The Principle of Making an *Ex Nunc* Examination
Risk Assessments at the European Court of Human Rights

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Abstract

The purpose of this thesis is to examine and recount for the principle of making an *ex nunc* examination in Article 3 cases regarding expulsion that is practiced by the European Court of Human Rights (the ECtHR or the Court). The method that is going to be used is the legal dogmatic method; material on the chosen topic will be thoroughly read, assessed and then presented as a *de lege lata* analysis.

The thesis is divided into three different chapters. The first one being an introduction of the non-refoulement principle, as it is a central part of this thesis and a full understanding of how it works is key to fully understand the remainder of the thesis. The second part of the thesis is the part where the main topic is fully explored and developed. This is done with the establishment of how the principle is used in case law and also through examinations of different criticisms against the use of the principle from different sources. The third and final chapter contains an analysis of the findings and also suggestions on how to improve some of the parts of the principle that have been prone to criticism.

It was concluded that the use of an *ex nunc* examination is something that is firmly established through the Court's case law. It is something that while at times being problematic, as it risks the Court becoming a court with third or fourth-instance connotations instead of a subsidiary organ, is still necessary for the effective protection of human rights. This thesis hopes to be a means to start a conversation about the use of the principle and how it can possibly be altered to work even better and to solve the issues that has been raised about its use.
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Chapter 1 – Introduction

1.1 Object

The principle of non-refoulement is more current than ever in a world where people are fleeing war and leaving everything behind for a shot at a life in a country that is not in ruins. However, not all people are allowed in, some are turned away after the national authorities find that they have not raised sufficient grounds for persecution. For individuals that have fled to states that are parties to the European Convention on Human Rights (the ECHR) there exists a last resort, an application to the European Court of Human Rights (the ECtHR or the Court). In that application they can allege that their deportation would cause the Contracting State to violate Article 3 of the ECHR. If the case is found admissible the Court will make an assessment of the facts and judge on whether the Contracting State can expel the individual without violating one of the most fundamental human rights there is, the right to be free of torture and ill-treatment.

The object of this thesis is to examine the application of a principle that the Court uses in such cases, the principle of making an *ex nunc* examination. This thesis will look at how the principle has been applied in different cases and also examine different criticisms of the chosen form of examination by different sources. Examples of these criticisms are that with an *ex nunc* examination where the facts have changed since the final domestic decision so that the individual no longer risks suffering ill-treatment if returned, the State may not be held responsible. Even if the deportation order made would potentially have violated fundamental principles of human rights such as those enshrined in Article 3 of the ECHR at the time of ordering this is not reviewed. Another issue is that the *ex nunc* examination makes the Court function similar to a court of third or fourth-instance rather than a subsidiary body to control national procedures.

1.2 Background

1.2.1 The Principle of Non-refoulement, its Origin, and its Development

The principle of non-refoulement is a fundamental principle of international law. It exists to protect individuals from being returned to a country where they would be in danger of persecution. The first mention of non-refoulement in international law came as early as 1933 in Article 3 of the 1933 Convention relating to the International Status of Refugees from the then-existing League of Nations. That article prevented state parties from turning away refugees at the borders of their home countries or expelling legally residing refugees. However this was only a first mention of non-refoulement in international law and it was not until circa 20 years later that the principle of non-refoulement was officially enshrined in an international convention. This was the 1951 Convention Relating to the International Status of Refugees (the Refugee Convention), where Article 33 titled “Prohibition of expulsion or return (“refoulement”)” reads as follows,

No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be

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1 In full Article 3 reads, ”No one shall be subjected to torture or to inhuman or degrading treatment or punishment”.
2 Latin term for "from now on".
threatened on account of his race, religion, nationality, membership of a particular group or political opinion.  

The International Covenant on Civil and Political Rights (the ICCPR) also includes a provision on non-refoulement. However, it has no expressly written prohibition but the United Nations Human Rights Committee has clarified this to be inherent in the text in its General Comments.  

One very important international instrument that does have an explicit non-refoulement provision is the United Nations Convention against Torture (the Torture Convention). Article 3 of the Torture Convention states that no party to it “shall expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”.  

As regards non-refoulement protection under the ECHR this not expressly written in the Convention text but it has been deemed to be inherent in the terms of Article 3 since the landmark case of Soering v. the United Kingdom (Soering). In Soering a German national that faced extradition from the United Kingdom (the UK) to the United States where he would face murder charges brought the case before the Court. He argued that being exposed to the “death row phenomenon” if extradited would violate Article 3 of the Convention. The UK contended this with the argument that an interpretation of Article 3 that imposes responsibilities on the Contracting State for acts that occur outside of their jurisdiction would be straining the language of the article. The Government argued that it would make the article say that a state has “subjected” an individual to treatment prohibited by it solely by the act of extradition.  

The Court firstly noted that there is no right to not be extradited enshrined in the Convention. However it further stated that the consequences of an extradition measure, if negatively affecting the enjoyment of an individual’s Convention right, still could attract obligations of a Contracting State. This meant that the main legal issue in Soering was whether Article 3 could be applied when the consequences of the extradition would be outside of the jurisdiction of the extraditing state. Article 1 of the Convention sets out a territorial limit on the Convention’s reach, specifying that the engagement undertaken by a Contracting State is to secure the enshrined rights and freedoms within its own jurisdiction. The Court further stated that the aim is not to have Contracting States impose Convention standards on Non-contracting States. It thus concluded that Article 1 of the ECHR cannot be used as justification for a general principle that a Contracting State is prohibited from surrendering an individual to a State that would infringe on such rights and freedoms.  

6 UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, Article 3.
7 The "death row phenomenon" can be defined as “the combination of circumstances to which a prisoner would be exposed to if held in solitary confinement on death row. These circumstances can be separated into three further categories: the harsh, dehumanizing conditions of imprisonment itself; the sheer length of time spent living under such conditions; and the psychological repercussions associated with a death sentence”, Karen Harrison & Anouska Tamony, ‘Death Row Phenomenon, Death Row Syndrome and their Affect on Capital Cases in the US’ [2010] Internet Journal of Criminology <https://media.wix.com/ugd/b93ddd4_0a1562dfdf3e44a87896b5e6366c484e9.pdf> accessed 20 May 2017, 3.
8 Id. § 83.
9 Id. § 85.
10 Article 1 of the ECHR reads, “the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I”.

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individual unless completely sure that the conditions in the destination state are up to full Convention standard.\textsuperscript{12}

However, the Court emphasized that when interpreting the Convention text there must be regard to its special character, a treaty for the collective enforcement of human rights and fundamental freedoms. Further that this means that the object and purpose of the ECHR is to protect individuals and this requires making applications of the safeguards effective and practical.\textsuperscript{13} The Court also stated that Article 3 of the ECHR is one of its non-derogable rights, as there are no permissible derogations under Article 15. This absolute right to be protected from torture and inhuman or degrading treatment or punishment is one of the fundamental values of the societies making up the Council of Europe. The Court stated that it would be incompatible with the ECHR’s underlying values, referred to in its preamble\textsuperscript{14}, that a Contracting State surrender a fugitive to a country where the state is aware of substantial grounds for believing that he or she would be in danger of being subjected to treatment prohibited by Article 3. It further stated that this is regardless of how horrible of a crime he or she has allegedly committed to warrant the extradition.\textsuperscript{15}

Based on the reasoning above the Court concluded that a Contracting State’s decision to extradite a fugitive may give rise to an issue under Article 3 and engage that state’s responsibilities under the Convention. This responsibility arises where substantial grounds have been shown for believing that the individual concerned would, if extradited, face a real risk of being subjected to torture or inhuman or degrading treatment or punishment in the requesting country.\textsuperscript{16} The Court also set out guidelines on how to establish such a responsibility,

The establishment of such responsibility inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 (art. 3) of the Convention. Nonetheless, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under the general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment.\textsuperscript{17}

This is the establishment of the non-refoulement principle that has since then been applied and developed through an extensive and ever growing amount of case law. In the case \textit{J.K. and Others v. Sweden (J.K. and Others)} from 2016 the Court laid down the general principles, that can be read through the Court’s case law, that govern expulsion cases under Article 3 in an thorough and extensive way.\textsuperscript{18} The Court started by highlighting the absolute and non-derogable nature of Article 3 and also stated that the Court on numerous occasions has acknowledged the importance of the non-refoulement principle. Further that the main concern for the Court to examine in such cases is whether there exists effective guarantees to protect the applicant against arbitrary refoulement, direct or indirect, to the country from where the

\textsuperscript{12} \textit{Soering}, § 86.
\textsuperscript{13} Id. § 87.
\textsuperscript{14} The relevant parts of the ECHR’s Preamble reads, “ … the governments of European Countries which are likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take steps for the collective enforcement of certain of the rights stated in the Universal Declaration” (emphasis added).
\textsuperscript{15} \textit{Soering}, § 88.
\textsuperscript{16} Id. § 91.
\textsuperscript{17} Id. § 91.
\textsuperscript{18} \textit{J.K. and Others v. Sweden [GC]}, no. 59166/12, §§ 77-105, ECHR 2016 [hereinafter \textit{J.K. and Others}].
individual has fled.\textsuperscript{19} The general principles regarding the application of Article 3 in expulsion cases was set out in \textit{Saadi v. Italy (\textit{Saadi})}\textsuperscript{20} and has been further reiterated in cases such as the recent case of \textit{F.G. v. Sweden (\textit{F.G.})}. In \textit{F.G.} the Court stated that Contracting States have the right to control the entry, residence and expulsion of aliens as a matter of well-established international law. However, the Court further reiterated that this does not preclude the Contracting State from having the obligation to not deport individuals to countries where they would face a real risk of being subjected to treatment prohibited by Article 3.\textsuperscript{21}

The Court also established in \textit{J.K. and Others} that because of the absolute character of the prohibition of conduct contrary to Article 3 it does not only apply to danger deriving from State authorities but also when it is coming from groups of persons or persons that are not public officials. However when it comes to this obligation it not only has to be proven that there is a real risk but also that the State authorities of the receiving country will not be able to provide appropriate protection to counteract the risk.\textsuperscript{22} It is also of relevance whether there is a possibility of relocation of the applicant within the state of origin and the Court stated that Article 3 does not preclude states from relying on existence of an internal flight alternative in their risk assessments.\textsuperscript{23} However this allowance for reliance does not affect the responsibility of the Contracting State to make sure that the applicant is not exposed to ill-treatment contrary to Article 3. Thus there are certain preconditions that have to be fulfilled for a state to rely on an internal flight alternative. These are firstly that the individual being expelled must be able to travel to the area concerned and secondly that he or she must be able to gain admittance and settle in said area.\textsuperscript{24}

