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STEERING COMMITTEE FOR HUMAN RIGHTS

(CDDH)

**COMMITTEE OF EXPERTS ON THE SYSTEM OF THE EUROPEAN
CONVENTION ON HUMAN RIGHTS**

(DH-SYSC)

**Progress report 2020-2021 on the effective processing and resolution of cases
relating to inter-State disputes**

as adopted by the DH-SYSC at its 6th meeting (24–26 October 2021)

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I. EXECUTIVE SUMMARY

1. This report reflects the work carried out by the DH-SYSC-IV pursuant to its mandate during the biennium 2020-2021. It contains the analysis of the Drafting Group of the issues tabled by various delegations regarding the processing and resolution of cases relating to inter-State disputes and identifies questions that will need to be examined further. The fundamental premise of this report is that a high number of inter-State applications and individual applications related to inter-State disputes are pending before the European Court of Human Rights (the Court). Their processing raises exceptional challenges for the Court and the State Parties in these cases.

2. It is widely recognised that the right of an individual application is the cornerstone of the system of protection of the rights and freedoms set forth in the European Convention on Human Rights (the Convention). The inter-State application is predicated on the legitimacy of States Parties action to bring before the Court any alleged breach of the Convention not only to protect the right and freedoms of individuals but also to vindicate the public order of Europe. The subject-matter of inter-State applications before the Court relates, albeit not exclusively, to particularly serious situations often involving allegations of largescale violations of the Convention. Through its case-law the Court has played a prominent role in guaranteeing a peaceful public order in Europe and addressing the responsibility of States, within the framework of the Convention. The Court's case-law in inter-State cases is notable for being more extensive than the case-law under other human rights instruments. Hence, preserving the smooth functioning of the inter-State application as a distinct mode of Convention proceedings constitutes an intrinsic part of the shared responsibility of the States and of the Court to ensure the effective implementation of the Convention as well as the proper functioning of the system of the Convention.

3. In analysing questions that have been raised regarding the processing in parallel of inter-State applications and individual applications related to inter-State cases or conflicts, this report takes a close look at the differences in admissibility requirements applicable to these two types of applications. While noting that the Convention does not specifically deal with the issue of the correlation between inter-State applications and individual applications, the report emphasizes that the lower admissibility requirements applicable to the inter-State application reflect the distinct features of this application which are enshrined in the Convention and recognised by the Court in its case-law. This part of the report also highlights the Court's practices of prioritising inter-State applications without putting aside the examination of individual applications. It also provides an overview of how the Court addresses the relationship between inter-State cases and individual cases on a substantive level, notably in respect of establishing the existence of an administrative practice in contravention of the Convention.

4. The examination of inter-State applications or individual applications relating to inter-State cases or conflicts in parallel by the Court and other international bodies may potentially lead to contradictory results concerning human rights obligations set forth in the Convention and obligations arising from other international human rights instruments. Ultimately this could create legal uncertainty for States as to how they can respect their international human rights obligations and for individuals as regards the exact scope of their rights. It may also potentially threaten the coherence of human rights law and the credibility of human rights institutions. While the analysis of the relevant case-law of the Court reveals that few cases relating to inter-State disputes and concerning the same events or subject-matter have been brought in parallel before the Court and other international bodies or have in fact led to diverging or conflicting decisions, the risk of such decisions is not to be excluded. The CDDH report on the place of the European

Convention on Human Rights in the European and international legal order constitutes, in its entirety, the basis for consideration of questions raised regarding the Court's interpretation and application of the Convention in a manner consistent with international law.

5. The report focuses in particular on a number of challenges relating to the establishment of the facts which are specific to the processing and resolution of inter-State cases and related individual applications. These challenges relate to the obtaining of necessary evidence *inter alia* by fact-finding missions, witness hearings and a variety of different sources of information as well as the assessment of the evidence before the Court. The analysis of the case-law of the Court with regard to the standard of proof and its fact-finding functions emphasises the principle that issues of admissibility of evidence and the establishment of the facts remain exclusively within the competence of the Court. On the other hand, States should give consideration to the question of how to enhance the ways they fulfil their obligation to co-operate with the Court, notably as regards facilitating the Court's on-the-spot investigations and ensuring witnesses' attendance of Court hearings.

