Proving discriminatory violence at the European Court of Human Rights

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3 The collection of facts and the actors involved in fact-finding at the ECtHR

3.1 Introduction

This chapter describes different ways in which the ECtHR gathers facts and identifies the various actors who may play a role in establishing those facts. A variety of actors may contribute to fact-finding at the Court, including applicants and respondent States as direct parties, but also the Court itself through fact-finding hearings and on-site investigations, as well as external actors through third party intervention or otherwise. Fact-finding is described in this context as "a process (which may consist of different phases) in which [the] court … attempts to clarify an unclear or disputed fact or set of facts."[1] The contribution made by each actor to the fact-finding process and the obligations of the parties involved will be examined in turn. A general overview of fact-finding at the Court will be useful, because it helps to determine what means of gathering evidence may be most effective in establishing the facts in cases of discriminatory violence.

The chapter starts off with a discussion in section 3.2 of the legal framework that governs the examination of cases by the Court. This legal framework forms the basis for fact-finding in the Convention system. It consists of Article 38 of the Convention (regarding the 'examination of the case'), the 'Rules of Court' and 'Annex to the Rules (concerning investigations)'. Article 38 ECHR is of particular importance because it indicates – albeit to a limited extent – how the Court is supposed to carry out its adjudicatory task. It further emphasises the roles of the Court and the different parties during the examination of a case. The different roles of the direct parties are further described in section 3.3 where the procedure by which applicants may present their case is described along with the obligations of respondent States in this context. Section 3.4 subsequently addresses the Court's fact-finding function. The Court may also organise fact-finding hearings and on-the-spot investigations and these are both briefly analysed. Thereafter, section 3.5 considers the ways in which external actors can contribute to the collection and establishment of the facts of a case. In section 3.6 the chapter concludes with an indication of the fact-finding instruments that may be most useful for complaints concerning discriminatory violence.

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1 P. Leach, C. Paraskeva & G. Uzelac, *International human rights & fact-finding. An analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights*, London Metropolitan University: Report by the Human Rights and Social Justice Research Institute 2009, p. 22.

3.2 The legal framework for the examination of a case by the ECtHR

The legal framework for the examination of a case by the ECtHR consists mainly of Article 38 of the ECHR, the 'Rules of Court' and 'Annex to the Rules (concerning investigations)'.[2] These documents provide basic information concerning the manner in which facts may be gathered during proceedings at the Court. The Rules of Court and Annex contain rules that also set out the timeframe within which the presentation of the case must be completed and the provisions governing fact-finding missions carried out by the Court, such as instructions on how fact-finding hearings should be organised.[3]

Article 38 of the Convention contains the principles for the Court to follow regarding establishing the facts. This provision allows the Court to become actively involved in the examination of a case. Instead of laying down that the ECtHR should rigorously apply the principle of *actori incumbit probatio*, which in Convention proceedings prescribes that the burden of proof rests on the one who affirms, Article 38 instead underlines that the process of collecting relevant facts is a joint undertaking on the part of the Court and the actors involved in the proceedings. The provision reads as follows:

> "The Court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities."

This is also reflected in a statement made by the Court in *Ireland v. United Kingdom*, where it noted that in "the cases referred to it, the Court examines all the material before it, whether originating from the Commission, the Parties or other sources, and, if necessary, obtains material *proprio motu*."[4]

In light of the reference in *Ireland v. United Kingdom* to 'the Commission,' it is useful to mention that the 'examination of the case' was originally regulated under Article 28 § 1 ECHR which empowered the former European Commission of Human Rights to conduct an investigation into the main issue and to establish the facts in a case. It is important to be aware of the fact that this institution once existed because it was this Commission that laid the foundation for certain rules of evidence at the ECtHR and which played a crucial role in the fact-finding processes in several cases mentioned elsewhere in this study. The Commission was entrusted with the task of establishing whether the facts amounted to a violation of the Convention. Thereafter, if it considered a case to be well-founded, it could decide to refer the case to the ECtHR or to the Committee of Ministers. In this context, the Court remained more in the background in terms of fact-finding activities.

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2 Hereafter this document is referred to as the 'Annex'.

3 The most recent Rules of Court, dated 14 November 2016, have been evaluated in this thesis. They can be found on the Court's webpage (www.echr.coe.int).

4 ECtHR 18 January 1978, 5310/71 (*Ireland/United Kingdom*) (GC), para. 160.

Because the task of establishing the facts was primarily attributed to the Commission under the old Convention system, the Court was cautious in applying its own investigative powers.[5] While this provision was still in force, the Court repeatedly stated in specific cases where it had to decide on difficult factual issues that on the one hand, it was not bound by the Commission's findings of fact and that it remained free to make its own assessment in the light of all the material before it and, on the other hand, that only in exceptional circumstances would it exercise its own investigatory powers.[6]

Alterations to this system were made after most Central and Eastern European States became parties to the Convention in the 1990s. The increased number of members of the Council of Europe created long delays in the processing of cases which were taking at least four to five years (in addition to the time taken to pursue domestic proceedings). Thus, in order to simplify and speed up the system, Protocol No. 11 was introduced which disbanded the Commission.[7] After that protocol entered into force in November 1998, the establishment of facts was regulated in a new provision, i.e. Article 38 § 1a ECHR. From then on, the Court became a full-time institution with the authority to investigate a case and to verify and evaluate the evidence.[8] However, as Protocol No. 11 appeared to be insufficient to manage the increasing case load of the Court, this led to the adoption by the Committee of Ministers of Protocol No. 14 to the Convention in May 2004.[9] With the entry into force of Protocol No. 14 from 1 June 2010, the rule on the examination of the case is now recorded in Article 38 in its current form.

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5 P. Leach, C. Paraskeva & G. Uzelac, *International human rights & fact-finding. An analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights*, London Metropolitan University: Report by the Human Rights and Social Justice Research Institute 2009, p. 26.

6 ECtHR 16 September 1996, 21893/93 (*Akdivar a.o./Turkey*) (GC), para. 78; ECtHR 8 July 1999, 23763/94 (*Tanrikulu/Turkey*) (GC), para. 67. See also L.G. Loucaides, *Essays on the Developing Law of Human Rights*, Dordrecht/Boston/London: Martinus Nijhoff Publishers 1995, p. 157-158.

7 P. Leach, *Taking a Case to the European Court of Human Rights*, New York: Oxford University Press 2011, p. 6-7.

8 However, even after Protocol No. 11 entered into force, the Commission still held the power to conduct an investigation into those cases that were placed in the 'transitional' category. Article 5 § 3 Protocol No. 11 prescribed that applications that had already been declared admissible on the day Protocol No. 11 entered into force were supposed to be finalised by the members of the Commission under the former system within a period of one year. Applications that had not been handled within the prescribed amount of time were to be dealt with by the Court under the new system. Consequently, many cases, based on requests filed before 1998 where the Commission had already conducted an investigation, were settled by the Court. See P. Leach, C. Paraskeva & G. Uzelac, *International human rights & fact-finding. An analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights*, London Metropolitan University: Report by the Human Rights and Social Justice Research Institute 2009, p. 27.

9 P. Leach, *Taking a Case to the European Court of Human Rights*, New York: Oxford University Press 2011, p. 7.

The 'new' Article 38 indicates that the Court may undertake two specific activities when establishing the facts. Firstly, it may examine the case together with the representatives of the parties. Thus, it then takes into account submissions about the facts of a case from the different parties involved in that case. Since the Convention system has been described as "primarily a written rather than an oral procedure,"[10] this activity is conducted mostly through the examination of written documents previously drawn up in the domestic context. Secondly, the Court may conduct an 'investigation' into the circumstances of a case itself, where deemed necessary. This is an activity for which the Member States involved must furnish all 'necessary facilities'. However, in most cases such investigations are regarded as superfluous because the facts are not contested by the parties to the dispute or have already been considerably clarified by the domestic judgments.[11] Therefore, in most cases, it may be assumed that the documentary material has already been collected and presented in the national context and passed on to the Court by the parties' representatives. So, in the vast majority of cases, ECtHR judges – while ascertaining the facts – rely on previous decisions that were taken in the domestic setting concerning those cases and on documents created in the course of prior domestic proceedings. The Court's task is then limited to assessing whether or not the established factual findings reveal a violation of the Convention.[12]

This approach by the Court is in line with the subsidiary nature of its role, which means that the ECtHR needs to be wary of assuming the function of a first-instance tribunal of fact where this is not rendered unavoidable by the circumstances of a particular case.[13] However, the presence of 'cogent elements' in certain cases may require the ECtHR to depart from the reasoned findings of fact arrived at by national judicial authorities. Cogent elements arise in situations where the fact-finding activities performed by

10 Ibid., p. 44.

11 M. Smith, 'The Adjudicatory fact-finding tools of the European Court of Human Rights', 2 *European Human Rights Law Review* (2009), p. 206-228, p. 207; M. O'Boyle & N. Brady, 'Investigatory powers of the European Court of Human Rights', in: O. Chernishova & M. Lobov (eds.), *Russia and the European Court of Human Rights: A Decade of Change. Essays in honour of Anatoly Kovler, Judge of the European Court of Human Rights in 1999-2012*, Oisterwijk: Wolf Legal Publishers 2013, p. 121-141, p. 121.
This was also noted in a broader context for international tribunals in general, such as the ICJ, the IACtHR and the ECtHR. See P. Kinsch, 'On the uncertainties surrounding the standard of proof in proceedings before international courts and tribunals', in: G. Venturini & S. Bariatti (eds.), *Diritti Individuali E Giustizia Internazionale/Individual Rights and International Justice/Droits Individuels et Justice Internationale. Liber Fausto Pocar*, Milano: Giuffrè Editore 2009, p. 427-442, p. 434.

12 U. Erdal, 'Burden and standard of proof in proceedings under the European Convention', 26 *European Law Review: Supp (Human rights survey)* (2001), p. 68-85, p. 69.