Further the Court set out the principle of how to assess the existence of a real risk in \textit{J.K. and Others} by first referencing \textit{Saadi} where the Court held that it is sufficient and necessary “for substantial grounds to have been shown for believing that there is a real risk that the person concerned will be subjected in the receiving country to treatment prohibited by Article 3”.\textsuperscript{25} Secondly the Court referenced \textit{F.G.} where it was held that the assessment of the existence of a real risk must be rigorous. Further it stated that it is in principle for the applicant to adduce evidence that can prove that there are substantial grounds for believing that he or she would be exposed to a real risk of being subjected to treatment prohibited by Article 3 if the measure, e.g. a deportation order, were to be implemented.\textsuperscript{26} The focus of the risk assessment must be on foreseeable consequences of the applicant’s removal to the destination country in the light of his or her personal circumstances and of the general situation in the country.\textsuperscript{27} If it is established that there are substantial grounds to believe that the applicant would face a real risk of being subjected to treatment prohibited by Article 3 if returned the removal of the applicant would violate Article 3 regardless of whether the risk arises from a personal characteristic of the applicant, a general situation of violence in the destination country or some combination of the two. A general situation of violence in the destination country alone cannot, however, always give rise to a real risk.\textsuperscript{28}

When assessing evidence the Contracting State has an obligation to take into account all facts that are relevant under the examination and not just the evidence submitted by the

\textsuperscript{19} \textit{J.K. and Others}, §§ 77-78.
\textsuperscript{20} \textit{Saadi v. Italy [GC]}, no. 37201/06, ECHR 2008 [hereinafter \textit{Saadi}].
\textsuperscript{22} \textit{J.K. and Others}, § 80.
\textsuperscript{23} Id. § 81.
\textsuperscript{24} Id. § 82.
\textsuperscript{25} \textit{Saadi}, § 140.
\textsuperscript{26} \textit{F.G.}, § 113.
\textsuperscript{27} Id. § 114.
\textsuperscript{28} Id. § 116.
In the assessment of how much weight to attach to Country of Origin Information (COI) the Court has stated that consideration must be given to the source of the material, particularly its objectivity, reliability and independence. The reputation and authority of the author shall be considered in respect of reports and also the seriousness of the investigations and consistency of their conclusions. Considerations must also be given to the reporting capacities of the author and his or her presence in the country in question. The Court accepts that it is not always possible to carry out investigations in the immediate vicinity of a conflict and in such circumstances sources with first-hand knowledge may have to be relied upon.

The general principle of distribution of the burden of proof in expulsion cases is that it is for the applicant to adduce evidence that is capable of proving that there are substantial grounds for believing that he or she would be exposed to a risk of being subjected to ill-treatment if the measure complained of were to be implemented. It is then for the Government to dispel any doubts of the evidence the applicant has adduced. It is on the applicant/s that allege that their expulsion would violate Article 3 to the greatest extent practically possible adduce information and material for the risk assessment. However the Court acknowledges that it may be difficult, and even impossible, for persons to supply evidence within a short time and especially if the evidence has to be obtained from the country of which the applicant has fled. This means that lack of direct documentary evidence cannot be decisive.

Because of the special situation that asylum-seekers are often in it is necessary to give them the benefit of the doubt when assessing the credibility of documents submitted and statements that are made. However if information is presented that will give rise to the questioning of an applicant’s submission the applicant must provide a satisfactory explanation for the inaccuracies. There can, however, be details in the applicant’s story that seem somewhat implausible and yet this should not necessarily detract from the overall general credibility of the claim. The general rule set out by the Court is that an asylum-seeker cannot be seen as having discharged the burden of proof until he or she has provided a substantiated account of a real and individual risk of ill-treatment upon deportation. The individual situation must be distinguished from the general perils of the destination country.

Factors that would not have constituted a real risk separately may do so when taken cumulatively and when considered in a situation of heightened security or general violence. Some examples of such risk factors can be the age, gender and origin of an individual, previous arrest warrant and/or criminal record and previous records as suspected or actual member of a persecuted group. It is the shared duty of the domestic immigration authorities and the individual to ascertain and evaluate all relevant facts of the case in the proceedings. Normally the asylum-seeker is the party who is able to provide information of their own personal circumstances and because of this, when it comes to individual circumstances, the burden of proof shall in principle be on the applicant/s. The applicant/s must then as soon as possible submit all evidence that relates to their individual circumstances that will be needed to substantiate the claim. The Court noted, however, that the burden of proof rules should not render the rights protected by Article 3 ineffective and the difficulties that an individual can encounter when collecting evidence abroad shall be taken into account.

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29 J.K. and Others, § 87.
30 Id. § 88.
31 Id. § 89.
32 Id. § 91.
33 Id. § 92.
34 Id. § 93.
35 Id. § 94.
36 Id. § 95.
37 Id. § 96.
38 Id. § 97.
the general situation in a country concerned the Court shall take a different approach. In matters of evaluating a country generally the domestic authorities have full access to information and for that reason the general situation in a country has to be established 

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 39 by the domestic immigration authorities. 40

 There are also principles that apply regarding how to assess past ill-treatment as an indication of risk. When an applicant alleges that he or she has been ill-treated in the past this may be of relevance when assessing the risk of future ill-treatment. When evaluating the future risk it is absolutely necessary to take into account if the applicant has made a plausible case that he or she has been subjected to treatment prohibited by Article 3 in the past. 41 In the case R.C. v. Sweden (R.C.) the Court stated that the burden of proof was on the Government to dispel any doubts about the risk of being subjected to ill-treatment as the applicant had already been tortured before. 42 The general principle to follow in such circumstances is that past ill-treatment provides a strong indication of a future real risk of treatment prohibited by Article 3,

 ... in cases in which an applicant has made a generally coherent and credible account of events that is consistent with information from reliable and objective sources about the general situation in the country at issue. In such circumstances, it will be for the Government to dispel any doubts about that risk. 43, 44

 The requirement that an asylum-seeker shall be capable of distinguishing his or her situation from the general perils in the destination country can be relaxed in certain circumstances. One of these is when an applicant alleges to be a member of a targeted group. 45 A targeted group is a group that is systematically exposed to a practice of ill-treatment. In such cases the Article 3 protection against arbitrary refoulement enters into play when an individual establishes that there exists serious reasons to believe in the existence of the practice of ill-treatment in question and the individual’s membership of the targeted group. 46 In circumstances where the applicant is a member of a targeted group the Court will not demand that he or she demonstrate the existence of further special distinguishing features. This determination will be made in the light of information on the situation in the destination country in respect of the concerned group and also of the applicant’s account. 47 In J.K. and Others the Court also laid out the principles of making an ex nunc examination of the

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39 Latin term for "on his own impulse", describes acts that the Court may perform on its own initiative and without any application.
40 J.K. and Others, § 98.
41 Id. § 99.
43 J.K. and Others, § 102.
44 Judge Ranzoni heavily critiqued the wording of this paragraph in his dissenting opinion of the case. He claimed that the majority had established new principles by stating what is written in § 102 of J.K. and Others without providing sufficient reasoning for it. He concentrated his critique on four terms of the paragraph that he found problematic, two of which feature in the part cited above. Firstly the use of "generally coherent and credible account" where he found that the term generally is added without any explanation and with references that do not use said word in their judgments. He observed that adding the term generally seemed to be to lower the credibility threshold and thus shift the burden of proof to the state sooner, something that in his view would have required more reasoning to be able to follow. The second term was the requirement for the State to "dispel any doubts" and he pointed to that if the burden of proof now with the newly established credibility requirement, shifts so quickly to the State it would seem close to impossible to dispel any doubts. Judge Ranzoni’s opinion was that the principles established are problematic as they impose a heavy burden of proof on Member States. (J.K. and Others, Dissenting Opinion of Judge Ranzoni, 61-65, §§ 9-12).
45 J.K. and Others, § 103.
46 Saadi, § 132.
47 J.K. and Others, § 105.
circumstances and the principle of subsidiarity, two principles that will be further dealt with and developed at different stages of this thesis. The principle of making an *ex nunc* examination in chapter two and the principle of subsidiarity under the next heading below coupled with the possibility for the Court to grant interim measures.

### 1.2.2 The Subsidiarity Principle & Interim Measures

Two factors that play a part in non-refoulement cases in general and that are of particular importance to this thesis is the subsidiarity principle of the Court as enshrined in Articles 13 and 35 § 1 of the ECHR and the possibility of granting of interim measures under Rule 39 of the Rules of Court. The subsidiarity principle, as already briefly touched upon above, is an establishment of the Court’s supervisory role, as an organ to regulate Contracting States compliance with the ECHR. The principle is articulated in the Convention text in Article 13 that guarantees the right to an effective remedy before a national authority and further in Article 35 § 1 that sets out the first set of admissibility criteria among which is the criterion of having exhausted all domestic remedies before petitioning the Court. The Court has stated that this principle is one of the general principles that can be derived from the Court’s case law when assessing non-refoulement cases.

The case *F.G.* is where the Court most recently described the nature of the examination in non-refoulement cases. In that case it stated that the Court itself does not verify how the States honor their obligations under the Geneva Convention Relating to the Status of Refugees nor do they examine the actual asylum application as the main concern is if the Contracting State has effective guarantees that protect the applicant against arbitrary refoulement. Further the Court pointed to that by virtue of Article 1 of the ECHR the primary responsibility of implementing and enforcing the guaranteed Convention rights is laid on the Contracting State and its national authorities. The Court also stated that it is not its task to substitute its own assessment of the facts for that of the domestic courts where domestic proceedings have taken place. As a general rule it is for the domestic courts to assess the evidence brought before them as it is a general principle that the national authorities are the ones that are best placed to assess the facts and also particularly the credibility of witnesses given that it is them who have had the opportunity to hear, see and assess the demeanor of said individuals.

In the case *M.S.S. v. Belgium and Greece* the Court also clearly stated that the machinery of complaint to the Court is subsidiary to national systems that safeguard human rights.

Another factor that has a part in the issue this thesis is examining is the competence of the Court to grant interim measures under Rule 39 of the Rules of Court. At the request of a party or of any other person concerned, or of the Court’s own motion, it can indicate to the parties that any interim measure they consider should be adopted in the interests of the parties or for the proper conduct of the proceedings. Interim measures have been established through case law to only be applicable in cases where there is an imminent risk of irreparable damage.

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48 J.K. and Others, § 83.  
49 Id. § 84.  
50 In full Article 13 reads, “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity”.  
51 In full Article 35 § 1 reads, “The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken”.  
52 J.K. and Others, § 84.  
53 See note 9 for Article 1 in full.  
54 F.G., § 117.  
55 Id. § 118.  
56 *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 287, ECHR 2011 [hereinafter *M.S.S.*].  
57 Rule 39 (interim measures) of the Rules of Court.
There is no specific provision in the ECHR concerning in which domains Rule 39 will apply but it usually concerns Articles 2 and 3 and in exceptional cases Article 8. However, it is not limited to not apply to any of the other articles. The absolute majority of cases where interim measures are used are in cases of non-refoulement, which is why the articles concerned usually are 2 and 3.  

