Greek Criminal Code.

The proceedings were for the applicant in the Rodopi Criminal Court continued contraversial that the defence lawyers then withdrew from the case and their clients stated that they did not want any other lawyer to be appointed. The Sadık Family then conducted their own defence and denied committing the offences that they charged. The court acquitted the applicant and

[111] For the whole text, see Sadik Ahmet v. Greece Application no. The case is numbered 46/1995/552/638. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission, 25 October 1996, Press Releases of the European Court of Human Rights, 16 September-9 November 1996.

his co-defendant of electoral deception, but found them guilty of disturbing the citizens' peace on 26 January 1990.

The court found that the accused, he was convicted for the distributing of the public peace and the peaceful and harmonious co-existence that had obtained for centuries between the citizens of the two Greek communities which is combined of the Christian and the Muslim communities.

The abovementioned Rodopi Court sentenced Mr Ahmet Sadık to eighteen months' imprisonment. This punishment was not commutable into a fine. The applicant Mr. Sadık remained in detention from 26 January to 30 March 1990. His candidacy in the Greek elections in 1989 was revoked for technical reasons.

When the case was brought to the Greek Court of Cassation, the applicant maintained that the charges against him were vague and that the courts should have dismissed the prosecution case. Mr. Sadık also alleged that the Patras Court of Appeal had not given sufficient reasons for its decision, as Greek legislation required. Lastly, the applicant complained that the judgment gave no specific example of events which had actually occurred towards the end of October 1989 and which could be said to have disturbed public peace. However, the Court of Cassation dismissed the appeal.

When the case was brought to the Commission, it declared the application admissible on 8 July 1994, in so far as it concerned the complaints under Articles 9, 10, 11 and 14 of the Convention, while expressing the opinion that the main issue raised was the question whether there had been a violation of Article 10 and declared the remainder of the application inadmissible.

On the other hand, The Greek Government argued in conclusion in their memorial that the applicant’s petition should be declared inadmissible according to Article 26 of the Convention. Because the Government argued their position on the fact that the national remedies have not been exhausted, since the argument that the application of article 192 of the Greek Penal Code in the concrete case constituted a violation of the freedom of expression of the applicant has not been invoked before the national courts.

The preliminary observation as to the law was noted by The Court notes, firstly, that the applicant was convicted by the Greek courts of disturbing, through his writings, the public peace and the peace of the citizens of Western Thrace. Without prejudice to its decision on the objection relating to non-exhaustion of domestic remedies, the Court considered that Mr Ahmet Sadik's widow and children had a legitimate moral interest in obtaining a ruling that his conviction infringed the right to freedom of expression.

The government's preliminary objection was based on the Government submitted that Mr Ahmet Sadik had not exhausted domestic remedies, not having raised before the national courts, even in substance, the complaint relating to a violation of Article 10. They asserted that neither the applicant nor his lawyers had alleged at any stage of the proceedings in the Rodopi Criminal Court and the Patras Court of Appeal any infringement whatsoever of the right to freedom of expression. The only reason why, in the Court of Cassation, the applicant had asserted his right to use the term 'Turkish' to designate the Muslims of Western Thrace. This definition had been to prove that the act he had committed was not adequate to make out the objective element of the offence defined in Article 192 of the Criminal Code.

In its decision the commission dismissed the objection on the ground that the applicant had in substance raised before the Court of Cassation a complaint relating to a breach of Article 10, on the admissibility of the application. In addition, the Delegate of the Commission argued before the Court that it was sufficient, for the purposes of exhaustion. Because the applicant had challenged the State's actions in the domestic courts and thus afforded them the opportunity to put right the alleged violation. The Court referred to the case-law of the International Court of Justice and the generally recognised rules of international law (the former - Article 26 of the Convention of that time) that he maintained that it was not necessary for the domestic remedy to be based on the same ground as the international remedy. However, The Court did not accept that argument. It reiterated that the supervision machinery set up by the Convention is subsidiary to the national human rights protection systems. That principle is reflected in the rule set forth in Article 26, as (De Wilde, Ooms and Versyp v. Belgium judgment 1971, p. 29,) "…dispenses States from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system".

Indeed, ECtHR accepted a similar judgment in the case of Akdivar and Others v. Turkey. In this judgment, the Court 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, The Court recognized in the same case that Article 26 must be applied with some degree of flexibility and without excessive formalism. Hence, according to the court it did not require merely that applications should be made to the appropriate domestic courts and that use should be made of remedies designed to confront decisions already given. ECtHR normally required also that the complaints intended to be made subsequently at Strasbourg should have been made to those same courts, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law. [112]

The Convention, according to The Court, forms an integral part of the Greek legal system, where it takes superiority over every contrary provision of the law[113]. Hence, ECtHR further noted that Article 10 of the Convention is directly applicable. Therefore, Mr Ahmet Sadık could have relied on that provision in the Greek courts and complained of a violation thereof in his case. However, the applicant did not rely on Article 10 of the Convention, or on arguments to the same or like effect based on domestic law, in the courts dealing with his case.

Indeed, the Greek courts were able to examine the case of their own motion under the Convention, this cannot have dispensed the applicant from relying on the Convention in those courts. This situation is also advancing arguments to the same or like effect before them, thus drawing their attention to the problem he intended to propose subsequently, if need be, to the institutions responsible for European supervision[114]. That applies where, as here, a charge of disturbing the peace may be challenge and indeed in the present case was challenged by Mr Ahmet Sadik on the basis of arguments which do not raise the matter of freedom of expression. For these reasons, the Court concluded that the domestic remedies were not

[112] see the Cardot v. France judgment of 19 March 1991, Series A no. 200, p. 18, para. 34
[113] Article 28 para. 1 of the Greek Constitution
[114] see the Van Oosterwijck v. Belgium judgment of 6 November 1980, Series A no. 40, p. 19, para. 39

exhausted in the instant case. In conclusion, the Court holded by six votes to three that as domestic remedies have not been exhausted it cannot consider the merits of the case.[115]

b) Castells v. Spain

This case was originated in an application[116] against Spain lodged with the Commission under Article 25 by a Spanish national, Mr Miguel Castells, on 17 September 1985.

The case was referred to the Court by the Commission and by the Government of the of Spain.The particular circumstances of the case was based on a disputed article entitled Insultante Impunidad *(Outrageous Impunity)* and signed by the applicant was published in 1979. The criminal proceedings against the applicant was subject to the judicial investigation and the trial.

From the judicial investigation part**,** on 3 July 1979 the prosecuting authorities instituted criminal proceedings against Mr Castells for insulting the Government. The court with competence for the investigation procedure, the Supreme Court, requested the Senate to withdraw the applicant's parliamentary immunity, which it did by a majority on 27 May 1981.

After several interlocutory applications, including one which resulted in a decision of the Constitutional Court on 12 July 1982 enjoining the Supreme Court to find the challenge admissible. However the latter court dismissed the challenge on its merits on 11 January 1983. Mr Castells filed an appeal, but on 16 June 1982 the Supreme Court confirmed its decision on the ground that the accuracy of the information was not decisive for a charge of insulting the Government.

The applicant then filed an *amparo appeal* in the Constitutional Court, alleging that the rights of the defence had been disregarded. That court dismissed it on 10 November 1982, holding that the question could be resolved only in the light of the proceedings in their whole grounds and after the decision of the trial court.

[115] On the other hand, concurring opinion of Judge Valticos defended that the terms of Article 26 of the Convention (art. 26), must be construed 'according to the generally recognised rules of international law'. That means that the condition concerned cannot be minimised as is sometimes envisaged.

[116] For the whole text, see Castells v. Spain Application Application No. 11798/85, judgment, Press Releases of the European Court of Human Rights, 23 March-24 April 2006.

From the trial side**,** The Criminal Division of the Spanish Supreme Court held a hearing on 27 October 1983 and gave judgment on 31 October. It sentenced the applicant to a term of imprisonment of one year and a day for extending insults of a less serious kind[117] against the Government. This punishment was an accessory penalty that he was also disqualified for the same period from holding any public office and exercising a profession and ordered to pay costs.

Finally, the Supreme Court confirmed its decision of 19 May 1982 regarding the admissibility of the defence of truth. The applicant again indicated in the Supreme Court his intention of filing an *amparo appeal* against the judgment, relying the relevant articles of Spanish Constitution. He lodged his appeal to the Supreme Court, having regard to the circumstances of the case, stayed for two years the enforcement of the prison sentence. In his *amparo appeal*, the applicant complained that he had not been able to have the Supreme Court's judgment examined by a higher court and of the length of the proceedings.

The applicant made a further reference to Article 20 of the Constitution in the summary of his complaints In conclusion, The Constitutional Court dismissed the appeal on 10 April 1985.[118]

As to the law, Mr Castells claimed to be a victim of a violation of his right to freedom of expression as guaranteed under Article 10 of the Convention,[119] The Government contested this assertion, whereas the Commission agreed with it.

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[117] The term is *"menos graves*" in Spanish law.