13 R. Ryssdal, 'The coming of age of the European Convention on Human Rights', 1 *European Human Rights Law Review* (1996), p. 18-29, p. 24-25. See also ECtHR 8 October 2015, 36503/11 (*Gahramanli a.o./Azerbaijan*), para. 72.

national courts show serious deficiencies.[14] Under such circumstances, the ECtHR has imposed an obligation on itself to conduct a particularly thorough scrutiny of all the material submitted by the parties. In that regard, and particularly in the context of cases where allegations have been made under Articles 2 or 3 of the Convention, the Court has underlined that:

> "The Court is sensitive to the subsidiary nature of its role and recognises that it must refrain from taking on the role of a first-instance tribunal of fact unless this is rendered unavoidable by the circumstances of a particular case. Nonetheless, where allegations are made under Articles 2 and 3 of the Convention the Court must apply a particularly thorough scrutiny even if certain domestic proceedings and investigations have already taken place. The Court is not bound by the findings of domestic courts, and cogent elements may require it to depart from and set aside these findings …."[15]

So, in principle, the Court adopts a position of reserve as far as fact-finding activities are concerned because fact-finding is, in principle, considered to be the task of national courts. There are still circumstances in which the Court itself conducts a more thorough investigation into the facts of the case and establishes facts not solely on the basis of written documents. Hence, fact-finding is sometimes based on the Court's own active engagement in the collection of evidence and on the direct and external parties' cooperation with the Court in all matters relating to the establishment of facts. Consequently, in those cases, establishing the facts before the Court is not simply a matter of one party bearing the duty to present the relevant factual elements and all the evidentiary material in order to persuade the Court of their arguments. Rather, establishing the facts appears to be an interplay between the different actors, which are the applicant and the respondent Member State, the Court and sometimes even external actors.

3.3 How applicants and respondent States are engaged in fact-finding during the procedure before the ECtHR

One way in which facts are gathered at the Court is through submissions made by the applicants and respondent States. In order to understand how they may contribute to the fact-finding process, this section first sets out how these direct parties may become engaged in a procedure before the ECtHR, i.e. through individual petitions or through inter-State applications. More precisely, it outlines how applications may be presented to the Court. Thereafter, it focuses on the duty of both parties, and respondent States in particular, to cooperate with the Court in gathering evidence.

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14 M. Smith, 'The Adjudicatory fact-finding tools of the European Court of Human Rights', 2 *European Human Rights Law Review* (2009), p. 206-228, p. 208; D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, *Harris, O'Boyle & Warbrick. Law of the European Convention on Human Rights*, New York: Oxford University Press 2014, p. 143.

15 ECtHR 26 April 2011, 25091/07 (*Enukidze and Girgvliani/Georgia*), para. 286.

3.3.1 Presenting an application to the Court

Two types of application procedures may be lodged with the Court: individual applications and inter-State applications. The basis for individual applications is laid down in Article 34 ECHR, which prescribes that applications may be brought by "any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto." The right of individual petition is considered by the Court as "a key component of the machinery for protecting the rights and freedoms set forth in the Convention."[16] The last sentence of Article 34 ECHR indicates that Member States ought "not to hinder in any way the effective exercise of this right." Obstructing applicants or potential applicants in taking their cases to the ECtHR will lead to findings of violations of this provision.[17]

In addition to individual petitions, it is also possible to bring inter-State complaints before the Court, which is provided for by Article 33 ECHR. Leach makes a distinction between three categories of inter-State cases.[18] The first arises where applicant States represent, or are closely related to, the individual victims in the context of a certain political dispute, or some other controversy, between States. For example, a series of cases have been brought before the Commission and the Court by Cyprus against Turkey following Turkey's military operations in northern Cyprus in 1974, its continuing occupation of that territory and its proclamation of the 'Turkish Republic of Northern Cyprus' in 1983.[19] A second category concerns cases in which applicant States attempt to obtain a remedy for one of their nationals whose rights have been violated by a respondent State. Leach mentions the case *Denmark v. Turkey* as an example in this regard. In this case it was argued that a Danish national had been tortured by the Turkish police. Eventually, a friendly settlement was reached between the parties, which included the payment of a sum of money to the applicant government and a statement of regret by the respondent government concerning the incidence of occasional and individual cases of torture and ill-treatment in Turkey.[20] A third category of inter-State cases are those issues where applicant States conduct a so-called policing role. Through such procedures, they condemn the human

16 ECtHR 4 February 2005, 46827/99 and 46951/99 (*Mamatkulov and Askarov/Turkey*) (GC), para. 122.

17 ECtHR 16 September 1996, 21893/93 (*Akdivar a.o./Turkey*) (GC), para. 106; ECtHR 21 February 2002, 23423/94 (*Matyar/Turkey*), para. 159; ECtHR 12 April 2005, 36378/02 (*Shamayev a.o./Georgia and Russia*), para. 518; ECtHR 25 May 1998, 15/1997/799/1002 (*Kurt/Turkey*), para. 165; ECtHR 4 February 2005, 46827/99 and 46951/99 (*Mamatkulov and Askarov/Turkey*) (GC), para. 128.

18 P. Leach, *Taking a Case to the European Court of Human Rights*, New York: Oxford University Press 2011, p. 13-14.

19 EcomHR 26 May 1975, 6780/74 and 6950/75 (*Cyprus/Turkey*) (Admissibility decision); EcomHR 10 July 1978, 8007/77 (*Cyprus/Turkey*) (Admissibility decision).

20 ECtHR 5 April 2000, 34382/97 (*Denmark/Turkey*) (Friendly Settlement), paras. 23-24.

rights situation in another Council of Europe Member State on a more generic level.[21] Leach refers to the *Greek* case to illustrate this third category of inter-State complaints. In this case, the applicant States complained that, following the *coup d'état* in 1967, among other things, the Greek government violated Article 3 of the Convention. They alleged numerous cases of torture or ill-treatment of political prisoners at the time in Greece, which resulted in an administrative practice (this is discussed below in section 5.4.2).[22] This example demonstrates that applicant States do not necessarily need to have some sort of relationship with the victims of violations by another Member State. The victims do not necessarily have to be the nationals of the applicant State, for example. Hence, inter-State cases could concern allegations of large-scale human rights violations in a specific Contracting Party, and those Council of Europe members that complain about such practices are not necessarily pursuing some national interest with this activity. Rather, they raise a concern about the "public order of Europe."[23]

The inter-State mechanism has been invoked in addressing situations of systemic violations.[24] However, given the negative diplomatic and political consequences that can potentially arise from one Member State accusing another of being a violator of human rights, inter-State procedures are not used very often.[25] Thus, Member States do not often draw the Court's attention to allegations of serious and repeated violations of the Convention committed by other Member States. In the context of widespread complaints about violations committed by Turkey, the following has been observed:

> "The inter-State mechanism under the Convention is more readily designed to raise these larger issues. However because the political will is absent on the part of other States to become involved in such an application against Turkey, it is in the context of the individual complaints mechanism that efforts have been made to raise complaints of such large scale violation …."[26]

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21 P. Leach, *Taking a Case to the European Court of Human Rights*, New York: Oxford University Press 2011, p. 13-14.

22 EcomHR 5 November 1969, 3321/67 (*Denmark/Greece*); 3322/67 (*Norway/Greece*); 3323/67 (*Sweden/Greece*); 3344/67 (*Netherlands/Greece*), published in: 'The Greek Case', 12 *Yearbook of the European Convention on Human Rights* (1972).

23 D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, *Harris, O'Boyle & Warbrick. Law of the European Convention on Human Rights*, New York: Oxford University Press 2014, p. 115-117.

24 Examples include EcomHR 5 November 1969, 3321/67 (*Denmark/Greece*); 3322/67 (*Norway/Greece*); 3323/67 (*Sweden/Greece*); 3344/67 (*Netherlands/Greece*), published in: 'The Greek Case', 12 *Yearbook of the European Convention on Human Rights* (1972); ECtHR 18 January 1978, 5310/71 (*Ireland/United Kingdom*) (GC).

25 L. Hodson, *NGOs and the Struggle for Human Rights in Europe*, Oxford: Hart Publishing Ltd 2011, p. 79-80.

26 A. Reidy, F. Hampson & K. Boyle, 'Gross Violations of Human Rights: Invoking the European Convention on Human Rights in the Case of Turkey', 15 *Netherlands Quarterly of Human Rights* (1997), p. 161-173, p. 172.

Thus, currently the focus is more on individual complaints, of which it has been said that each separate judgment on a certain issue "adds credibility to allegations that human rights violations are widespread and that systemic reform is required."[27]

Rules 46 and 47 of the Rules of Court enumerate the contents that must be included in inter-State and individual applications. In inter-State applications, a State applicant must provide the Court with a statement of the facts, a statement of the alleged violation(s) of the Convention and the relevant arguments, 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 and copies of any relevant documents and in particular the decisions, whether judicial or not, relating to the object of the application (Rule 46). A complaining individual must provide a concise and legible statement of the facts and of the alleged violation(s) of the Convention and the relevant arguments with a concise and legible statement of the applicant's compliance with the admissibility criteria mentioned in Article 35 § 1 ECHR (Rule 47 § 1). Among the documents to be submitted the applicants may include "domestic court claim forms, witness statements and judgments and relevant correspondence, reports and other non-judicial decisions, including any document which is required to show that the admissibility criteria (notably, the exhaustion of domestic remedies and the six-month time limit) have been complied with."[28]

Practitioners representing the applicants are advised to submit to the Court the most convincing application already at the initial stage when the Court decides on the admissibility of a case. This applies particularly to individual complaints. In this context, convincing applications are necessary for several reasons. Firstly, sufficient information about a case allows the Court to conduct an initial analysis of the application. Sufficient information makes it possible to decide that individual applications with clear problems of admissibility can be submitted rapidly to a single judge for a further decision.[29] The admissibility of cases mostly concerns procedural issues which, if found, may prevent the Court from dealing with the case. Thus, applicants are required to satisfy a number of conditions of admissibility as set out in Article 35 ECHR before the Court can examine the merits of the case. In the context of individual complaints, it is important that applicants exhaust

27 L. Hodson, *NGOs and the Struggle for Human Rights in Europe*, Oxford: Hart Publishing Ltd 2011, p. 81.

28 P. Leach, *Taking a Case to the European Court of Human Rights*, New York: Oxford University Press 2011, p. 29.

29 D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, *Harris, O'Boyle & Warbrick. Law of the European Convention on Human Rights*, New York: Oxford University Press 2014, p. 118.

all domestic remedies before they turn to the ECtHR[30] and that they do so within a period of six months from the date on which the final decision by a domestic judge was taken. If they do not fulfil these conditions, their cases are declared inadmissible. Other reasons for inadmissibility are: anonymous applications; applications that are substantially the same as matters that have already been examined by the Court or have already been submitted to another procedure of international investigation or settlement and contain no relevant new information; applications that are incompatible with the provisions of the Convention or its Protocols, are manifestly ill-founded, or entail an abuse of the right of individual application, or; applications from which it appears that applicants have not suffered a significant disadvantage. Complaints that are incompatible *ratione personae*, *ratione loci*, *ratione temporis* or *ratione materiae* are also declared inadmissible.[31] This stands in contrast with inter-State applications, where the only applicable admissibility criteria are the requirement to exhaust domestic remedies,[32] the six-month rule and the conditions *ratione personae*, *ratione loci*, *ratione temporis* or *ratione materiae*.[33]

The second reason why applications must be convincing is connected to the first and concerns the inadmissibility condition that a complaint is 'manifestly ill-founded' in individual applications (Article 35 § 3 ECHR). This condition, in essence, entails a preliminary test of the case on its merits.[34] The Court will declare an application inadmissible if, on preliminary investigation, the application does not disclose *prima facie* grounds that there has been a breach of the Convention.[35] More concretely, this means that during the admissibility stage, *prima facie* evidence must be presented that supports the application. In international law, a *prima facie* case is described as evidence "which, unexplained or uncontradicted is sufficient to maintain

30 There is an exception to this rule. Applicants need not exhaust domestic remedies in cases where such remedies are either ineffectual or impractical. See Parliamentary Assembly. Committee on Legal Affairs and Human Rights. *Report. Member states' duty to co-operate with the European Court of Human Rights*, Rapporteur Mr. Christos Pourgourides, Doc. 11183, 9 February 2007 (online), para. 11.

