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**COMMITTEE OF EXPERTS ON THE SYSTEM OF THE
EUROPEAN CONVENTION ON HUMAN RIGHTS
(DH-SYSC)**

**DRAFTING GROUP ON EFFECTIVE PROCESSING AND RESOLUTION OF CASES
RELATING TO INTER-STATE DISPUTES
(DH-SYSC-IV)**

**Background paper on the practice of the European Court of Human Rights
with regard to inter-State applications**

Note:

This background paper was drafted by the Secretariat and discussed with the Chair of DH-SYSC-IV who endorsed it in order to prepare and facilitate the first meeting of the Drafting Group (19-21 February 2020). It outlines in a non-exhaustive way some issues for possible reflection and discussion at the meeting which were identified on the basis of the Bureau's conclusions regarding challenges that are specific to inter-State cases and individual applications arising from tensions between two member States, comments by member States on the subject matter as well as proposals by the European Court of Human Rights (the Court) for a more efficient processing of inter-State cases. The background paper approaches the identified issues through an analysis of relevant principles and standards established in the case-law of the Court as well as the perspective of the Rules of the Court. It does not seek to provide an exhaustive analysis of these issues or to offer responses thereto but rather a conceptual framework that is open to the reflections of the Drafting Group regarding the scope of its work in line with its terms of reference.

Contents

A. Background.....	3
B. Introduction.....	4
C. The scope of an inter-State application.....	5
D. Admissibility requirements.....	7
<i>I. An overview of the requirements and admissibility criteria applicable to inter-State applications and individual applications.....</i>	<i>7</i>
<i>II. Differences in the formal requirements and admissibility criteria between inter-State applications and individual applications concerning the same-subject matter and relating partly to the same individuals.....</i>	<i>9</i>
<i>III. Inter-State and individual applications pending before the Court and cases pending before other international bodies which may, at least in part, concern the same subject-matter and relate to same individuals.....</i>	<i>11</i>
E. Exclusion of other means of dispute settlement.....	11
F. Establishment of the facts.....	12
<i>I. General principles regarding the admissibility and evaluation of evidence.....</i>	<i>13</i>
<i>II. The fact-finding function of the Court.....</i>	<i>14</i>
<i>a. Preparation and conduct of fact-finding missions.....</i>	<i>15</i>
<i>b. Witness hearings.....</i>	<i>15</i>
<i>c. Witness protection.....</i>	<i>16</i>
<i>d. Amicus curia.....</i>	<i>17</i>
<i>e. Documentary evidence.....</i>	<i>17</i>
<i>f. On-the-spot investigations.....</i>	<i>18</i>
<i>g. States' duty to cooperate.....</i>	<i>18</i>
<i>II. Fact-finding functions of other international courts.....</i>	<i>19</i>
<i>a. The International Court of Justice (ICJ).....</i>	<i>19</i>
<i>b. The Inter-American Human Rights System.....</i>	<i>21</i>
<i>c. The International criminal justice system.....</i>	<i>23</i>
F. Just satisfaction in inter-State cases.....	25
G. Concluding remarks.....	26

A. Background

1. Following the Copenhagen Declaration,¹ the Ministers' Deputies, at their 1317th meeting (30 May 2018) invited the CDDH to include in its report "Contribution to the evaluation provided for by the Interlaken Declaration"² among other elements "proposals on how to handle more effectively cases related to inter-State disputes, as well as individual applications arising from situations of conflict between States, without thereby limiting the jurisdiction of the Court, taking into account the specific features of these categories of cases, *inter alia* regarding the establishment of facts".³

2. At its 91st meeting (18-21 June 2019), the CDDH had an in-depth exchange of views on the topic⁴ on the basis of a (i) document prepared by its Bureau⁵ (ii) contributions made by the member States prior to this meeting,⁶ and (iii) a report by the Plenary Court on "Proposals for a more efficient processing of inter-State cases" submitted to the CDDH (hereinafter the Court's Report)⁷.

3. The CDDH did not yet adopt a text in this regard.⁸

4. At its 92nd meeting (26-29 November 2019), the CDDH, in the framework of adopting its "Contribution to the evaluation provided for by the Interlaken Declaration"⁹, took the view that questions regarding inter-State applications require a more in-depth examination. It, therefore, considered it useful that the CDDH/DH-SYSC conduct work facilitating proposals to ensure the effective processing and resolution of cases relating to inter-State disputes as well as individual applications arising from situations of conflict between States, without thereby limiting the jurisdiction of the Court, taking into account the specific features of these categories of cases, *inter alia* regarding the establishment of facts in the next biennium.¹⁰

5. Also, at its 92nd meeting the CDDH decided to set up the Drafting Group DH-SYSC-IV to operate under the authority of the DH-SYSC, which under its terms of reference for the 2020-2021 biennium is tasked, *inter alia*, to "[d]evelop proposals to improve the effective processing and resolution of cases relating to inter-State disputes".¹¹ With a view to submitting to the Committee of Ministers, before 31 December 2021, its proposals on effective processing and resolution of cases relating to inter-State disputes, the CDDH gave to DH-SYSC-IV the following terms of reference:

¹ See the [Copenhagen Declaration](#).

² See document CDDH(2019)R92Addendum2.

³ See [CM/Del/Dec\(2018\)1317/1.5](#).

⁴ See [CDDH\(2019\)R91](#), §§ 25-28.

⁵ See document [CDDH-BU\(2019\)R101 Addendum](#) of 12 June 2019, §§ 61-91 and Appendices I and II.

⁶ See document [CDDH\(2019\)12](#).

⁷ See for the redacted version of the report adopted by the Plenary of the Court on 18 June 2018 document [CDDH\(2019\)22](#).

⁸ Paragraphs 61-91 of document [CDDH-BU\(2019\)R101 Addendum](#) have not been provisionally adopted, see document [CDDH\(2019\)R91](#), §§ 25-28.

⁹ See document [CDDH\(2019\)R92](#).

¹⁰ *Ibid*, see §§ 124.

¹¹ See document DH-SYSC-IV(2020)01.

“In the light, in particular, of the reflections carried out during the elaboration of (i) the Contribution of the CDDH to the evaluation provided for by the Interlaken Declaration; (ii) the follow-up given by the CDDH to the relevant paragraphs of the Copenhagen Declaration and (iii) the CDDH Report on the place of the European Convention on Human Rights in the European and international legal order, the DH-SYSC Drafting Group on effective processing and resolution of cases relating to inter-State disputes (DH-SYSC-IV) is called upon to elaborate proposals on how to handle more effectively cases related to inter-State disputes, as well as individual applications arising from situations of conflict between States, without thereby limiting the jurisdiction of the Court, taking into account the specific features of these categories of cases, *inter alia* regarding the establishment of facts. In this context and under the supervision of the Committee of Experts on the System of the European Convention on Human Rights (DH-SYSC), the Group is tasked to prepare:

- a) a draft CDDH report to be submitted to the forthcoming high-level expert conference on inter-State disputes in the framework of the ECHR system to be held in spring 2021 under the auspices of the German Chairmanship of the Committee of Ministers 7 (deadline: 15 October 2020);
- b) a draft final activity report of the CDDH for the Committee of Ministers containing the reflections and possible proposals of the Steering Committee in this field (deadline: 15 October 2021).”

B. Introduction

6. According to Article 33 of the European Convention on Human Rights (the Convention) any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party.

- Some notable commentaries have considered that the inter-State procedure has an intrinsic importance as a mode of Convention proceedings and that Article 33 casts the Court in the very important role of guarantor of the peaceful public order in the greater Europe.¹²
- It has also been considered that this type of application has, from the outset, represented an essential component of the “collective guarantee” of the rights protected by the Convention, and that it has had a decisive influence on the very structure of international law. The existence of inter-State applications was seen as a testament to

¹² See [speech](#) by Dean Spielmann, President of the Court (2012-2015) “The European Court of Human Rights as guarantor of a peaceful public order in Europe”, 12 November 2014.

the *erga omnes partes* nature of all the Convention obligations.¹³ It allows for the collective enforcement of human rights and thus can address widespread human rights issues beyond a specific individual case.¹⁴

7. The Court acknowledges that an application brought before it under Article 33 of the Convention may contain different types of complaints pursuing different goals. An applicant State Party may complain about general issues (systemic problems and shortcomings, administrative practices, etc.) in another State Party. In such cases the primary goal of the applicant Government is that of vindicating the public order of Europe within the framework of collective responsibility under the Convention.¹⁵

8. Also, there is another category of inter-State complaints where the applicant State denounces violations by another State Party of the basic human rights of its nationals (or other victims). In fact such claims are substantially similar not only to those made in an individual application under Article 34 of the Convention, but also to claims filed in the context of diplomatic protection.¹⁶ Hence, the range of individuals potentially beneficiaries of inter-State application is not limited to the nationals of the applicant State.¹⁷

9. According to the Court's statistics, on 1 January 2020, more than 8,900 individual applications, representing 15% of the total number of applications pending before the Court, were individual applications arising out of situations of inter-State conflict.¹⁸

10. This document aims to dissect issues for possible reflection and examination by DH-SYSC-IV which have been identified in various CDDH processes leading to the creation of the Drafting Group (see paragraph 2 above). The preliminary analysis of the identified issues contained in this document gives an analytical tool for the Drafting Group to build on in respect of defining the scope of its work under its terms of reference.