6. Article 41 of the Convention provides that just satisfaction is afforded to the injured party. According to the case-law of the Court in inter-State cases, 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. Practical difficulties encountered by the Court in the context of awarding just satisfaction relate to the identification of victims when a large number of individuals is involved, which in turn increases the risk of awarding just satisfaction to individuals who may not be eligible for such an award. Questions are also raised regarding potential double recovery when inter-State applications and related individual applications are processed in parallel. Moreover, there is often a time gap between the judgment on the merits and the one on just satisfaction. The report addresses these questions from the perspective of the Court's relevant case law and its practice.

7. The report looks also at friendly settlement as a possible mechanism for resolving inter-State cases. While the Court's practice in this respect is scarce, the friendly settlement of individual applications has grown and shown some positive results in the last couple of years. This experience reveals distinct features of the mechanism such as its consensual approach and the confidential nature of negotiations which may offer opportunities not only for adopting a large variety of measures to remedy the alleged violations of the Convention and provide redress to the victims but also for taking measures that may have a wide impact on society in terms of effecting change and promoting compliance with the Convention.

8. Finally, it should be noted that this report provides a basis for further consideration of matters falling within the mandate of DH-SYSC, subject to the final adoption of its terms of reference for the quadrennium 2022-2025 by the Committee of Ministers, and does not limit further discussions within DH-SYSC and/or DH-SYSC-IV.

II. THE MANDATE OF DH-SYSC-IV

9. Following the Declaration adopted by the High Level Conference meeting in Copenhagen (12 and 13 April 2018, the [Copenhagen Declaration](#)), 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"¹ among other elements "proposals on how to handle more effectively cases related to inter-State disputes, as well as individual applications arising

¹ See document [CDDH\(2019\)R92Addendum2](#).

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”.²

10. At its 91st meeting (18-21 June 2019), the CDDH had an in-depth exchange of views on the Draft elements resulting from the Copenhagen Declaration concerning inter-State applications which were reflected in the *Contribution of the CDDH to the evaluation provided for in the Interlaken Declaration*³ on the basis of a (i) document prepared by its Bureau⁴ (ii) contributions made by the member States prior to this meeting,⁵ and (iii) a report by the Plenary Court on “Proposals for a more efficient processing of inter-State cases” submitted to the CDDH.⁶ The CDDH did not, at that stage, adopt a text on the subject matter.⁷ It decided to take up this point again at its next meeting in the light of the proposals by the Committee of Experts on the System of the European Convention on Human Rights (DH-SYSC).⁸

11. The Committee of Ministers adopted, at its 1361st meeting (19-21 November 2019), the terms of reference of the DH-SYSC, to operate under the authority of CDDH. The DH-SYSC was given, *inter alia*, the specific task of developing proposals to improve the effective processing and resolution of cases relating to inter-State disputes in the light of the Committee of Ministers’ decision on the follow-up to the evaluation set out by the Interlaken Declaration.⁹

12. At its 92nd meeting (26-29 November 2019), in the framework of adopting its “Contribution to the evaluation provided for by the Interlaken Declaration”,¹⁰ the CDDH took the view that questions regarding inter-State applications require a more in-depth examination. Therefore, the CDDH decided to set up the Drafting Group DH-SYSC-IV to operate under the authority of the DH-SYSC to which it gave the following terms of reference: “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^[11]; (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,¹² 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 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

² See [CM/Del/Dec\(2018\)1317/1.5](#).

³ See [CDDH\(2019\)R91](#), §§ 25-28.

⁴ See document [CDDH-BU\(2019\)R101 Addendum](#) of 12 June 2019, §§ 61-91 and Appendices I and II.

⁵ See document [CDDH\(2019\)12](#).

⁶ See for the redacted version of the report adopted by the Plenary of the Court on 18 June 2018 document [CDDH\(2019\)22](#).

⁷ Paragraphs 61-91 of document [CDDH-BU\(2019\)R101 Addendum](#) have not been provisionally adopted, see document [CDDH\(2019\)R91](#), §§ 25-28.

⁸ Ibid, document [CDDH\(2019\)R91](#), §§ 25-28.