31 Council of Europe, *Practical Guide on Admissibility Criteria*, Strasbourg: Council of Europe 2014 (online), p. 41-81.

32 There are two exceptions to the exhaustion rule in inter-State cases. The first is that the rule does not apply to inter-State complaints regarding legislative measures. The second exception is that the rule is waived where there is an administrative practice in the respondent State that would render any remedies ineffective (see ECtHR 3 July 2014, 13255/07 (*Georgia/Russia I*) (GC), paras. 125 and 147-158). Both exceptions are mentioned in D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, *Harris, O'Boyle & Warbrick. Law of the European Convention on Human Rights*, New York: Oxford University Press 2014, p. 46.

33 D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, *Harris, O'Boyle & Warbrick. Law of the European Convention on Human Rights*, New York: Oxford University Press 2014, p. 45.

34 P. Leach, *Taking a Case to the European Court of Human Rights*, New York: Oxford University Press 2011, p. 29.

35 Ibid., p. 157. See also D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, *Harris, O'Boyle & Warbrick. Law of the European Convention on Human Rights*, New York: Oxford University Press 2014, p. 122.

the proposition affirmed."[36] Leach mentions, as an example, that applicants need to produce sufficient evidence of telephone tapping or torture, for example, failing which an application will be declared inadmissible as being manifestly ill-founded.[37] Hence, the more authoritative and convincing an initial application is, the less likely it is to be declared inadmissible.[38]

Currently, it has become the usual practice that the Court takes a decision on admissibility and merits together (Article 29 § 1 ECHR). In many cases, therefore, the Court immediately establishes the existence of *prima facie* evidence on a case, also during the discussion of the merits. However, the Court can still choose to take a decision on admissibility separately (Article 29 § 1 ECHR), which means that the presence of *prima facie* evidence will be assessed at the admissibility stage. This stands in contrast with inter-State cases, where the Court has refused to assess the merits of a case while assessing admissibility. Consequently, an inter-State application cannot be rejected as manifestly ill-founded under Article 35 § 3 ECHR.[39]

Finally, sufficient and convincing information enables the Court to identify high priority cases at the initial stage of proceedings concerning individual applications. The Court's priority policy ensures that the most serious cases revealing the existence of widespread problems are dealt with more rapidly. Cases in higher categories relate to urgent applications, such as those where there is a particular risk to the life or health of the applicant, applications that raise questions which may have an impact on the effectiveness of the Convention system, inter-State cases and applications whose main complaints appear to raise issues under Articles 2, 3, 4 (prohibition of slavery and forced labour) or 5 § 1 (right to liberty and security) of the Convention (the 'core rights'), irrespective of whether they are repetitive, and which have given rise to direct threats to the physical integrity and dignity of human beings. These issues will be eligible for examination before applications which are manifestly inadmissible, for example.[40]

This subsection has shown that in individual applications the facts are principally brought primarily by the applicant when presenting the case, as it is the applicant who brings the case to Court. Even at the initial stages, the applicant must be able to make a strong case. However, as will be demon-

36 C.E. Foster, *Science and the Precautionary Principle in International Courts and Tribunals. Expert Evidence, Burden of Proof and Finality*, Cambridge: Cambridge University Press 2011, p. 230.

37 P. Leach, *Taking a Case to the European Court of Human Rights*, New York: Oxford University Press 2011, p. 157.

38 Ibid., p. 29.

39 D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, *Harris, O'Boyle & Warbrick. Law of the European Convention on Human Rights*, New York: Oxford University Press 2014, p. 45.

40 'The Court's Priority Policy' is available online and may be viewed on the Court's web page. See also D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, *Harris, O'Boyle & Warbrick. Law of the European Convention on Human Rights*, New York: Oxford University Press 2014, p. 118-120.

strated below, in many cases in which Article 2 and 3 complaints are made, providing sufficient evidence to the Court is particularly complicated. In such cases it may occur that evidentiary material is not available to the applicants, while the State authorities have exclusive knowledge of the events at issue.[41] In this context, respondent States are required to cooperate with the establishment of facts at the Court. The next subsection discusses how far these obligations extend in this context.

3.3.2 The parties' obligation to cooperate with the Court

Both parties to a case are bound to cooperate with the Court during the examination of a case in accordance with Article 38. For example, where there are circumstances which make the gathering of evidence practically impossible for the applicant and where the respondent State controls access to the evidentiary material, the obligation formulated under Article 38 ECHR for the respondent State to 'furnish all necessary facilities' becomes particularly important. This requirement includes the following non-exhaustive list of activities that the Contracting Parties must undertake: submit to the Court all documentary evidence relating to the case, identify, locate and ensure the attendance of witnesses, comment on documents submitted to the Court and reply to questions posed by the Court.[42]

Further obligations regarding cooperation are provided in Rule 44A of the Rules of Court in addition to Article 38 ECHR. This rule underlines both parties' duty to cooperate fully with the Court in the conduct of the proceedings and, in particular, to take such action within their power as the Court considers necessary for the proper administration of justice. This duty applies equally to those Member States that are not parties to the proceedings, but whose cooperation is still deemed necessary. Where there is a failure to comply with an order of the Court concerning the conduct of the proceedings, the President of the designated Chamber has the power to take any steps which he or she considers appropriate (Rule 44B). If one of the parties fails to produce evidence or provide the information that was requested by the Court or to divulge relevant information of its own motion or otherwise fails to take part effectively in the proceedings, the Court may

41 H. Keller & C. Heri, 'Enforced Disappearance and the European Court of Human Rights. A 'Wall of Silence, Fact-Finding Difficulties and States as 'Subversive Objectors'', 12 *Journal of International Criminal Justice* (2014), p. 735-750, p. 738.

42 Parliamentary Assembly. Committee on Legal Affairs and Human Rights. *Report. Member States' duty to co-operate with the European Court of Human Rights*, Rapporteur Mr. Christos Pourgourides, Doc. 11183, 9 February 2007 (online), para. 14. See also P. Leach, C. Paraskeva & G. Uzelac, *International human rights & fact-finding. An analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights*, London Metropolitan University: Report by the Human Rights and Social Justice Research Institute 2009, p. 13.

draw such inferences as it deems appropriate (Rule 44C § 1).[43] However, such failure or refusal by a party shall not, in itself, be a reason for the Chamber to discontinue the examination of the application (Rule 44C § 2).

Additionally, the Annex to the Rules prescribes that the applicant and any Contracting Party concerned shall assist the Court as necessary in implementing any investigative measures (Rule A2 § 1). The second paragraph of Rule A2 imposes significant duties on Contracting Parties on whose territories on-site proceedings shall take place before a delegation (as discussed in the next section). Accordingly, these Contracting Parties are required to extend to the delegation the facilities and cooperation necessary for the proper conduct of the proceedings, such as, to ensure, to the full extent necessary, freedom of movement within the territory and all adequate security arrangements for the delegation, for the applicant and for all witnesses, experts and others who may be heard by the delegation. These Contracting Parties also have the responsibility to take steps to ensure that no adverse consequences are suffered by any person or organisation on account of any evidence given, or any assistance provided, to the delegation.

The Court's jurisprudence reveals numerous examples in which the duty to cooperate with the Court in establishing the facts under Article 38 was not respected in practice, especially by respondent States. In various Article 2 and Article 3 related issues, Member States did not comply with their duties under Article 38 where, for example, they failed to provide the Court with an unexpurgated version of an investigation file containing information that had been deleted from the file originally sent [44] or where they failed to submit a requested document or omitted to submit it within the requisite time.[45]

Member States cannot successfully rely on the allegedly secret nature of a document in order to justify why they failed to provide the document to the Court.[46] For example, in the cases *Al Nashiri v. Poland* and *Husayn (Abu Zubaydah) v. Poland*, the Court did not accept the respondent government's argument that it was not in a position to submit to the Court all the requested information and documents about the presumed torture of terrorist suspects on CIA 'black sites' that were allegedly facilitated by Poland on its territory. The respondent State stated that it was obstructed from providing any information on the matter, because in the interests of the administration of justice it was required to adhere strictly to the secrecy of the investigation. In response to that argument, the ECtHR stated:

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43 The Court's leeway to 'draw inferences' from parties' conduct is discussed in detail in chapter 5 of this study.

44 ECtHR 2 August 2005, 65899/01 (*Tanış a.o./Turkey*), para. 164.

45 ECtHR 9 May 2003, 27244/95 (*Tepe/Turkey*), para. 131.

46 ECtHR 13 June 2000, 23531/94 (*Timurtaş/Turkey*), para. 67; ECtHR 12 February 2009, 2512/04 (*Nolan and K./Russia*), para. 56; ECtHR 24 July 2014, 28761/11 (*Al-Nashiri/Poland*), paras. 345-376.