C. The scope of an inter-State application

11. Whereas Article 34 of the Convention provides that individual applications concern a violation by one of the State Parties of the rights set forth the Convention and Protocols thereto, Article 33 of the Convention provides that inter-state applications concern any alleged breach of the provisions of the Convention and the Protocols thereto. Hence, the object of an inter-State application seems, at least potentially, wider than that of an individual complaints since it may also refer to certain "provisions" of the Convention which do not necessary contain "rights".

¹³ See the [article](#) by Judge Linos-Alexandre Sicilianos, (President of the Court since 5 May 2019), "The European Court of Human Rights at a Time of Crisis in Europe", pp. 131-133, *European Human Rights Law Review*, 2016.

¹⁴ See "The inter-State Application under the European Convention on Human Rights – Between collective enforcement of human rights and international dispute settlement", by Isabella Risini, pp.106.

¹⁵ [Cyprus v. Turkey \(just satisfaction\) \[GC\]](#), no. 25781/94, 12 May 2014, § 44.

¹⁶ *Ibid*, § 45. See also speech by Dean Spielmann, *supra* note 12.

¹⁷ See also [Austria v. Italy](#), no.788/60, decision of 11 January 1961.

¹⁸ Information provided by the Court's Registry. A list of inter-State applications is available at https://echr.coe.int/Documents/InterState_applications_ENG.pdf.

12. Under Rule 46 of the Rule of the Court:

“Any Contracting Party or Parties intending to bring a case before the Court under Article 33 of the Convention shall file with the Registry an application setting out

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

13. In its Report the Court has noted that the formal requirements for lodging an inter-State application laid down in the above-mentioned provision of the Rules of Court are less strict than those for lodging an individual application in compliance with Rule 47 of the Rules of Court.¹⁹ The Court also stated that inter-State applications could be dealt with more efficiently if its Rules were amended to the effect that parties were requested at the outset to submit translations of all relevant documents to which they refer in their observations (see in particular Rule 46(g) above as regards the applicant State) into one of the official languages of the Council of Europe. Rule 46 (g) could thus be amended accordingly, by asking the Rules Committee to come up with a concrete proposal which would help to determine, in particular, which documents should be translated by the parties.²⁰

14. The comments of a member state have noted that the provisions of Rule 46 go beyond the provisions of the Convention to the extent that they permit the lodging of an inter-State application with the aim of protecting the rights of particular persons with lodging claims for just satisfaction or awarding compensation (see also section F of this report below).²¹

15. A specific aspect of the contents of inter-State applications underlined in comments by the same member State is that Rule 46 lacks a requirement that a State lodging an inter-State application explain why a private individual may not apply to the Court independently.²²

¹⁹ See document [CDDH\(2019\)22](#) §§ 8.

²⁰ Ibid, §§ 9 and 10.

²¹ See comments by the Russian Federation contained in document [CDDH\(2019\)12](#), section 3, pp.26.

²² See document [CDDH\(2019\)12](#), section 3, pp.26.

D. Admissibility requirements

I. An overview of the requirements and admissibility criteria applicable to inter-State applications and individual applications

16. It is worth starting by a general description of the admissibility procedures and criteria applicable in both types of applications (that is when they do not concern the same subject matter or the same individuals). Here we highlight differences in the applicable requirements to inter-State applications and individual applications. This approach does not aim to raise any questions regarding the validity and justification of the different requirements. Instead it seeks to facilitate a better understanding of the implications of the identified differences when there is a relationship between inter-State applications and individual applications and, on this basis, enable a definition of the issues at stake.

17. First, as regards the **admissibility procedure**, there are separate procedures on the admissibility and on the merits in inter-State cases. Article 29 § 2 of the Convention, provides that the decision on admissibility must be taken separately unless the Court, in exceptional cases, decides otherwise. This principle is also reflected in Rules 51 and 58 of the Rules of Court.

- According to the Court’s view if the admissibility questions are closely related to the merits, it may be appropriate to examine them at the same time as the merits. By contrast there may also be situations where it would be preferable to deal with the admissibility questions and the merits separately. In order to be more efficient, it would be wise for the Court to remain flexible where it wishes to deal with questions of admissibility and the merits at the same time, taking into account in each case of the legal issues raised in terms of admissibility.²³
- In addition, the Court took the view that having regard to the priority and sensitive nature of inter-State cases it may be appropriate for the Chamber to relinquish the case as quickly as possible to the Grand Chamber.²⁴

18. Second, inter-State applications under Article 33 of the Convention are subject to fewer admissibility requirements than individual applications under Article 34 of the Convention. While the **admissibility criteria** under Article 35 § 1 of the Convention apply to both individual and inter-State applications those under paragraphs 2 and 3 of the same Article apply to individual applications only. We deal with these requirements in turn below.

19. The **six-months rule** as stipulated in Article 35 § 1 of the Convention applies in the same manner in both types of applications. In respect of **exhaustion of domestic remedies**,

²³ See document [CDDH\(2019\)22](#) §§ 16 and 17.

²⁴ Ibid § 19. Another procedural aspect underlined by the Court was that the “immediate communication” of inter-State applications to the respondent State in accordance with Rule 51 § 1 of the [Rules of the Court](#), without a summary of the – almost always disputed – facts helps to deal with these cases more efficiently, see §§ 14.

generally speaking, this requirement applies also to both individual and inter-State applications. The rationale is to afford the national authorities, and primarily the domestic courts, the opportunity to prevent or remedy the alleged violations of the Convention. It is based on the assumption that the domestic legal order will provide an effective remedy for a violation of Convention rights, guaranteed also by Article 13 of the Convention.²⁵

20. Derogations from this rule exist where an inter-State application is not concerned with the fate of a concrete individual but with a systemic issue. In particular these exceptions apply in inter-State cases in which the existence of administrative practice in contravention of the Convention can be established (the notion of administrative practice is explained in more detail in section II below).

- For example, in the case of *Denmark, Norway, Sweden and the Netherlands v. Greece*²⁶ the requirement of exhaustion of domestic remedies, according to the generally recognised rules of international law did not apply taking into consideration that the object of that inter-State application was the determination of the compatibility with the Convention of legislative measures and administrative practices in Greece.²⁷

21. As to the possibility to rely on the concept of administrative practice in individual applications, it appears that the Court has not completely excluded this possibility. However, the test employed in this case is whether there were effective domestic remedies in the case at hand, not whether there was a systemic problem within the national legal order.²⁸

22. Regarding the admissibility criteria under Article 35 § 3 (a) of the Convention, given that they do not apply to inter-State applications the latter cannot be declared inadmissible as **manifestly ill-founded**. However, this cannot prevent the Court from establishing already at the admissibility stage, under the general principles governing the exercise of jurisdiction by international tribunals, whether it has any competence at all to deal with the matter brought before it.²⁹

23. Another difference between the requirements applicable to inter-State applications and those applicable to individual applications is that an individual applicant has to prove that he or she was directly or indirectly affected by the alleged violation (victim status). In an inter-State application, an applicant State only needs to allege breaches of the Convention without having to show a victim status (see also paragraph 11 of this report).

²⁵ [Practical guide of admissibility criteria](#), Directorate of the Jurisconsult at the ECtHR, 2019, p. 22.

²⁶ [Denmark, Norway and Sweden and the Netherlands v. Greece](#) nos. 3321/67, 3322/67, 3323/67 and 3344/67, 5 November 1969.

²⁷ *Ibid*, § 8.

²⁸ [Donnelly and others v. United Kingdom](#), nos. 5577-83/72, second admissibility decision, 15 December 1975.

²⁹ [Georgia v. Russia \(II\)](#) (dec.), no. 38263/08, 13 December 2011, § 64.