⁹ See document [DH-SYSC-IV\(2020\)01](#).

¹⁰ See document [CDDH\(2019\)R92](#).

¹¹ See document [CDDH\(2019\)R92Addendum2](#).

¹² See document [CDDH\(2019\)R92Addendum1](#).

German Chairmanship of the Committee of Ministers (deadline: 15 October 2020);

- 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)."

13. On 11 December 2019, the Deputies took note of the CDDH report "Contribution to the evaluation foreseen by the Interlaken Declaration" and agreed to transmit it to the Court for information and possible comments.¹³

14. On 11 February 2020 the Court submitted a "Comment on the CDDH contribution to the evaluation of the Interlaken reform process" as it had been adopted by the Plenary Court on 27 January 2020.¹⁴

15. On 4 November 2020, the Committee of Ministers adopted its decisions "Securing the long-term effectiveness of the system of the European Convention on Human Rights".¹⁵ The Committee of Ministers resolved to ensure the continued effectiveness of the Convention system. In this connection, it "agreed [*inter alia*] that, whilst no comprehensive reform of the Convention machinery is now needed, further efforts should be pursued by the Council of Europe as a whole to ensure that the Convention system can continue to respond effectively to the numerous human rights challenges Europe faces, including through the efficient response of the Court to pending applications".¹⁶

III. INTRODUCTION

16. Starting from the 7th of May 1956 when the first inter-State application was introduced, 18 inter-State cases have been resolved by the European Commission of Human Rights and the Court. These cases, which form a basis of interpretation of the Court's practice in the field, are:

- Greece v. United-Kingdom (I) (no. 176/56, reports of the Commission 26.09.1958 (Vol I) 26.09.1958 (Vol II));
- Greece v. United-Kingdom (II) (no. 299/57, report of the Commission 26.09.1959);
- Austria v. Italy (no.788/60, report of the Commission 30.03.1963);
- Denmark, Norway, Sweden & the Netherlands v. Greece (I) (nos. 3321/67 to 3323/67 & 3344/67, report of the Commission 05.11.1969);
- Denmark, Norway and Sweden v. Greece (II) (no. 4448/70, reports of the Commission 05.10.1970; 04.10.1976);
- Ireland v. United-Kingdom (I) (no.5310/71, 18.01.1978 Revision: 20.03.2018);
- Ireland v. United-Kingdom (II) (no.5451/72, struck off the list 01/10.1972);

¹³ See Ministers' Deputies decision at the 1363rd meeting, 11 December 2019, document [CM/Del/Dec\(2019\)1363/4.2b](#)

¹⁴ See document [DD\(2020\)34E](#).

¹⁵ See document [CM/Del/Dec\(2020\)130/4](#).

¹⁶ See document [CM/Del/Dec\(2020\)130/4](#), paragraph 1.

- Cyprus v. Turkey (I) and (II) (no. 6780/74 & 6950/75, report of the Commission 10.07.1976: Vol. I; Vol. II);
- Cyprus v. Turkey (III) (no. 8007/77, reports of the Commission 12.07.1980 (Conf.) (Interim), 04.10.1983 (Art.31));
- Denmark, France, Norway, Sweden & the Netherlands v. Turkey (nos. 9940/82 to 9944/82, report of the Commission 07.12.1985);
- Cyprus v. Turkey (IV) (no.25781/94, 10.05.2001; 12.05.2014 (just satisfaction));
- Denmark v. Turkey (no. 34382/97, 05.04.2000);
- Georgia v. Russian Federation (I) (no.13255/07, 03.07.2014; 31.01.2019 (just satisfaction));
- Georgia v. Russian Federation (II) (no.38263/08, 12.08.2008 (merits));
- Georgia v. Russian Federation (III) (no.61186/09, struck off the list 16.03.2010);
- Ukraine v. Russian Federation (III) (no.49537/14, struck off the list 01.09.2015);
- Slovenia v. Croatia (no. 54155/16, 18.11.2020);
- Latvia v. Denmark (9717/20, struck off the list 16.06.2020).