1.3 Limitations
The United Nations Committee Against Torture (the CAT Committee), like the Court, also works as an international court in judging non-refoulement cases and has the same principle of making *ex nunc* examinations. This thesis will, however, only examine how the principle is used by the Court to hinder the text from being too descriptive which may occur when dealing with such a magnitude of sources. Further this thesis is not meant to be a comparative analysis of how the principle is used in the different international organs but a *de lege lata* analysis of the case law of the Court of how the principle is used, criticisms of it and potential changes to make.

Another limitation that has been made is that this thesis will focus mainly on the use of an *ex nunc* examination in expulsion cases when the alleged violation is a breach of Article 3. It has been used together with other articles as well such as Article 8, however the focus on Article 3 is chosen because that is the most common one when it comes to non-refoulement cases. The choice to not mix all different articles is to keep the thesis within a reasonable limit of materials and instead be able to delve deeper into the chosen areas.

1.4 Method & Materials
The method used for this thesis will be the legal dogmatic method. A large portion of material on the chosen subject will be thoroughly read and assessed and then presented together with an analysis of the relevant findings. Naturally with the chosen topic the material used will mainly be case law from the European Court of Human Rights but certainly not exclusively so. The thesis will, as mentioned above, mainly be a *de lege lata* analysis as the area is not very explored or at least not very written about. The final analysis will have some notes of *de lege ferenda*, as a proposal for a change will be made, however the main part will be that of establishing what the law is on the topic.

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Chapter 2 – Research

2.1 The Principle of an *Ex Nunc* Examination through Case Law

2.1.1 The Establishment and Development of the Principle

2.1.1.1 *Cruz Varas, Vilvarajah & Chahal*, the Establishment

The principle of having the Court make an *ex nunc* examination when dealing with non-refoulement cases first started to take its form in the case *Cruz Varas and Others v. Sweden* (*Cruz Varas*). The case concerned three Chilean citizens who came to Sweden in 1987 where they applied for political asylum. Among other things one of the applicants claimed to have been arrested and ill-treated in detention where he was obliged to stand naked and not allowed to sleep. He also claimed to have been arrested and detained on a number of other occasions as a result of his political activity. The application for asylum was rejected for not having invoked sufficiently strong political reasons to be considered refugees, the applicants then appealed it to the Government but the appeal was also rejected. Two of the applicants went into hiding in Sweden but the third was expelled to Chile in 1989 after a two-year long process of trying to have the expulsion order revoked.

In this case the Court stated that while the nature of the responsibility under Article 3 cases of non-refoulement kind lies in the act of exposing an individual to the risk of ill-treatment and the risk should be assessed primarily with reference to facts which were known or ought to have been known by the Contracting State in question, the Court is not precluded from having regard to new information that comes to light. In the case of *Cruz Varas* this resulted in the Court taking facts and evidence that had surfaced subsequent to the applicant’s expulsion to Chile from Sweden into account for their examination of a possible violation of Article 3.

The final decision in *Cruz Varas* was made in March 1991 and in October the same year the case was referenced when establishing a general approach to risk assessment in the case *Vilvarajah and Others v. the United Kingdom* (*Vilvarajah*). The case was brought before the Court by a Sri Lankan citizen of Tamil ethnic origin who claimed that the Sri Lankan army had attacked his district of the island and killed several men and also that his family shop was damaged and raided. He also claimed to have been detained by naval forces on two different occasions. The applicant applied for asylum in the United Kingdom under the Refugee Convention, he was interviewed by the UK immigration officers and stated the reasons mentioned above as reasons why it was unsafe for him to stay in Sri Lanka. However the request, after being referred to the Refugee Section of the Immigration and Nationality

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59 *Cruz Varas and Others v. Sweden*, 20 March 1991, § 13, Series A no. 201 [hereinafter *Cruz Varas*].
60 Id. §§ 14-15.
61 Id. §§ 16-18.
62 Id. §§ 19-33.
63 Id. § 76.
64 Id. § 79.
65 *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, § 107, Series A no. 215 [hereinafter *Vilvarajah*].
66 Id. § 9.
67 Id. § 10.
69 *Vilvarajah*, § 12.
Department of the Home Office, was refused as they found that he had not shown a well-founded fear of persecution. The applicant was subsequently returned to Sri Lanka.\textsuperscript{70}

Regarding the use of an *ex nunc* examination in this case it was firstly stated by the Court that it will assess the issue in the light of all materials brought before it or if necessary also materials obtained *proprio motu*.\textsuperscript{71} Secondly that, reiterating the reasoning in *Cruz Varas* as to why, the Court is not precluded from having regard to new information that has come to light. The Court also added that this new information might be of value to refute or confirm the appreciation made by the Contracting State or the “well-foundedness or otherwise of an applicant’s fears”.\textsuperscript{72}

This principle of making an *ex nunc* examination was further reaffirmed in *Chahal v. the United Kingdom* (*Chahal*) where the four applicant’s, who are members of the same family, are Sikhs from India. The first applicant entered the United Kingdom illegally in search for employment in 1971 and three years later he applied to the Home Office to regularize his stay. Some months later he was granted indefinite leave to remain under the terms of an amnesty for illegal entrants that arrived before 1973. However he had been detained in a prison since 1990 for the purposes of deportation when the case was brought before the Court in 1996. The second applicant, the first applicant’s wife, came to England following her marriage in India to the first applicant. The third and fourth applicants are the couple’s children that by virtue of being born in the United Kingdom are of British nationality.\textsuperscript{73} The husband and wife applied for a British citizenship in 1987, the wife’s request was still pending by the time the Court heard the case, however the husband’s was refused in 1989.\textsuperscript{74}

In this case the applicant and the State Party Government presented different arguments about what the decisive point of time for the risk assessment should be. The applicant argued that the Court should consider the decisive point of time to be that of when the decision to deport him was made final and to support this he made two arguments. Firstly he argued that the purpose of the stay on removal, which had been requested by the Commission, was to prevent irreversible damage and not to afford the State Party with opportunity to improve its case. The applicant’s second argument was that it would be inappropriate for the “Strasbourg organs” to be involved in a continuous fact-finding operation.\textsuperscript{75} The Government on the other hand pointed to that the responsibility for states under Article 3 in expulsion cases lies in the act of exposing an individual to a real risk of ill-treatment and thus the date for the risk assessment should be that of the proposed deportation. Because the applicant had not yet been expelled due to stayed removal the Government stated that the relevant time should be that of the proceedings before the Court.\textsuperscript{76}

The Court stated that the crucial question to examine was to see whether it had been substantiated that there was a real risk of the applicant to be subjected to treatment prohibited by Article 3 if expelled. Agreeing with the argument made by the Government the Court stated that since the deportation had not yet taken place the material point in time would have to be that of the Court’s consideration of the case. Finally the Court established that “although the historical position is of interest in so far as it may shed light on the current situation and its likely evolution, it is the present conditions which are decisive”.\textsuperscript{77}

\textsuperscript{70} Vilvarajah, § 13-15.
\textsuperscript{71} Id. § 107 (1).
\textsuperscript{72} Id. § 107 (2).
\textsuperscript{73} *Chahal v. the United Kingdom*, 15 November 1996, § 12, *Reports of Judgments and Decisions* 1996-V [hereinafter *Chahal*].
\textsuperscript{74} Id. § 13.
\textsuperscript{75} Id. § 84.
\textsuperscript{76} Id. § 85.
\textsuperscript{77} Id. § 86.
2.1.1.2 Salah Sheekh & Final Remarks

In the case Salah Sheekh v. the Netherlands (Salah Sheekh) from 2007 the Court further established the reasoning behind the necessity of an ex nunc examination. The case regarded a Somali national who had requested for asylum in the Netherlands on the grounds that he had to flee Mogadishu due to the civil war and belonging to the Ashraf population, a minority group. The applicant and his family did not flee the country; they fled to a village 25 km away from Mogadishu. The applicant and his family were robbed of all their remaining possessions while in the village as it was controlled by a clan whose armed militia knew that the applicant had no means of protection as he belonged to minority. Thus he and his family were persecuted, as were the three other families that belonged to the same minority group who lived in the village. The militia would often come to the family’s home and threaten them and the applicant would get beaten and harassed when going outside. The militia killed the applicant’s father and family members were locked up and ill-treated, being hit with belts and a rifle butt and having their bones broken. The females of the family were taken to a place outside the village where they were raped and held until the following morning. Conditions like these continued for the applicant from the family’s flight in 1991 until they had financial means to pay for the applicant to flee to the Netherlands, where he arrived in Amsterdam in 2003.

The applicant indicated that he wished to apply for asylum upon his arrival and was taken to the asylum application centre to lodge his request the following day. That same day the first interview took place with an official at the Immigration and Naturalisation Department to establish the nationality, travel route and identity of the applicant. The applicant’s asylum request was rejected nearing a month after his arrival, the domestic authorities stating failure to submit documents to establish nationality, identity and itinerary to affect the sincerity of his account and detract from his credibility as a reason for the rejection. Further they found that the situation in Somalia for asylum seekers, regardless of belonging to a minority group or not, was not enough on its own to grant refugee recognition.

The applicant appealed the decision, however the Regional Court of The Hague rejected the appeal. The applicant then, on recommendation from his lawyer, did not lodge any further appeal against the rejection of his appeal as his lawyer claimed that any such appeal would not stand any chance of success. The applicant was informed that he would be issued a European Union travel document and deported to the relatively safe areas of Somalia and instead lodged an objection to that decision and also requested to be issued a provisional measure to not be deported pending the appeal. This request was also rejected on 20 January 2004, however on 15 January 2004 the application to the Court was lodged and also a request for the Court to rule for interim measures under Rule 39. On the same day, the Court decided to indicate for the Dutch Government to not expel the applicant for the proper conduct of the proceedings, subsequently the expulsion order was cancelled.