[118] Relevant legislation was in Spanish law following as**:** *1.* Constitution of *1978***:** The relevant articles of the Constitution provide as follows: Article 14 "*All Spanish citizens are equal before the law. Any discrimination based on birth, race, sex, religion, opinion or any other condition or personal or social circumstances shall be prohibited."* Article 18 "The right to honour, to a private life and to a family life and the right to control use of one's likeness shall be protected." Article 20 1. The following rights shall be recognised and protected: (a) the right freely to express and disseminate thoughts, ideas and opinions by word of mouth, in writing or by any other means of reproduction;… (d) the right to receive and communicate true information by any means of dissemination. The right to invoke the conscience clause and that of professional confidentiality shall be governed by statute. 2. The exercise of these rights may not be restricted by any prior censorship.... 4. These freedoms shall be limited by respect for the rights secured in this Title, by the provisions of the implementing Acts and in particular by the right to honour and to a private life and the right to control use of one's likeness and to the protection of youth and children." Article 23 " 1. Citizens shall have the right to participate in public life directly or through their representatives freely elected at periodically held elections by universal suffrage...." *2. The Criminal Code*. The Institutional Act 8/1983 of 25 June 1983 reformed the Criminal Code. It provide that the offences of insulting the Government shall be punishable by the following penalties: Article 161 "The following shall be liable to long-term prison sentences [from six years and a day to twelve years - Article 30 of the Criminal Code]: 1. Those who seriously insult, falsely accuse or threaten ... the Government ...; Article 162 *"When the insult or threat referred to in the preceding Article is not serious, it shall be punishable by a short-term prison sentence [from six months and a day to six years - Article 30 of the Criminal Code]."*

The Government's preliminary objection was based on they had done before the Commission, that the applicant had failed to exhaust his domestic remedies Article 26 of the Convention. The applicant had not specifically raised in the Constitutional Court the complaint concerning the alleged breach of the right to freedom of expression protected under Article 20 of the Constitution orobably 'for tactical reasons'. In his *amparo appeal* he had referred to this provision only indirectly, complaining of discrimination in the exercise of that freedom; in addition, he had made no mention of Article 10 of the Convention or of similar provisions in other international instruments. According to the Institutional Act governing the *amparo appeal* procedure, he should have indicated clearly both the facts and the provisions allegedly infringed. It followed that Mr. Castells had not given the Constitutional Court the opportunity to rule on the question which was now before the Court.

While expressing its agreement with the applicant, the Commission primarily invited the Court to find that it lacked jurisdiction to entertain the objection. On this point the Court confine itself to referring to its consistent case-law, confirmed most recently in its B. v. France judgment of 25 March 1992.[120]

The Court observed that (Guzzardi v. Italy judgment 1980, p. 26,) "the complaints intended to be made subsequently before the Convention organs" should have been raised "at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law"

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[119] Article 10 of the Convention which is worded as follows:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

[120] Series A no. 232-C, p.45, paras. 35-36

From the court's perspective, the submissions in support of the *amparo appeal* of 22 November 1983 made only an indirect and brief reference to Article 20 of the Constitution; they did however set out the complaints discussed above.

Accordingly, the Court considered that the applicant did invoke before the Constitutional Court, 'at least in substance', the complaints relating to Article 10 of the Convention. The objection that Mr Castells failed to exhaust domestic remedies must therefore be dismissed according to the Court's determination.

On the other hand, a similar judgment should be referred here regarding the exhaustion of domestic remedies rule called Azinas v. Cyprus Case.[121] In their request for the referral of the case to the Grand Chamber, the Government reiterated the objection they had pleaded before the Chamber as to the non-exhaustion of domestic remedies. They underlined that the applicant expressly withdrew the allegation of a violation of a property right which was never raised, even in the substantial way. The applicant referred to the retirement benefits only in the context of challenging dismissal as a disproportionate sanction. Thus, the Supreme Court did not in substance deal with the opportunity of dealing with an alleged property violation. However, before the Supreme Court, constitutional matters must be specifically raised and pleaded by the party concerned; they are not examined by the court *proprio motu*. The Chamber appeared to have misunderstood the nature of the proceedings in the domestic courts. The issue of non-exhaustion was a real question of admissibility and the Court was empowered under Article 35 - 4 to deal with it at this stage.

On the other hand, the applicant's submissions to the Grand Chamber was based on the question that the principle of exhaustion of domestic remedies had already been settled by the Chamber in its final decision. Thus, the Government had failed to raise it again at the merits stage before the Chamber and it was doubtful that they even could have done so. The Chamber's decision due its admissibility of the application of 19 June 2001.

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[121] For the whole text, see Azinas v. Cyprus Application no. 56679/00, judgment, 28 April 2004, Press Releases of the European Court of Human Rights, 13 March-19 May 2004.

The Court's assessment was referred to the Grand Chamber was not precluded from examining the Government's objection of non-exhaustion of domestic remedies since, in accordance with Rule 55 of the Rules of Court, they duly raised this objection at the admissibility stage before the Chamber.

The Court examined that, while in the context of machinery for the protection of human rights the rule of exhaustion of domestic remedies must be applied with some degree of flexibility and without excessive formalism, it does not require merely that applications should be made to the appropriate domestic courts and that use should be made of remedies designed to challenge impugned decisions which allegedly violate a Convention right. It normally requires also that the complaints intended to be made subsequently at the international level should have been aired before those same courts, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law.

According to the Court, the object of the rule on exhaustion of domestic remedies is to allow the national authorities to address the allegation made of violation of a Convention right and, where appropriate, to give redress before that allegation is submitted to the Court.[122]. If the complaint presented before the Court has not been put, either explicitly or in substance, to the national courts when it could have been raised in the exercise of a remedy available to the applicant, the national legal order has been denied the opportunity to address the Convention issue which the rule on exhaustion of domestic remedies is intended to give it. It is not sufficient that the applicant may have, unsuccessfully, exercised another remedy which could have overturned the impugned measure on other grounds which are not connected with the complaint of violation of a Convention right. It is the Convention complaint which must have been mannered at national level for there to have been exhaustion of 'effective remedies'. It would be contrary to the subsidiary character of the Convention machinery if an applicant, ignore a possible Convention argument. In that case, the appliant could rely on some other ground before the national authorities for challenging an impugned measure, but then lodge an application before the Court on the basis of the Convention argument.

The Court noted that the Convention forms an integral part of the Cypriot legal system, where it takes precedence over any contrary provision of national law[123]. It further noted that Article 1 of Protocol No. 1 is directly applicable within the Cypriot legal system. The applicant could

[122] see *Kudła v. Poland* Grand Chamber, no. 30210/96, para. 152, ECHR 2000-XI
[123] Article 169 - 3 of the Cyprus Constitution.

therefore have relied on that provision in the Supreme Court or on arguments to the same or like effect based on domestic law, namely, Article 23 of the Constitution which guarantees the right of property and complained of a violation thereof in his case.

In conclusion, the applicant did not provide the Cypriot courts with the opportunity which is in principle intended to be afforded to a Contracting State by Article 35 of the Convention. Namely the opportunity of addressing, and thereby preventing or putting right, the particular Convention violation alleged against it. The objection that the relevant 'effective' domestic remedy was not used by Mr Azinas in the instant case is therefore well-founded. Consequently, the application must be rejected as inadmissible, in accordance with Article 35-1 and 4 *in fine* of the Convention. For these reasons, the court Rejected the application by twelve votes to five the application as inadmissible.

As it is seen also from these judgments, the Court accepted an implied confidence approach when the exhaustion of domestic remedies rule was applied. The Court accepts a presumption when the applicant applied for the violation regarding he/she did every possible effort for the exhaustion of domestic remedies. It could also observed from these judgments, burden sharing is between the State and the applicant should be dispersed in a fair manner.

3.3.2 Effectiveness and Availability of the Exhaustion Rule

a) Kiiskinen v. Finland

The application was originally submitted by Esa Kiiskinen [124]. The applicant was a Finnish national who was born in 1948..

At national legal procedures stage, the parties appeared twelve times before the then City Court[125] of Helsinki. The presiding judge apparently changed on a number of occasions. Furthermore, the court heard thirteen witnesses called by the applicant and ten witnesses called by the companies. The applicant objected to the hearing of two witnesses called by the

[124] For the whole text, see Case Of Kiiskinen v. Finland (No. 2) Application no. 41585/98, judgment, 1 June 1999, Press Releases of the European Court of Human Rights, 17 May-14 June 1999.

[125] The term is originally "*raastuvanoikeus, rådstuvurätten" in the* Finnish Court system.

companies. The City Court rejected the applicant's action regarding the companies Ms. Kiiskinen had.

In a later civil case, one of the parties requested that the abovementioned decision's judge to step down on account of his being a member of the the directors of the other party. The Helsinki District Court, where the case was pending, rejected this request. Thereafter, the Parliamentary Ombudsman[126] was filed with a petition. Thereafter, the abovementioned decision's judge receded himself from the case on his own initiative. The applicant did not request the case be reopened.

The applicant complained that he was denied a fair hearing before an impartial tribunal. The applicant maintained that the City Court heard influenced witnesses called by the applicant's adversaries. However, the applicant stated that, the City Court ignored inspection reports drawn up by witnesses who were called by the applicant. The court examined the Company's countersuit, although the summons had not been properly served on the applicant. Furthermore, the court failed to examine the applicant's principal argument. According to ECtHR there was a lack of equality of arms between the parties.

As to the law**,** the applicant complained that he was denied a fair hearing before an impartial tribunal and that Judge T of the City Court was partial when examining his case. ECtHR reached the opinion that, the present complaints fall to be considered under Article 6 - 1 of the Convention which, in so far as relevant.[127]

Concerning the fairness of proceedings; firstly, the applicant stated that influenced witnesses were heard and that testimony given by witnesses called by the applicant was ignored. ECtHR recalled that it is normally not competent to deal with complaints alleging that errors of law or fact have been committed by domestic courts. Furthermore, ECtHR noted that the admissibility of evidence is primarily governed by the rules of domestic law, and as a general rule it is for the national courts to assess the evidence before them[128]. ECtHR did not find any reason to question the findings of the domestic court in respect of hearing the witnesses in question. Furthermore, the domestic court relied on evidence in addition to the statements of

[126] The Finnish Ombudsman is called *eduskunnan oikeusasiamies, riksdagens justitieombudsman* in local terms.