II. Differences in the formal requirements and admissibility criteria between inter-State applications and individual applications concerning the same-subject matter and relating partly to the same individuals

24. The differences in formal requirements and admissibility criteria between inter-State applications and individual applications, as they have been described above, might raise an issue when such applications concern the same subject-matter and relate partly to the same individuals.³⁰ One member State has commented that, as a result of such differences, the conditions for the protection of individual rights of applicants before the Court are objectively different, depending on whether the application is lodged by the applicant him/herself or by the state for his/her protection.³¹ In addition, the Rules of the Court do not address the issue of the relation of an inter-State case to individual applications raising the same issue as that raised in the inter-State case. Moreover, the Rules lack provisions regulating the procedure for lodging and examination of such inter-State applications. Such legal uncertainty leads to, *inter alia*, two major problems. First, it is not clear whether an interstate application may be lodged if individual applications in connection with the same events are pending before the Court and that there are no obstacles for lodging similar individual applications by other applicants. Second, in some instances the processes of examination of inter-State and individual applications lodged in connection with the same events are taking place simultaneously or duplicate each other (see also paragraph 82 below).³²

25. The Court has held that an inter-State application does not deprive individual applicants of the possibility of introducing or pursuing their own claims.³³ It is the Court's recent present practice, where an inter-State case is pending, that individual applications raising the same issues or deriving from the same underlying circumstances are, in principle and in so far as practicable, not decided before the overarching issues stemming from the inter-State proceedings have been determined in the inter-State case.³⁴ Recently the Court also decided that any individual applications related to inter-State cases which were not declared inadmissible or struck out at the outset were to be communicated to the appropriate respondent Government or Governments for observations in parallel with the inter-State case.³⁵

26. The establishment of the existence of an administrative practice in contravention of the Convention in an inter-State case is of particular relevance to the question of the relationship between inter-State cases and individual applications concerning the same subject matter. The

³⁰ The issue was identified by the Bureau in the document "Draft additional elements resulting from the Copenhagen Declaration that should be reflected in the future Interlaken follow-up report as prepared by the Bureau at its 101st meeting (Helsinki, 15-17 May 2019) for consideration and possible provisions adoption by the CDDH at its 91st meeting (18-21 June 2019)" [CDDH-BU\(2019\)R101 Addendum](#), see § 88.

³¹ See comments of the Russian Federation contained in document [CDDH\(2019\)12](#), § § 3.1. and 3.2

³² *Ibid.*, §§ 3.1.

³³ [Varnava and others v. Turkey](#), nos . 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, 18 September 2009, §§ 118 and 119.

³⁴ See Copenhagen Declaration, § 45. See also [Berdzenishvili and Others v. Russia](#), nos. 14594/07 and 6 others, 20 December 2016, § 4; and [Press Release](#) issued by the Registrar of the Court in respect of the case of *Ukraine v. Russia*, ECHR 432 (2018), 17 December 2018.

³⁵ See Press Release quoted above.

notion of an “administrative practice” has most recently been set out in the case of *Georgia v. Russia*.³⁶

“122. The Court reiterates that an administrative practice comprises two elements: the “repetition of acts” and “official tolerance” (see *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, nos. 9940-9944/82, Commission decision of 6 December 1983, § 19, DR 35, and *Cyprus v. Turkey*, cited above, § 99).

123. As to “repetition of acts”, the Court describes these as “an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected not to amount to merely isolated incidents or exceptions but to a pattern or system” (see *Ireland v. the United Kingdom*, cited above, § 159, and *Cyprus v. Turkey*, cited above, § 115).

124. By “official tolerance” is meant that “illegal acts are tolerated in that the superiors of those immediately responsible, though cognisant of such acts, take no action to punish them or to prevent their repetition; or that a higher authority, in face of numerous allegations, manifests indifference by refusing any adequate investigation of their truth or falsity, or that in judicial proceedings a fair hearing of such complaints is denied”. To this latter element the Commission added that “any action taken by the higher authority must be on a scale which is sufficient to put an end to the repetition of acts or to interrupt the pattern or system” (see *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, cited above, *ibid.*). In that connection the Court has observed that “it is inconceivable that the higher authorities of a State should be, or at least should be entitled to be, unaware of the existence of such a practice. Furthermore, under the Convention those authorities are strictly liable for the conduct of their subordinates; they are under a duty to impose their will on subordinates and cannot shelter behind their inability to ensure that it is respected” (see *Ireland v. the United Kingdom*, cited above, § 159).”

27. The establishment of the existence of an administrative practice in contravention of the Convention in an inter-State case may have a bearing on the Court’s consideration of the burden of proof in individual applications arising from the same subject matter. It appears that the Court in *Berdzenishvili and Others v. Russia*, having previously concluded in the inter-State case of *Georgia v. Russia* that an administrative practice existed, created a rebuttable presumption that an applicant in any following individual application arising from the same subject matter was concerned by the same administrative practice. Consequently, in these situations the Court reversed the burden of proof to the respondent State.³⁷

28. Similarly, the establishment of the existence of an administrative practice within the meaning of the Convention in an inter-State may have a bearing on the Court’s consideration of the exhaustion of domestic remedies. As mentioned above where the existence of an administrative practice is established, domestic remedies are ineffective.³⁸ Consequently, it is unnecessary to exhaust them unless the respondent State subsequently undertakes the necessary steps to eliminate that administrative practice by introducing an effective remedy which is capable of providing redress at the domestic level in respect of the applicant’s complaints.³⁹

³⁶ [Georgia v. Russia \(I\)](#) [GC], no.13255/07, 03 July 2014

³⁷ [Berdzenishvili and Others v. Russia](#), quoted above, § 49.

³⁸ [Cyprus v. Turkey](#) [GC], no.25781/94, § 171 and 184.

³⁹ [Demopoulos and others v. Turkey](#), nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04, 21819/04, 1 March 2010, §§ 90.

III. Inter-State and individual applications pending before the Court and cases pending before other international bodies which may, at least in part, concern the same subject-matter and relate to same individuals

29. The Bureau has taken the view that the fact that inter-State and individual applications pending before the Court and cases pending before other international bodies may, at least, in part concern the same subject-matter and relate to the same individuals may equally pose a risk of double and/or diverging decisions in respect of substantially the same case.⁴⁰

30. Article 35 § 2 (b) of the Convention, which provides that the Court must not deal with any individual application where it “has already been submitted to another procedure of international investigation or settlement”, does not apply to inter-State cases. It may be useful to recall in this context that in *Karoussiotis v. Portugal* the Court specified that the proceedings before the European Commission pursuant to Article 258 of the Treaty on the Functioning of the European Union (TFEU) shall not be understood as constituting procedures of investigation or settlement pursuant to 35 § 2 (b) of the Convention.⁴¹

31. The Court’s Report has highlighted the importance of taking into account the decision or investigation results of other international bodies and remaining within the confines of its jurisdiction while dealing with inter-State cases and avoiding as far as possible encroaching upon that of other international bodies.⁴²

E. Exclusion of other means of dispute settlement

32. State Parties are prevented under Article 55 of the Convention to submit a dispute arising out of the interpretation or application of the Convention to a means of settlement other than those provided for in the Convention. In practice, such disputes relate primarily to the inter-state application procedure.⁴³ While the case-law of the Court on Article 55 is not extensive it clearly establishes the principle that the possibility of a State Party of withdrawing a case from its jurisdiction on the grounds that it has entered into a special agreement with the other State

⁴⁰ See document [CDDH-BU\(2019\)R101 Addendum](#), §§ 89.

⁴¹ *Karoussiotis v. Portugal*, no.23205/08, 1/2/2011.

⁴² See document [CDDH\(2019\)22](#), §§ 26 and 27.

⁴³ The only case in which the Court has pronounced itself on Article 55 is the Commission’s decision on admissibility in the case of *Cyprus v. Turkey*, no.25781/94, part III. This is also implicit in the provisions of the Committee of Ministers’ [Resolution \(70\) 17](#) adopted by the Ministers’ Deputies on 15 May 1970 ‘UN Covenant on Civil and Political Rights and the European Convention on Human Rights: Procedure for dealing with inter-state complaints’. The Committee of Ministers [d]eclare[d] that’, as long as the problem of interpretation of Article 62 of the European Convention [current Article 55] is not resolved, States Parties to the Convention which ratify or accede to the UN Covenant on Civil and Political Rights and make a declaration under Article 41 of the Covenant should normally utilise only the procedure established by the European Convention in respect of complaints against another Contracting Party to the European Convention relating to an alleged violation of a right which in substance is covered both by the European. Convention (or its protocols) and by the UN Covenant on Civil and Political Rights, it being understood that the UN procedure may be invoked in relation to rights not guaranteed in the European Convention (or its protocols) or in relation to States which are not Parties to the European Convention.”