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78 Salah Sheekh v. the Netherlands, no. 1948/04, §§ 5-6, 11 January 2007 [hereinafter Salah Sheekh].
79 Id. § 7.
80 Id. § 8.
81 Id. § 9.
82 Id. §§ 10-17.
83 Id. § 18.
84 Id. § 25.
85 Id. § 27.
86 Id. § 33.
87 Id. § 35.
88 Id. § 36.
89 Id. § 37.
90 Id. § 38.
As regards the use of an *ex nunc* examination the Court firstly stated that materials obtained *proprio motu* can be necessary given the absolute nature of Article 3 because it must be made clear that the assessment made by the Contracting State is adequate and sufficiently supported. Further the Court noted that owing to its supervisory task under Article 1991 of the ECHR it would be too narrow of an approach under Article 3 in cases concerning aliens facing extradition or expulsion if the Court only were to take into account materials made available from the domestic authorities and not compare these with materials from other sources. Further stating that this fact implies that a full and *ex nunc* examination is called for when assessing an alleged risk of treatment prohibited by Article 3 in respect of aliens facing extradition of expulsion, because the situation in the destination country may change over the course of time and thus be different when the case is before the Court from when the domestic authorities took its final decision.92

As can be concluded from this the principle of making an *ex nunc* examination in Article 3 cases concerning expulsion is firmly established through case law. The reasoning behind the use of it is hard to argue with, it would more often than not be completely useless to have the Court set the material point in time to be that of the final domestic decision. This is mostly because of one factor that is often discussed when it comes to the Court, the time that it takes for a case to reach a final decision. It would be completely contrary to the purpose of the ECHR and the Court, which is protect human rights, to not take new information into account. There may be times where an individual has fled a situation in a country that might have not been deemed a violation of Article 3, but since then, and by the time it reaches the Court, the country has started to execute everyone that enters the country. It is an extreme example but if the principle of making an *ex nunc* examination did not exist, then in a situation like the exampled the Court might evaluate the final domestic decision, deem it to be up to Convention standard at the time and allow for the Contracting State to send the individual back to certain death. However, as non-arguable as the use of the principle is this does not mean that it is without criticism, something that will be discussed at a later stage of this thesis.

2.1.2 Cases Where the Situation in the Destination Country has Improved

2.1.2.1 *Venkadajalasarma v. the Netherlands*

The principle of making an *ex nunc* examination has been reiterated in an extensive amount of case law and has sometimes, as pointed to above in *Cruz Varas*, added new things to the facts of the case since the domestic proceedings which potentially can have an effect on the outcome of the case. As exampled above the use of the *ex nunc* examination is crucial when the general situation in a country has deteriorated, but it can also be the other way around, that by the time the case reaches the Court the situation has improved instead. One case where this has occurred and is particularly evident is that of *Venkadajalasarma v. the Netherlands* (*Venkadajalasarma*) in which the Court took note of the considerable improvement in the development of the security situation in Sri Lanka to which the applicant was being expelled.93

The applicant arrived in the Netherlands in 1995 where he applied for asylum or for a residence permit for compelling reasons of a humanitarian nature.94 In support of this claim he

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91 In full Article 19 reads, "To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as “the Court”. It shall function on a permanent basis”.

92 Salah Sheekh, § 136.

93 *Venkadajalasarma v. the Netherlands*, no. 58510/00, § 66, 17 February 2004 [hereinafter *Venkadajalasarma*].

94 Id. § 9.
submitted that he belonged to the Tamil population group and had lived in an area controlled by the Tamil Tigers, a terrorist organization that was engaged in an armed struggle for independence. The applicant’s livelihood was a minibus he owned, in which he had been forced by the Tamil Tigers to transport foodstuffs and members of the group a few times a month and in return the group would pay for his gas. The applicant once refused to transport bombs for the Tamil Tigers and as a result they had his minibus confiscated and he was forced to help dig trenches and work in their kitchens. Further on a different occasion some members of the group showed up at the applicant’s house and told his wife that he had to report to the Tamil Tiger’s camp. This meant that he was expected by them to fight alongside them and also transport their weapons. As soon as this reached the applicant he went into hiding. Two of his friends who had driven his minibus had been shot dead when refusing to join the Tamil Tiger’s ranks and fearing the same faith the applicant decided to flee to Sri Lanka’s capital Colombo.

The applicant went to an army camp to apply for the required travel pass to get to Colombo but was held for two days as they suspected that he was a supporter of the Tamil Tigers. He was undressed and beaten with a small iron rod, stabbed with a knife, burned with a cigarette and his hands were tied so he was strung up while being beaten. After the two days he was made to stand in a line where an informant wearing a black mask walked past the line indicating the moment he recognized someone as a Tamil Tigers supporter. As the applicant was not recognized he was released and got a travel pass on the condition that he would return from Colombo within seven days. He travelled to Colombo by train and stayed at the house of acquaintance for a month, being too scared of being arrested by the army to leave the house. Since he was not allowed to settle in Colombo and he could not go back to his home he decided to leave the country. A flight to Amsterdam was arranged and he arrived on 2 November 1995 and he was interviewed by an official of the Immigration and Naturalisation Service around a month later. This official stated that the scars the applicant showed to prove his story were older than what he claimed and that a burn mark he claimed came from a cigarette had a much wider diameter than a if a cigarette would have caused it.

The applicant’s request was rejected and the Deputy Minister of Justice noted that it did not appear that the Sri Lankan authorities had grave presumptions against the applicant so that he could be said to have a well-founded fear of persecution. Further the applicant was informed that he would not be allowed to stay in the Netherlands while waiting for the consideration of any objection he might wish to submit. The applicant still filed an objection and also applied for interim measures, however he was informed that his expulsion actually would be suspended while his objection was pending and thus he withdrew his request for interim measures. The applicant’s objection was ultimately rejected and he was informed that he would not be allowed to stay in the Netherlands while an appeal would be pending should he make one. Still, the applicant appealed the decision but with a final decision the President of the Regional Court of The Hague rejected the appeal and following that came an expulsion order. The applicant did however not leave the Netherlands and he was not forcibly expelled.

95 Venkadajalasarma, § 10.
96 Id. § 11.
97 Id. § 12.
98 Id. § 13.
99 Id. § 14.
100 Id. § 15.
101 Id. § 16.
102 Id. § 17.
103 Id. § 18-19.
The applicant lodged a new request for a residence permit based on compelling reasons of a humanitarian nature two months later, however the Deputy Minister of Justice rejected this request as he found that there had been no new circumstances or facts submitted. The applicant objected the rejection and the domestic authorities rejected the objection, the applicant appealed the decision and requested for interim measures, the domestic authorities rejected these as well. Following this judgment a new expulsion order was issued.

The Court firstly took note of the Netherlands policy on asylum seekers of Sri Lankan nationality and noted that at the time of the final objection by the domestic authorities, 8 December 1998, the policy in use was based on country reports by the Ministry of Foreign Affairs from 24 March and 6 November 1998. Further it noted that the policy in force when the Dutch Government submitted its observations on the admissibility of the case before the Court was based on reports dating to the year 2000. The Court also took note that there was a country report from 2002 that included information on the developments of the peace process, which was started in 2000. Among other things the report stated that a formal cease-fire agreement between the Sri Lankan Government and the Tamil Tigers had been signed in 2002. The Court then referred to the most recent country report that existed, which was from May 2003, that stated that the security situation in Sri Lanka had significantly improved and so had the freedom of movement within the country. According to the report Tamils were now free to travel through the entirety of Sri Lanka without requiring the permission that was needed previously for some locations. This meant that it was now easier for individuals fleeing from areas controlled by the Tamil Tigers to get to areas that were under Government control. Further the report noted that there had been no arbitrary arrests and also that ill-treatment or torture of persons arrested for involvement in the Tamil Tigers no longer occurred. Further the Court took note of different reports from sources such as Amnesty International and the US Department of State stating that the human rights situation in Sri Lanka had majorly improved.

The applicant submitted a number of cumulative elements that would constitute a violation of Article 3 if he were to be returned to Sri Lanka. Among other things he stated that because of his work for the Tamil Tigers with his minivan he had a strong connection to them and also that the minivan could be traced back to him should it be seized by the army. The applicant also accepted that the general situation in Sri Lanka had improved, however he noted that it still was far from stable and claimed that many attempts in the peace process had resulted in nothing. The Dutch Government on the other hand argued that there would be no violation, partly because the applicant had not been politically active and thus would be unlikely to attract suspicion but mostly on the grounds that since the cease-fire agreement in 2002, or even earlier than that, there had been no reports of Tamils arrested in Colombo after being stopped and asked for identity papers.

The Court, when making its assessment, firstly noted that the material point in time was that of the Court’s consideration of the case given that the applicant had not yet been expelled. Firstly it observed that it was undisputed that the applicant left Sri Lanka after his

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104 Venkadajalasarma, § 20-25.
105 Id. § 28.
106 Id. § 36.
107 Id. § 40.
108 Id. § 41.
109 Id. § 42.
110 Id. §§ 46-47.
111 Id. § 56.
112 Id. § 58.
113 Id. § 59-60.
114 Id. § 63.
refusal to join the Tamil Tigers ranks and having been detained for two days by the army for suspicion of involvement in the group. During this detention it was also undisputed that he was subjected to torture or ill-treatment.\textsuperscript{115} The Court did question whether it could be proven that the Sri Lankan authorities knew about the applicant’s involvement in the Tamil Tigers.\textsuperscript{116} However it went on to state that even if made an assumption that the authorities did in fact know, or would be able to become aware, the Court considered that in the improved human rights climate in Sri Lanka it would be unlikely that the applicant would run a real risk of being subjected to ill-treatment. As stated above the Court took note of the considerable improvement of the security situation in the country and that no round-ups or large-scale arbitrary arrests of Tamils had taken place. Also that individuals that were arrested on suspicion of involvement in the Tamil Tigers were not tortured or ill-treated.\textsuperscript{117} It further observed that while the situation in the country was not yet stable, just as the applicant argued, it should be borne in mind that the main parties to the conflict had emphasized their commitment to the peace process and very real progress had been made already.\textsuperscript{118} Ultimately the Court found that the expulsion of the applicant would not violate Article 3.\textsuperscript{119}

In this case it can be directly seen how the fact that the Court makes an \textit{ex nunc} examination can change the outcome of the case drastically given the time period that passes between the final domestic decision and the final decision by the Court. The Court was, however, not unanimous in its decision and there was a dissenting opinion that will be discussed below regarding the use of the \textit{ex nunc} examination when the general situation in the destination country has improved.