[127] Article 6-1 of the Convention reads as follows: "In the determination of his civil rights ... , everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law. ..."

[128] see, *inter alia*, the Lüdi v. Switzerland judgment of 15 June 1992, Series A no. 238, p. 20, para. 43, and the Schuler-Zgraggen v. Switzerland judgment of 24 June 1993, Series A no. 263, p. 21, para. 66

the three witnesses at issue. Hence, ECtHR followed that this part of the application is manifestly ill-founded within the meaning of Article 35 - 3 of the Convention.

The Government alleged that this part of the application should be rejected for the non-exhaustion of domestic remedies. In the alternative the Government also alleged that, the application was introduced out of time. They argued that, although extraordinary remedies are not generally considered to be such effective and adequate remedies which an applicant has to exhaust. However, in the present case an extraordinary appeal would have offered an effective remedy for the purposes of former Article 26[129] of the Convention. To show the effectiveness of an extraordinary appeal, the Government referred to the Supreme Court's judgment of 28 March 1997 by which the that court nullified its own judgment on grounds relating to bias. Therefore, the Government maintained that the applicant has failed to exhaust domestic remedies. The Government argued, furthermore, that the applicant's initial application did not include references to the effect that Judge T would have been biased when presiding over the City Court's last session. Accordingly, the Government consider that the initial application does not constitute a sufficient introduction of his later application for the purposes of former Article 26 of the Convention. Therefore, the Government maintained that the later application was introduced out of time. The applicant disputed these arguments.

The Court recalled that the principle of exhaustion of domestic remedies referred to in Article 35 - 1 of the Convention compels the applicants seeking to bring their case against the relevant State before an international judicial or arbitral organ to use first the remedies provided by the national legal system. 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[130].

The Court reiterated that the rule of exhaustion of domestic remedies in Article 35 - 1 of the Convention requires an applicant to have normal recourse to remedies within the national legal system which are available and sufficient to afford redress in respect of the breaches alleged. According to the court, the existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite

[129] Article 35 - 1 since the entry into force of Protocol No. 11
[130] see the Handyside v. the United Kingdom judgment of 7 December 1976, *Ibid*, Series A no. 24, p. 22, para. 48, and, *mutatis mutandis*, the Akdivar and Others v. Turkey judgment of 16 December 1996, *Reports of Judgments and Decisions* 1996-IV, p. 1210, para. 65.

accessibility and effectiveness. [131]From the court's perspective, there is no obligation to have recourse to remedies which are inadequate or ineffective. [132]

The Court noted that the applicant did not become aware of Judge T's membership of the Freemasons until about 15 months after the City Court's judgment had acquired legal force. However, under domestic law the applicant could have requested the Supreme Court to annul the City Court's judgment. The time-limit for an application for annulment was one year from the day on which the applicant became aware of the fresh circumstance that might have caused disqualification of the judge.

In the circumstances of this case, the annulment of the judgment was the only meaned by which the respondent State would have been provided an opportunity to put matters right through their own legal system. In view of the fact that in the Supreme Court's practice a reason relating to the impartiality of a judge has been regarded as a ground for nullification of a judgment that had acquired legal force, the remedy should be regarded as effective. As to the Court's determination, although Article 35 - 1 of the Convention does not normally require resort to extraordinary remedies, the Court concluded that in the circumstances of this case the applicant was, in principle, obliged to exhaust the extraordinary remedy in question, unless there were special circumstances absolving him from this obligation[133].

The Court followed that this part of the application is manifestly ill-founded within the meaning of Article 35 - 3 of the Convention. For these reasons, the Court accepted an exception that the applicant did not have any special circumstances to avoid aehausting remedy. Thus, ECtHR unanimously declared the remainder of the application inadmissible.

b) Prystavska v. Ukraine

The applicant, Mrs Danyila Semenivna Prystavska, was a Ukrainian national who was born in the L'viv region, Ukraine[134]. The facts of the case were based on the applicant's proceedings in the local court of L'viv against the local accommodation office and the local authority,

[131] Op. Cit. Kiiskinen v. Finland para. 43.
[132] see, *inter alia*, the Andronicou and Constantinou v. Cyprus judgment of 9 October 1997, *Reports* 1997-VI, p. 2097, para. 159.
[133] see, *mutatis mutandis*, the above-mentioned Akdivar and Others judgment, *Reports* 1996-IV, p. 1210, para 67
[134] For the whole text, see Prystavska v. Ukraine Case**.** Application no 21287/02. judgment, 17 December 2002, Press Releases of the European Court of Human Rights, 15 Nov-21 December 2002.

seeking an order for repairs to be carried out to her apartment. She also sought compensation for moral damage, since her living conditions were unsatisfactory. The local court accepted these requests. However, the applicant's claims for compensation for moral damage were rejected by the District Court of L'viv. The L'viv Regional Court upheld this decision. Later,the applicant lodged complaints with the Supreme Court of Ukraine in accordance with the Ukrainan procedure . The panel of three judges of the Supreme Court of Ukraine refused to transfer the applicant's appeal for consideration on the merits to a chamber of the Supreme Court of Ukraine.

The applicant complained under Article 6 - 1 of the Convention that the domestic courts unfairly refused to allow her claims. She also complained that the Supreme Court of Ukraine refused to re-open the proceedings in her case.

ECtHR considered it appropriate first to determine whether the applicant has complied with the admissibility requirements defined in Article 35 - 1 of the Convention.[135] As to the rule on exhaustion, ECtHR recalled that Article 35 - 1 of the Convention requires that the only remedies to be exhausted are those that are available and sufficient to give redress in respect of the violations alleged. Hence, the purpose of Article 35 - 1 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to ECtHR.

ECtHR determined that, an applicant was not obliged to have recourse to remedies which are inadequate or ineffective[136]. It followed that the pursuit of such remedies will have consequences for the identification of the 'final decision' and, likewise, for the calculation of the starting point for the running of the six-months' rule.

In the present case, ECtHR accepted the effectiveness of the new cassation appeal to the Supreme Court of Ukraine for decisions which were adopted after 29 June 2001. ECtHR found that this remedy affords an individual aggrieved by a court decision adopted after that date a real opportunity to have that decision annulled if the conditions prescribed by the

[135] Article 35-1 which stipulates: "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.'

[136] *Akdivar and Others v. Turkey* judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-V, p. 1210, para. 67

relevant domestic law. According to ECtHR, the cassation appeal must therefore be considered to form part of the chain of domestic remedies. This evaluation is also accepted as an applicant is required to exhaust in accordance with the relevant procedural requirements as a condition for the admissibility of an application lodged under the Convention. However, in the present case as regards final decisions adopted before 29 June 2001,the Court did not consider the new cassation channel to be part of the necessary chain of domestic remedies, for the following reasons: (Pryztava v. Ukraine 2001, para. 27)

> *The decision in the applicant's case was res judicata, and it was only by virtue of the introduction of the new transitional remedy on 21 June 2001 that she was able to challenge that decision. However, inherent to the Convention are the notions of legal certainty and the rule of law. In such circumstances, the applicant's recourse to the Supreme Court to challenge proceedings which had been brought to an end by a final decision must be seen as akin to a request to re-open those proceedings by means of the extraordinary transitional remedy provided for by the Law of 21 June 2001. However, the Court recalled in this connection that the Convention does not guarantee a right to re-open proceedings in a particular case, nor is an applicant normally required to avail himself of an extraordinary remedy for the purposes of the exhaustion rule under Article 35 – 1. Therefore, in so far as the applicant impugns the fairness of the refusal of the Supreme Court of Ukraine to re-open the proceedings in her case, her complaint must be rejected as being incompatible ratione materiae with the provisions of the Convention, pursuant to Article 35 - 3 and 4 of the Convention.*

ECtHR also followed from the above considerations that, the decision of the L'viv Regional Court of 12 March 2001 must be considered the 'final' decision at the domestic level. Since that decision was rendered more than six months before the date of introduction of the application with the Court, ECtHR concluded that the application has been introduced out of time and must be rejected in accordance with Article 35 - 1 and 4 of the Convention. For these reasons, the Court unanimously affirmed the application inadmissible.

3.3.3 Determination of Spesific Remedies and Burden of Proof

a) Van Oosterwijck v. Belgium

The Van Oosterwijck case was referred to the Court by the Government of Belgium and by the Commision. The case originated in an application against the Kingdom of Belgium

lodged with the Commission on 1 September 1976 under Article 25 of the Convention by a Belgian citizen, Danielle van Oosterwijck.[137]

Both the Government's application and the Commission's request, to which was attached the report provided for in Article 31 of the Convention, were lodged with the registry of the Court within the period of three months which was laid down by Articles 32 para. 1 and 47 of that time of the structure of the Commission.. The purpose of the application and the request was to obtain a decision from the Court as to whether or not the facts of the case disclose a breach by the respondent State of its obligations under Articles 8 and 12 of the Convention.[138]

The particular circumstances of the case was the based on the the applicant called, Danielle Van Oosterwijck, who had been working since 1963 in the Secretariat of the Commission of the European Communities. she was at the same time studying at the Free University of Brussels and, in June 1979, obtained a degree in law.