> "The absence of specific, detailed provisions for processing confidential, secret or otherwise sensitive information in the Rules of Court – which, in the Government's view justified their refusal to produce evidence – does not mean that the Court in that respect operates in a vacuum. On the contrary, and as pointed out by the applicant..., over many years the Convention institutions have established sound practice in handling cases involving various highly sensitive matters, including national-security related issues. Examples of procedural decisions emerging from that practice demonstrate that the Court is sufficiently well equipped to address adequately any concerns involved in processing confidential evidence by adopting a wide range of practical arrangements adjusted to the particular circumstances of a given case...."[47]

In light of this reasoning, the Court eventually established that the Polish government failed to live up to its obligations under Article 38 of the Convention.[48]

Member States also cannot claim that a requested document has already been examined by the national authorities who established that the applicant's allegations were groundless. Otherwise, the Court will establish the facts in favour of the applicant.[49] Besides which, they may not decide for themselves what is the relevance or importance of a particular witness or other evidence. This is an issue which the Court must decide on and a respondent State is not allowed to refuse to summon a specific witness that the Court has requested to appear, for example.[50] In this last context, the Court has underlined that it is for the Court to "decide whether and to what extent the participation of a particular witness would be relevant for its assessment of the facts and what kind of evidence the parties are required to produce for due examination of the case."[51] The parties then have the task to comply with the Court's evidentiary requests and instructions, to inform the Court in time of any obstacles to complying with these and to provide reasonable or credible explanations for any failures in that context.[52]

In addition, when Member States are unwilling to cooperate with the Court during on-site visits (a means of fact-finding discussed in the next section), this represents a violation of Article 38 of the Convention and Rule A2 § 2 of the Annex. Certain Member States have attempted to put pressure on delegates from the former Commission or the Court in their fact-finding process during those visits. Serious examples of States' non-cooperation were presented in the two *Cyprus v. Turkey* cases in which the Commission's delegation was refused entry into Turkey by the respondent State and in which

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47 ECtHR 24 July 2014, 28761/11 (*Al Nashiri/Poland*), para. 371; ECtHR, 24 July 2014, 7511/13 (*Husayn (Abu Zubaydah)/Poland*), para. 364.

48 ECtHR 24 July 2014, 28761/11 (*Al Nashiri/Poland*), para. 372; ECtHR, 24 July 2014, 7511/13 (*Husayn (Abu Zubaydah)/Poland*), para. 365.

49 See ECtHR 31 May 2005, 27693/95 (*Çelikbilek/Turkey*), paras. 71-72. In this case, owing to the government's failure to provide the requested information, the Court concluded that the applicant's brother had indeed been arrested and detained by agents of the State, as the applicant alleged.

50 ECtHR 17 February 2004, 25760/94 (*İpek/Turkey*), para. 125.

51 ECtHR 21 October 2013, 55508/07 and 29520/09 (*Janowiec a.o./Russia*) (GC), para. 208.

52 Ibid.

cooperation was refused during an investigation in northern Cyprus.[53] In the *Greek* case, the Commission's delegates were denied access to specific premises which made conducting interviews and inspecting the premises impossible.[54] Special measures were taken by the Court against Russia in *Shamayev a.o. v. Georgia and Russia*, after Russia refused to provide access to thirteen applicants for a delegation of Strasbourg judges, despite the Court's repeated requests to do so. In addition to the conclusion that Russia did not fulfil its obligation under Article 38,[55] the Court ordered Russia to reimburse the costs incurred by the Court during its preparations for the fact-finding visit. Because the planned visits of the Court's delegation had to be cancelled, the Court ruled that the respondent State had to bear the cost of the cancelled air travel tickets for the entire delegation of the Court and for the two interpreters who had been hired by the Court in Russia. The total sum of €1,580.70 was ordered to be paid into the Council of Europe budget.[56]

Another problem in the context of Member States' obligation to cooperate with the Court is connected to their duty to ensure that witnesses attend the hearings organised by the Court. This aspect is often challenging, given that fact-finding missions organised by the Court generally deal with incidents in 'trouble-zones'. As a result, many applicants or witnesses have been intimidated, harmed or some allegedly even murdered in the past.[57] In this context, in a resolution dating from 2007, the Parliamentary Assembly of the Council of Europe has called upon Member States to take positive measures:

> "to protect applicants, their lawyers or family members from reprisals by individuals or groups including, where appropriate, allowing applicants to participate in witness protection programmes, providing them with special police protection or granting threatened individuals and their families temporary protection or political asylum in an unbureaucratic manner."[58]

53 EcomHR 26 May 1975, 6780/74 and 6950/75 (*Cyprus/Turkey*) (Admissibility decision); EcomHR 10 July 1978, 8007/77 (*Cyprus/Turkey*) (Admissibility decision).

54 EcomHR 5 November 1969, 3321/67 (*Denmark/Greece*); 3322/67 (*Norway/Greece*); 3323/67 (*Sweden/Greece*); 3344/67 (*Netherlands/Greece*), published in: 'The Greek Case', 12 *Yearbook of the European Convention on Human Rights* (1972).

55 ECtHR 12 April 2005, 36378/02 (*Shamayev a.o./Georgia and Russia*), paras. 494-504.

56 Ibid., paras. 534-536.

57 D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, *Harris, O'Boyle & Warbrick. Law of the European Convention on Human Rights*, New York: Oxford University Press 2014, p. 145; H. Keller & C. Heri, 'Enforced Disappearance and the European Court of Human Rights. A 'Wall of Silence, Fact-Finding Difficulties and States as 'Subversive Objectors'', 12 *Journal of International Criminal Justice* (2014), p. 735-750, p. 747.

58 Parliamentary Assembly. Committee on Legal Affairs and Human Rights. *Report. Member States' duty to co-operate with the European Court of Human Rights*, Rapporteur Mr. Christos Pourgourides, Doc. 11183, 9 February 2007 (online), para. 17.2.

The Court has been repeatedly faced with cases in which witnesses, for one reason or another, did not attend the hearings.[59] The ECtHR's powers do not reach so far that the Court is able to compel the attendance of witnesses during hearings. This has often been described as a weakness in the Court's system.[60] The Court may declare that the Member State concerned fell short of its obligations under Article 38 ECHR, if it did not manage to ensure that a certain witness was present during the hearing.[61] Such a declaration does not really compensate in any way for the defects caused by a government's non-cooperation, as the obstacles thrown up by governments in this regard can sometimes even make it impossible for the Court to find that violations have occurred.[62] What is more effective, in this context, is the option of making presumptions and drawing inferences, since utilising such tools may have major consequences for the distribution of the burden of proof.[63] Presumptions and inferences as concepts essentially enable the Court to conclude that because some facts have been proved, other facts may be presumed or inferred to be accurate. This is further discussed in chapter 5.[64]

3.4 Fact-finding missions conducted by the ECtHR

The Court itself has avenues by which it can become more actively involved in gathering information about a case. The most effective fact-finding activity undertaken by the ECtHR is a 'fact-finding mission'. Its practice, proce-

59 Some examples may be mentioned here. In *Ergi*, no reason was given for the absence of the witnesses (ECtHR 28 July 1998, 66/1997/850/1057 (*Ergi/Turkey*), para. 27); in *Bilgin*, two witnesses died, one fell ill, and two others were too afraid to testify (ECtHR 16 November 2000, 23819/94 (*Bilgin/Turkey*), para. 61); in *Kaya*, the witnesses were put under pressure by the police to refrain from appearing (ECtHR 19 February 1998, 158/1996/777/978 (*Kaya/Turkey*), paras. 36-37). In *Kiliç*, the respondent government presented numerous practical reasons to the Court as to why several witnesses could not appear before the Court's delegation: one witness could not be traced, another witness was about to appear for the hearing but due to weather conditions his flight was cancelled, and yet another failed to appear claiming that he could not recall being petitioned for the hearing (ECtHR, 28 March 2000, 22492/93 (*Kiliç/Turkey*), para. 35).

60 D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, *Harris, O'Boyle & Warbrick. Law of the European Convention on Human Rights*, New York: Oxford University Press 2014, p. 146. See also P. Leach, C. Paraskeva & G. Uzelac, *International human rights & fact-finding. An analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights*, London Metropolitan University: Report by the Human Rights and Social Justice Research Institute 2009, p. 60.

61 ECtHR 14 November 2000, 24396/94 *(Taş/Turkey)*, para. 54.

62 ECtHR 8 July 1999, 23763/94 (*Tanrikulu/Turkey*) (GC).

63 Ibid., paras. 96-99. See also H. Keller & C. Heri, 'Enforced Disappearance and the European Court of Human Rights. A 'Wall of Silence, Fact-Finding Difficulties and States as 'Subversive Objectors'', 12 *Journal of International Criminal Justice* (2014), p. 735-750, p. 738.

64 A similar impact of presumptions and inferences on adjudicators' decision-making has been observed in a U.S. criminal law context. See T. Gardner & T. Anderson, *Criminal law*, Belmont: Thomson Wadsworth 2009, p. 50.

dure and organisation are regulated by the Annex to the Rules. According to Leach, Paraskeva and Uzelac, a fact-finding mission includes both fact-finding hearings and on-the-spot investigations, and some fact-finding missions contain elements of both.[65] The authors describe a fact-finding hearing as "a formal hearing process during which witnesses give evidence before a delegation of the Court and are subject to a process of examination and cross-examination."[66] Fact-finding hearings are usually organised on the territory of the Contracting Parties and are conducted by a delegation of ECtHR judges.[67] Very occasionally such hearings take place in Strasbourg.[68] This in contrast to on-the-spot investigations which are not formal (which, therefore, means that there is no examination and cross-examination of witnesses) and usually involve inspections in prisons or other places of detention.[69]

There are some basic rules regulating how both fact-finding hearings and on-the-spot investigations should be organised and managed. Rule A1 § 1 of the Annex allows a Chamber to adopt any investigative measure which it considers capable of clarifying the facts of the case either at the request of a party or of its own motion. The fact that the Court can actually operate 'of its own motion' implies that the Court's decision to conduct a fact-finding mission (or not) is sovereign and does not depend on having Member States' permission.[70] This provision allows the Court to invite the parties to produce documentary evidence and to hear a witness or expert or a person in any other capacity whose evidence or statements seem likely to assist the Court in carrying out its tasks. The Chamber may also ask any person or institution of its choice to express an opinion or to produce a written report on any matter considered to be relevant to the case by the ECtHR (Rule A1 § 2). After it has declared a case admissible or, rather exceptionally, before the decision on admissibility, the Chamber may select one or more of its members or other judges of the Court as its delegate or delegates, to conduct an inquiry, carry out an on-site investigation or take evidence in some other manner. If it considers it appropriate, the Court may appoint any person or institution of its choice to assist the delegation in this fact-finding process (Rule A1 § 3). Third parties can also contribute at this stage of the Conven-

65 P. Leach, C. Paraskeva & G. Uzelac, *International human rights & fact-finding. An analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights*, London Metropolitan University: Report by the Human Rights and Social Justice Research Institute 2009, p. 9.