\subsection*{2.1.2.2 Al Hanchi, Abdulhakov & Müslim}

Another case where the changes of the situation in the destination country played a large part in the outcome of the case is \textit{Al Hanchi v. Bosnia and Herzegovina} (\textit{Al Hanchi}). In that case the applicant claimed that he would be treated as an Islamist and suspected terrorist in Tunisia if returned because of his association to the foreign mujahedin in Bosnia and Herzegovina.\textsuperscript{120} The applicant had never been given a residence permit or a citizenship in Bosnia and Herzegovina but obtained a national identity card. He married a Bosnian citizen and had two children with her.\textsuperscript{121} During a random check in 2009, around 15 years after his entry into the country from Tunisia, the Aliens Service found that the applicant was an illegal immigrant and he was put in an immigration centre for deportation purposes. The applicant lodged an application for judicial review but it was rejected on the grounds of being out of time. The detention was extended on a monthly basis and the Court of Bosnia and Herzegovina upheld each of the orders.\textsuperscript{122} The applicant was established to be a threat to national security after a month in detention and his deportation was ordered as well as a five-year re-entry ban. Both the Ministry of Security and the State Court upheld the deportation.\textsuperscript{123}

The applicant claimed asylum and maintained that Tunisian citizens who joined the mujahedin during the Bosnian war were treated as suspected terrorist and subjected to ill-treatment in Tunisia.\textsuperscript{124} The asylum claim was refused on grounds that it had not been shown that the applicant would be treated as a suspected terrorist upon return, therefore he did not

\textsuperscript{115} Venkadajalasarma, § 64.
\textsuperscript{116} Id. § 65.
\textsuperscript{117} Id. § 66.
\textsuperscript{118} Id. § 67.
\textsuperscript{119} Id. § 69.
\textsuperscript{120} \textit{Al Hanchi v. Bosnia and Herzegovina}, no. 48205/09, § 35, 15 November 2011 [hereinafter \textit{Al Hanchi}].
\textsuperscript{121} Id. § 9.
\textsuperscript{122} Id. § 10.
\textsuperscript{123} Id. § 11.
\textsuperscript{124} Id. § 12.
face a real risk of being subjected to ill-treatment.\(^{125}\) The final decision by the domestic authorities of the applicant’s removal was made in December of 2009.\(^{126}\) The judgment by the Court was taken in October 2011, circa two years later. Despite this being “only” two years it happened to be two very eventful years for the general situation in Tunisia with the Arab Spring and because of the Court’s obligation to make an *ex nunc* examination this played a significant part in the outcome of the case.

Firstly the Court reiterated the principle, stating that when an applicant that has not yet been deported the decisive point in time will be that of the proceedings before the Court.\(^{127}\) Thus in the present case the examination was whether the applicant would face a real risk of being subjected to treatment prohibited by Article 3 if he would be deported back to Tunisia despite the recent changes in the destination country.\(^{128}\) The Court then stated that there was a process of democratic transition in progress in Tunisia and that steps had been taken to dismantle the oppressive structures of the former regime. There had been put in place some elements of a democratic system, for example an amnesty was granted to all political prisoners, security forces widely accused of human-rights abuses were dissolved and a number of officials from the Ministry of Justice and Ministry of Interior were dismissed and/or prosecuted for their past abuses.\(^{129}\)

The Court took note of that cases of ill-treatment were still reported despite this, however there was no indication that Islamists as a group had been targeted since the change in regime and those instances of ill-treatment reported of seemed to be sporadic. The Court also emphasized that Tunisia had acceded to the Torture Convention and the ICCPR which in the Court’s view showed that the Tunisian authorities was determined to eradicate the culture of impunity and violence once and for all.\(^{130}\) Because of this evaluation of the new regime and political climate in Tunisia the Court concluded that there was no real risk that the applicant would be subjected to ill-treatment if deported and thus there would be no violation of Article 3 by Bosnia and Herzegovina if this were to happen.\(^{131}\)

In the case *Abdulkhakov v. Russia (Abdulkhakov)* the Court noted that when assessing if there exists a risk of ill-treatment in the requesting country the Court will assess the general situation in that country and take into account any indications of both improvement or worsening of the human-rights situation in general or in respect of a particular group or area.\(^{132}\) This is of particular interest as it is the Court explicitly stating that the *ex nunc* examination shall apply regardless if the situation in the country of destination has improved or worsened, something that has been questioned and will be discussed at a later stage of this thesis.

There is also the case of *Müslim v. Turkey (Müslim)* where the Court stated that it would not examine if the Turkish authorities correctly assessed the risk of the complaints from Saddam Hussein’s agents as Hussein’s regime had fallen during the time period of the final domestic decision and that of the Court.\(^{133}\) These three instances are proof of that when using an *ex nunc* examination where drastic positive changes have been made in the destination country the Court makes no mention about the final domestic proceedings being Convention-compliant or not. This is understandable as it is not the main task for the Court, however it

\(^{125}\) *Al Hanchi*, § 14.
\(^{126}\) Id. § 16.
\(^{127}\) Id. § 41.
\(^{128}\) Id. § 42.
\(^{129}\) Id. § 43.
\(^{130}\) Id. § 44.
\(^{131}\) Id. § 45.
\(^{132}\) *Abdulkhakov v. Russia*, no. 14743/11, § 135, 2 October 2012 [hereinafter *Abdulkhakov*].
\(^{133}\) *Müslim v. Turkey*, no. 53566/99, § 54, 26 April 2005 (translation to English made by the author).
might be something that is beneficial for the future, something that will be discussed more below.

2.1.3 Government Objections to the Use of an *Ex Nunc* Examination

As can be imagined there have been some objections to the use of an *ex nunc* examination in expulsion cases from Contracting State Government’s that have challenged the use of this type of examination. These are of importance as they both illustrate the fact that the use of the principle is not welcomed by all and also how the Court has dealt with these objections and established that it is absolutely necessary to make an *ex nunc* examination despite the issues raised by some Governments.

When the case *Maslov v. Austria (Maslov)* was brought before the Grand Chamber the Austrian Government raised the argument that in the Chamber judgment\(^{134}\) weight had been attached to facts that had occurred after the final decision was taken domestically.\(^{135}\) The Government argued that the relevant point in time should be that of when the residence prohibition of the applicant had become final in the domestic proceedings and that any developments past this point should not be taken into account. The Government pointed to that an interpretation that would allow for circumstances occurring after the final domestic decision to be taken into account would be counter to Article 35 § 1. Further it argued that Article 35 § 1 exists to ensure that Contracting States are only answerable for alleged violations after having had their opportunity to put things right through its own domestic system.\(^{136}\) The Court was not convinced by this argument. Firstly stating that it is true that the exhaustion of domestic remedies-requirement exists to ensure that States are only answerable in front of an international body after having had the opportunity to put matters rights domestically first.\(^{137}\) However, the Court pointed out that its task is to assess the compatibility of the applicant’s actual expulsion with the Convention, not the compatibility with the final expulsion order.\(^{138}\)

This is the reasoning behind why the use of an *ex nunc* examination is not counter to Article 35 § 1. It is essentially mostly resting on the fact that the Court is given the task of assessing the compatibility with the expulsion and not the expulsion order. This then means that what facts were or were not available to the domestic authorities is of little to no relevance as the assessment is on whether the expulsion, if implemented at the time of the proceedings before the Court, would be in violation of Article 3.

In the case *I.K. v. Austria (I.K.)* from 2013 the Austrian Government challenged the admissibility of a complaint under Article 3 if the applicant were to be expelled arguing that he had not exhausted domestic remedies. The Government argued that the applicant had not informed the national authorities of his declining psychological health and had not provided medical information to them that he had submitted to the Court.\(^{139}\) The applicant contested this saying that the medical records all were from after the domestic asylum proceedings had ended and that his health had deteriorated after the dismissal of his request.\(^{140}\) The Court firstly noted that the applicant was correct in that the material provided dated from after the domestic proceedings had ended.\(^{141}\) Secondly the Court dealt with the merits of the admissibility objection and reiterated that, in accordance with its settled case-law, if the

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\(^{134}\) *Maslov v. Austria*, no. 1638/03, 22 March 2007.

\(^{135}\) *Maslov v. Austria [GC]*, no. 1638/03, § 58, ECHR 2008 [hereinafter *Maslov*].

\(^{136}\) Id. § 59.

\(^{137}\) Id. § 92.

\(^{138}\) Id. § 93.

\(^{139}\) *I.K. v. Austria*, no. 2964/12, § 58, 28 March 2013 [hereinafter *I.K.*].

\(^{140}\) Id. § 59.

\(^{141}\) Id. § 61.
applicant has not yet been expelled it is for the Court to make an ex nunc examination of the facts. The Court then stated that because the Court can take events and materials that date from a time after the domestic proceedings have ended into account, those submissions cannot be deemed to render the case inadmissible for non-exhaustion of domestic remedies. Because of this reasoning the Austrian Government’s objection was rejected.142

Here there is another very similar attempt at objecting to the use of an ex nunc examination by claiming non-exhaustion of domestic remedies by the applicant. Firstly it is notable that in this case the Government’s arguments were factually inaccurate in that the medical records were dated past the final domestic proceedings and thus it would have been impossible for the applicant to submit them. However, the argument that he had failed to inform the national authorities of his declining mental health is of interest as the applicant claimed that this also had happened after the final proceedings and even that it was a direct result of the final decision to deport him. The Court then stated, unsurprisingly as it is in line with its previous case law but still notably, that because it is allowed to take new materials into account that dates from after the final domestic proceedings submissions of new material cannot render a case inadmissible for non-exhaustion of domestic remedies. This even more clearly establishes that the use of an ex nunc examination is not counter to Article 35 § 1 of the ECHR.

2.1.4 Ex Nunc Requirements for Domestic Authorities?

2.1.4.1 Article 3 in Conjunction with Article 13

Another factor with the principle of making an ex nunc examination is the question of whether there exists a procedural requirement under Article 3 for the domestic courts to apply the principle as well at this point. Are domestic courts obliged to consider information that only has come up on appeal, i.e. make a continuous ex nunc examination throughout the different national instances? Arguments have been made that because of the subsidiary role of the Court it follows that domestic courts shall undertake a review that will provide individuals with the same level of protection as the Court offers.

Professor Spijkerboer argues that owing to the subsidiarity principle the Court shall not address issues, as far as possible, that are new compared to the national proceedings. He further argues that the Court should not apply a level of scrutiny that exceeds the amount of scrutiny the case has been put under during the domestic proceedings. He argues that if the Court would do so it would make it a court of first instance, which it is not, and therefore the conclusion can be drawn that if the Court applies a particular kind of scrutiny in a particular kinds of cases this should also have taken place in the national system. He argues that the national systems should be constructed to have at least the same level of judicial supervision as the Court and also that if this is not the case the Court will always have another thing to offer that cannot be obtained at national level.143

The Court has recently laid down in F.G. that there is a procedural requirement to make an ex nunc examination of a case and to not overlook certain risk factors even if the applicant himself or herself has explicitly requested for it. However the Court does not mention if this obligation lies with the first instance only or if further appellate courts are obliged to do this as well. The Court has also touched upon this in the previously mentioned M.S.S case. In that case the Court reviewed an alleged violation of Article 13 in conjunction with Article 3 and

142 I.K., § 62.
144 For Article 13 in full see note 48.
established that the national authorities had not carried out a Convention-compliant examination. The Court stated that while the individuals concerned did try to add more material to their files as proof after the interviews by the Aliens Office the Aliens Appeals Board did not always take the newly added material into account. Further the Court stated that this demonstrates that the individuals were prevented from establishing the nature of their complaints. The Court then concluded that the procedure complained of did not meet the requirements of Article 13. This was, however, not only based on the prevention of the individuals to add new evidence but it can still be seen that Article 13 in conjunction with Article 3 has a procedural requirement for the domestic authorities to take new facts and circumstances into account.