Party concerned is given only in exceptional circumstances.⁴⁴ The principle established in Article 55 is that it is the monopoly of the Convention institutions for deciding disputes arising out of the interpretation and application of the Convention. The State Parties agree not to avail themselves of other treaties, conventions and declarations in force between them for the purpose of submitting such disputes to other means of settlement. Only exceptionally is a departure from this principle permitted, subject to the existence of a special agreement between the State Parties concerned, permitting the submission of the dispute-concerning the interpretation or application of the Convention to an alternative means of settlement by way of petition.⁴⁵

33. Article 55, while not entirely excluding the possibility that inter-State disputes involving human rights issues are brought and addressed in other international bodies, creates in particular a barrier for State Parties which are not satisfied with the judgements of the Court in an inter-State case to “appeal” such judgments to another international body. Because of the principle of monopoly established in Article 55 (see paragraph 32 above) as well as the significance of this provision of the Convention in respect of ensuring the separation between the system of the Convention and other international dispute settlement mechanisms it was necessary to include an interpretation of Article 55 in the “Draft Revised Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms.” The Draft Revised Agreement states in its Article 5 that proceedings before the CJEU do not constitute a means of dispute settlement within the meaning of Article 55 of the Convention.⁴⁶ Therefore, Article 55 of the Convention does not prevent the operation of the rule set out in Article 344 of the TFEU.⁴⁷

F. Establishment of the facts

34. One of the challenges identified by the Bureau which are specific to inter-State cases and individual applications resulting from tensions between two member States is the proper establishment of facts notably in situations in which the Court has to act as a Court of first instance for lack of a prior examination of the cases concerned by the national courts. Elements to consider in this respect cover, in particular, the challenges related to obtaining the necessary evidence *inter alia* by fact-finding missions and witness hearings, the different sources of information and the assessment of the evidence before the Court.⁴⁸

35. The establishment of the facts in inter-State cases has also been considered by the Court as one of the greatest challenges.⁴⁹ Particular reference is made to the examination of the

⁴⁴ [Cyprus v. Turkey](#) Decision of the Commission, quoted above, part III.

⁴⁵ Ibid.

⁴⁶ See Final Report to the CDDH of the Fifth Negotiation Meeting between the CDDH Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights, contained in document [47+1\(2013\)008Rev2](#).

⁴⁷ Article 344 of the TFEU states that: “Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.”

⁴⁸ See document [CDDH-BU\(2019\)R101 Addendum](#), § 87.

⁴⁹ See document [CDDH\(2019\)22](#), § 20.

question whether the existence of an administrative practice within the meaning of the Convention can be established, instances when the Court has to act as a court of first instance, the examination of the effectiveness and accessibility of domestic remedies as additional evidence of whether an administrative practice exists, the length of parties' observations and annexes, the failure of the respondent Governments to provide the Court with all the necessary facilities to enable it to establish the facts and witness and expert hearing.⁵⁰

36. One member State has also pointed out in its comments difficulties encountered in the Court's case-law related to the fact that the Court may have to act as a court of first instance when establishing the facts as well as difficulties with regard to the number of witnesses, the Court's power to compel witnesses to appear, the protection of witness, assessment of witness depositions.⁵¹ Another member State has pointed out in its comments regarding the standard of proof employed by the Court to the lack of sufficient filter for screening out inadmissible evidence as well as recognition of a violation of the Convention in the absence of a direct or irrefutable evidence.⁵²

37. In order to have a better understanding of all these challenges it is necessary to have an overview of the general principles and approaches of the Court to the evaluation of evidence.

1. General principles regarding the admissibility and evaluation of evidence

38. On this matter the Court takes a rather flexible approach. In its judgment in *Ireland v. United Kingdom* the Court emphasised that

160. "... In the cases referred to it, the Court examines all the material before it, whether originating from the Commission, the Parties or other sources, and, if necessary, obtains material *proprio motu*"⁵³

There are no procedural barriers to the admissibility of evidence, as it was stated in the Court's judgment in *Nachova v. Bulgaria*.⁵⁴

39. According to the principle of the free evaluation of evidence, each piece of evidence will be assessed for its credibility and probative weight without reference to strict rules concerning hearsay evidence or privilege documents or how evidence has been obtained.⁵⁵ Neither the Convention nor the Rules of Court seek to regulate how evidence is to be assessed by the Court, although the Rules contain detailed provisions concerning investigatory measures and the obligations of the parties in this respect.⁵⁶

⁵⁰ See document [CDDH\(2019\)22](#), §§ 20 and 24.

⁵¹ See comments by Cyprus available in document [CDDH\(2019\)12](#), pp.6.

⁵² See comments by the Russian Federation, available in document [CDDH\(2019\)12](#), pp.28 and 29.

⁵³ *Ireland v. United Kingdom*, no. 5310/71, § 160, 18 January 1978.

⁵⁴ *Nachova and Others v. Bulgaria*, nos. 43577/98 and 43579/98, 6 July 2005 § 147, ECHR 2005-VII.

⁵⁵ Essays in honour of Anatoly Kovler, Judge of the ECtHR in 1999-2012, Investigation powers of the ECtHR, Michael O'Boyle and Natalia Brady, Wolf Legal Publishers (WLP), 2013.

⁵⁶ Annex 1 to the [Rules of the Court](#).

40. In assessing evidence the Court has adopted the standard of proof “beyond reasonable doubt”.⁵⁷ As there are no procedural barriers to the admissibility of evidence or predetermined formulae for its assessment the Court accepts that proof can follow from the coexistence of sufficiently strong, clear and concordant inferences or similar unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake. The Court’s role is not to rule on criminal guilt or civil liability but on the Contracting States’ responsibility under the Convention.⁵⁸

41. In establishing the existence of an administrative practice, the Court will not rely on the concept that the burden of proof is born by one or the other of the two Governments concerned, but will rather study all the material before it, from whatever source it originates.⁵⁹ The principle of reversal of the burden of proof is most consistently applied by the Court in the situation of injuries sustained in detention⁶⁰ or in armed conflict when individuals were found injured or dead or disappeared, in areas under the exclusive control of the authorities if there was *prima facie* evidence that State agents could have been involved.⁶¹

II. The fact-finding function of the Court

42. As mentioned above, there may be exceptional cases when the Court acts as a court of first instance. When there are factual disputes between the parties which cannot be resolved by considering the documents before it or when there has been no examination of the matters complained of by the domestic courts, the Court might take the decision to resort to investigatory measures such as fact-finding. The decision as to whether to resort to investigation measures is at the discretion of the Court and may be taken at the request of one of the parties or on its own motion. The Court does not need to obtain the consent of the State Party concerned.

43. In the early days fact-finding missions had become relatively frequent but since the establishment of the “new” Court in 1998 fact-finding missions have, however, been reduced to a certain extent.

- For example, in the case of *Denmark, Norway, Sweden and the Netherlands v. Greece*,⁶² which involved extensive fact-finding by the Commission, the final report contained more than 1000 pages.
- Furthermore, in the case of *Ireland v. United Kingdom*, the Commission invested greatly in fact-finding, taking testimony in various locations.

⁵⁷ See *Ireland v. United Kingdom*, § 161 and *Cyprus v. Turkey [GC]* no.25781/94, § 112 and 113.

⁵⁸ *Mathew v. the Netherlands*, no. 24919/03, § 156, 29 September 2005.

⁵⁹ *Georgia v. Russia (I)*, quoted above § 95.

⁶⁰ Among others see *Salman v Turkey*, no. 21986/93, 27 June 2000, § 100.

⁶¹ *Varnava and others v. Turkey*, quoted above, § 184.

⁶² *Denmark, Norway, Sweden and the Netherlands v. Greece*, quoted above.

- Likewise, in the case of *Cyprus v. Turkey*, the Commission conducted a fact-finding hearing and on-spot investigations on issues related to effective control and jurisdiction in the northern part of Cyprus. However, in recent years, the Court is more leaning towards “limited” forms of fact-finding. In particular, in the cases of *Georgia v. Russia (I)* and (II), the Court conducted hearings of witnesses which took place in Strasbourg.

44. The investigation powers of the Court are based on Article 38 of the Convention which stipulates that the “Court shall examine the case together with the representatives of the parties, and, if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities.” In addition, the Annex to the Rules of Court (Rules A1 to A8) contains detailed provisions concerning investigative measures and the obligations of the parties in this respect. In order to place the identified issues (see para.29-30 above) into perspective an overview of the relevant rules with relevant references to the Court’s case-law is given below.

a. Preparation and conduct of fact-finding missions

45. Before any fact-finding measure is conducted the composition of the Court’s delegation has to be determined. In that respect, Rule A1 § 3 of the Annex to the Rules of Court gives significant discretion as to the judges forming that delegation, including the participation of the national judges of the state parties involved.⁶³

b. Witness hearings

46. According to Rule A5 § 1 of the Annex to the Rules of Court, witnesses⁶⁴ which are selected to be heard by the delegation are to be summoned by the Court’s Registrar. The Contracting State in whose territory the witness resides is responsible for serving any summons sent to it by the Court.⁶⁵ Each State Party can propose witnesses to be heard at the hearing. Communication in respect of the preparation of the witness hearing between State Parties and the Court is mostly done in writing but, if needed, a preparatory meeting can be organised as well.⁶⁶

47. Even though the Court enjoys a wide discretion as regards the selection of witnesses, in practice it is often necessary to limit the number of witnesses it hears, taking into consideration that the delegation only has a relatively short amount of time to conduct a hearing.

- In the case *Cyprus v. Turkey*, for example, it justified this approach, arguing that the effective execution of its fact-finding role necessarily obliged it to regulate the procedure for the taking of oral evidence, having regard to constraints of time and to its own assessment of the relevance of additional witness testimony.⁶⁷ On the other hand, it has

⁶³ See composition of the delegation formed for witnesses hearing in the case of [Georgia v. Russia \(II\)](#), no.38263/08, 12.08.2008. See also [Press Release](#) issued by the Registry of the Court, ECHR 183 (2018), 23.05.2018.