The applicant possessed all the physical and biological characteristics of a child of the female sex and she was entered on the birth register of the Brussels as the daughter of J. Van Oosterwijck, at her birth on 23 December 1944. However, according to her, from the age of five she became conscious of a dual personality: although physically female she felt herself psychologically of the male sex. After going through a period of depression on this account, she attempted suicide in 1962 and had to be treated in hospital as indicated in the Commission's report. From 1966 onwards, the applicant tried to find a solution to his problem by having a 'sex-change' carried out on his body. Accordingly, the doctors decided to apply hormone therapy, followed by surgery fort his 'sex-change' operation.

The applicant filed a petition for rectification of a civil states certificate. He requested the Brussels Court of First Instance to direct that his birth certificate should henceforth read a child of the male sex with the forenames Daniel, Julien, Laurent, born on ..., son of ....

[137] For the whole text, see Van Oosterwijck v. Belgium Case, 6 November 1980 , Application No. 65681/01, Decision, European Commission of Human Rights, Stock-Taking on the European Convention on Human Rights, a Periodic Note on the Concrete Results Achieved under the Convention, The First Thirty Years-1954 until 1984, Supplement 1980 (1981).

[138] - The applicant referred to Article 8 in that the application of the law obliged him to use documents which did not reflect his real identity and Article 12 of the Convention at that time, since maintaining a distortion between his legal being and his physical being, the contested court decisions prevented his marrying and founding a family.

However, The Brussels Court dismissed the petition on 30 January 1974 on the ground that the petitioner had not demonstrated that the Registrar had made a mistake when drawing up the birth certificate. Indeed, the applicant's submissions represented that just the opposite since he did not claim to have been 'fundamentally' a man from the outset.

The applicant appealed to the Brussels Court of Appeal. The Attorney-General's department submitted that the appeal should be dismissed. The Brussels Court of Appeal also dismissed D. Van Oosterwijck's appeal. The applicant decided not to take his case to the Court of Cassation. In addition, a lawyer practising before the Court of Cassation, advised the applicant after the event, that in his view such an appeal would have had no prospects of success. The applicant has not sought authorisation to change his forenames, authorisation which may be granted by the Government according to the Belgian legislation. He had an identity card bearing his female forenames, but with a photograph corresponding to his present outward appearance. The Commission concluded unanimously that there had been a breach of Article 8 and Article 11in its report.

The plea of non-exhaustion of domestic remedies was based on Article 26 of the Covention at that time, which the Government claimed, domestic remedies were not exhausted in the instant case.

According to the the Court the only remedies which Article 26 of the Convention requires to be exercised are those that relate to the breaches alleged and at the same time are available and sufficient[139]. In order to determine whether a remedy satisfies these various conditions and is on that account to be regarded as likely to provide redress for the complaints of the person concerned, ECtHR evaluated that it did not have to assess whether those complaints are well-founded however, on a strictly provisional basis and purely as a working hypothesis[140]. ECtHR further stressed that, in the light of these principles, whether any one or more of the remedies listed by the Government is or are relevant for the purposes of Article 26and whether any special grounds nevertheless dispensed D. Van Oosterwijck from having recourse in the present case.

[139] see the Deweer judgment of 27 February 1980, Series A no. 35, p. 16, par. 29
[140] see the arbitration award of 9 May 1934 in the matter of the "Finnish ships", United Nations Collection of Arbitration Awards, Vol. III, pp. 1503-1504, also cited by the Commission in its decision of 17 January 1963 on the admissibility of application no. 1661/62, X and Y v. Belgium, Yearbook of the Convention, Council Of Europe, 1963, Strausburg, vol. 6, p. 366

In this case, for the determination of domestic remedies, D. Van Oosterwijck did not plead the Convention at first instance or on appeal. He also did not appeal further to the Court of Cassation. As the Convention forms an integral part of the Belgian legal system in which it has primacy over domestic legislation, whether earlier or subsequent. In this regard, ECtHR rejected the objection that in this context the Convention lacks the precision required for the exercise of an effective domestic remedy. From ECtHR's perspective, the wording of Article 8 appeared sufficiently clear to the Commission for it to uphold in large measure the arguments put to it by D. Van Oosterwijck arguments that ECtHR must deem correct for the purposes of Articles 26. For ECtHR, it was impossible to discern what might have prevented the applicant from making the same submissions before the Belgian courts and those courts from reaching the same conclusion. It also seems quite impossible that, this determination was required as a consequence in order to give effect the right being claimed.

From the domestic proceedings side, the Convention as a general rule furnishes a supplementary ground of argument, to be prayed in aid if judged suitable for achieving an objective which is in principle rendered possible by other legal arguments[141]. In certain circumstances it may nonetheless occur that express reliance on the Convention before the national authorities constitutes the sole appropriate manner of raising before those authorities. First, as is required by Article 26, an issue intended if need be, to be brought subsequently before the European review bodies[142]. In conclusion, the applicant denied the Belgian courts precisely that opportunity which the rule of exhaustion is designed in principle to afford to States, namely the opportunity to put right the violations alleged against them.

D. Van Oosterwijck also pleaded his financial difficulties, however the Court noted, as did the Government, that he has supplied no proof of this. Furthermore, he did not seek free legal aid for the purposes of an appeal to the Court of Cassation . The applicant argued finally that the Belgian courts were bound by the principle *jura novit curia*[143] to apply the Convention even though he had not requested them to do so. Indeed this was the case more especially as the Convention was a matter of public policy in Belgium.

[141] see the Commission's decision of 11 January 1961 on the admissibility of application no. 788/60, Austria v. Italy, Yearbook of the Convention, Strausburg, 1962, vol. 4, pp. 166-176

[142] See the decision of the Commission, 18 December 1963, on the admissibility of application no. 1488/62, X v. Belgium, Collection of Decisions, no. 13, pp. 93-98

[143] *Iura novit curia* means that the court is solely responsible for determining which law applies to a spesific case.

However, ECtHR was not persuaded by this argument. The fact that the Belgian courts might have been able, to examine the case of their own motion under the Convention. That situation cannot be regarded as having dispensed the applicant from pleading before them the Convention or arguments to the same or like effect. According to ECtHR, whether the obligation laid down by Article 26 has been satisfied has to be determined by reference to the conduct of the victim of the alleged breach. In addition, the manner in which the applicant presented his case to the Brussels Court of First Instance and Court of Appeal scarcely afforded them an opportunity of taking the Convention into account. The issue had, never come before the Court of Cassation for decision. From this point of view, there was not even any case-law which could be regarded as likely to render obviously futile an appeal based on the Convention or on arguments to the same or like effect.[144] Accordingly, ECtHR concluded that the domestic remedies were not exhausted in the instant case. Therefore, The Court holded, by thirteen votes to four, that by reason of the failure to exhaust domestic remedies, it is unable to take cognisance of the merits of the case.[145]

b) Demouplos and Others v. Turkey

The 8 applicants (Demouplos and Others) are all Cypriot nationals of Greek-Cypriot origin.[146] The General context of the complaints were raised in these applications arise out of the Turkish military operations in northern Cyprus in July and August 1974 and the continuing division of the territory of Cyprus State.

[144] see, muatis mutandis, the above-mentioned De Wilde, Ooms and Versyp judgment, p. 34, par. 62

[145] However, according to the concurring opinion of Judge Thór Vılhjálmsson: "For the reasons given at paragraph 32 of the judgment, I have, together with the majority of the Court, found that in this case domestic remedies were not exhausted as required by Article 26 (art. 26) of the Convention. In my opinion, the reasons contained in that particular paragraph suffice. I do, however, entertain some doubts as concerns the grounds set out in the succeeding paragraphs of the judgment." Ibid, D. Van Oosterwijck Case, para.43.

[146] Grand Chamber Decision Application nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04, 21819/04 by Takis Demopoulos and Others, Evoulla Chrysostomi, Demetrios Lordos and Ariana Lordou Anastasiadou, Eleni Kanari-Eliadou and Others, Sofia (Pitsa) Thoma Kilara Sotiriou and Nina Thoma Kilara Moushoutta, Yiannis Stylas, Evdokia Charalambou Onoufriou and Others and Irini (Rena) Chrisostomou against Turkey. For the whole text, see Case Of Demopoulos v. Turkey, 18 November 2009 and 1 March 2010, Press Releases of the European Court of Human Rights, 11 November 2009-17 April 2010.

As it is recalled in the previous chapter 2.4.2, ECtHR in its judgment of 10 May 2001 in *Cyprus* v. *Turkey* concluded that, *"..it is evident from international practice that the international community does not recognise the Turkish Republic of Northern Cyprus 'TRNC' as a state under international law...the Republic of Cyprus has remained the sole legitimate government of Cyprus"*[147] . In the light of this and the very heavy dependence of the territory upon Turkey, TRNC cannot be regarded as a sovereign state, but remains as a *de facto* administered entity within the recognised confines of the Republic of Cyprus and dependent upon Turkish assitance. Therefore, this case was also sued against not TRNC but the Republic of Turkey according to ECtHR.

The complaints were raised in these applications arise out of the Turkish military operations in northern Cyprus in July and August 1974 and the continuing division of the territory of Cyprus. At the time of the Court's consideration of the merits of the *Loizidou v. Turkey* case in 1996, the Turkish military presence at the material time was described.[148]

In the present case, EctHR declared that the 'TRNC'is a democratic and constitutional State which is politically independent of all other sovereign States including Turkey, and the administration in northern Cyprus had been set up by the Turkish-Cypriot people in the exercise of its right to self-determination and not by Turkey according to the submissions of respondent Turkish Government in the inter-State case[149]. Notwithstanding this view, the Court held that it was only the Cypriot government which was recognised internationally as the government of the Republic of Cyprus in the context of diplomatic and treaty relations and the working of international organisations.