17. There are currently 12 inter-State cases pending before the Court with a great majority linked to situations of conflict between member States.¹⁷

18. Thousands of individual applications relating to inter-State disputes have also been decided by the Court and/or the European Commission of Human Rights throughout the years.¹⁸

19. Processing inter-State cases and the high number of related individual applications, raises exceptional challenges for the Court¹⁹ and the State Parties to the cases because such cases are particularly time-consuming and complex as a result of their nature and dimension. It should be recalled that the concern about the high number of applications brought before the Court has been the central focus of the process of reforming the system of the Convention from the outset. As stated in the Copenhagen Declaration, improving the Convention system's ability to deal with the increasing number of applications has been a principal aim of the current reform process from the very beginning. It is in connection with the need for further action to address the caseload challenges that the Copenhagen Declaration stated that "[t]he challenges posed to the Convention system by situations of conflict and crisis in Europe must also be acknowledged".²⁰

20. One of the greatest challenges in inter-State cases is the establishment of facts, in particular, when the Court has to act as a court of first instance as the result of the lack of prior examination of the cases by the national courts.²¹ These challenges relate particularly to the obtaining of the necessary evidence *inter alia* by fact-finding missions, witness hearings, the different sources of information as well as the assessment of evidence before the Court.²²

¹⁷ The full list of inter-State applications is available at https://echr.coe.int/Documents/InterState_applications_ENG.pdf

¹⁸ Statistical report on conflict-related applications, last updated on 20.10.2021, see document CDDH(2021)21.

¹⁹ See document CDDH(2019)22 § 4. See document DD(2020)34E, § 18.

²⁰ See the [Copenhagen Declaration](#), § 45.

²¹ See also document CDDH(2019)22, paragraph 20.

²² See document CDDH-BU(2019)R101 Addendum, paragraph 87.

21. Moreover, the processing in parallel of, on the one hand, inter-State cases and, on the other hand, a high number of individual applications relating to inter-State cases or conflicts, raises questions regarding their prioritisation as well as in terms of avoiding inconsistencies and duplications. The Convention does not specifically deal with the issue of the correlation between interstate cases and individual applications. Even though the Court has developed its practice and established guiding principles, State Parties still experience practical difficulties. This is compounded by the possibility of parallel proceedings in other international bodies in respect of inter-State complaints or individual applications linked to the inter-State cases or related individual applications pending before the Court.

22. The sensitive and political nature of inter-State cases makes their friendly settlement according to Article 39 complex and difficult.

23. The Court has observed that the Article 41 procedure is normally very complex. “It is important to ask the applicant Government from the outset to submit lists of clearly identifiable individuals.”²³ This has led to practical questions being raised in terms of awarding just satisfaction in inter-State cases for the benefit of individual victims.

24. This report approaches these issues from the perspective of the requirements of the Convention and the Rules of the Court as well as the relevant principles established by the Court in its case-law, including in respect of the application of general international law. The States’ duty to co-operate with the Court in the examination of inter-State and related individual applications is underlined wherever applicable and constitutes a transversal thread in this analysis.

25. In the view of one delegation, “[a] fundamental challenge lies in the discrepancies between the case-law of the Court and other international courts and tribunals, such as the International Court of Justice, with regard to rules on establishing a State’s responsibility for violation of its international obligations.” On this view, “[a]s an example, in some of its decisions – though not in others – the Court adopted less stringent criteria of responsibility, such as the degree of control which must be exercised in order for the conduct of a group of persons to be attributable to the State, than those used under the case-law of the ICJ and other international courts (tribunals), as well as those in the Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission. This creates legal uncertainty *vis-à-vis* both general international law and the Court’s own (inconsistent) practice.”²⁴ Also, on this view, reference is made to the CDDH Report on the place of the European Convention on Human Rights in the European and international legal order, (CDDH(2019)R92 Addendum 1), in particular to paragraphs 164-167, 189, 193-199.

26. The DH-SYSC-IV might wish to consider in the future, under the authority of the DH-SYSC, examining the relevance of these questions in respect of cases relating to inter-State disputes bearing in mind the conclusions and the instruction given by the CDDH at its 93rd meeting (14-16 December 2020).²⁵

²³ See document [CDDH\(2019\)22](#), § 31.

²⁴ See compilation of comments in document DH-SYSC-IV(2020)06REV.

²⁵ See document CDDH(2020)R93.