⁶⁴ The same rule applies to experts and other persons as well.

⁶⁵ See Rule 37 § 2 of the [Rules of the Court](#) and Rule A5 § 4 of the Annex to the [Rules of the Court](#).

⁶⁶ See Rule A4 § 2 of the Annex to the [Rules of the Court](#).

⁶⁷ [Cyprus v. Turkey \[GC\]](#), quoted above, §§ 110 and 339.

to be noted that the respondent State in the case of *Georgia v. Russia (II)* expressed concerns as regards the short amount of time allocated for the cross-examination of witnesses (15 minutes per witness).⁶⁸

48. Until now there have always been witness hearings in inter-State cases. In the cases of *Cyprus v. Turkey* and *Ireland v. United Kingdom*, for instance, hearings by the Commission took place in the country concerned or in places outside the Court's premises. More recently, in the cases of *Georgia v. Russia (I)* and *(II)* the hearings took place in Strasbourg at the Court's premises, lasting one and two weeks respectively. Evidently, this approach has visible advantages for the Court in respect of the availability of legal staff, recording equipment and interpreters. It must also be noted that where a witness is summoned at the request or on behalf of the Contracting Party, the costs of their appearance shall be borne by that Party unless the Chamber decides otherwise.⁶⁹ In addition, it can provide a neutral venue and thus avoids disagreement by the parties as to where the fact-finding hearing should take place. However, this approach presupposes that the witnesses are free and willing to attend the hearing.

c. Witness protection

49. According to Rule A2 § 2 of the Annex to the Rules of Court, the Member States are obliged to ensure freedom of movement and adequate security for, among others, witnesses and experts.⁷⁰ The protection of witnesses⁷¹ as well as States' failure to cooperate with the Court have been identified as challenging aspects of the Court's fact-finding function.⁷²

50. According to Rule A7 § 4 of the Annex to the Rules of Court, the head of delegation may make special arrangements for witnesses, experts or other persons to be heard in the absence of the parties where that is required for the proper administration of justice. For instance, in the case of *Cyprus v. Turkey*, a certain number of witnesses were questioned only by members of the Commission's delegation, without disclosing their identity due to security reasons. Subsequently, the Court in its assessment established that the Commission took the necessary steps to ensure that the taking of evidence from unidentified witnesses complied with the fairness requirements of Article 6 of the Convention. It was noted that the respondent State could sufficiently participate in the proceedings, comment on the evidence taken and present counter-evidence even though this approach was criticised by the respondent State in question.⁷³

⁶⁸ Grand Chamber hearing in the case of [Georgia v. Russia \(II\)](#), quoted above, 23 May 2018.

⁶⁹ See Rule A5 § 6 of the Annex to the [Rules of the Court](#).

⁷⁰ See Rule A2 § 2 of the Annex to the [Rules of the Court](#).

⁷¹ See comments by Cyprus, document [CDDH\(2019\)12](#).

⁷² Parliamentary Assembly [Resolution 1571\(2007\)](#), Council of Europe member states' duty to co-operate with the European Court of Human Rights, called upon all member States to take positive measures to protect applicants, their lawyers or members of their families from reprisals by individuals or groups including, where appropriate, allowing applicants to participate in witness protection programmes, providing them with special police protection or granting threatened individuals and their families temporary protection or political asylum in an unbureaucratic manner, see § 17.2.

⁷³ See Commission's report in the case of *Cyprus v. Turkey*, §§ 33-47 and the judgment in the same case, §§ 105-118.

51. Another issue which may occur during fact-finding hearings is that a number of witnesses summoned may fail to appear for different reasons. In some cases, witnesses did not reply to the Court's summons, got sick or the States did not locate and summon witnesses residing on their territory (see for the States' obligation in this respect Rule A5 § 4 of the Annex to the Rules of Court).⁷⁴ The Court on the other hand has no means to a compel witnesses to attend its hearings.

d. Amicus curia

52. According to Rule 44 § 3 of the Rules of Court, the President of the Chamber may, in the interests of the proper administration of justice, as provided in Article 36 § 2 of the Convention, invite, or grant leave to, any Contracting Party which is not a party to the proceedings, or any person concerned who is not the applicant, to submit written comments or, in exceptional cases, to take part in a hearing. In general, it would appear that the Court has a quite liberal policy as regards granting such leave to third-party interveners.

e. Documentary evidence

53. The Court establishes the facts not just based on witness and experts statements but also on documentary evidence which includes among others reports⁷⁵ from international governmental and non-governmental organisations⁷⁶. The Court, in its judgment in *Georgia v. Russia (I)*, established relevant criteria for the assessment of the reliability and probative value of this documentary evidence:

*"...the Court would reiterate that, being "master of its own procedure and its own rules, it has complete freedom in assessing not only the admissibility and relevance but also the probative value of each item of evidence before it" (see Ireland v. the United Kingdom, cited above, § 210 in fine). It has often attached importance to the information contained in recent reports from independent international human-rights-protection associations or governmental sources (see, mutatis mutandis, Saadi v. Italy [GC], no. 37201/06 , § 131, ECHR 2008; NA. v. the United Kingdom, no. 25904/07, § 119, 17 July 2008; M.S.S. v. Belgium and Greece [GC], no. 30696/09, §§ 227 and 255, ECHR 2011; and Hirsi Jamaa and Others v. Italy [GC], no. 27765/09, § 118, ECHR 2012). In order to assess the reliability of these reports, the relevant criteria are the authority and reputation of their authors, the seriousness of the investigations by means of which they were compiled, the consistency of their conclusions and whether they are corroborated by other sources (see, mutatis mutandis, Saadi, cited above, § 143; NA., cited above, § 120; and Sufi and Elmi v. the United Kingdom, nos. 8319/07 and 11449/07, § 230, 28 June 2011)."*⁷⁷

⁷⁴ [Georgia v. Russia \(I\)](#), quoted above, §§ 90-92.

⁷⁵ *Ibid*, §§ 83-84.

⁷⁶ In this respect see also comments by the Russian Federation, document [CDDH\(2019\)12](#), § 3.3.

⁷⁷ [Georgia v. Russia \(I\)](#), quoted above, § 138.

f. On-the-spot investigations

54. The main function of on-the-spot-investigations is to provide the Court's Delegations⁷⁸ with the opportunity to explore the location themselves and to gain a first-hand impression thereof. In the early days, as it was mentioned above, the Commission was conducting more on-the-spot investigations than the Court does nowadays. That being said, it has to be noted that on-the-spot investigations were carried out by the Court in several inter-State cases.⁷⁹ Even though arguably it has a very crucial role in some cases, especially where the facts have not been established by the domestic courts, nevertheless it needs to be acknowledged that these measures can be undoubtedly expensive and time-consuming for the Court. Moreover, the appropriateness of fact-finding missions where the event in question had taken place many years before has been raised as a potential issue.⁸⁰ Recently, it appears that the Court to a certain extent has changed its practice and embraced a less procedurally challenging way of arriving at a conclusion in a given case.⁸¹ Finally, as mentioned above, even though the Court does not need to obtain the consent of the respondent State to carry out the fact-finding mission, nevertheless there may be serious difficulties in practice if the State concerned is not willing to cooperate.

g. States' duty to cooperate

55. Article 38 of the Convention requires the State Parties to furnish all necessary facilities for the effective conduct of the investigation. The notion of "necessary facilities" includes *inter alia* submitting documentary evidence to the Court, identifying, locating and ensuring the attendance of witnesses at hearings, etc. It has to be noted that not every failure to cooperate with the Court will amount to a breach of Article 38 of the Convention. The Court assesses in each case whether the extent of non-cooperation has been such as to prejudice the establishment of the facts or to otherwise prevent a proper examination of the case.⁸²

56. However, the non-disclosure of even one or part of a document, if considered crucial, would lead to a finding of a violation of Article 38 of the Convention. A respondent State may refuse to disclose documents classified as "state secret" as such disclosure is prohibited under domestic law. In such cases the Court relied on Rule 33 of the Rules of Court,⁸³ which permits a restriction of public access to a document deposited with the Court for a legitimate purpose,

⁷⁸ According to Rule A1 § 3 of the Annex to the [Rules of the Court](#), the Chamber also may appoint any person or institution of its choice to assist the delegation in conducting on-spot investigation or in taking evidence in some other matter.

⁷⁹ For example in the cases of *Cyprus v. Turkey*, quoted above and in the case of Denmark, Norway, Sweden and the Netherlands v. Greece, also quoted.

⁸⁰ See comments by Cyprus contained in document [CDDH\(2019\)12](#).

⁸¹ In the cases of [Georgia v. Russia \(I\)](#) (II) the Court carried out only witnesses hearings.

⁸² See for example case of [Musayev and others v. Russia](#), nos. 57941/00, 58699/00 and 60403/00, §183, 26 July 2007.