ECtHR first referred to the Annan Plan called for the establishment of the United Cyprus Republic (hereinafter 'UCR'), which would include two constituent states: a predominantly Greek-Cypriot one in the south, eventually comprising about 71 % of the land area of Cyprus; and a predominantly Turkish-Cypriot one in the north, comprising about 29 % of the land area. Cypriots would be citizens both of the UCR and of the appropriate constituent state. The

[147] Op. Cit. Cyprus v. Turkey para. 16

[148] (*Loizidou v. Turkey* (merits), 18 December 1996, p. 2223, §§ 16-17, *Reports of Judgments and Decisions* 1996-VI, Council Of Europe, Strausburg.

[149] *Cyprus v. Turkey* Grand Chamber, no. 25781/94, § 15, ECHR 2001-IV

Court also appreciated, it became apparent that the Turkish-Cypriots would vote yes on 24 April 2004, making a United Cyprus Republic possible. The Annan plan failed to pass, however, because even though 65 % of Turkish Cypriots accepted the settlement plan, 76 % of Greek Cypriots rejected it.

Indeed the Annan Plan had provided for the property rights of Greek Cypriots to be balanced against the rights of those now living in the homes or using the land. Some of them Turkish-Cypriot refugees from the south of the island, who had lost homes of their own, but many others of them Turkish settlers[150].

The particular circumstances of the cases could be briefly explained as all the applicants, Greek Cypriots, claimed to own or partly own immovable and movable property in the northern part of Cyprus under the control of the 'TRNC'. The applicants claimed that since August 1974 they had been deprived of their property rights, all their property being located in the area which is under the occupation and the control of the Turkish military forces. The latter prevented them from having access to and from using and enjoying their homes, property and possessions in northern Cyprus. Details of all properties were contained in the ECtHR's case-files.

On the other hand, the Government's position was that the applicants had not established the basic facts. They had not produced evidence to show that, according to the Land Registry authorities in the south, they were the current owners of the properties in question. According to ECtHR, they also had not shown that they had proof of title in 1974. Moreover, none of the applicants had made an application to the Immovable Property Commission for restitution or compensation in respect of their property claims.

From the relevant domestic law and practice law for the compensation, exchange and restitution of immovable properties which are within the scope of sub-paragraph (b) of paragraph 1 of Article 159 of the TRNC Constitution, as amended by Law 67/2005. Law 67/2005 came into effect on 22 December 2005. This Law provided that all natural and legal persons claiming rights to immovable or movable property might bring a claim before the Immovable Property Commission (hereinafter 'IPC') until 21 December 2009 subject to a fee

[150] http://unannanplan.agrino.org/Annan_Plan_MARCH_30_2004.pdf Accession Date: 16.01.2011

of 100 Turkish liras (TRY) for each application[151]. On 22 October 2009, this deadline was extended by the Parliament of the 'TRNC' until 21 December 2011. Under the provisions of the Law, the burden of proof is on the applicant who must prove beyond a reasonable doubt that, *inter alia*, the immovable property was registered in his name on 20 July 1974, that he owned the movable property before 13 February 1975 and was forced to abandon it due to conditions beyond his own volition; and that according to the Land Registry records there are no other persons claiming rights to the claimed immovable property.[152]

ECtHR examined that the IPC has the duties and powers to examine and reach decisions on applications, determine the amount and method of payment of compensation, collect written or oral testimony or hear witnesses, furthermore it has right to summon any person residing in the 'TRNC' to give testimony or produce any document in his possession, to compel a person to give evidence or produce a document in his possession, to award expenses to any persons summoned[153]. The decisions of the IPC have binding effect and are of an executory nature similar to judgments of the judiciary and such decisions shall be implemented without delay upon service on the relevant authorities [154]. It is also determined in this law, an offence to refuse to produce any document or information required by the IPC or to fail to appear, or give evidence without legal excuse, a fine of TRY 2,000 being imposable on conviction.[155] ECtHR also referred to the composition of Immovable Property Commission, that organizes in a legitimate organization.

It should be also referred to the judgment of the 'TRNC' Constitutional Court in case no. 3/2006. In this case, the plaintiffs had filed applications claiming that Law 67/2005 was unconstitutional as contrary to Article 159 of the Constitution and requested that this law should be annulled. However, the 'TRNC' Constitutional Court rejected these applications. ECtHR in particular emphasised about the scope of any effective remedy for property complaints in the decision on admissibility in *Xenides-Arestis v. Turkey* [156]. In this case, it considered that it should interpret the Constitution in a manner such as to reconcile it with

[151] Section 4 of the Turkish Republic of Northern Cyprus, Immovable Property Commission. http://www.northcyprusipc.org/ Accession Date: 16.01.2011

[152] Ibid,section 6.
[153] section 13,Ibid.
[154] section 14,Ibid.
[155] section 15, Ibid.
[156] *Xenides-Arestis v. Turkey* (Decision) no. 46347/99, 14 March 2005

international law and held that it was not contrary to the Constitution for restitution of possession to be made and compensation to be paid to Greek-Cypriot right owners.

The cases before the IPC, should also be referred. As of the date of the hearing in November 2009, at Grand Chamber of ECHR, the number of cases brought before the IPC stood at 433. Of these, 85 had been concluded, the vast majority by means of friendly settlement. Only a handful of decisions not based on a settlement had been issued. In four cases, the IPC had ordered restitution and compensation, in two cases, exchange of property was agreed, in one case the applicant agreed to restitution on resolution of the Cyprus problem. In more than 70 cases, compensation had been awarded. Some 361,493 square metres of property had been restituted and approximately 47 million euros paid in compensation.[157]

The applicants complained under Articles 8[158] of the Convention and 1 of Protocol No.1[159] that they had been deprived of the use of their property and access to their homes in northern Cyprus which was under the control of the 'TRNC'.

The Turkish Government raised a number of objections to admissibility in their observations before the Chamber. They had submitted that the complaints fell outside the temporal jurisdiction of the Court and that the acts which took place within the 'TRNC' were not under the responsibility of Turkey. They further submitted in particular that the applicants had failed to exhaust domestic remedies. The Court recalled that it had considered the Government's

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[157] http://www.northcyprusipc.org/Documents/Statics Accession Date: 16.01.2011

[158] Article 8 of the Convention as relevant provides:

"1. Everyone has the right to respect for... his home ....

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[159] Article 1 of Protocol No. 1 provides:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

objections of inadmissibility *ratione loci* and *ratione temporis* in previous cases and rejected them[160]. The Government also did not submit further argument on these matters in their submissions before the Grand Chamber. The Court concluded that, it will therefore proceed to examine the Government objection concerning domestic remedies alone.

Submissions before the Court on exhaustion of domestic remedies from the Government side; it was recalled that in *Xenides-Arestis v. Turkey* (no. 46347/99) the Court set in train a pilot-judgment procedure, adjourning all other cases, to examine the former Law No. 49/2003. After it was found not to provide an effective remedy, the 'TRNC' enacted Law 67/2005, setting up the new IPC and taking full account of the indications given by the Court in its decision on admissibility. When adopting the judgment on just satisfaction, the Court had welcomed the steps taken by the Government to provide redress in this and the other pending cases and stated: *"that the new compensation and restitution mechanism, in principle, has taken care of the requirements of the decision of the Court on the admissibility of 14 March 2005 and the judgment on the merits of 22 December 2005…"*[161]

The Turkish Government argued that they settled the matter of remedies for the future. The Government submitted that the remedy established at the Court's instigation was effective and accessible. The Law had been published in Greek and English in a Cyprus newspaper and received wide media coverage. It was emphasised that while Article 159 of the Constitution had seemed to exclude on its face any restitution or compensation, the 'TRNC' Constitutional Court had rejected a challenge to the constitutionality of the law, holding that Article 159 had to be interpreted in conformity with international law and the Convention. On the other hand, the Government argued that IPC did not prevent return of property, exchange of property or compensation. It had also relied on *Xenides-Arestis* as setting out the range of redress that must be made available.

The Government submitted that the IPC was independent and impartial, the members not subject to removal save as provided for by law nor subject to any instructions. The Government also asserted that Law 67/2005 created a legally valid domestic remedy for the purpose of the Convention: "*this was not affected by the fact that it was created by 'TRNC' legislation, the Court's case-law indicating that the 'TRNC' could establish legally valid*

[160] The Court rejected these applications as referred before in *Loizidou* case (*op. cit.*), *Cyprus v. Turkey*, para 69-81, (*op. cit.*),
[161] Xenides-Arestis v. Turkey (just satisfaction), no. 46347/99, para. 37, 7 December 2006, Press Releases of the European Court of Human Rights, 21 October-29 December 2006.

domestic law. Any other approach would imply that the Xenides-Arestis judgment had directed Turkey to create an unlawful remedy..."[162] Furthermore, the government asserted that the remedies available in the 'TRNC' were to be regarded as domestic remedies of the respondent Government as was well-established in ECtHR's case-law. They were not limited to residents of northern Cyprus as since 23 April 2003 Greek Cypriots had free access to the north. However, the Cypriot Government had been making repeated efforts to mislead, intimidate and discourage Greek Cypriots from making use of the IPC. They considered that the statements by claimants which were critical of the IPC and which had been taken by police officers instructed by the Cyprus Government for the purposes of the hearing should be regarded as unreliable in those circumstances. Finally, the Government stated that it had cooperated fully and in good faith with the Court in bringing the pilot-judgment procedure to a successful conclusion. The applicants should therefore be required to exhaust the available and effective remedy provided under Law No. 67/2005.