IV. QUESTIONS REGARDING THE PARALLEL PROCESSING OF RELATED INTER-STATE AND INDIVIDUAL APPLICATIONS

27. A considerable number of pending individual applications that relate to inter-State disputes or inter-State applications is also pending before the Court. This report takes the view that the link between such applications for purposes of their processing is established by the Court.

1. Specific features and categories of inter-State applications

28. This section highlights the specific features of the **scope and contents** of inter-state applications which distinguish them from individual applications. Article 33 of the Convention lays down, in unqualified terms, the right of any High Contracting Party to refer any alleged breach of the Convention and the Protocols thereto by another High Contracting Party to the Court.²⁶ The European Commission of Human Rights characterised this right as an expression of the system of collective guarantee enshrined in the Convention rather than a mechanism for inter-State dispute resolution or to enforce the rights of States.²⁷ On this view, the obligations undertaken by the High Contracting Parties in the Convention are designed to protect the fundamental rights of individual human beings from infringement by any of the High Contracting Parties rather than to create subjective and reciprocal rights for the High Contracting Parties themselves.²⁸ Thus, when a High Contracting Party refers an alleged breach of the Convention, this is not to be regarded as exercising a right of action for the purpose of enforcing its own rights, but rather as bringing before the Court an alleged violation of the public order of Europe.²⁹ While the right of an individual application to the Court pursuant to Article 34 of the Convention is considered as a cornerstone of the system for protecting the rights and freedoms set forth in the Convention³⁰ the inter-State application provides an additional pathway to ensure the protection of the rights of individuals.

29. The Court distinguishes inter-State applications whose purpose is not to seek individual findings of violations and just satisfaction but rather to invoke the jurisdiction of the Court to establish the existence of the pattern of violations alleged by the applicant State and to put an end to them and prevent their recurrence.³¹ By asking the Court not to give a decision on any individual case in support of the alleged pattern of violations, the applicant Government limits the scope of its complaint before the Court to the alleged **administrative practice of human rights violations** as such.³² When the applicant Government asks the Court to determine the compatibility of the alleged administrative practices with the provisions of the Convention but does not invite the Court to make findings in respect of each alleged individual violation – which are advanced as illustrations of the alleged administrative practices – the Court considers that the claim is to prevent the repetition of such practices by the respondent State and to prevent the violations that are ongoing.³³ Therefore, the Court is called upon to examine whether or not

²⁶ [Austria v. Italy](#), no.788/60, decision of 11 January 1961, page 20.

²⁷ Ibid.

²⁸ Ibid., page 19.

²⁹ Ibid.

³⁰ See the [Copenhagen Declaration](#), §1. See also the speech delivered by Jean-Paul Costa (President of the Court from 19 January 2007 to 3 November 2011) at the High-level Conference of Interlaken (18-19 February 2010), available in the [proceedings](#) of the Conference, page 21.

³¹ [Ukraine v. Russia \(dec\)](#) [GC], nos. 20958/14 and 38334/18, § 235, 16 December 2020.

³² [Ukraine v. Russia \(dec\)](#) [GC], nos. 20958/14 and 38334/18, § 238, 16 December 2020.

³³ [Georgia v. Russia](#) (II) (merits) [GC] no. 38263/08, § 100, 21 January 2021.

there existed administrative practices incompatible with the Articles of the Convention allegedly breached.³⁴

30. The Court defines administrative practice as comprising two elements: the repetition of acts and official tolerance. As to the 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. 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. 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. 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.³⁵ While these criteria define a general framework, they do not indicate the number of incidents required in order to be able to conclude that an administrative practice existed, which is a question left to the Court to assess having regard to the particular circumstances of each case.³⁶

31. The Court's acknowledgement at the stage of admissibility that the scope of an inter-State application is limited to specific allegations of an administrative practice amounting to violations of the Convention has a close relationship with the Court's evaluation of the requirement of exhaustion of domestic remedies under Article 35 § 1 of the Convention (procedural admissibility, see also paragraphs 36-40 below) as well as implications for the substantive admissibility of the alleged breach of the provisions of the Convention under Article 33 of the Convention (see also paragraphs 42-44 below).³⁷

32. In the context of the application of Article 41 of the Convention to inter-State cases, notably when addressing the question whether granting just satisfaction to an applicant State is justified, the Court acknowledges that an application brought before it under Article 33 of the Convention may contain different types of complaints pursuing different goals. Accordingly, two main categories of complaints can be distinguished.