2.1.4.2 F.G. v. Sweden

Most recently in the above-mentioned F.G. the Court laid out the procedural duties that exists for Contracting States in cases concerning Articles 2 and 3. However, in the quite lengthy section, there is no mention of an obligation to make an ex nunc assessment of the case on the domestic level other than at first instance. However the Court made a thorough examination of the risk assessment made by the Swedish domestic authorities, finding procedural flaws in how they had conducted the risk assessment.

The applicant in F.G. wished to not rely on his sur place conversion to Christianity in the original asylum proceedings. His case was referred to the Migration Board where the applicant explained that he considered his religion a private matter and he “did not want exploit his valuable newfound faith as a means of buying asylum”. However, in hindsight he claimed that he had not been provided with sufficient legal support and advice to understand the risk that was associated with his conversion. The Court had some issues with this statement as they found it difficult to accept that the applicant, who had lived his entire life in Iran, spoke good English and was experienced with the internet, could be unaware of what the risk for converts in Iran would entail.

The Swedish authorities became aware of the applicant’s sur place conversion in an interview with him that was done before the Migration Board. The Migration Board rejected his request for asylum and found that a certificate from the congregation pastor only could be regarded as a plea to the Migration Board for the applicant to be granted asylum. Further it noted that the applicant had stated that his faith was a private matter and thus that if he were to pursue his faith privately in Iran that was not a plausible reason to believe that he would risk persecution. This last notion made the Court conclude that the Migration Board made a kind of risk assessment on the ground of his religious beliefs despite that the applicant did not wish to rely on it. The applicant did, however, rely on his conversion in his appeal to the Migration Court and also provided an explanation for why he had not wished to rely on it previously. During the oral hearing before the Migration Court the applicant once again

145 M.S.S., § 369.
146 Id. § 389.
147 Id. § 390.
148 For the whole reasoning of the Court see M.S.S. §§ 385-397.
149 F.G., § 119.
150 Id. §§ 119-127.
151 Id. § 146.
152 Id. § 147.
153 Id. § 148.
154 Id. § 149.
155 Id. § 150.
156 Id. § 151.
decided to not rely on his conversion as grounds for asylum but did however add that his Christian faith would obviously cause him problems upon return to Iran.\textsuperscript{157}

The Migration Court did not further consider the question of the applicant’s conversion, how he intended to manifest his religion in Iran if returned, what “problems” the conversion might cause upon return or even about the way he manifested his religion in Sweden. The Migration Court dismissed the appeal, observing that the applicant was no longer relying on his conversion as grounds for persecution. Thus it did not carry out a risk assessment of the risk the applicant might be confronted with upon return as a result of his religious views.\textsuperscript{158} The applicant did then request for leave to appeal to the Migration Court of Appeal where he alleged that he indeed had relied on his conversion before the Migration Court. He also stated that his fear that his conversion had become known to the Iranian authorities had increased. However, the Migration Court of Appeal considered those submissions insufficient and refused the request. After that the applicant’s removal order became enforceable.\textsuperscript{159} The applicant then requested for the Migration Board to stay the execution of his removal order, relying on his conversion to do so. However, the request was refused by both the Migration Board and the Migration Court that found that his conversion could not be considered a “new circumstance” that would justify a re-examination of his case. The Migration Court of Appeal also refused leave to appeal.\textsuperscript{160}

Based on this line of circumstances the Court found that the authorities had not carried out a thorough examination of the risk attached to the applicant’s conversion. The Court noted that this was due to the fact that the applicant had declined to invoke his conversion as a grounds for asylum, however it also pointed to that the domestic authorities still was aware of this fact. The Court stated that the Swedish domestic authorities never made a risk assessment of potential risks that would occur because of the applicant’s conversion and that with regard to the absolute nature of Article 3 the applicant’s conduct is irrelevant and the competent national authorities have an obligation to assess, of their own motion, all information brought to their attention before it takes a decision on the applicant’s removal.\textsuperscript{161}

Further the Court noted that the applicant had submitted several documents that were not presented to the domestic authorities. In light of these materials and the materials previously submitted to the domestic authorities the Court found that the applicant had sufficiently shown that his claim for asylum on the grounds of his conversion merited an assessment by the domestic authorities. Finally the Court stated that it was for the domestic authorities to take the material into account, together with any further development regarding the situation in the destination country or the individual’s particular situation.\textsuperscript{162} The Court then concluded that a violation of both Article 2 and 3 would occur if the applicant would be returned to Iran without an \textit{ex nunc} examination being made by the Swedish domestic authorities including the consequences of his conversion to Christianity.\textsuperscript{163}

This is the most the principle of making an \textit{ex nunc} examination has been discussed in relation to domestic authorities and it has definitely shed some light on the matter. However it is unclear whether the Court with this reasoning meant to establish a procedural obligation for all domestic authorities dealing with asylum cases, no matter what instance, to always make an \textit{ex nunc} examination, or it if only was meant to mean that a risk assessment of all factors, regardless of if the applicant wants to rely on them or not, is a must when doing the first risk

\textsuperscript{157} F.G, § 152.
\textsuperscript{158} Id. § 153.
\textsuperscript{159} Id. § 154.
\textsuperscript{160} Id. § 155.
\textsuperscript{161} Id. § 156.
\textsuperscript{162} Id. § 157.
\textsuperscript{163} Id. § 158.
assessment. However, as mentioned above, the Court noted that the Migration Board did in fact take the fact that applicant did not want to rely on his conversion into account as well, however the Migration Court did not and this is what prompted the Court to establish that without a new and ex nunc examination it would be a violation of Articles 2 and 3.

2.2 Critique of the Use of an Ex Nunc Examination

2.2.1 Critiques as Regards the Functioning of the Court

The principle of making the examinations of alleged Article 3 violations in relation to expulsion cases ex nunc has not been without some criticism. One of larger criticisms against this is the effect it has on the functioning of the Court. As previously mentioned the Court is a supervisory organ as is enshrined in Article 19 of the ECHR and also, as can be seen in Articles 13 and 35 § 1 of the same text, it is a subsidiary organ to domestic remedies. However when having the Court make an ex nunc examination and thus also allow for it to obtain evidence proprio motu it gives it some connotations of instead being a third or fourth-instance court.

The first issue relating to this is the use of Rule 39 as it while being absolutely necessary to effectively protect the rights at stake also is threatening the Court to transform into a first-instance immigration court. It has been made clear via the Interlaken Declaration that the Court cannot assume the role of a third- or fourth-instance court without infringing on the subsidiarity principle. The Interlaken Declaration stresses the subsidiary nature of the supervisory mechanism of the Court and the fundamental role that national authorities must play in guaranteeing and protecting human rights at national level. The conference where the declaration was made reiterated the obligation for the Contracting State to ensure that the rights and freedoms set out in the ECHR will be fully secured at national level and called for the strengthening of the principle of subsidiarity. Further that the principle implies a shared responsibility between the Contracting States and the Court. Lastly in the Declaration’s action plan the conference invited the Court to take fully into account its subsidiary role in the interpretation and application of the ECHR.

While the focus in this thesis is not that of the use of interim measures and it is nothing that will be further dwelled upon it is an important first notion to make as it is heavily intertwined with the subject this thesis is covering. The use of interim measures is what will most often stay the deportation of an individual and thus also what will create the instances where the Court will make an ex nunc examination of the facts since the expulsion will not yet have been implemented. In a concurring opinion to the above lengthily discussed case of J.K. and Others Judge O’Leary pointed out that there will be differing views of the application of the general principles regarding how to assess non-refoulement related cases in the context of an ex nunc examination. He then went on to state that there is no doubt that such assessments have fourth instance overtones. He also referred to a statement made in F.G. which said that,

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166 Interlaken Declaration, 1-2, page 2.
167 Interlaken Declaration, 9 b, page 5.
168 J.K. and Others, Concurring Opinion of Judge O’Leary, §10, 56.
… in cases concerning the expulsion of asylum-seekers, the Court does not itself examine the actual asylum applications or verify how the States honor their obligation under the Geneva Convention relating to the Status of Refugees.\textsuperscript{169}

Judge O’Leary then states that this is completely correct in theory but given the nature of an \textit{ex nunc} examination it can be less accurate in practice in certain cases.\textsuperscript{170} It can be seen from case law such as \textit{Salah Sheekh} that the Court shall in fact compare the sources made available by the domestic authorities with materials from other objective and reliable sources.\textsuperscript{171} It does not explicitly say to examine and compare the actual asylum application however it can be assumed that it is also included. This is because it is likely that the Contracting State provides for evaluations of said asylum application and proof found to refute the claim on various grounds, which the Court will then compare to other reliable sources. Thus it will actually examine the asylum application.

In a concurring opinion in \textit{F.G.} Judge Bianku made some interesting remarks regarding the use of the principle of making an \textit{ex nunc} examination. He pointed to that the principle has been firmly established since the decisions in \textit{Cruz Varas} and \textit{Vilvarajah} in 1991. Thus it should be clear that for the purposes of a risk assessment analysis under Article 3 the \textit{ex nunc} examination approach has been used both to developments in the country of destination and also the developing situations of the applicants themselves while in the country they are seeking asylum in. Finally he stated that the judgment in \textit{F.G.} was confirmation that the \textit{ex nunc} principle also applies to \textit{sur place} activities. He cited paragraph 156 of \textit{J.K. and Others}, which stated, “regardless of the applicant’s conduct, the competent national authorities have an obligation to assess, of their own motion, all the information brought to their attention before taking a decision on his removal to Iran”. Judge Bianku then pointed to that in his opinion this obligation should have been clear to the national authorities given that this procedural obligation has existed for more than twenty years. Further he would have wished that because of the consistent approach of use of the \textit{ex nunc} examination by the Court, which has also been used by national courts for many years and been codified at EU level\textsuperscript{172}, the Court should have found a violation of Article 3 because of the fact that the national authorities did not conduct an Article 3-compliant assessment.\textsuperscript{173} Lastly he stated,

\begin{quote}
I believe that only an assessment at national level which is compliant with Article 3, as established by the Court, would gradually reduce the need for Strasbourg to intervene and proceed itself with an \textit{ex nunc} analysis of continuously evolving and difficult situations at a second stage.\textsuperscript{174}
\end{quote}

While seemingly a good idea to help make national authorities make Convention-compliant risk assessments and at the same time lower the strain on the Court, it is not always that simple. Risk assessments are qualified guesses about future events and lawyers will never assess all cases the exact same way. Just because the assessment at national level also is made \textit{ex nunc} and Convention-compliant in all other ways the “guess of future events” from the lawyers at the domestic authorities may still not be the same one as the one from the Judges of the Court. The most effective way to really reduce the tendency of the Court taking the role of

\begin{footnotes}
\item[169] \textit{F.G.}, § 117.
\item[170] \textit{J.K. and Others}, Concurring Opinion of Judge O’Leary, footnote 13, 56.
\item[171] \textit{Salah Sheekh}, § 136.
\item[173] \textit{F.G.}, Concurring Opinion of Judge Bianku, 53.
\item[174] \textit{F.G.}, Concurring Opinion of Judge Bianku, 54.
\end{footnotes}
a third or fourth-instance Court is that of accelerating the procedure of the Court so that there would be no time for significant changes to happen.