66 Ibid., p. 10.

67 Ibid., p. 53.

68 A fact-finding hearing was organised in Strasbourg in the following case examples: ECtHR 27 June 2000, 21986/93 (*Salman/Turkey*) (GC); ECtHR 19 December 1989, 10964/84 (*Brozicek/Italy*) (GC); ECtHR 3 July 2014, 13255/07 (*Georgia/Russia I*) (GC).

69 P. Leach, C. Paraskeva & G. Uzelac, *International human rights & fact-finding. An analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights*, London Metropolitan University: Report by the Human Rights and Social Justice Research Institute 2009, p. 10 and p. 71 ff.

70 Ibid., p. 34.

tion proceedings: Rule A1 § 6 permits the Court to invite, or grant leave to, any third party to participate in an investigative measure. As indicated earlier in this chapter, Rule A2 sets out the further duties of the Contracting Party on whose territory the fact-finding mission will be conducted to fully cooperate with the Court. If a party considers it necessary for the Court to conduct a fact-finding mission, it may request the Court to do so, in writing, after the admissibility decision has been taken.[71]

In respect to fact-finding hearings, the Court determines which individuals should be heard, although the parties to the case may provide suggestions to the Court on this matter. However, the Court is free to reject any such initiative by a party, and it may do so without providing reasons for the rejection.[72] An important factor in the choice of specific witnesses is the relevance of their testimony.[73] When preparing a fact-finding hearing, Rule A4 § 2 permits the head of the delegation to hold a preparatory meeting with the parties or their representatives before any formal proceedings have taken place before the delegation. The main goal of such a meeting is to consider whether testimonies from certain proposed witnesses would be relevant or useful, and to determine whether the witnesses will be available to provide evidence.[74]

The Court maintains a flexible approach to the process of hearing witnesses. In past cases, it has applied questioning methods originating from both continental (more inquisitorial) and common law (more adversarial) legal systems. The procedure to be followed was determined very much on a case-by-case basis. In *Ireland v. United Kingdom*, involving two common law countries, the Commission applied the adversarial approach in the interrogation of witnesses. More concretely, this means that the parties' representatives questioned the witnesses first and, only when it found it to be necessary, the Commission posed further questions. Leach, Paraskeva and Uzelac describe the accounts of members of the former Commission who were involved in the case and who stressed that the interrogations were started on behalf of the British government and that the interrogators used "very typical British tactics" throughout this process.[75] This early example of fact-finding in *Ireland v. United Kingdom* stands in contrast with many

71 Ibid., p. 30.

72 Ibid., p. 35. An example of a case in which the Court rejected the applicant's request to conduct a fact-finding mission is ECtHR 4 May 2001, 28883/95 (*McKerr/United Kingdom*), para. 102.

73 P. Leach, C. Paraskeva & G. Uzelac, *International human rights & fact-finding. An analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights*, London Metropolitan University: Report by the Human Rights and Social Justice Research Institute 2009, p. 47.

74 Ibid., p. 48-49. A preparatory meeting was organised in, for example, ECtHR 24 July 2003, 26973/95 (*Yöyler/Turkey*).

75 P. Leach, C. Paraskeva & G. Uzelac, *International human rights & fact-finding. An analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights*, London Metropolitan University: Report by the Human Rights and Social Justice Research Institute 2009, p. 56.

other cases in which the Court's interrogation procedure leaned more towards the continental style of hearing witnesses.[76] In practical terms, this means that the Court delegates question the witnesses first, after which the parties' representatives may pose further questions.

The process of hearing witnesses is now further regulated under Rules A4 and A7 of the Annex. On the basis of the first paragraph of Rule A4, the delegates are in charge of the proceedings before them. Rule A7 § 1 then prescribes that any delegate may ask questions to anyone appearing before the delegation, including the Agents, advocates or advisers of the parties, to the applicant, witnesses and experts. Agents and advocates or advisers of the parties are allowed to examine witnesses, experts and other persons appearing before the delegation. This takes place under the control of the head of the delegation (Rule A7 § 2). Beyond this, it is up to the head of the delegation to make special arrangements for witnesses, experts or other persons to be heard in the absence of the parties where this is required for the proper administration of justice (Rule A7 § 4). Finally, where a dispute arises from an objection to a witness or expert, it is up to the head of the delegation to decide on the matter. In that regard, for information purposes, the delegation may hear a person who is not qualified to be heard as a witness or expert (Rule A7 § 5).

Apart from facilitating a formal hearing, a delegation of three (or sometimes two) judges from the Court may visit the location concerned in a particular case and even inspect the premises. Usually, these 'on-the-spot investigations,' as they are referred to, are organised in order to ascertain the conditions under which prisoners were held in detention and, on other occasions, the conditions in psychiatric institutions. The delegation of judges may be assisted by medical experts or experts from other fields in assessing the facilities and well-being of the applicants. The delegation usually observes in detail the facilities, the equipment and the general atmosphere at the relevant location. Additionally, the delegation ascertains the physical and psychological state of detainees, by carrying out interviews with the prisoners and with the officials responsible for the detention facility.[77]

Fact-finding missions have been organised, e.g. after a state of emergency was declared, where there has been an armed conflict or where an 'autonomous province' has attempted to become independent from central State control. These types of situations open the door to grave human rights abuses committed both by State agents and private persons, where there is a lack of accountability or supervision by national authorities.[78]

Several factors may lead the Court to conduct a fact-finding mission, some of which are directly linked to the particular case and some of which may not be directly related to it. Case-related factors which may lead the Court to conduct a fact-finding mission include the following: the grave

76 Ibid.
77 Ibid., p. 71-76.
78 Ibid., p. 5.

nature or seriousness of the case (particularly 'serious' allegations, mostly those related to Articles 2 and 3, are eligible for a fact-finding mission), the presence of factual disputes between the parties that cannot be resolved through the case file, the failure of the national authorities to conduct an effective investigation into the allegations, the realistic prospects of resolving the factual disputes involved, any *prima facie* indication that the allegations can be substantiated, and the limited amount of time which has elapsed since the events in question took place.[79] In relation to this last factor, the Court considers that fact-finding missions may be expected to have little impact and will be less credible, more difficult to arrange and more open to manipulation, if they are conducted several years after the alleged events took place.[80] General factors, unrelated to the specific facts of the case, are time and cost considerations, the existence of a presumption against fact-finding missions conducted by the Court (i.e. sometimes, there is more willingness within the Court to decide a case without a fact-finding hearing; this is also described as a culture within the Court which is not 'fact-finding friendly'), the pedagogical functions of fact-finding missions (i.e. would the fact-finding mission serve the purpose of attracting the attention of a lot of officials on the topic) and the subsidiarity principle.[81] In accordance with this last principle, fact-finding missions are the exception rather than the rule. The ECtHR's subsidiarity role has been invoked as an argument for not holding fact-finding missions in certain cases of a civil nature, because "[s]uch an exercise would duplicate the proceedings before the civil courts which are better placed and equipped as fact-finding tribunals."[82]

Despite the fact that the Convention system offers the possibility of conducting fact-finding missions, the Court has shown a preference over the years for reaching "its conclusions by placing the responsibility on the parties to produce the evidence that is within their knowledge and by relying on a variety of adjudicatory techniques involving the drawing of adverse

79 The research of Leach, Paraskeva and Uzelac reveals in this context that fact-finding missions are likely to be held when the Court considers that there is a *systematic* failure in the functioning of the domestic courts. See ibid., p. 37-39. See also M. O'Boyle & N. Brady, 'Investigatory Powers of the European Court of Human Rights', in: O. Chernishova & M. Lobov (eds.), *Russia and the European Court of Human Rights: A Decade of Change. Essays in honour of Anatoly Kovler, Judge of the European Court of Human Rights in 1999-2012*, Oisterwijk: Wolf Legal Publishers 2013, p. 121-141, p. 125 and p. 136-137.

80 P. Leach, C. Paraskeva & G. Uzelac, *International human rights & fact-finding. An analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights*, London Metropolitan University: Report by the Human Rights and Social Justice Research Institute 2009, p. 40-42.

81 Ibid., p. 42-44.

82 ECtHR 4 May 2001, 28883/95 (*McKerr/United Kingdom*), para. 117.

inferences or the utilisation of presumptions when they fail to comply."[83] There are several explanations for this. The first has already been mentioned and is linked to the principle that ECtHR is often able to establish the facts of a case on the basis of adduced documentary evidence.[84] As all national remedies must be exhausted before a complaint is filed in Strasbourg, in most cases, the facts have already been established at a lower level by the domestic courts.[85] As a general rule, the Court even prefers that national courts assess the evidence, thus underlining its own subsidiary nature. The Court has frequently underlined that the primary task of establishing the facts in a case rests with national courts and that it would not normally be within its own province to substitute its own assessment of the facts for that of the domestic adjudicators.[86] The Court has, for instance, in its jurisprudence emphasised the great benefit which the domestic courts have in seeing the witnesses give their evidence and evaluating their credibility at first hand.[87]

Another reason for the Court's reluctance to organise fact-finding missions appears to be connected with the Court's original function. Under the system in operation prior to the enforcement of Protocol No. 11, it was the Commission, and not the Court, that was charged with the task of fact-finding.[88] According to O'Boyle and Brady, under that system, the Court extensively and almost exclusively relied on the facts established by the Commission. They argue, therefore, that the Court has always understood its own

83 M. O'Boyle & N. Brady, 'Investigatory Powers of the European Court of Human Rights', in: O. Chernishova & M. Lobov (eds.), *Russia and the European Court of Human Rights: A Decade of Change. Essays in honour of Anatoly Kovler, Judge of the European Court of Human Rights in 1999-2012*, Oisterwijk: Wolf Legal Publishers 2013, p. 121-141, p. 140. In this regard, a reduction in the number of ECtHR fact-finding missions can be observed. Leach, Paraskeva and Uzelac revealed that the former Commission conducted 74 fact-finding missions, whereas 18 fact-finding missions were conducted by the Court in the period 1998-2009 (P. Leach, C. Paraskeva & G. Uzelac, *International human rights & fact-finding. An analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights*, London Metropolitan University: Report by the Human Rights and Social Justice Research Institute 2009, p. 27; P. Leach, C. Paraskeva & G. Uzelac, 'Human Rights Fact-Finding. The European Court of Human Rights at Crossroads', 28 *Netherlands Quarterly of Human Rights* (2010), p. 41-77, p. 42).