33. First, an applicant State Party may complain about general issues (systemic problems and shortcomings, administrative practices, etc.) in another State Party. Article 33 empowers the Contracting Parties to bring an inter-State application before the Court regardless of whether the victims of the alleged breach are nationals of the applicant State.³⁸ In such cases the primary goal of the applicant Government is that of **protecting the public order of Europe** within the framework of collective responsibility under the Convention even if the State's own nationals are not concerned.³⁹ The Court's judgments with regard to such claims may serve to

³⁴ *Georgia v. Russia* (II) (merits) [GC] no. 38263/08, § 101, 21 January 2021.

³⁵ *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, nos. 9940-9944/82, Commission decision of 6 December 1983, Decisions and Reports 35, p. 163, § 19; *Ireland v. United Kingdom*, no. 5310/71, § 159, 18 January 1978; *Cyprus v. Turkey* (merits) [GC], no. 25781/94, § 99, 10 May 2001; *Georgia v. Russia* (I) [GC], no. 13255/07, 3 July 2014, §§ 122-124; See also *Ukraine v. Russia* (dec), nos. 20958/14 and 38334/18 § 363, 14 January 2021; *Georgia v. Russia* (II) (merits) [GC] no. 38263/08, § 102, 21 January 2021.

³⁶ *Georgia v. Russia* (II) (merits) [GC] no. 38263/08, § 102, 21 January 2021.

³⁷ *Ukraine v. Russia* (dec) [GC], nos. 20958/14 and 38334/18, § 260, 16 December 2020.

³⁸ See also *Austria v. Italy*, quoted above, page 19.

³⁹ *Cyprus v. Turkey* (just satisfaction) [GC], no. 25781/94, § 44, 12 May 2014.

elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties.⁴⁰

34. The second category of inter-State cases involves complaints where the applicant State denounces systemic violations by another State Party of the basic human rights of its nationals. “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** that is, invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility”.⁴¹ The Court has recently held that an inter-State application aimed at protecting the interests of one concrete legal in precisely circumscribed sets of legal proceedings, and claiming just satisfaction on behalf of it according to Article 41, belongs to this second category of inter-State cases.⁴²

35. Moreover, applications relating to situations of inter-State disputes have increased since 2007.

36. The requirements regarding the content of an inter-State application are specified in Rule 46 of the Rules of Court. The translation of copies of documents relevant to the object of an inter-State application under Rule 46(g) into one of the official languages of the Court raises significant challenges for the Court as well as for the applicant and respondent States.

37. In the context of its proposals for a more efficient processing of inter-State cases, the Court has observed that it is appropriate to request at the outset that translations be submitted of all the relevant documents to which the parties refer in their observations (in particular Rule 46 (g) as regards the applicant State), in one of the two official languages of the Court, thus saving both time and resources.⁴³ It has recommended that 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.⁴⁴

38. While noting that the Court has started to implement this recommendation⁴⁵ the review of the Rules of Court could be encouraged with a view to providing predictability as to which documents referred to in the States Parties’ observations should be provided in one of the official languages of the Court and specifying at which phase of the proceedings should such translations be submitted. In respect of documents not translated in full, the States Parties could provide translated summaries of the documents referred to in their upon the Court’s request.

39. Lastly, when looking at inter-State applications and individual applications in parallel, mention can be made of the fact that the vast majority of requests on the basis of Rule 39 of the Rules of Court are usually submitted in the scope of an individual application. Nevertheless, the Court has developed a practice of indicating interim measures in inter-State cases as well. Since the adoption of the Rules of Court in 1959, the Court examined and decided upon Rule 39 requests in relation to eight inter-State applications concerning mainly situations related to armed conflicts.⁴⁶

⁴⁰ [Ireland v. United Kingdom](#), no. 5310/71, § 154, 18 January 1978.

⁴¹ [Cyprus v. Turkey \(just satisfaction\) \[GC\]](#), no. 25781/94, § 45, 12 May 2014. See also para. 111 of the present report.