⁸³ The Court has been considering to amend Rule 33 of the [Rules of the Court](#) for quite some time and this process is still going on.

such as the protection of national security, private life of the parties as well as the interest of justice.⁸⁴

57. Furthermore, the Court can draw inferences from a party's insufficient participation in the proceedings. Rule 44C of the Rules of Court provides that "[w]here a party fails to adduce evidence or provide information requested by the Court or to divulge relevant information of its own motion or otherwise fails to participate effectively in the proceedings, the Court may draw such inferences as it deems appropriate". Hence, the Court stated in its judgment in *Georgia v. Russia (I)* that "[a] failure on a Government's part to submit such information which is in their hands without a satisfactory explanation may not only give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations, but may also reflect negatively on the level of compliance by a respondent Government with its obligations under Article 38 of the Convention".⁸⁵ In the operative part of this judgment the Court found a violation of Article 38 of the Convention although it did not award non-pecuniary damage on the account of this violation.⁸⁶ In any event, the absence of cooperation could be considered as one of the major arguments against carrying out fact-finding mission. Two Member States, in their comments provided to the CDDH, indeed raised the issue of non-cooperation of the respondent State, especially in situations where the facts have not been established by the national courts while the Court does not have direct and detailed knowledge of the existing conditions in the region where the conflict has occurred.⁸⁷

II. Fact-finding functions of other international courts

58. This part of the paper sketches out some of the key fact-finding powers of other international courts and highlights some of the challenges that they encounter in the exercise of those powers. The aim is not to provide a comprehensive comparative analysis between the fact-finding functions of the Court and those of other courts but to start drawing a map for any possible comparative inquiry that the DH-SYSC-IV might wish to make with a view to identifying best practices in respect of some of the common challenges that international courts face as regards the establishment of the facts. As the Drafting Group advances with the implementation of its mandate it may also wish to consider expanding the comparative analysis to admissibility requirements in inter-State cases in other international courts.

a. The International Court of Justice (ICJ)

59. The ICJ, which is established under Article 7 of the Charter of the United Nations (UN), deals only with disputes submitted by States on issues of international law pursuant to Article 34/1 of the Statute of the ICJ.

⁸⁴ [Georgia v. Russia \(I\)](#), quoted above, §§ 105-108.

⁸⁵ [Georgia v. Russia \(I\)](#), quoted above, § 99.

⁸⁶ Certain authors consider that a violation of Article 38 should not be considered as an additional, technical breach of the Convention but should rather be interpreted as being indicative of a policy of non-cooperation with the Court, see P. Leach, *The Chechen Conflict: Analysing the Oversight of the ECtHR*, EHRLR 6, 2008, p. 760.

⁸⁷ See comments by Cyprus and Georgia in document [CDDH\(2019\)12](#).

60. According to Article 44 of its Statute, the ICJ can procure evidence on the spot and summon witness and experts by applying to the government of the state upon whose territory the visit will take place or notice has to be served. Witnesses and experts who appear before the ICJ upon its own decision are paid out by the funds of ICJ (Article 68 of the Rules of the ICJ). It seems that neither the Statute nor the Rules of the Court confer upon the ICJ the power to compel witnesses' appearance.

61. On-site visits are carried out by the full bench of the ICJ on the basis of a decision by the ICJ. As such they are to be distinguished from unofficial visits or visits by experts. This practice has an incidence on the number of on-site visits cases which are rare in practice. One example is the visit made in the Gabčíkovo case during which the agent of Slovakia invited the Court to "visit the locality to which the case relates and there to exercise its functions with regards to the obtaining of evidence, in accordance with Article 66 of the Rules of the Court".⁸⁸

62. Article 49 of the ICJ's Statute, read together with Article 62/1 of the Rules of the ICJ, confers upon the ICJ the power to obtain evidence, both documentary and testimonial, on its own motion, by means of calling upon the parties "to produce any document or to supply any explanation". Thus, the ICJ has the power not only to request further documents from the parties but also to seek explanation and clarification from them on questions of law or fact.

63. While Article 49 does not explicitly contain an obligation by the state parties to disclose information it states that formal note shall be taken of any refusal to comply with the ICJ's request for information. In other words ICJ cannot compel the parties to produce evidence or subpoena witnesses. Neither the Statute nor the Rules of the ICJ mention specifically the duty of cooperation of states with the ICJ. Also, the ICJ seems reluctant to draw adverse inferences from a refusal to produce the requested information.⁸⁹

64. Article 50 of the ICJ's Statute gives the ICJ the fact-finding power to appoint an expert to advise it regarding the case. The utility of an expert appointed by the ICJ can have two main constraints. First, there is no obligation on the parties to cooperate with the expert or to provide him/her with information. Second, the parties do not have any right to cross-examine the expert appointed by the ICJ.⁹⁰

65. Furthermore, Article 50 of the ICJ's Statute gives the ICJ the power to entrust an independent body or commission with the task of carrying out an inquiry. Such inquiries should be distinguished from site-visits discussed above because while a site visit will usually help to ascertain the facts of a case, Article 50 only covers inquiries that the Court entrusts to other bodies or institutions. The use of Article 50 powers by the ICJ has been rare in its practice.⁹¹

⁸⁸ Gabčíkovo-Nagymaros Case (1997).

⁸⁹ See Michael P. Scharf and Margaux Day: "The International Court of Justice's Treatment of Circumstantial Evidence and Adverse Inferences" Chicago Journal of International Law, vol.13, no.1.

⁹⁰ Article 67 of the Rule of the ICJ does not provide for this possibility but only that every report or record of an enquiry or every expert opinion shall be communicated to the parties which shall be given the opportunity to comment on it.

⁹¹ Germany v. Poland (Chorzów Factory Case), Merits, 17 PCIJ (Series A) 29, 51, 1928; United Kingdom v. Albania (Corfu Channel Case) 1949 I.C.J.4.

66. The Court has also the power to request information from public international organisations.⁹² However, it was neither utilised nor referred to in the early years of the Court's operation.⁹³ The first use only came with the Aerial Incident of 27 July 1955 case.⁹⁴ Another means by which information and expert opinion not submitted by the parties could come before the Court is through *amicus curiae* briefs. The practice of the Court, unlike other international courts and tribunals, to date has been limited.⁹⁵

67. The principles on burden and standard of proof have been established in various decisions of the ICJ. Generally, the ICJ applies the commonly accepted principle of *actori incumbit probatio*, which means that it is up to the claimant party to prove her claim.⁹⁶ The ICJ may take another approach to the burden of proof only when the parties contest the facts brought before the ICJ. In these cases, the ICJ may divide the burden of proof in relation to different facts or particular issues⁹⁷ or even shift the burden of proof to the party claiming to prove the negative.⁹⁸

68. As regards the standard of proof the ICJ has to be persuaded of a claim and no particular standard is applicable. In the Corfu Channel Case the ICJ appears to have employed a high standard, which is proof beyond reasonable doubt in respect of the allegations by the applicant party with regard to the knowledge and assistance of the respondent country regarding the damages incurred by the first, given the seriousness of such allegations. In other cases such as in the Nicaragua case the ICJ has applied a lower standard to proving certain facts, which is that the fact in question has to be proved in a convincing manner.⁹⁹ In sum, the ICJ decides which standard to apply when, based on the facts and merits of the case. Such flexibility seems to be justified in view of the cases presented before the ICJ which involve claims of rights of nations and political questions.

b. The Inter-American Human Rights System

69. Despite certain differences, the strongest similarities with the European system of human rights protection, in terms of fact-finding missions, can be found in the Inter-American system of human rights protection.¹⁰⁰ At this stage we look at the fact-finding powers of the Inter-American

⁹² Article 34 (2) of the Court's Statute.

⁹³ Pierre-Marie Dupuy, "Article 34" in A. Zimmermann (ed), *The Statute of the International Court of Justice: A Commentary*

⁹⁴ Israel v. Bulgaria (Aerial Incident of 27 July 1955) 1959.

⁹⁵ The Law and Practice of Fact-Finding before the International Court of Justice, James Gerard Devaney, p.40

⁹⁶ Corfu Channel Case 1949 I.C.J.4; Nicaragua v. United States of America (Nicaragua case), Merits, 1986 I.C.J. 14.

⁹⁷ Guinea v. Congo, 2010, the ICJ decided that it was for one party to establish that local remedies were exhausted or that extenuating circumstances existed that avoided this requirement –whilst at the same time it was for the other side to prove that these local remedies had not been exhausted.

⁹⁸ France v. Norway (Norwegian Loans), 9 I.C.J. 1957; the onus was on the party which raises the contention that local remedies have not been exhausted to prove before the Court that there are other domestic remedies which have not been used by the parties.

⁹⁹ In the Nicaragua case, the ICJ elaborating on Article 53/2 of its Statute, which states that if a party fails to appear or defend its case, the ICJ, after satisfying itself that it has jurisdiction and the claim is "well founded in fact and law", shall rule in favour of the other party, held that 'satisfy itself' means that the ICJ must attain a "degree of certainty", as in any other case, that the facts are based on convincing evidence.