From the applicant side, they submitted that they should not be expected to exhaust a remedy which only became available several years after the introduction of their complaints. They argued that, as a rule, the assessment as to exhaustion of domestic remedies should be carried out with reference to the date on which the applications were lodged. There were no exceptional circumstances to justify a departure from this rule, specifically since these cases had been pending for some years and it would be particularly unjust given the advanced age of many applicants[163]. The applicants also emphasised that the IPC remedy was operated by the authorities of an entity widely resented and distrusted by Greek Cypriots and universally viewed as an unlawful occupier. According to the applicants, it was important to note that Turkey had failed to acknowledge responsibility for any violations in this area, and also Turkey had not it returned property in the *Loizidou* and *Xenides-Arestis* cases, or three years later, paid the latter applicant the award of just satisfaction, showing a consistent practice of failing to comply with Court judgments. They also stressed that the purported remedy was inconsistent with Article 159 of the 'TRNC' Constitution. According to them, this article continued in force with extensive associated legislation and demonstrated the absence of any genuine commitment to remedying the systemic defects. Further, there was a continuing policy and practice to prevent the return of Greek Cypriots, reinforced by sale and development of their land, and visa provisions impeding permanent return.

[162] Demouplos v. Turkey op.cit. para.44
[163] Demouplos v. Turkey op.cit. para.48

The Government of the Republic of Cyprus submitted as the 'intervening Government' of the case that the Turkish Government's admissibility challenge was an abuse of the pilot-judgment procedure since, rather than being designed to provide redress for systemic violations and reinforce the effectiveness of the Court, it was an attempt to legitimise their unlawful mass appropriation of Greek-Cypriot properties[164]. It was the precondition of any pilot-judgment procedure that the respondent Government should abide by the Court's judgments; the Turkish Government showed a continuing and deliberate flouting of such judgments as indicated by the *Xenides-Arestis* case, where no property had been returned or compensation paid. Also, the provision of compensation machinery could only be seen as an adequate remedy where the authorities had taken reasonable steps to comply with their obligations by preventing as far as possible any occurrences or repetition of the acts in question.[165] They argued that the rule of exhaustion of domestic remedies, as well-established in customary international law, only required the applicants to exhaust Turkish remedies; Turkey insisted the IPC was a 'TRNC' remedy. They respectfully submitted that the Court's conclusion in *Cyprus v. Turkey* that remedies available in the 'TRNC' might be regarded as 'domestic remedies' of Turkey be reconsidered. According to Republic of Cyprus submissions, the applicants could not be required to have recourse to any Turkish remedy either as there was no relevant connection between Greek Cypriots and the occupiers who had only assumed *de facto* jurisdiction by the unlawful use of force. Further, they also claimed that the 2005 Law was null and void, not only because, under international law, it was the product of an unlawful legislature but because its purported legal basis was Article 159 of the 'TRNC' Constitution which the Court had held must not be recognised and also because its purported basis was discriminatory. According to the intervening government, the applicants could not be required to show that they had exhausted the remedy under the 2005 Law as their complaints concerned a denial to Greek Cypriots of access to homes and property which continued to be a matter of policy and practice by Turkey and it would be oppressive, discriminatory and unfair to require them to do so. Finally, the intervening goverment submitted that the remedies provided under the 2005 Law were wholly inadequate and ineffective in practice.

Exhaustion of domestic remedies issue was raised in detail in this case. ECtHR explained first the aim of the rule as referring the machinery of protection established by the Convention is

[164] Demouplos v. Turkey op.cit. para.52
[165] *Frederiksen and Others v. Denmark*, no. 12719/87, Commission Decision of 3 May 1988, Decisions and Reports (DR) 56, p. 237, at p. 244

subsidiary to the national systems safeguarding human rights. According to ECtHR, the Court cannot, and must not, usurp the role of Contracting States whose responsibility it is to ensure that the fundamental rights and freedoms enshrined therein are respected and protected on a domestic level.[166] ECtHR examined that the rule of exhaustion of domestic remedies is therefore an indispensable part of the functioning of this system of protection.. The Court also highlighted that it is not a court of first instance; it does not have the capacity, nor is it appropriate to its function as an international court, to adjudicate on large numbers of cases which require the finding of basic facts or the calculation of monetary compensation – both of which should, as a matter of principle and effective practice, be the domain of domestic jurisdictions. As being said, the Court reacted to its workload in a case-law by putting limits to its jurisdiction.

The Court indicated that there is no obligation to have recourse to remedies which are inadequate or ineffective. In addition, according to the "generally recognised rules of international law" there may be special circumstances which absolve the applicant from the obligation to exhaust the domestic remedies at his disposal[167]. The rule is also inapplicable where an administrative practice consisting of a repetition of acts incompatible with the Convention and official tolerance by the State authorities has been shown to exist, and is of such a nature as to make proceedings futile or ineffective [168].

In the area of the exhaustion of domestic remedies there is a distribution of the burden of proof according to the Court. 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 and where 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. [169] The Court emphasized

[166] Demouplos v. Turkey para. 59

[167] *Van Oosterwijck v. Belgium* judgment of 6 November 1980, Series A no. 40, pp. 18-19, paras. 36-40

[168] *Ireland v. the United Kingdom* judgment of 18 January 1978, Series A no. 25, p. 64, para. 159, and the report of the Commission in the same case, Series B no. 23-I, pp. 394-97

[169] see, inter alia, the Commission's decision on the admissibility of application no. 788/60, *Austria v. Italy*, 11 January 1961, Yearbook,1962, Council Of Europe, Strausburg vol. 4, pp. 166-168; application no. 5577-5583/72*, Donnelly and Others v. the United Kingdom* (first decision), 5 April 1973, Yearbook, vol. 16, p. 264;

that, one such reason may be constituted by the national authorities remaining totally passive in the face of serious allegations of misconduct or infliction of harm by State agents, for example where they have failed to undertake investigations or offer assistance. In such circumstances it can be said that the burden of proof shifts once again, so that it becomes incumbent on the respondent Government to show what they have done in response to the scale and seriousness of the matters complained of.[170]

The Court furhter emphasised that the application of the rule 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 this rule 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.[171]. This means amongst other things that it must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate as well as the personal circumstances of the applicants.[172]

Remedy issues examined in previous property cases were held on various grounds. First,on the issue of remedies, the Court recalled its finding in the inter-State case that pursuant to Article 159 of the 'TRNC' Constitution the ownership rights of Greek Cypriots to their properties in northern Cyprus were no longer recognised by the 'TRNC' authorities and that the legality of any interference was unassailable before the 'TRNC' courts. In those circumstances no requirement to exhaust arose according to EctHR. Furthermore, it emphasised that there was, correspondingly, a breach of Article 13 in that Turkey had failed to provide to Greek Cypriots not residing in northern Cyprus any remedies to contest interferences with their rights under Article 8 of the Convention and Article 1 of Protocol No. 1.

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also the judgment of 26 June 1987 of the Inter-American Court of Human Rights in the *Velásquez Rodríguez* case, Preliminary Objections, Series C no. 1, para. 88, and that Court's Advisory Opinion of 10 August 1990 on "Exceptions to the Exhaustion of Domestic Remedies" (Article 46 (1), 46 (2) (a) and 46 (2) (b) of the American Convention on Human Rights),Series A no. 11, p. 32, para. 41.

[170] Demouplos v. Turkey Op.cit. para 64.

[171] *Van Oosterwijck* judgment, Ibid p. 18, para. 35

[172] Demouplos v. Turkey para Op.cit. 66.

The Chamber notified the parties in *Xenides-Arestis v. Turkey* that this was to be a pilot case and put questions as to the compensation commission set up under the Law. In this regard, Annan Plan is having regard to the large number of individual applications raising property complaints pending before the Court and the introduction of Law 49/2003 that purported to provide applicants with redress. Meanwhile, ECtHR adjourned examination of all other cases. Following a hearing, it ruled in its decision on admissibility that Law No. 49/2003, which provided for compensation for immovable properties that the remedy did not satisfy the requirements of Article 35 – 1. Because the compensation in this remedy was limited to damages for pecuniary loss for immovable property, without provision for movable property or non-pecuniary damages; there was no provision for the restitution of property; the Law did not address the applicant's complaints under Articles 8 or 14 of the Convention. According to the Court, at that time the Law was vague as to its temporal application and the composition of the compensation commission gave rise to difficulties, the Government not disputing that the majority of its members lived in houses owned or built on property of Greek Cypriots. It was noted that an international composition would enhance the commission's standing and credibility.

In this case, the Court considered that the respondent State should introduce a remedy which secured genuinely effective redress for the Convention violations identified in the judgment. Moreover, this remedy should be similar for all pending applications, in accordance with the principles for the protection of rights laid down in applicable provisions and in line with the admissibility decision in its subsequent judgment on the merits.[173] Following this judgment, 'TRNC' authorities enacted the new compensation law no 67/2005 which entered into force on 22 December 2005. The IPC, which was established under this law for the purpose of examining applications made in respect of properties within the scope of the aforementioned law, was composed of five to seven members; two of whom were foreign members, Mr Hans-Christian Krüger (former Secretary to the European Commission of Human rights and former Deputy Secretary General of the Council of Europe) and Mr Daniel Tarschys (former Secretary General of the Council of Europe), and had the competence to decide on the

[173] *Xenides-Arestis v. Turkey*, no. 46347/99, para. 40, 22 December 2005. In the same judgment (para 53), the Court determined the concept of domestic remedies as following: "*The Court considers that the respondent State must introduce a remedy which secures genuinely effective redress for the Convention violations identified in the instant judgment in relation to the present applicant as well as in respect of all similar applications pending before it, in accordance with the principles for the protection of the rights laid down in Article 8 of the Convention and Article 1 of Protocol No. 1 and in line with its admissibility decision of 14 March 2005. ...*"

restitution, exchange of properties or payment of compensation. A right of appeal lay to the "TRNC" High Administrative Court.[174]

On the other hand, subsequently in Eugenia Michaelidou Developments Ltd and Michael Tymvios v. Turkey[175], the Court struck off a case, where there had been a finding of a breach of Article 1 of Protocol No. 1 arising out of denial of enjoyment of property in northern Cyprus, on the basis of a settlement in which the applicant accepted the offer of compensation of one million dollars and exchange of property put forward by the IPC. It was satisfied that the settlement was based on respect for human rights as defined in the Convention or its Protocols and that it was equitable within the meaning of Rule 75 - 4 of the Rules. The same conclusion was reached in respect of a settlement reached in Alexandrou v. Turkey[176] in which the applicant was to receive one million five hundred thousand pounds sterling and restitution of a plot of land.