What is also noteworthy from the concurring opinion of Judge Bianku, as recounted for above, is that in his opinion the Court should have found a violation of Article 3 on the grounds that the national authorities did not make an Article 3-compliant risk assessment. He would have preferred this to the majority finding “just” a potential future violation if the applicant were to be deported without the assessment being redone. If this had been the case it would have been a major change as the obligation is to not deport and as it stands now if the deportation has been stayed and the Court holds that the enforcement of said deportation would mean a violation of Article 3 this is still a only potential violation of the Article. If, however, procedural wrongs in a risk assessment can be deemed to be an actual violation of Article 3 that would certainly apply more pressure on the domestic authorities. Potentially this could be a good thing, as it would make Contracting States even more attentive on the Court’s case law to make the correct and Convention-compliant risk assessment. However, it would also put a huge amount of pressure on the Contracting States and presumably, one can hope at least, Contracting States are doing the absolute utmost as it is so the knowledge that any missteps can result in a violation of Article 3, one of the most fundamental human rights there is, might not create a very healthy legal environment. There are many eyes on the Court and being deemed to have violated Article 3 in such a public forum is something a State will want to avoid at all costs.

The Court has also discussed the subject of its own scrutiny on different occasions. For example in the Abdulkhakov judgment where it stated that it must be cautious in taking the role as a first-instance tribunal of fact. Further stating that while the Court is not bound by the findings of the domestic authorities it requires compelling elements for it to depart from those facts. However, it also stated that the Court’s duty is to ensure the Contracting States’ compliance with the Convention in accordance with Article 19. When a case is regarding deportation or extradition and the applicant provides for reasoned grounds that will cast doubt on the accuracy of the information the domestic authorities relied on the Court must be satisfied that the assessment made is sufficiently supported by domestic materials and also materials originating from other reliable sources.175

A note to take from the above stated is that the Court is aware of this potentially problematic situation that can occur when applying the principle of making an ex nunc examination. The fact that the Court itself takes note of the need to take caution to not become a first-instance Court of fact but also highlights what can only be described as a clash between this need for caution to not become something that it is not meant to be but also the need to act in accordance with Article 19. This illustrates that there is a need for discussion on the topic of ways on how to better the application of this principle.

2.2.2 Critiques as Regards State Responsibility

2.2.2.1 Judge Mularoni

Another criticism to the use of the principle of the ex nunc examination is one relating to state responsibility. It is the fact that in cases where there has been significant improvements to the general situation in the destination country the Court may find that there would be no violation of Article 3, not reviewing whether or not there would have been one at the time of the domestic proceedings. In Venkadajalasarma Judge Mularoni had a dissenting opinion stating his difficulties with accepting certain statements in the judgment regarding the

175 Abdulkhakov, §137.
decisive point in time. He fully agreed that the principle of an *ex nunc* examination shall be applied when the situation in the destination country has deteriorated since the final decision at national level. However, he was hesitant about whether it should also be applied when the situation has improved instead. He argued that this would render national decisions of expulsion, even to countries where the risk of being subjected to treatment contrary to Article 3 is extremely high, compatible with the Convention as long as the Contracting State waits for the “right moment” to expel.\(^\text{176}\)

This is one way to potentially tweak the principle of making an *ex nunc* examination, to have it only apply as regards facts about the destination country when the general situation in a country has deteriorated. That is the most important notion and why there is a need for the *ex nunc* examination, because if the Court were to review the static facts from the potentially several years old final domestic proceedings and base its decision on that then it could have horrific outcomes for the individual concerned. However simply deciding to not take facts into account when they are about the improvement of the situation in a country will most likely not work either given that the responsibility for the Contracting States is to not expel if there is a real risk of the individual being subjected to ill-treatment. If the expulsion is yet to happen and new facts arise that the real risk is now non-existent the Court cannot simply disregard these facts and claim a violation of Article 3 when there actually might not be one.

As for Judge Mularoni’s notion saying that by allowing the principle to function as it does it allows for Contracting States to order deportation orders of individuals as long as they wait for the right moment to actually expel them, this may be true and seems indeed problematic when but so bluntly. However, it seems to be of little consequence in reality as there is little no to a appeal for a Contracting State to be allowed to issue deportation orders as long as they wait for the situation in the destination state to improve until they expel. Unless this would mean giving out deportation orders and holding people in custody until they can be carried out, but there are other safeguards regulating that this cannot happen, for example Article 6 of the ECHR.

### 2.2.2.2 Judge Bianku

In a concurring opinion to the verdict in *J.K. and Others* Judge Bianku stated that the Court finds itself in a particularly delicate situation when dealing with asylum cases compared to analyses related to other Convention-protected rights. He noted that this particularity is because of the need to conduct an *ex nunc* examination of the destination country. He further emphasized that he fully agrees with the need for this type of analysis and does not see another possible solution in a system that aims to offer practical and effective protection of the Convention rights. However he argued that before deciding to conduct an *ex nunc* examination and proceed with the application of the general principles governing non-refoulement cases, which has been discussed in chapter 1 of this thesis, the Court should check whether or not the analysis that was conducted by the domestic authorities at national level was Convention-compliant. Judge Bianku stated that when circumventing this review of the domestic analysis and not giving a direct answer to whether the national authorities have failed to make a Convention-compliant risk assessment or not, he is of the opinion that the Court does not help the domestic authorities in applying Convention standards at national level. He does however not rule out the possibility for an *ex novo*\(^\text{177}\) analysis from the Court where deemed necessary if there has been a change of circumstances since the final domestic decision.

As a solution for the problem he illustrated in his concurring opinion Judge Bianku suggested the addition of another general principle to apply in cases relating to non-

\(^{176}\) *Venkadajalasarma*, Dissenting Opinion of Judge Mularoni, 18-19.

\(^{177}\) Latin term for "from the beginning".
refoulement. This principle would concern a test of necessity of a new analysis of the case by the Court. He further developed two circumstances in which this test would not be met and it would be necessary to make a new analysis since the final domestic proceedings. The first one being when the assessment of the concrete circumstances of the case by the national authorities have not been Convention-compliant. The second being when there has been fundamental changes in the circumstances of the case, whether personal or general, that require the Court to conduct a new analysis with the view of the effective protection of rights protected by Article 3. 178 If the Court finds that neither of these two circumstances has occurred than in Judge Bianku’s view there is no need for the Court to make a new analysis, the one made by the domestic authorities will suffice.

This suggestion, while certainly being a step in the right direction of rectifying the problem, is not without flaws. Once again it circles back to the fact that the time frame between the final domestic proceedings and when a case reaches the Court is more often than not very lengthy. There needs to be extensive case law made as to what can constitute “fundamental” changes in the circumstances of a case given that when there will often be years between the two different decisions some changes to the circumstances will arguably always exist. It will create the necessity of drawing a line in an area where line drawing is avoided and is so for a reason. The suggested principle can be developed and broadened through case law and said line must not be set in stone, but for the principle to be effective there needs to be some application area set out and this automatically leaves some instances out of the area as well. This will mean that the line will be drawn somewhere and in some cases where there may be changes but they are not deemed to be “fundamental” there will be no new analysis of the facts. Not even if change has happened towards the real risk being more substantiated than during the domestic proceedings.

While there are some good things to come with having such a principle one cannot see it be used in practice because, as has been reiterated on several occasions, a full and ex nunc examination of the facts is necessary for the effective protection of ones Convention rights. However, glossing over the compliance or non-compliance with the ECHR of the final domestic decision is not ideal either as it does sort of pass over the chance for the Court to use its supervisory competence to check if the Contracting State’s domestic authorities practices are Convention-compliant. Once again it circles back to the issue of time and how much time that often passes between the decisions because if the usual time passing between the decisions were only a few weeks, or maybe if being generous a few months, then the principle suggested by Judge Bianku could potentially work. This is because with so short time in between the decisions it is possible that there would not be any fundamental changes to the circumstances and the Court could conclude this and then only look at the domestic decision. However, until this is anywhere near a reality, which it most likely never will be, there is no use of the principle since it will only act as one extra thing to look at before anyway always concluding that an ex nunc examination of the facts is necessary.

One can argue that the principle still would serve a purpose despite the outcome of it almost always being the same, as it still sets out some sort of limitations on the ex nunc examination and gives further incentive as to why it is needed in every individual case. It would require the Court to go through the domestic proceedings first to check before moving on with their own assessment even if that would always be the next step. However this, at least in author’s view, is not the best way to solve the issue. As can be noted from the research made and recounted for in this thesis, while different types of “solutions” or “tweaks” to the principle of making an ex nunc examination in Article 3 cases regarding expulsion has been voiced on different occasions through the years none of them have really gained any traction.

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In the author’s view this is because, as firmly established in this thesis as well, there is a necessity of having the examination be made *ex nunc* for the protection of human rights. However, there could potentially be something done about it and such solutions will be presented and discussed in the upcoming chapter.
Chapter 3 – Conclusion

3.1 Summary
To sum up it can firstly be concluded that the principle of making an *ex nunc* examination is firmly rooted in case law, being reiterated in almost every case concerning Article 3 in regards to expulsion. It is hard to argue with its importance, as it is vital for the Court to make their examinations *ex nunc* to fully and effectively protect human rights. However it can also be concluded that for being such a well established and frequently used principle it is still criticized occasionally, both by Contracting States and Judges of the Court. The criticism from Contracting States is not very surprising, the argument that the use of an *ex nunc* examination is counter to the exhaustion of domestic remedies-criterion for admissibility, while having been shot down by the Court, still has some traction. It is, as the Court explained in *I.K.*, not viable for the use of an *ex nunc* examination to be counter to Article 35 § 1. Nonetheless, one can see how it must be frustrating for Contracting States to not have the opportunity to assess new facts that has come up since the final decision before having the Court scrutinize its behaviour. However, the domestic authorities still have the option to judge on newly arisen circumstances if they so choose.