⁴² [Slovenia v Croatia \(dec\)](#), no. 54155/16, § 67, 18 November 2020.

⁴³ See document [CDDH\(2019\)22](#), § 9.

⁴⁴ See document [CDDH\(2019\)22](#), §10.

⁴⁵ See document [DD\(2020\)34E, § 18](#).

⁴⁶ Georgia v. Russia (II), no. [38263/08](#), 21 January 2021; Georgia v. Russia (III), Dec. no. [61186/09](#), 16 March 2010; Ukraine v. Russia (re Crimea), [GC], Dec. no. [20958/14](#) and 38334/18, 16 December 2020; Ukraine v. Russia (III), Dec. no. [49537/14](#), 1 September 2015; Ukraine v. Russia (VIII), no. 55855/18, lodged on 29 November 2018; Armenia

2. The Court's practice with regard to the admissibility of inter-State applications and individual applications

40. Inter-State applications are subject to fewer admissibility requirements than individual applications. While the criteria established in Article 35 § 1 of the Convention apply to both individual and inter-State applications, those set out in paragraphs 2 and 3 of the same provision only apply to individual applications.

41. The **four-months rule** as stipulated in Article 35 § 1 of the Convention⁴⁷ applies in the same manner to both types of applications.

42. The requirement of **exhaustion of domestic remedies**, also established in Article 35 § 1 of the Convention, applies to inter-State applications in the same way as it does to individual applications, when the applicant State does no more than denounce a violation or violations allegedly suffered by individuals whose place, as it were, is taken by the State.⁴⁸ In respect of the inter-State application, the Court ascertains whether the persons concerned could have availed themselves of effective remedies to secure redress, having particular regard to whether the existence of any remedies is sufficiently certain not only in theory but in practice and whether there are any special circumstances which absolve the persons concerned by the instant application from the obligation to exhaust the remedies.⁴⁹ It may be noted that the Court applies the requirement of exhaustion of domestic remedies in each case having regard to its particular circumstances.

43. In principle, the rule on the exhaustion of domestic remedies does not apply where the applicant State complains of the existence of administrative practice, namely a repetition of acts incompatible with the Convention, and official tolerance by the State (see paragraph 28 above), with the aim of preventing its continuation or recurrence but does not ask the Court to give a decision on each of the cases put forward as proof or illustration of that practice.⁵⁰ In any event the rule on the exhaustion of domestic remedies does not apply where an administrative practice has been shown to exist and is of such a nature as to make proceedings futile or ineffective.⁵¹

44. The rule of exhaustion of domestic remedies may also be found inapplicable in respect of individual applications where it can be established that an administrative practice existed.⁵² In respect of individual applications, the Court has taken into account new remedies introduced

v. Azerbaijan, no. 42521/20, lodged on 27 September 2020; Armenia v. Turkey, no. 43517/20, lodged on 4 October 2020; Azerbaijan v. Armenia, no. 47319/20, lodged on 27 October 2020.

⁴⁷ The four-months rule was introduced by Protocol No.15 which entered into force on 1 August 2021. According to Article 8, paragraph 3, of Protocol No.15 this rule shall enter into force following the expiration of a period of six months after the date of entry into force of this Protocol.

⁴⁸ *Ireland v. United Kingdom*, no. 5310/71, § 159, 18 January 1978; *Ukraine v. Russia (dec)* [GC], nos. 20958/14 and 38334/18, § 363, 16 December 2020.

⁴⁹ *Cyprus v. Turkey (merits)* [GC], no.25781/94, § 99, 10 May 2001.

⁵⁰ *Ireland v. United Kingdom*, no. 5310/71, § 159, 18 January 1978; *Cyprus v. Turkey (merits)* [GC], no. 25781/94, § 99, 10 May 2001; *Georgia v. Russia (I)* [GC], no.13255/07, 3 July 2014, §. 125; *Ukraine v. Russia (dec)* [GC], nos. 20958/14 and 38334/18, § 363, 16 December 2020. See also *Denmark, Norway and Sweden and the Netherlands v. Greece* nos. 3321/67, 3322/67, 3323/67 and 3344/67, 5 November 1969, the requirement of exhaustion of domestic remedies 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.