84 See also in this regard P. Leach, *Taking a Case to the European Court of Human Rights*, New York: Oxford University Press 2011, p. 55.

85 U. Erdal, 'Burden and standard of proof in proceedings under the European Convention', 26 *European Law Review: Supp (Human rights survey)* (2001), p. 68-85, p. 69.

86 See, for example, ECtHR 22 September 1993, 15473/89 (*Klaas/Germany*), para. 29, and, more recently, ECtHR 22 January 2013, 32501/11 (*Suleymanov/Russia*), para. 126. See also M. Smith, 'The Adjudicatory fact-finding tools of the European Court of Human Rights', 2 *European Human Rights Law Review* (2009), p. 206-228, p. 207-208.

87 ECtHR 22 September 1993, 15473/89 (*Klaas/Germany*), para. 30. See also M. O'Boyle & N. Brady, 'Investigatory Powers of the European Court of Human Rights', in: O. Chernishova & M. Lobov (eds.), *Russia and the European Court of Human Rights: A Decade of Change. Essays in honour of Anatoly Kovler, Judge of the European Court of Human Rights in 1999-2012*, Oisterwijk: Wolf Legal Publishers 2013, p. 121-141, p. 121.

88 ECtHR 8 July 1999, 23763/94 (*Tanrikulu/Turkey*) (GC), para. 67.

role as primarily that of interpreting and applying the Convention, rather than conducting investigations into the facts itself. Hence, the Court is more inclined to examine evidence on the basis of the submissions of the parties and external actors.[89] The Court's rare use of more thorough investigatory powers may ultimately be explained by policy reasons. Investigatory activities take time and money, two precious commodities for the ECtHR. Some judges are therefore not inclined to hold fact-finding hearings due to costs and delays.[90]

3.5 Contributions to fact-finding by external actors

The foregoing has shown that the Court may pursue various avenues in order to establish the facts of a case. Some of these avenues are not always helpful to the fact-finding process. For example, applicants may not be able to provide the Court with all the information because they do not have access to it, while respondent States may be unwilling to provide all the relevant information about a case to the ECtHR. The Court may also actively investigate the facts of the case itself. However, this is a means that the Court does not use very often. Besides these options, the Court can also obtain information from external actors. The Court may use the documents that these external actors produce as a source in establishing the facts.[91] In addition, it may allow them to become formally involved in the Court proceedings through third party interventions. These interventions enable external actors to provide information on issues of law and to clarify the context in which a particular policy or practice has been adopted by a Contracting Party.[92] This section highlights which external actors can contribute to fact-finding, and then looks at the involvement of NGOs in the fact-finding process, since NGOs have been most actively involved in establishing facts.

89 M. O'Boyle & N. Brady, 'Investigatory Powers of the European Court of Human Rights', in: O. Chernishova & M. Lobov (eds.), *Russia and the European Court of Human Rights: A Decade of Change. Essays in honour of Anatoly Kovler, Judge of the European Court of Human Rights in 1999-2012*, Oisterwijk: Wolf Legal Publishers 2013, p. 121-141, p. 136.

90 P. Leach, *Taking a Case to the European Court of Human Rights*, New York: Oxford University Press 2011, p. 59; M. O'Boyle & N. Brady, 'Investigatory Powers of the European Court of Human Rights', in: O. Chernishova & M. Lobov (eds.), *Russia and the European Court of Human Rights: A Decade of Change. Essays in honour of Anatoly Kovler, Judge of the European Court of Human Rights in 1999-2012*, Oisterwijk: Wolf Legal Publishers 2013, p. 121-141, p. 138.

91 K.C. Sadeghi, 'The European Court of Human Rights: The Problematic Nature of the Court's Reliance on Secondary Sources for Fact-finding', 25 *Connecticut Journal of International Law* (2009-2010), p. 127-151, p. 127.

92 P. Leach, *Taking a Case to the European Court of Human Rights*, New York: Oxford University Press 2011, p. 50.

The Court relies on various documents, mostly in the form of reports, from several bodies in order to establish the facts regarding a specific human rights issue in a Member State. Firstly, the Court utilises reports and opinions produced by competent international bodies, primarily those related to the Council of Europe, but also occasionally from outside.[93] For example, in terms of the Council of Europe bodies, the ECtHR has often obtained information from the European Committee for the Prevention of Torture (CPT). The Court has frequently used reports by this body to establish whether the detention conditions in a Member State lived up to the Convention standards.[94] The CPT has a broad mission in this sense: it visits a wide variety of places of detention throughout the Council of Europe's Contracting Parties, reports on the treatment of prisoners in these institutions and, if necessary, recommends improvements to Member States.[95] In addition to the CPT, there are also other examples of Council of Europe-related organisations that have assisted the Court in establishing facts. For example, in *D.H.*, the Grand Chamber also relied on ECRI reports to determine the number of Roma children in special schools.[96] The ECtHR sometimes also turns to intergovernmental bodies outside the Council of Europe to establish facts. In *M.S.S. v. Belgium and Greece*, the Court relied on observations provided by the United Nations High Commissioner for Refugees (UNHCR), appearing as a third party in the proceedings, to establish the detention and living

93 D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, *Harris, O'Boyle & Warbrick. Law of the European Convention on Human Rights*, New York: Oxford University Press 2014, p. 144.

94 See, for example, ECtHR 15 May 2012, 38623/05 (*Plotnicova/Moldova*). In this case, the applicant alleged, among other things, that she had been held in inhuman conditions and had not been given sufficient medical assistance while in detention. To verify the accuracy of her complaint, the Court turned to several reports from the CPT on its visits to Moldova between September 2004 and September 2007. The ECtHR stated the following: "[t]he applicant's description also matches that given several months earlier by the CPT .... Accordingly, the Court accepts the applicant's submission in this respect" (para. 37 of the judgment).

95 The mandate of the CPT arises from Article 1 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, and reads as follows:

> "There shall be established a European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter referred to as 'the Committee'). The Committee shall, by means of visits, examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment."

See also P. Leach, C. Paraskeva & G. Uzelac, *International human rights & fact-finding. An analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights*, London Metropolitan University: Report by the Human Rights and Social Justice Research Institute 2009, p. 74; D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, *Harris, O'Boyle & Warbrick. Law of the European Convention on Human Rights*, New York: Oxford University Press 2014, p. 145.

96 See ECtHR 13 November 2007, 57325/00 (*D.H. a.o./Czech Republic*) (GC), para. 192.

conditions of asylum seekers in Greece.[97] The factual findings of that same body were used by the Court in *Hirsi Jamaa a.o. v. Italy*, in order to establish that the applicants would be exposed to the risk of inhuman and degrading treatment if forcibly returned to certain countries outside the European continent.[98]

Aside from providing information about the human rights situation in a certain country through reports or opinions, external actors may also contribute substantially to ECtHR proceedings by intervening as third parties in a case. Third party interventions find their basis in Article 36 ECHR and Rule 44 of the Rules of Court. Any third party seeking to intervene must request permission to do so from the President of the Chamber within twelve weeks of the notice of the application being given to the respondent Contracting Party.[99] Once the request has been granted, the Court sets out the conditions for intervening, including the following: (1) a maximum length for the written submissions (usually ten to fifteen pages); (2) a specified time frame for lodging the submissions (usually within three to six weeks), and; (3) the conditions regarding the matters that may be covered by the intervention.[100] Requests for third party interventions may be refused when they are submitted too late or too close to the hearing of the case. Furthermore, requests may be refused where the Court has already granted permission to other organisations to intervene and where the Court considers that it has a sufficient number of interveners.[101] A well-established rule in this context is that a third party intervener should not comment on the particular facts or merits of the case (matters which are only for the parties). Interventions which do not respect this rule may be refused or only accepted in part.[102] This means, more specifically, that third party interveners principally comment on issues of law. However, there may be occasional exceptions to this approach, where the Court uses general information from external actors submitted through third party interventions about the human rights situation in a country. For instance, in expulsion cases, the Court may seek general information from third party interveners about the living conditions and levels of safety in a certain country.[103]

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97 ECtHR 21 January 2011, 30696/09 (*M.S.S./Belgium and Greece*) (GC), paras. 229, 255 and 258.

98 ECtHR 23 February 2012, 27765/09 (*Hirsi Jamaa a.o./Italy*), paras. 133 and 150.

99 See Rules 44 § 1 (b), § 2 and § 3 (b) of the Rules of Court. Some exceptions to this rule are also set out in Rule 44 of the Rules of Court.

100 P. Leach, *Taking a Case to the European Court of Human Rights*, New York: Oxford University Press 2011, p. 49.

101 D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, *Harris, O'Boyle & Warbrick. Law of the European Convention on Human Rights*, New York: Oxford University Press 2014, p. 154.

102 See P. Harvey, 'Third Party Interventions before the ECtHR: A Rough Guide', *Strasbourg Observers* (24 February 2015) (online). See also D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, *Harris, O'Boyle & Warbrick. Law of the European Convention on Human Rights*, New York: Oxford University Press 2014, p. 154.

103 D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, *Harris, O'Boyle & Warbrick. Law of the European Convention on Human Rights*, New York: Oxford University Press 2014, p. 154.