What could potentially seem a bit more surprising is the continuous questioning of how the principle shall be used by Judges of the Court in different separate opinions where the principle of making an *ex nunc* examination has played a significant part in the outcome of the case. It is not that separate opinions are something unusual, or the fact that the Judges are not completely in agreement, as lawyers will have differing views of how to tackle a legal issue. What seemingly stands out is the fact that these different criticisms have been voiced over a long period of time (the first dissenting opinion in *Venkadajalasarma* in 2004 and most recently in *F.G.* in 2016) and yet this has not gotten more attention. While it may be because the general opinion still is to use an *ex nunc* examination these different criticisms and ideas to alter the use of the principle are well-founded and there certainly are ways in which the use of the principle could be optimized if some time was spent on developing such a theory.

It can also be concluded that there are cases where one can see the use of the *ex nunc* examination having a very prominent role. Two examples of this being *Venkadajalasarma* and *Al Hanchi* where the fact that the situation in the destination country has improved since the final domestic decision is essentially the reasoning for why the Court found no violation of Article 3 if the applicant were to be returned. It is in cases like those where the *ex nunc* examination being the examination form of choice is really noticeable. The Court’s reasoning, to differing extents, may be largely based on facts or circumstances that did not even exist during the time of the national proceedings. As also mentioned above this does not have to be negative thing but on the contrary it is evident that it is the way the Court has to work for the protection of human rights. Nonetheless it is noteworthy that a subsidiary international body with specific rules made to make sure that Contracting States will have the opportunity to make things right through their own legal system first still functions this way without more discussions being had about it.

3.2 Analysis

3.2.1 Proposal for Change
As recounted for there has been a number of comments on the use of the principle of making an *ex nunc* examination and also suggestions on how to improve the application of it, most notably the suggestion of another principle by Judge Bianku in his concurring opinion in *J.K.*
and Others. The positives and negatives with these different suggestions have been discussed already above, however after having researched this issue for this thesis there has, in the author’s view, not yet been a good way to alter the use of the principle presented. Neither the test suggested by Judge Bianku nor the rule of only using the principle when the general situation in a country has deteriorated as suggested by Judge Mularoni in his dissenting opinion in Venkadajalasarma seems to be a viable option. However, this thesis will move on to suggest another kind of solution to the problem of not having the actual final domestic decisions reviewed by the Court.

One could propose a two-part system to be used by the Court when dealing with Article 3 cases in regards to expulsion. For the Court to still begin with making an ex nunc examination of the case for the sake of protecting the individual and ensure the fundamental rights and freedoms that the ECHR exists to protect. This is the most important part and, as previously stated, in the author’s view there is no situation in which this can be done another way. However, this thesis then suggests that the Court also makes an examination of the domestic proceedings leading up to the deportation order. This might seem excessive, as the priority is to protect the individual, however it is also important that states are to be held responsible for their wrongdoings, or at least made aware of them. A state having finalized a deportation order that would subject an individual to treatment prohibited by Article 3 should still have some sort consequence and should not be overlooked simply because the individual knows his or her rights and has been granted stayed removal as a result of taking the case to the Court.

As the Court has reiterated on a number of occasions, the responsibility is that of not deporting and if the deportation has been stayed the state cannot technically be held responsible. However, in the author’s view, it is not necessary to be able to sanction states if it turns out that the deportation order would have violated Article 3 at the time of the final decision. It would be enough that the Court systematically also reviews the domestic proceedings, building a body of case law for Contracting States to look at for what is required to make the correct risk assessment. It would simply be a review of whether the risk assessment has been done according to Convention standards and potentially a condemnation of the procedure if it is deemed faulty. It is to be seen as something for the Contracting State to learn from, to make sure that the correct level of human rights protection is upheld. There is also the argument that this means more work for an already busy Court but one should see it as a long-term investment as hopefully these reviews of the decisions will work as guidelines for the national authorities of all the Contracting States and fewer cases will need to be assessed at the international level.

This is not to say that the Court does not on occasion already review and voice its opinions regarding the domestic proceedings. This has happened in both F.G., as discussed above, and also in another case against Sweden that was briefly touched upon earlier, R.C., in which the Court critiqued the risk assessment made by the Swedish domestic authorities when assessing the risk of returning the applicant to Iran. One could argue that this is enough and there is no need to have a two-part system, the Court can when seeing it fit to do so also review the domestic proceedings and decide not to when it is of less relevance to the main task of protecting fundamental rights. However, there is something advantageous of having it be a principle that is always used, as this would produce consistent amounts of case law for the domestic authorities of Contracting States to use. Further because of the consistency it would be easier to navigate through the cases and also see what is the most current opinion of the Court.

There is also a discussion to be had of what sorts of case law can be useful for national authorities and what will not. Every case is individual and contains a unique set of facts,
meaning that there will never be two cases that are exactly the same or even similar enough to have principles that can be applied from one case to another as regards the issues of fact. However this does not mean that there cannot be leading cases. Judge Bianku has written that the Court’s case law in the field of asylum is unique as it concerns itself with questions of both fact and law. He therefore states that any case concerning a question of general importance, factual or legal or both, can be a leading case.180 In his article Judge Bianku suggests that broadly there are four key areas in which the Court has delivered leading cases. The first one of these is on the proper assessment of COI, the second the proper interpretation and application of Article 3 to questions of generalized risk, thirdly the application of the Convention to the Common European Asylum System and lastly on the relationship between the ECHR and the Refugee Convention.181 One can argue that if these leading cases exist there is already guidance for Contracting States. However, in the author’s view, the same argument is applicable here as regards the advantages of a continuous and consistent review that was made above.

It could also be useful in cases where the general situation in a country is considered so poor that everyone being returned to it will be exposed to a real risk of being subjected to torture or ill-treatment simply be virtue of being in the country. If so, having a case stating this could provide for guidance for as long as the circumstances remains that way. However there are other components of a case as well that may be of use to national authorities and these are the legal issues, for example where the burden of proof shall lie, what treatments constitutes conduct prohibited by Article 3 and what the standard of proof should be. Some of this can already be derived from existing case law, but what would be beneficial with having the constant review of the national authorities final decisions is that it would be specifically made to be used as a guide.

If the fact that it will constitute a more sizable work load for the Court is too much of an issue one could even have it work so that the Court will always examine the domestic proceedings but only make a longer assessment and reasoning if there is something lacking. Further also that even if finding something lacking then if it is the same mistake as another case then simply refer to that. Because the nature of risk assessments in non-refoulement cases is so particular as it regards making a, more or less, qualified guess on future events there are many areas that are very diffuse such as standard of proof where the guidance from the Court could be very useful. It is also beneficial as this might harmonize the asylum process in the Contracting States, if only ever so slightly, which is something to work toward, as it should not be “easier” to be granted asylum in one country than another.

3.2.2 Final Remarks
There is also the issue that has come up on several occasions in this thesis already, which is that of the very strained and overwhelmed Court which results in the time periods between final domestic decisions and final international decisions being extremely long. Now if there was a solution to this that would already be in use as it is one of the most well known struggles for the Court. However, there might be ways one could try to lessen the burden, one of these being the Contracting States rules on leave to appeal. The rules on when applying for leave to appeal is necessary differs as it is something that it up to the Contracting State to have procedural rules about. Thus having the Court actually somehow find an obligation to have all cases of asylum claims be tried at all available instances is not something that could be done, however this could be changed at national level.

180 Judge Ledi Bianku, ‘Roundtable Discussion with the IARLJ, the CJEU and the ECtHR on Leading Asylum Cases’ (2013) 25 Int J Refugee Law 382, 382-383.
181 Judge Ledi Bianku, ‘Roundtable Discussion with the IARLJ, the CJEU and the ECtHR on Leading Asylum Cases’ (2013) 25 Int J Refugee Law 382, 383.
Why this would help the Court is because it would mean that all cases have been tried by the highest instance domestically first and there has been more chances of finding wrongdoings in the risk assessments or of assessing newly surfaced circumstances. This means that the higher Courts of the Contracting States could potentially deal with cases and make it right domestically instead of having the individual concerned petition the Court after having been refused leave to appeal after one or two instances. This would mean a significantly greater burden on the domestic court systems and most likely not be something that all Contracting States would opt to do. However, there would be the benefit of not having to defend as many cases at the Court as they would be solved at a higher instance domestically instead which, at least in author’s view, is something that makes it worth considering.

Another solution to have the system work in accordance with the subsidiarity principle would be to have the Court be able to rule that the case shall be examined by the domestic authorities once again with regard to the reasoning the Court has found that the assessment made was not Convention-compliant. A version of this can be seen in F.G. where the Court held in the verdict that while it would not be a violation of Articles 2 and 3 to send back the applicant to Iran on account of his political past it would however be a violation if the applicant were to be deported without an ex nunc examination by the domestic authorities of the potential risks due to his religious conversion.\textsuperscript{182}

However, there is the condition in F.G. that this needs to be done before potentially returning the applicant to the destination country. This means that if he were to be allowed to stay there would be no violation even without a new and ex nunc examination of his case. This makes sense as no risk assessment is needed if an individual is allowed to remain. However one can ponder the idea of instead having the Court hold that the assessment made by the domestic authorities is fundamentally lacking some of the elements to make it Convention-compliant and thus the Court sends it back to the domestic authorities to make a new assessment with guidelines as to what changes that needs to be made. Should the applicant still not be satisfied with the outcome after that then he or she can petition the Court once again. One could also see this type of function to be used when granting interim measures, instead sending the case back for review by the national authorities once again. This would help, as the Court would not have to receive the case for review, send it back, and then receive it again after a new domestic decision that the applicant is still not satisfied with.

3.3 Conclusion
To conclude there is certainly discussions about how to alter and optimize the use of the ex nunc examination when dealing with Article 3 cases regarding expulsion. While it is not dysfunctional as it is working today, which probably is part of the reason as to why there are not more discussions about the topic, there are certain problems with it. Or perhaps problems is a slightly harsh word to use, but one can definitely say that there are room for improvement of how the principle shall be used and how to potentially change it to not have the Court give up its supervisory role to check that the Contracting States are honoring their obligations. Because, as reiterated on a number of occasions throughout this thesis already, simply because there is a need for the Court to make an ex nunc examination and engage in something that has some overtones of a third or fourth-instance Court to work as the human rights protector it was created to be does not mean that it has to let go of the other part.

So while there is no urgency in coming up with a “fix” for the problems recounted for in this thesis there is room for discussion. This is also something that in the author’s view is welcomed as the issue has been raised by different people at different times yet it seems as if

\textsuperscript{182} F.G., verdict points 2 & 3.
those attempts at a further discussion about the topic has sort of fallen on deaf ears. Granted with the non-urgency of the issue it is assuredly also partly down to prioritizing. However, in the author’s view a suggestion like the one of having a two-part system or something similar would benefit both the Court, because in the long-run it would result in fewer cases needing the Court to intervene, and for the domestic authorities as the reviews would help serve as guidelines of how to make a Convention-compliant risk assessment.
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