¹⁰⁰ Under the auspices of the Organization of American States, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights are the bodies responsible for ensuring the promotion and protection of human rights in the Americas. The Inter-American Commission with functions similar to the UN treaty-monitoring bodies and the old European Commission of Human Rights, monitors the situation of human rights in the various

Commission and the Inter-American Court and their practices in general without attempting to highlight possible distinctions in the establishment of facts through fact-finding missions between individual applications and inter-State cases. It is envisaged, that subject to the deliberations of DH-SYSC-IV, such analysis could be included in its report on the basis of the decisions of the Drafting Group regarding the objectives and the scope of a comparison with other international courts.

70. The American Convention on Human Rights provides the Inter-American Commission with formal powers to carry out investigations to verify the facts of a submitted complaint.¹⁰¹ On the site, a Special Commission appointed for that purpose will carry out the investigation.¹⁰² A member of the Inter-American Commission who is a national or who resides in the territory of the State in which the onsite observation is to be conducted is unequivocally disqualified from participating in it.¹⁰³ Once the Inter-American Commission has obtained the consent of the State for an on-site observation, the latter is “governed by broad rules of inquiry”.¹⁰⁴ The Inter-American Commission can specifically interview witnesses, government officials, etc. or perform on-site visits. The State will furnish to the Special Commission all necessary facilities for carrying out its mission. Moreover, the State shall commit itself not to take any reprisals of any kind against any persons or entities cooperating with or providing information or testimony to the Special Commission.¹⁰⁵

71. Once the proceedings before the Inter-American Commission are terminated and the case is not dismissed, the Inter-American Court will consider the merits of the case. During this phase, the Inter-American Court is empowered to gather any additional evidence that it considers necessary in order to determine whether the State is responsible for the alleged violation.¹⁰⁶ These powers include witness hearings (including experts), requesting from the parties the production of certain evidence, requesting a report or opinion from a third party or appointing its own Judges to hold a hearing at the Court premises or elsewhere.¹⁰⁷ Hearings are public unless the Inter-American Court considers it appropriate to hold a hearing *in camera*. The Inter-American Court’s Rules of Procedure authorise the use of electronic means to facilitate communication between those involved in the case.¹⁰⁸ Therefore, the witnesses and others can give their statements through electronic audiovisual means. One of the advantages of this approach is, surely, a reduction in expenses.

72. Article 26 of the Rules of the Procedure of the Inter-American Court refers to member States’ obligations in relation to the attendance of witnesses. However, the Inter-American

member States, conducts on-site visits, handles complaints alleging human rights violations and hosts several thematic rapporteurs. The Inter-American Commission also brings cases to the Inter-American Court, as was done by the Commission of Human Rights in the old European human rights system prior to Protocol no. 11

¹⁰¹ Article 48 (1)(d) of the American Convention of Human Rights.

¹⁰² Article 53 of the Rules of Procedure of the Inter-American Commission on Human Rights.

¹⁰³ *Ibid*, Article 54.

¹⁰⁴ Inter-American Commission on Human Rights, Regulations Regarding On-Site Observations, oas Doc.OEA/Ser.LV/II.35.

¹⁰⁵ Articles 56 and 57 of the Rules of Procedure of the Inter-American Commission on Human Rights.

¹⁰⁶ *Ibid*, Article 58.

¹⁰⁷ In practice the Inter-American Court generally relies on the information that the Commission has provided or acts cautiously in deploying fact-finding missions given the high costs they imply.

¹⁰⁸ Article 51 (11) of the Rules of Procedure of the Inter-American Court on Human Rights.

Court, similar to the Strasbourg Court, does not have the power to compel witnesses to attend a hearing. Also, the reasons of the non-attendance of the witnesses are various. In order to overcome these issues the Inter-American Court can designate an expert to visit a particular location to interview witnesses when the trip itself would be difficult or expensive for the entire Inter-American Court.¹⁰⁹ A witness can also be heard by a person appointed by the President of the Inter-American Court with the consent of the respondent state.¹¹⁰

73. As regards documentary evidence they must normally be authenticated before they can be admitted as evidence. In that respect, in the case of *Bámaca-Velásquez v. Guatemala*, the opposing party objected to the inclusion in the file of documents attributed to the Central Intelligence Agency that were not authenticated. They were, *inter alia*, not signed from another State and included statements from unknown witnesses etc. The party could not cross-examine the persons who had written the documents, nor could the judges question them to make a critical assessment of the reliability of the statements contained therein. The Inter-American Court refused to admit these documents confirming that they did not comply with the “minimum formal requirements for admissibility”.¹¹¹

c. The International criminal justice system

74. The international criminal justice system is different from other international/regional tribunals such as the Strasbourg Court in view of the fact that all the parties are individuals and not States. Nevertheless, States assistance and cooperation are necessary in order to investigate against and prosecute persons accused of having committed serious violations of international humanitarian law. Failure of States involved in conflicts to cooperate with international criminal tribunals regarding the investigation and prosecution of the alleged crimes also raises issues. The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Court (ICC) have specific provisions on this.

i. ICTY

75. According to Article 29 of the Statute of the ICTY the States were obliged to comply without undue delay with any request for assistance or an order issued by the ICTY. As in the case of other international tribunals and the Strasbourg Court there are no effective sanction at hand in cases of non-cooperation. The only sanction which was available, in particular, to the ICTY was to report any failure to comply with a request for assistance to the UN Security Council.

¹⁰⁹ In *Loayza Tamayo* the Inter-American Commission named several witnesses who were imprisoned in Peru. These witnesses could not appear at the seat of the Inter-American Court, so the Commission requested that the Inter-American Court proceedings be held at the various Peruvian penitentiaries. Instead, the Court, with the permission of the State, appointed an expert to interrogate the witnesses where they were incarcerated. *Loayza Tamayo v. Peru (Merits)* IACtHR, 17 September 1997, Ser. C, No. 33, §. 13. See also Pasqualucci, J., *The Practice and Procedure of the Inter-American Court of Human Rights*. (2nd. Ed., Cambridge University Press, New York, 2013).

¹¹⁰ In the case of *Caballero Delgado and Santana v. Columbia*, for reasons of ill-health, the Inter-American Commission requested that one of the witnesses be heard in Colombia by an academic. See, Héctor Faúndez Ledesma, *The Inter-American System for the Protection of Human Rights: Institutional and Procedural Aspects*, Inter-American Institute of Human Rights, San Jose, 2008, pp. 699-700.

¹¹¹ Pasqualucci, J., *supra* note 109.

76. Different protective measures have been employed in respect of ensuring witness protection an issue which is closely related to that of non-attendance of witnesses at hearings. For example, Rule 69 § A of the Rules of Procedure and Evidence of the ICTY enables the Prosecutor to apply to a judge to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the person is brought under the protection of the Tribunal. Furthermore, Rule 69 § B of the Rules of Procedure and Evidence of the ICTY entitles the trial chamber to consult the ICTY's Victims and Witnesses Section in order to determine the requisite protective measures to be applied.

ii. ICC

77. Similar provisions can be found in the Rome Statute. The ICC shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.¹¹² In order to protect victims or witnesses who are at high risk arrangements can be made to relocate them away from the source of threat. Given that relocation entails a high level of intrusiveness in the lives of victims and witnesses and their close families, less drastic protection measures need to be considered before deciding on relocation. Therefore, relocation is a measure of last resort which is considered only when all other measures are deemed insufficient to ensure protection. Relocations can be achieved through arrangements entered into by the Registrar of the ICC on behalf of the ICC with States on the provision of relocation and support services for victims and witnesses.¹¹³

78. In addition to the possibility of *in camera* proceedings, Article 68 § 2 of the ICC's Statute expressly refers to the possibility of presenting evidence "by electronic or other special means". It has been noted that practice showed that using video-links also allowed witnesses to feel more protected while giving evidence in witness-friendly locations (outside of a court room).

79. As to the collection of evidence prosecutors and criminal investigators in the ICC rely not only on first-hand testimonies and eye witness accounts but also take into account information that might become available through the United Nations and/or regional organisations and human rights and humanitarian NGOs.¹¹⁴ These bodies do not only carry out competent and regular human rights monitoring. They often have extensive knowledge of the local situation, and have the capacity to identify and locate witnesses, victims and survivors, and maybe even alleged perpetrators, even before the ICC could start planning its initial field mission to the crime scene.

80. The ICC signed different agreements with various entities in order to further institutionalise the cooperation with them; such agreements are without prejudice to the Prosecutor's powers in respect of investigations initiated and conducted in accordance with Articles 53 and 54 of the ICC's Statute.

¹¹² Article 68 (1) of the Rome Statute of the ICC.

¹¹³ ICC's Rules of Procedure and Evidence, Rule 16(4).

¹¹⁴ Article 15 of the Rome Statute of the ICC.