Written submissions are eventually sent to the parties to the case, to enable them to submit observations in reply or, where relevant, to reply at any hearing. If the parties makes any such observations, they will be sent to the intervener, although the latter will usually have no opportunity to submit any comments in return.[104]

Three types of interventions can be distinguished. The first arises from Article 36 § 1 ECHR, which grants the opportunity to submit written comments or take part in hearings before a Chamber or the Grand Chamber to any High Contracting Party of which the applicant is a national. This type of third party intervener is therefore also allowed to appear before the Court in oral hearings and has the right to gain access to the entire case file, and in this way holds a stronger legal position than, for example, an NGO seeking to intervene.[105] The second type of third party intervener is enshrined in Article 36 § 2 ECHR, which prescribes that the President of the Court may, in the interests of the proper administration of justice, invite any High Contracting Party that is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or, exceptionally, take part in hearings.[106] Rule 44 § 3 (b) of the Rules of Court lays down that requests for this purpose must be duly reasoned and submitted in writing. This type of third party intervention can be further subdivided into three categories of interveners: (1) interventions by governments other than the respondent government that have a specific interest in the subject matter of the case; (2) interventions by people other than the applicant who are directly implicated in the facts of the case, and; (3) interventions by interested parties who have special expertise in a certain area, such as NGOs[107] with particular experience in or knowledge of the subject matter of the case before the Court.[108] A famous example of the first category under Article 36 § 2 ECHR is *Saadi v. Italy*, where the UK government intervened in order to

104 P. Leach, *Taking a Case to the European Court of Human Rights*, New York: Oxford University Press 2011, p. 50.

105 See also Rule 44 § 1 of the Rules of Court. And see D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, *Harris, O'Boyle & Warbrick. Law of the European Convention on Human Rights*, New York: Oxford University Press 2014, p. 152. An example of a third party intervention under Article 36 § 1 ECHR is ECtHR 7 July 1989, 14038/88 (*Soering/United Kingdom*) (GC).

106 See also Rule 44 § 3 (a) of the Rules of Court.

107 'Any person concerned' thus also includes NGOs. See for that matter, L. Hodson, *NGOs and the Struggle for Human Rights in Europe*, Oxford: Hart Publishing Ltd 2011, p. 37.

108 D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, *Harris, O'Boyle & Warbrick. Law of the European Convention on Human Rights*, New York: Oxford University Press 2014, p. 152-153. See, for comparison, P. Harvey, 'Third Party Interventions before the ECtHR: A Rough Guide', *Strasbourg Observers* (24 February 2015) (online). Harvey distinguishes between six types of interveners: (1) States exercising the right in Article 36 § 1 of the Convention to intervene in cases brought by one of their nationals against another Contracting State; (2) interventions by States when they have sought leave (rather than exercised the right) to do so; (3) interventions by other international institutions; (4) interventions by national human rights institutions; (5) interventions by NGOs (including bar associations), and; (6) interventions by litigation projects at leading universities.

request the Court to overturn its earlier case law on expulsion matters under Article 3 ECHR.[109] The second category does not occur very often. One of the few examples in this context is the case *Perna v. Italy*, concerning the conviction of an applicant who had slandered a judge. In that case, the judge was granted leave to intervene.[110] The third category mostly concerns contributions from NGOs,[111] which intervene because they have special expertise on certain legal issues raised by a case.[112]

A third category of interveners is laid down in Article 36 § 3 ECHR, which prescribes that the Council of Europe Commissioner for Human Rights may submit written comments and take part in hearings in all cases before a Chamber or the Grand Chamber.[113] This formal procedure was introduced with a view to protecting the general interest more effectively.[114] To understand this, it is necessary to become aware of the unique and independent position of the Commissioner in the Council of Europe.

The Commissioner for Human Rights is a non-judicial institution created to promote education in, awareness of and respect for human rights, as embodied in the human rights instruments of the Council of Europe.[115] To achieve these goals, the Commissioner takes a three-pronged approach. Firstly, he carries out country visits to all Member States to make a comprehensive evaluation of the human rights situation. During his visits, the Commissioner meets with various governmental officials as well as members of human rights protection organisations and civil society. He also visits relevant sites, such as prisons and asylum-seeker centres. After the visits, he publishes a report about the human rights situation and offers recommendations for improvement where necessary. Secondly, he offers advice and information on the protection of human rights and the prevention of violations. Finally, the Commissioner works with national human rights institutions (such as Ombudsmen and national human rights organisa-

109 ECtHR 28 February 2008, 37201/06 (*Saadi/Italy*) (GC).

110 ECtHR 6 May 2003, 48898/99 (*Perna/Italy*) (GC).

111 See D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, *Harris, O'Boyle & Warbrick. Law of the European Convention on Human Rights*, New York: Oxford University Press 2014, p. 153. However, contributions have also been submitted in this category by more formal institutions. See, for example, European Commission's intervention in ECtHR 30 June 2005, 45036/98 (*Bosphorus/Ireland*) (GC), concerning the implementation of EU law. See also the United Nations High Commissioner for Human Rights' observations in ECtHR 13 December 2012, 39630/09 (*El-Masri/The former Yugoslav Republic of Macedonia*) (GC), concerning extraordinary rendition.

112 D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, *Harris, O'Boyle & Warbrick. Law of the European Convention on Human Rights*, New York: Oxford University Press 2014, p. 153-154.

113 See further Rule 44 § 2 of the Rules of Court.

114 Council of Europe Treaty Series - No. 194, *Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention*, Strasbourg 13.V.2004, para. 87.

115 Article 1 of Resolution (99) 50 on the Council of Europe Commissioner for Human Rights (adopted by the Committee of Ministers on 7 May 1999 at its 104th Session).

tions) to develop an effective system of cooperation with them to foster the implementation of human rights standards.[116] These activities enable him to determine whether particular human rights problems in a country are systemic. Consequently, the Commissioner has been given right to intervene under Article 36 § 3 because it is expected that, given his experience, the Commissioner may be able to help enlighten the Court on certain questions, particularly in cases which highlight structural or systemic weaknesses in the situations of the respondent States or other High Contracting Parties.[117]

Proposals have been made over the years to involve the Commissioner more systematically in the formal proceedings of the ECtHR. For example, before Article 36 § 3 ECHR in its current form was included in the Convention, the Parliamentary Assembly proposed that the Commissioner should be ascribed a more far-reaching role. This entailed the creation of a post of Public Prosecutor at the ECtHR and entrusting this function to the Commissioner. The idea was that the Commissioner could bring cases before the Court regarding serious human rights violations, particularly where individuals or Contracting Parties are faced with obstacles in bringing complaints. The Parliamentary Assembly noted that applicants may be prevented from bringing complaints in several ways. Firstly, obstacles to bringing complaints may be related to an armed conflict or emergency situation, the occupation of part of a State's territory, or the intervention by one State in the territory of another, or the effective absence of control by a State over part of its territory. Secondly, individual applicants may be prevented from bringing complaints to the ECtHR through a lack of awareness of the ECHR or for practical reasons. Finally, another potential obstacle concerns the scale and gravity of violations which could be regarded as war crimes or crimes against humanity, and to which even thousands of individual applications would fail to do justice. Hence, the proposal to ascribe the role of Public Prosecutor to the Commissioner for Human Rights was an attempt to resolve the legal vacuum created by such obstacles, most notably, to put an end to the existence of areas where the ECHR cannot be implemented.[118] However, this proposal was rejected because the capacity of the Commissioner as a complainant was regarded to be incompatible with his role as a negotiating partner with the Contracting Parties in the context of his other tasks.[119]

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116 M. Lezertua & A Forde, 'The Commissioner for Human Rights', in: T.E.J. Kleinsorge (ed.), *Council of Europe*, Alphen aan de Rijn: Kluwer Law International 2010, p. 114-124, p. 117-119.

117 Council of Europe Treaty Series - No. 194, *Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention*, Strasbourg 13.V.2004, para. 87.

118 Parliamentary Assembly. Committee on Legal Affairs and Human Rights, *Report. Areas where the European Convention on Human Rights cannot be implemented*, Rapporteur Mr. Christos Pourgourides, Doc. 9730, 11 March 2003 (online).

119 J. Vande Lanotte & Y. Haeck, *Handboek EVRM. Deel 1. Algemene beginselen*, Antwerp: Intersentia 2005, p. 804-805.

As noted earlier, valuable information on certain human rights issues has been provided mainly by NGOs. NGOs have performed different roles during proceedings at the ECtHR and have been able to activate and engage the ECtHR in the protection and expansion of human rights in several ways.[120] There have been cases where they represented the applicants[121] or appeared as applicants,[122] in these ways helping to establish the facts. Additionally, the Court has more generally used relevant documentation produced by NGOs for the press and public in order to comprehend the relevant factual human rights situation in a Member State, without the NGOs being further involved in a formal procedure at the ECtHR.[123] NGOs have also intervened as third parties in cases and have informed the Court in this context most notably about issues of law. So far, NGOs have assisted the Court in establishing consensus on particular human rights-related issues in Europe. For example, in *Soering*, the Court quoted the Amnesty International submission in order to observe the "virtual consensus in Western European legal systems that the death penalty is, under current circumstances, no longer consistent with regional standards of justice."[124] In some cases, NGOs have inspired the Court to expand the scope and meaning of certain Convention provisions. This occurred in *Nachova*, for example, where the Open Society Justice Initiative argued that Article 14 ECHR also includes a procedural duty to investigate racial discrimination and violence,[125] a view subsequently accepted by the ECtHR.[126] Furthermore, NGOs have provided comparative law analysis and practical information to the Court about certain legal issues.[127] In *Sheffield and Horsham v. United Kingdom*, for example, the British-based NGO 'Liberty' provided the ECtHR with a comparative survey on the legal position of transsexual people in several Contracting

120 R.A. Cichowski, 'Civil Society and the European Court of Human Rights', in: J. Christoffersen & M.R. Madsen (eds.), *The European Court of Human Rights between Law and Politics*, New York: Oxford University Press 2011, p. 77-97, p. 81; W.A. Schabas, *The European Convention on Human Rights. A Commentary*, New York: Oxford University Press 2015, p. 794.

121 ECtHR 21 June 2007, 57953/00 and 37392/03 (*Bitiyeva and X/Russia*), para. 2; ECtHR 18 December 2012, 2944/06 and 8300/07, 50184/07, 332/08, 42509/10 (*Aslakhanova a.o./Russia*), para. 2. See also N. Vajić, 'Some Concluding Remarks on NGOs and the European Court of Human Rights', in: T. Treves et al. (eds.), *Civil Society, International Courts and Compliance Bodies*, The Hague: T.M.C. Asser Press 2005, p. 93-104, p. 96.

122 See Article 34 of the Convention. See also L. van den Eynde, 'An Empirical Look At the Amicus Curiae Practice of Human Rights NGOs Before the European Court of Human Rights', 31/3 *Netherlands Quarterly of Human Rights* (2013), p. 271-313, p. 276.

123 ECtHR 18 December 2012, 2944/06 and 8300/07, 50184/07, 332/08, 42509/10 (*Aslakhanova a.o./Russia*), paras. 78-79. See also R.A. Cichowski, 'Civil Society and the European Court of Human Rights', in: J. Christoffersen & M.R. Madsen (eds.), *The European Court of Human Rights between Law and Politics*, New York: Oxford University Press 2011, p. 77-97, p. 81.