Application of the exhaustion rule in the present case was based on EctHR's observation that the applicants and intervening Government have made submissions concerning the applicability of the pilot-judgment procedure to cases regarding property in northern Cyprus. Specifically, the good faith of the Turkish Government in its approach to providing a remedy and asserting that Turkey should not be allowed to benefit from a pilot-judgment procedure since it had been responsible for undue delays in the implementation of previous judgments.

On the other hand, these eight cases in this application are the first applications not yet declared admissible to be examined following the pilot-judgment procedure in *Xenides-Arestis v. Turkey*. Although the Chamber in *Xenides-Arestis* had concluded that the remedy seemed to be adequate, its judgments did not include a detailed analysis of the points of principle and interpretation of the Convention raised by the parties. According to ECtH, the fact that the panel of the Grand Chamber did not accept the request for referral of the *Xenides-Arestis* case does not mean that the Grand Chamber is bound in any formal sense by the Chamber's findings. [177]

The context of these applications were also examined by ECtHR. It observed that the arguments of all the parties reflect the long-standing and intense political dispute between the

[174] http://www.northcyprusipc.org/ Accession Date: 16.01.2011
[175] Just satisfaction-friendly settlement, no. 16163/90, 22 April 2008.
[176] Just satisfaction and friendly settlement), no. 16162/90, 28 July 2009.
[177] Demoplos v. Turkey Op. cit. para. 73

Republic of Cyprus and Turkey concerning the future of the island of Cyprus and the resolution of the property question.

ECtHR also commented also on the present applications' structue as some thirty-five years have elapsed since the applicants lost possession of their property in northern Cyprus in 1974. It also highlighted that the generations have passed and the local population has not remained static: (Demoplos v. Turkey Op. cit. para. 75)

> *Turkish Cypriots who inhabited the north have migrated elsewhere; Turkish-Cypriot refugees from the south have settled in the north; Turkish settlers from Turkey have arrived in large numbers and established their homes. Much Greek-Cypriot property has changed hands at least once, whether by sale, donation or inheritance. Therefore, the Court found itself faced with cases burdened with a political, historical and factual complexity flowing from a problem that should have been resolved by all parties assuming full responsibility for finding a solution on a political level. This reality, as well as the passage of time and the continuing evolution of the broader political dispute must inform the Court's interpretation and application of the Convention which cannot, if it is to be coherent and meaningful, be either static or blind to concrete factual circumstances.*

EctHR examined the case firstly, whether the requirement to exhaust domestic remedies applies at all to the situation of Greek-Cypriot owners of property under the control of the 'TRNC'. Secondly, EctHR tried to examine, whether or not the respondent Government in these cases have furnished a remedy in the IPC capable of providing effective redress.

The argument that the applicants were not required to exhaust any remedy which came into being after they lodged the applications was also observed by ECtHR. It observed that indeed the assessment of whether domestic remedies have been exhausted is normally carried out with reference to the date on which the application was lodged with it. However, as it has held on many occasions, this rule is subject to exceptions, which may be justified by the particular circumstances of each case[178]. As in these cases, the remedies under consideration were enacted to redress at a domestic level the Convention grievances of persons whose applications pending before the Court concerned similar issues. Giving weight therefore to the subsidiary character of its role. ECtHR regarded as that the exception applies here also.

[178] see Baumann v. France, no. 33592/96, para. 47, ECHR 2001-V, and Brusco v. Italy, (dec.), no. 69789/01, ECHR 2001-IX

As to the argument that the 'TRNC' compensation law was not part of Turkish domestic law The Court considered this to be an artificial argument according to ECtHR. Turkey has been held responsible for the acts and omissions of the authorities within the 'TRNC' entity in numerous cases. ECtHR assessed that, any domestic remedy is made available by acts of 'TRNC' authorities or institutions, it may be regarded as a 'domestic remedy' or 'national' remedy vis-à-vis Turkey for the purposes of Article 35 - 1[179]. From ECtHR view, it should also not be overlooked that Law 67/2005 and the IPC came into existence as the consequence of the Court holding in Xenides-Arestis that Turkey had to introduce a remedy which secured the effective protection of the rights laid down in Article 1 of Protocol No. 1 in relation to the applicant as well as in respect of all similar applications pending before the Court. From ECtHR's perspective, accepting the functional reality of remedies is not the same as to holding that Turkey wields internationally-recognised sovereignty over northern Cyprus. By emphasising this, ECtHR once again confirmed it does not recognize TRNC as a separate, sovereign state.

On the other hand, the argument that no obligation to exhaust arose since there was an administrative practice of ongoing violations of the applicants' right. For ECtHR, it is correct that in the inter-State case the European Commission of Human Rights made an express finding of administrative practices under Article 8 of the Convention and Article 1 of Protocol No. 1 as regarded the acknowledged public policy not to allow the entry of Greek Cypriots into northern Cyprus[180] and the legislation and practice vis-à-vis interference with property rights. While agreeing with the Commission, ECtHR in its judgment put weight on the non-existence of effective remedies due to the applicable legislation and to prevailing official attitudes and policies. According to ECtHR, that situation has changed and for the current situation, there is now legislation which seeks to provide a mechanism of redress and which has been interpreted so as to comply with international law, including the Convention and the political climate has reorganized, with borders to the north no longer closed.[181]

The argument that requiring exhaustion lent legitimacy to an illegal occupation was also evaluated whether the IPC provides adequate redress. The Court agreed that the issue before the International Court of Justice was different, and that the situation in Namibia differs from that in northern Cyprus, in particular since the applicants in these cases are not living under

[179] see Cyprus v. Turkey, cited above, para. 101-102
[180] Commission Report, para. 264-265
[181] Demouplos v. Turkey Op. cit. para 87.

occupation in a situation in which basic daily reality requires recognition of certain legal relationships but are rather seeking to vindicate, from another jurisdiction, their rights to property under the control of the occupying power.[182] It nonetheless derived support from this source, and others for the Court's view that the mere fact that there is an illegal occupation does not deprive all administrative or putative legal or judicial acts therein of any relevance under the Convention.

ECtHR aslo reitirated that, the overall control exercised by Turkey over the territory of northern Cyprus entails her responsibility for the policies and actions of the 'TRNC'. Therefore, those affected by such policies or actions come within the 'jurisdiction' of Turkey for the purposes of Article 1 of the Convention with the consequence that Turkey is accountable for violations of Convention rights which take place within that territory and is bound to take positive steps to protect those rights. For ECtHR, it would not be consistent with such responsibility under the Convention if the adoption by the authorities of the 'TRNC' of civil, administrative or criminal law measures, or their application or enforcement within that territory, were then to be denied any validity or regarded as having no 'lawful' basis in terms of the Convention[183]

The ECtHR considered that, even if the applicants are not living as such under the control of the 'TRNC', if there is an effective remedy available for their complaints provided under the auspices of the respondent Government, the rule of exhaustion applies under Article 35 - 1 of the Convention. ECtHR maintained its opinion that allowing the respondent State to correct wrongs imputable to it does not amount to an indirect legitimisation of a regime unlawful

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[182] In particular, in these proceedings, the parties have differed as to the relevance or applicability of the so-called "Namibia Principle": this, in brief, provides that even if the legitimacy of the administration of a territory is not recognised by the international community, "international law recognises the legitimacy of certain legal arrangements and transactions in such a situation, ... the effects of which can be ignored only to the detriment of the inhabitants of the [t]erritory" (*Advisory Opinion of the International Court of Justice in the Namibia case (Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution* 276 (1970), [1971] International Court of Justice Reports 16,. p. 56, para. 125).

[183] (see *Foka v. Turkey*, no. 28940/95, § 83, 24 June 2008, where arrest for obstruction of the applicant Greek Cypriot by a "TRNC" police officer was found to be lawful; *Protopapa v. Turkey*, no. 16084/90, § 87, 24 February 2009 where a criminal trial before a "TRNC" court was found to be in accordance with Article 6, there being no ground for finding that these courts were not independent or impartial or that they were politically-motivated).

under international law. Although this clear explanation of the Court regarding the non-recognition of the TRNC, some Turkish authors claimed that TRNC ‘as a state’ was recognised by this judgment.