- Further to the agreement with the UN signed in 2004 whereby close cooperation was established between different UN bodies and the ICC¹¹⁵ the UN Security Council set up in 2004 the International Commission of Inquiry on Darfur¹¹⁶ to determine whether or not acts of genocide had been committed and to identify the presumed perpetrators. This Commission received and gathered information including from UN human rights sources and various NGOs, on serious violations of international human rights and humanitarian law in Darfur and submitted a list of names of persons suspected of having committed crimes under international law. The report of the Commission triggered subsequent development as the UN Security Council, by its resolution 1593 (2005), referred the situation in Darfur to the ICC. The findings of the Commission of Inquiry led to the opening of an investigation before the ICC.

F. Just satisfaction in inter-State cases

81. It has been pointed out in comments by one member State that the Convention lacks a provision that would allow an inter-State application to be lodged in the interest of the affected persons stating claims for just satisfaction while noting that this is provided for only in the Rules of the Court (see also para.24 of this background paper above).

82. According to the Court's recent case-law just satisfaction is also applicable in inter-State application under Article 41 of the Convention. In the case of *Cyprus v. Turkey*¹¹⁷ the Court, for the first time, made an award of just satisfaction to individuals regarding violations established on the merits in an inter-State case. The Court derived its approach from the principles of public international law as established in the Vienna Convention on the Law of Treaties and further developed in the Draft Articles on Diplomatic Protection and the Draft Articles on Responsibility of States for Internationally Wrongful Acts, and in the international case-law and the *travaux préparatoires* of the Convention.

83. However, "according to the very nature of the Convention, it is the individual, and not the State, who is directly or indirectly harmed and primarily "injured" by a violation of one or several Convention rights. Therefore, if just satisfaction is afforded in an inter-State case, it should always be done for the benefit of individual victims."¹¹⁸

84. The question whether granting just satisfaction to an applicant State is justified is assessed and decided by the Court on a case-by-case basis, taking into account, *inter alia*, the type of complaint made by the applicant Government, whether the victims of violations can be identified, as well as the main purpose of bringing the proceedings in so far as this can be discerned from the initial application to the Court. The Court acknowledges that an application brought before it under Article 33 of the Convention may contain different types of complaints

¹¹⁵Quality Control in Preliminary Examination: Volume 2: The ICC's Interplay with UN Fact-Finding Commissions in Preliminary Examinations, Mutoy Mubiala, TOAEP, 2018.

¹¹⁶ Resolution 1564 (2004), UN Security Council, 18 September 2004.

¹¹⁷ [Cyprus v. Turkey \(just satisfaction\) \[GC\]](#), no. 25781/94, ECHR 2014.

¹¹⁸ Ibid, §§ 43

pursuing different goals. In such cases each complaint has to be addressed separately in order to determine whether awarding just satisfaction in respect of it would be justified.¹¹⁹

85. The Court bases itself on a determination of a “sufficiently precise and objectively identifiable” group of people whose rights were violated for purposes of awarding just satisfaction in respect of violations found and the criteria to be applied for an award of just satisfaction for non-pecuniary damage.¹²⁰ The Court’s Report highlighted that it was very important that the applicant State was, from the outset, asked to submit the list of clearly identifiable individuals.¹²¹ In this respect, the respondent State’s cooperation on this matter is important, which includes a duty to produce all information in its possession as prescribed by Article 38 of the Convention and Rule 44 A of the Rules of Court. Thereby, the risk of awarding just satisfaction to individuals who are not eligible for such an award due to various reasons could be decreased. Moreover, in order to handle these cases more efficiently and to avoid undue delays between the judgment on the merits and the just satisfaction judgment, it is important, in the operative part of the judgment on the merits, to fix a time-limit for the parties’ exchange of observations on just satisfaction.¹²²

G. Concluding remarks

86. This document took stock of a number of issues relevant to the terms of reference of DH-SYSC-IV which have been identified in the CDDH discussions and processes leading to the creation of the Drafting Group. What emerges from this stock-taking is a preliminary conceptual framework with several themes, issues and questions which require a deeper examination and/or further elaboration. This framework is a basis for the DH-SYSC-IV to build on during its first meeting and it is without prejudice to its members’ reflections, comments or observations. Being essentially an analytical tool it can be narrowed or expanded, as the DH-SYSC-IV may deem necessary in future discussions and deliberations, in full respect of the primordial consideration that any ensuing response proposals are without prejudice to the jurisdiction of the Court.

87. Scope of inter-State application

- a. The Drafting Group is invited to discuss and offer its views on:
 - the Court’s proposals to amend rule 46(g) of the Court’s Rules in order to provide for the submission at the outset by the Contracting Parties of translations of the documents to which they refer in their respective observations in one of the Court’s two official languages;
 - the Court’s conclusion that the immediate communication of an inter-State case without a summary of the facts, as provided for in Rule 51§§1 and 2, is positive.

¹¹⁹ Ibid, §§ 43. See also [Georgia v. Russia \(I\) \(just satisfaction\)](#), no. 13255/07, 31 January 2019, § 22.

¹²⁰ [Georgia v. Russia \(I\) \(just satisfaction\)](#), no. 13255/07, 31 January 2019, § 28.

¹²¹ See document [CDDH\(2019\)22](#), § 31

¹²² Ibid, § 30

- b. It is also invited to consider whether there are other questions regarding the content of inter-State applications that could be further discussed and analysed as part of the terms of reference of DH-SYCS-IV.

88. Admissibility requirements

- a. In respect of differences in the admissibility criteria between inter-State applications and individual applications concerning the same-subject matter and relating partly to the same individuals, the DH-SYSC-IV is invited:
 - to discuss with a view to defining the impact that such differences may ultimately have in decisions in respect of substantially the same case (for example risks of double and/or diverging decisions);
 - to consider the development of the Court’s practice to adjourn the examination of individual applications pending the outcome of parallel inter-State proceedings as a response to the proposition of formalising the order of examination of individual applications and inter-State cases (i.e. examination of individual applications only after an examination of inter-State cases as to admissibility and the merits).
- b. In respect of Inter-State and individual applications pending before the Court and cases pending before other international bodies which may, at least in part, concern the same subject-matter and relate to same individuals, the DH-SYSC-IV is invited:
 - to discuss with a view to defining the impact that such parallel proceedings may ultimately have in decisions in respect of substantially the same case (for example risks of double and/or diverging decisions);
 - to consider the Court’s practice to take into account the decisions or investigation results of other international bodies and to remain within the confines of the Court’s jurisdiction and avoid, as far as possible, encroaching upon that of other international bodies.
- c. consider whether there are other questions regarding the admissibility criteria that could be further discussed and analysed as part of the terms of reference of DH-SYSC-IV.

89. Establishment of facts

- a. In respect of obtaining evidence through fact-finding missions of the Court and against the background of their increasingly scarce use in recent years, the DH-SYSC-IV is invited to discuss and define further the practical difficulties arising from such missions (e.g. their relevance in terms of timing, costs, length, any other difficulties) and possible measures to address these difficulties, with due regard for the jurisdiction of the Court;
- b. In respect of obtaining evidence through witness hearings, the DH-SYSC-IV is invited to discuss difficulties arising in situations when hearings take place outside of Strasbourg, witnesses fail to appear or relating to the fact that the Court does not have the power to compel witnesses to appear or there is lack of co-operation from the respondent State to ensure witness protection, as well as possible measures to address these difficulties; the DH-SYSC-IV is also invited to discuss and identify

- possible measures to address these difficulties, such as the use of electronic video means, with due regard for the jurisdiction of the Court
- c. In respect of states duty to cooperate, the DH-SYSC-IV is invited to discuss the measures that member States can take to strengthen their discharge of their duty to cooperate, notably as regards the submission of documentary evidence to the Court, locating and ensuring the attendance of witnesses at hearings as well as their protection;
 - d. As regards the practice of the Court with respect to evidence, the DH-SYSC IV is invited to discuss difficulties encountered regarding the required standard ("beyond reasonable doubt"), the burden of proof, the use of presumptions as well as a possible description of the exceptional situations in which the Court itself had to establish the facts instead of the national authorities;
 - e. The DH-SYSC-IV is invited to consider whether there are other questions regarding the establishment of facts that that could be further discussed and analysed as part of the terms of reference of DH-SYSC-IV.

90. Just satisfaction

- a. The Drafting Group is invited to discuss and offer its views on:
 - the Court's conclusion that it is important to ask the applicant Government from the outset to submit lists of clearly identifiable individuals in order to make sure that just satisfaction awarded in an inter-State case is for the benefit of the individual victims;
 - the Court's conclusion that the operative part of the judgment on the merits fixes a time-limit for the parties' exchange of observations in order to avoid a situation where the period between the judgment on the merits and the just satisfaction judgment extends to a lengthy period;
- b. It is also invited to consider whether there are other questions regarding just satisfaction that could be further discussed and analysed as part of the terms of reference of DH-SYSC-IV.