124 ECtHR 7 July 1989, 14038/88 (*Soering/United Kingdom*) (GC), para. 102.

125 ECtHR 6 July 2005, 43577/98 and 43579/98 (*Nachova a.o./Bulgaria*) (GC), para. 143.

126 Ibid., paras. 160-168.

127 D. Shelton, 'The participation of nongovernmental organizations in international judicial proceedings', 88 *American Journal of International Law* (1994), p. 611-642, p. 638.

Parties.[128] In *Timurtaş v. Turkey*, the Kurdish Human Rights Project (KHRP), who assisted in the representation of the applicant, asked the Center for Justice and International Law (CJIL; an NGO based in Washington DC) to provide written comments on the IACtHR's jurisprudence on disappearances. The Court subsequently used this information to adapt its rules in order to establish gross and systemic violations of human rights.[129] Albeit exceptionally, NGOs have sometimes informed the Court about the general factual situation in a Member State regarding a certain human rights issue. In *Nachova*, the European Roma Rights Centre informed the Grand Chamber, for example, about the numerous incidents of ill-treatment and killing of Roma by law enforcement agents and private individuals of Bulgarian ethnic origin in Bulgaria.[130] In *M.C. and A.C.*, the Association for the Defence of Human Rights in Romania, the Helsinki Committee (the APADOR-CH), informed the Court about a general culture of impunity in Romania with regard to police officers who abuse their position and about discrimination towards the victims of crimes based on their ethnic origin, sexual orientation, or beliefs.[131] In that same case, the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) submitted several reports by international organisations revealing a general climate of hostility towards LGBTI individuals in Europe. It pointed out that in the respondent State, which was Romania, the level of discrimination on grounds of sexual orientation was the fifth highest in the European Union.[132]

Concerning the greater involvement of NGOs in ECtHR proceedings, practitioners and scholars debate whether or not the role of NGOs in ECtHR proceedings should be expanded, by facilitating them with *locus standi* at the ECtHR. The argument in favour of such a proposal is that some rights have a collective dimension and may not be properly reflected through individual applications. Hence, some scholars argue that NGOs should have *locus standi* as far as general or public interests are concerned, so that they can advance these interests through *actio popularis*.[133]

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128 ECtHR 30 July 1998, 31–32/1997/815–816/1018–1019 (*Sheffield and Horsham/United Kingdom*) (GC).

129 ECtHR 13 June 2000, 23531/94 (*Timurtaş/Turkey*). See also L. Hodson, *NGOs and the Struggle for Human Rights in Europe*, Oxford: Hart Publishing Ltd 2011, p. 83.

130 ECtHR 6 July 2005, 43577/98 and 43579/98 (*Nachova a.o./Bulgaria*) (GC), paras. 138-139.

131 ECtHR 12 April 2016, 12060/12 (*M.C. and A.C./Romania*), paras. 99-100.

132 Ibid., paras. 101-103.

133 M. Frigessi di Rattalma, 'NGOs before the European Court of Human Rights: Beyond *Amicus Curiae* Participation?', in: T. Treves et al. (eds.), *Civil Society, International Courts and Compliance Bodies*, The Hague: T.M.C. Asser Press 2005, p. 57-66; N. Vajić, 'Some Concluding Remarks on NGOs and the European Court of Human Rights', in: T. Treves et al. (eds.), *Civil Society, International Courts and Compliance Bodies*, The Hague: T.M.C. Asser Press 2005, p. 93-104.

There are various objections to this, however. In the first place, it is argued that establishing an *actio popularis* would reduce the scope of individual applications. In the second place, concerns have been raised that only those who have access to 'vocal' organisations would benefit from this new avenue. Thirdly, fears have been raised that this would increase the workload of the ECtHR which would only add to the length of the proceedings.[134] Particularly in light of the first argument, it is emphasised that the "strong individual nature of the rights enshrined in the ECHR entails the consequence that, as a rule, only the victim of the violation of the right should have the procedural right to bring the action."[135] Hence, extending the scope of NGO litigation could jeopardise the individual application system. In addition to this criticism, there is also some scepticism about what motivates NGOs to litigate, since – it is sometimes suggested – they are driven by the imperatives of their funding bodies instead of being led by individual applicants' interests and the interests of European society in general.[136] The *status quo* on this issue so far appears to be that NGOs can potentially be useful, as long as they act in service of the law and its institutions.[137] The work of external actors in general, and NGOs in particular, is also considered to be a valuable contribution to the protection of human rights in Europe because of the various ways in which they may become involved in cases at the ECtHR.[138]

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134 M. Frigessi di Rattalma, 'NGOs before the European Court of Human Rights: Beyond *Amicus Curiae* Participation?', in: T. Treves et al. (eds.), *Civil Society, International Courts and Compliance Bodies*, The Hague: T.M.C. Asser Press 2005, p. 57-66. Frigessi di Rattalma is generally very critical of this proposal. He argues that granting NGOs *locus standi* at the Court is "neither realistic nor appropriate" (p. 61). He stresses that inter-State complaints already assume the character of an *actio popularis*, since any Member State has the right to file a complaint about any alleged violation of a Convention right, regardless of whether there is a special relationship between the rights and interests of the applicant State and the alleged violation (p. 61).
Vajić is also very sceptical of this proposal. With regard to the argument that collective rights would be served by the NGOs having *locus standi*, she refers to the present practice of 'pilot cases' or 'pilot judgments', which enables the ECtHR to deal with similar groups of cases involving numerous applicants in the same situation. See N. Vajić, 'Some Concluding Remarks on NGOs and the European Court of Human Rights', in: T. Treves et al. (eds.), *Civil Society, International Courts and Compliance Bodies*, The Hague: T.M.C. Asser Press 2005, p. 93-104, p. 102-103.

135 M. Frigessi di Rattalma, 'NGOs before the European Court of Human Rights: Beyond *Amicus Curiae* Participation?', in: T. Treves et al. (eds.), *Civil Society, International Courts and Compliance Bodies*, The Hague: T.M.C. Asser Press 2005, p. 57-66, p. 63.

136 L. Hodson, *NGOs and the Struggle for Human Rights in Europe*, Oxford: Hart Publishing Ltd 2011, p. 93.

137 Ibid., p. 40.

138 N. Vajić, 'Some Concluding Remarks on NGOs and the European Court of Human Rights', in: T. Treves et al. (eds.), *Civil Society, International Courts and Compliance Bodies*, The Hague: T.M.C. Asser Press 2005, p. 93-104, p. 104.

3.6 Conclusion

The aim of this chapter was to provide an overview of the Court's approach to the examination of cases in general and to set out how information about the facts of a case is gathered at the ECtHR. On the whole, there are no particular problems in relation to fact-finding at the ECtHR, since the facts may be derived from the case file or domestic courts' judgments. As highlighted earlier, the Court's main task is generally limited to assessing whether or not the established findings are in accordance with the requirements of the Convention. In those cases where the facts are disputed and cannot be resolved by the documents in the Court's possession, the ECtHR may turn to various specific fact-finding techniques. Where there is little or no information on the facts, the Court may arrange fact-finding hearings or on-the-spot investigations. Information may also be gathered from other Council of Europe bodies or through other external avenues. External actors themselves may also choose different means to draw attention to pertinent human rights issues, most notably through submissions of documentary or other evidentiary material or through third party interventions. Among the third parties, NGOs appear to contribute the most in resolving legal and factual issues.

The question that subsequently arises concerns the means of fact-finding that may be most appropriate to establish the different types of complaints of discriminatory violence discussed in chapter 2. It may be assumed that especially with regard to those complaints concerning serious human rights violations, the ECtHR cannot always or blindly rely on the paper trail provided by the domestic courts. In individual complaints, applicants may not be able to produce all the relevant evidentiary material, while respondent States may be reluctant to furnish crucial information in a discriminatory context. Little may also be expected in inter-State complaints. Although in theory Member States are able to draw Court's attention to serious and repeated human rights violations in another Member State, in practice they are reluctant to do so. It is unlikely that the Court will resort to fact-finding missions for these types of complaints, if only because for the reasons of time and cost. Consequently, if the Court struggles with the gathering of facts in the three types of cases concerning discriminatory violence, it appears to be useful to explore how external actors can provide the Court with the information it needs.

The role of external actors in contributing to fact-finding at the ECtHR may be useful for all three types of complaints concerning discriminatory violence. They can contribute substantially in finding *systemic* violations of the duty of State agents to refrain from inflicting discriminatory violence, the duty to conduct an effective investigation into discriminatory violence in the domestic jurisdiction and the duty to take preventive measures against such wrongful conduct. Both formal and informal external actors may keep track of these types of violations in the Contracting Parties and in this way reveal a systemic pattern of violations by State officials. They may do this by collecting statistics about all three issues, or documenting their incident

in reports. In this way, they can report the history of the events, revealing that certain groups of individuals in certain Member States are exposed to discriminatory violence on a larger scale.

The next question arising in this context is what type of external actors may be most efficient at the Court in addressing systemic and deeply-rooted discriminatory violence. Firstly, the variety of external actors that the ECtHR already turns to through third party interventions, or by using the reports they produce, is already valuable and may continue to be valuable in further revealing issues related to discriminatory violence. Secondly, a greater role for the Commissioner for Human Rights could be reconsidered and discussed by the Council of Europe. The previously suggested post of Public Prosecutor at the ECtHR may be inappropriate in view of the fact that this could jeopardise the Commissioner's role as a negotiating partner with the Contracting Parties. However, the greater involvement of the Commissioner as a third party intervener may be useful in establishing the *status quo* of a particular human rights issue in a Member State. The Commissioner – whose current tasks enable him to find out about human rights situations in Member States – may be able to spot alarming and repeated human rights violations and different forms of discriminatory violence in Europe and raise them at the Court.

Thus, essentially, both the Commissioner and the remaining external actors may be capable of signalling to the Court situations where the Court must serve its role as an 'alarm bell' through third party interventions or publishing frequent reports on discriminatory violence in Member States. In this way, they can indicate to the Court whether there is a danger that occasional examples of discriminatory violence in a Member State could escalate and whether it is therefore even more necessary to underline the seriousness of such issues, condemn the incidence of discriminatory violence and call upon the Member States involved to take steps to combat this wrongful conduct.