The applicants in these cases, joined by the intervening Government, nonetheless argued that the principle of exhaustion of domestic remedies could not be applied to them as it could not be regarded as to their benefit to require them to exhaust remedies. The relevant effort and humiliation for this remedy would involve after years of continuing violations. According to the applicants, ECtHR could not subscribe to the position that it is somehow better for individuals to bring their cases directly before it than to make use of remedies available locally. This situation runs counter to the basic principle of exhaustion of domestic remedies. As EctHR accepted in this case, an appropriate domestic body, with access to the properties, registries and records, is clearly the more appropriate forum for deciding on complex matters of property ownership and valuation and assessing financial compensation. ECtHR was therefore not persuaded that the acknowledgement of the existence of a domestic remedy runs counter to the interests of those claiming to be victims of violations.

The argument that domestic remedies do not have to be exhausted where there is no relevant connection between the injured persons and the State responsible was also noted by ECtHR. It noted that the intervening Government relied on a territorial-restriction argument to the effect that Greek-Cypriot property owners who had not voluntarily submitted to the jurisdiction of Turkey could not be required to use Turkish remedies in respect of acts which were in violation of their rights outside Turkey's lawful jurisdiction. Otherwise, it was submitted, the aggressor would be treated as if it had the power to abrogate private rights and create new legal procedures; it was thus contrary to principle to insist that victims of an illegal armed invasion must first exhaust procedures imposed on them by the invader.

ECtHR clearly described that this argument seeks to draw its force from the international law position already examined above that institutions and procedures imposed by force by an occupying power cannot be treated as if they were established by the lawful Government of the State. However, as ECtHR confirmed, there is no direct, or automatic correlation of the issue of recognition of the ‘TRNC’ and its purported assumption of sovereignty over northern Cyprus on an international plane and the application of Article 35 - 1 of the Convention.

ECtHR recalled that applicants have not infrequently been required to exhaust domestic remedies even where they did not choose voluntarily to place themselves under the jurisdiction of the respondent State [184]. For ECtHR, under the Convention system, the principle of subsidiarity is of paramount importance to ensuring the protection of rights at domestic level; where effective remedies are available, an applicant is required to make use of them before invoking ECtHR's international supervision. According to EctHR's perspective, contracting States are bound by the stringent requirements of the rule of law enshrined in the provisions of the Convention. Thus, the Convention precisely to offer mechanisms of accountability and redress regarding the acts of their own security forces or other authorities, irrespective of the identity or origin of the alleged victim. ECtHR, hence rejected this argument.

ECtHR concluded that, for the purposes of Article 35 - 1 of the Convention, remedies available in the 'TRNC', called the IPC procedure, may be regarded as 'domestic remedies' of the respondent State. ECtHR finalized that there is no ground for exemption of the application of Article 35 - 1 of the Convention has been established. Therefore, ECtHR considered Law 67/2005, and the IPC in particular as effective and has independence and impartiality. ECtHR also confirmed the adequacy of the compensation and the accessibility and efficiency of the local remedies.

Finally, ECtHR found that Law 67/2005 provides an accessible and effective framework of redress in respect of complaints about interference with the property owned by Greek Cypriots. The applicant property owners in the present cases have not made use of this mechanism and their complaints under Article 1 of Protocol No. 1 to the Convention must therefore be rejected for non-exhaustion of domestic remedies. From ECtHR's perspective it was satisfied that Law 67/2005 makes realistic provision for redress in the current situation of occupation that is beyond this Court's competence to resolve. Lastly, ECtHR also stressed that this decision is not be interpreted as requiring that applicants make use of the IPC. According to this judgment, EctHR evaluated that, the applicants may choose not to do so and await a political solution. If, however at this point in time, any applicant wishes to invoke his or her rights under the Convention, the admissibility of those claims will be decided in line

[184] *Pad and Others v. Turkey* (dec.), no. 60617/00, 28 June 2007, concerning Iranian villagers shot in the border area by Turkish security forces and *Al-Sadoon and Mufdhi v. United Kingdom*, no. 61498/08, decision of admissibility of 30 June 2009, concerning Iraqis detained by UK security forces in Basrah.

with the principles and approach above according to ECtHR[185]. In conclusion, ECtHR concluded that this part of the application must therefore be rejected pursuant to Article 35 - 1 and 4 of the Convention.

[185] Demouplos v. Turkey para. 128.

4. CONCLUSION

This study has been a wide ranging agenda of sample cases for the exhaustion of domestic remedies rule in international institutions. Even though the materials were inspiration stemming, the European Convention's system still remains as distinctive and progressive. Nevertheless, the States influenced by the underlying purpose of paralyzing the state's responsibility via ineffective internal remedies, could not be alerted before a set of judgements give feedback after some years had passed.

Theoretically, it may be argued that the normal operation of the local remedies rule call for a reconsideration of the traditional positivist-dualist assumption that international law and municipal law govern relations between different subjects.The role of domestic courts in the implementation of international provisions is made important by the 'horizontal' and decentralized structure of international law,[186] a fact which may as a result expose their inadequacies in their administration of justice. When those courts operate pursuant to, for example, the Convention, certain uniformity in practice can be expected notwithstanding variations in the domestic legal systems concerned. Such uniformity ensuing from the co-ordinated of domestic courts (under the Convention) may be expected particularly in a system largely inspired by the notions of general interest and collective guarantee, with the local remedies rule operating therein as a procedural device for allocating jurisdiction between the municipal and international legal order. Nevertheless, in terms of maintaining the Council of Europe standards in human rights, the internal administration of justice is not an excuse to fulfill the obligations arising from an international instrument guaranteeing globally recognized primitive fundamental rights and freedoms.

From the European Union perspective, accession process of the Union to the ECHR has taken important steps.[187] At the same time, with these steps it is also aimed that this accession will

[186] Falk R.A., 1964, *"The Role of Domestic Courts in the International Legal Order"* p. 21-59 and 170-7
[187] http://www.europarl.europa.eu/sides European Parliament resolution of 19 May 2010, regarding to Article 6(2) of the Treaty on European Union, Articles 216(2), 218(6), 218(8) and 218(10) of the Treaty on the Functioning of the European Union and the Protocol on Article 6(2) of the Treaty on European Union

require enhanced cooperation between national courts, the ECJ and the ECtHR in protecting fundamental rights. It is believed in some EU institutions that, the cooperation between the two European courts will further the development of a coherent case-law system in the field of human rights. On this subject, European Parliament also referred to ECJ's role for the exhaustion of domestic remedies. On its report, European Parliament stressed out that, for the purposes of complying with the requirement set out in Article 35 of ECHR for domestic remedies to have been exhausted, the applicant shall have exhausted the judicial remedies of the State concerned including a reference for a preliminary ruling to the Court in Luxemburg; the latter procedure shall be regarded as having been complied with where following a request to that end by the applicant the national court does not consider it appropriate for a reference for a preliminary ruling to be made .[188]

From Turkey's perspective, the statistics of the ECtHR show that, approximately 139,650 applications were pending before a judicial formation on 1 January 2011. More than half of these applications had been lodged against one of four countries: Russia, Turkey, Romania or Ukraine. From violation judgments by State numbers represent which more than a third of the judgments delivered by the Court concerned these four of the Council of Europe's forty-seven member States in 2010. These figures show that, Turkey with 278 judgments came first. Russia (217 judgments), Romania (143 judgments) and Ukraine (109 judgments) were the other states after Turkey's negative status. Of the total number of judgments it has delivered in 2010, in over 85% of cases the Court has found at least one violation of the Convention by the respondent State. On the other hand, since it was established in 1959, near the half of the judgments delivered by the Court concerned four member States: Turkey, Italy, Russia and Poland.[189] Besides, the statistics and the general view draw another picture that, the tendancy of the judgments against Turkey also has been changing since the latest amendments in Turkish law, such as "Re – opening of the Judgments". In addition to that, diplomatic and cylical reasons are also another advantage for Turkey to decrease these violation judgments. However, these developments are not enough for Turkey to have the worst statistics from European human rights window.

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concerning the accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Accession Date: 29.01.2011.

[188] European Parliament Report 2009/2241 (INI) dated 6 May 2010. http://www.europarl.europa.eu Accession Date: 29.01.2011.

[189] http://www.echr.coe.int/statistics : faits_chiffres_en_jan 2011_version_web Accession Date: 29.01.2011

Following the referandum which were held in 12 September 2010, as indicated in previous sections, the constitutional complaint system to the Constitutional Court is on the agenda. Both the legal reasoning of the constitution and the draft law of constitutional complaint clearly emphasize that, by this new institutional remedy, the pending cases before ECtHR may decrease which Turkey is defendant. The Draft law regarding to this institution is still pending in Turkish Grand Assembly. It is assumed that the law would cover the necessary regulations regarding the individual complaint and its legal framework, in order to be an effective remedy in the eyes of ECtHR.

As soon as the exhaustion of local remedies rule is a pre-requisite for state responsibility cases, the proposition of this study to lay out a mosaic of internationally institutionalized precedents to understand the non-stable character of exhaustion of domestic remedies rule. As there is not any substantive, uniform evaluation for the principle, every member state to the Convention may access these decisions and realize the perceptions on merits of the case. In respect to the national sovereignty principle, margin of every member state's own legal system is also appreciated throughout some judgments of the ECtHR's, and therefore, the exhaustion of domestic remedies rule may vary from case to case and the state from another state's legal structure.

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EXHAUSTION OF DOMESTIC REMEDIES PRINCIPLE IN APPLYING TO EUROPEAN COURT OF HUMAN RIGHTS

Master's Thesis

ULVİ DARENDELİ

Thesis Supervisor: DR. ERDEM İLKER MUTLU

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I certify that this thesis meets all the requirements as a thesis for the degree of Master of Arts.

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Examining Comittee Members — Signature
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Dr. Erdem İlker MUTLU

Prof. Dr. Feridun YENİSEY

Asst. Prof. Cengiz AKTAR