⁵¹ *Ireland v. United Kingdom*, no. 5310/71, § 159, 18 January 1978; *Cyprus v. Turkey (merits)* [GC], no.25781/94, § 99, 10 May 2001; *Georgia v. Russia (I)* [GC], no.13255/07, 3 July 2014, §. 125

⁵² *Donnelly and others v. United Kingdom*, nos. 5577-83/72, second admissibility decision, § 3, 15 December 1975; *Akdivar and others v. Turkey* no. 21893/93, § 67 and 68, 16 October 1996; *Aksoy v. Turkey* no. 21987/93, § 52, 18 December 1996.

after the date on which the application is lodged provided that individuals have reasonable time to familiarise themselves with the judicial decision.⁵³

45. The admissibility criteria set out in Article 35 § 3 (a) and (b) of the Convention do not apply to inter-State applications, which therefore, cannot be declared inadmissible as **manifestly ill-founded** or as constituting an *abuse of the right of petition*. However, this does not prevent the Court at the admissibility stage from examining the substantive admissibility of the alleged breach of the provisions of the Convention under Article 33.⁵⁴ The Court can establish at the admissibility stage whether it has any competence at all to deal with the matter brought before it, under the general principles governing the exercise of jurisdiction by international tribunals.⁵⁵ The Court, in a few specific cases, has held that it does not construe the procedural provisions of the Convention in a way which excludes any possibility to carry out a preliminary assessment of the contents of the case outside the framework of Article 35 §1.⁵⁶ While the wording of Article 35 §§ 2 and 3 makes reference to Article 34, it does not exclude the application of a general rule providing for the possibility of declaring an inter-State application inadmissible, if it is clear, from the outset, that it is wholly unsubstantiated, or otherwise lacking the requirements of a genuine allegation in the sense of Article 33 of the Convention.⁵⁷ Such an approach is consistent with the principle of procedural economy.⁵⁸

46. Based on these principles, the Court has decided already at the admissibility stage on substantive questions such as whether matters complained of by the applicant Government are capable of falling within the jurisdiction of the respondent State even when they occur outside of its national territory⁵⁹ or whether they fall within the jurisdiction of the respondent State.⁶⁰ The Court's decision on these preliminary issues at this stage of the proceedings is without prejudice to the issues of attribution and responsibility of the respondent State under the Convention for the acts complained of, which fall to be examined at the merits phase of the proceedings.⁶¹

47. Other examples in which the Convention institutions have carried out a preliminary examination of the merits at the admissibility stage include the existence of *prima facie* evidence of a breach of the Convention in the light of the evidence adduced by the Parties.⁶² More recently the Court decided at the admissibility stage on the existence of *prima facie* evidence

⁵³ The assessment of whether domestic remedies have been exhausted is normally carried out with reference to the state of the proceedings on the date on which the application was lodged with the Court. This rule is, however, subject to exceptions following the creation of new remedies. The Court has applied this exception in in cases concerning the length of proceedings (*Predil Anstalt v. Italy* (dec.) no. 31993/96 (French only); *Bottaro v. Italy* (dec.), no. 56298/00 (French only); *Andrášik and Others v. Slovakia* (dec.), no. 57984/00; *Nogolica v. Croatia* (dec.), no. 77784/01; *Brusco v. Italy* (dec.), no. 1466/07 (French only); *Korenjak v. Slovenia* (dec.), §§ 66-71; *Techniki Olympiki A.E. v. Greece* (dec.); in cases concerning a new compensatory remedy in respect of interferences with property rights (*Charzyński v. Poland* (dec.); *Michalak v. Poland* (dec.); *Demopoulos and Others v. Turkey* (dec.) [GC]); in cases concerning failure to execute domestic judgments (*Nagovitsyn and Nalgiyev v. Russia* (dec.), §§ 36-40; *Balan v. Moldova* (dec.); in cases concerning prison overcrowding (*Latak v. Poland* (dec.); *Stella and Others v. Italy* (dec.), §§ 42-45).

⁵⁴ *Ukraine v. Russia* (dec) [GC], nos. 20958/14 and 38334/18, § 260, 16 December 2020.

⁵⁵ *Georgia v. Russia (II)* (dec), no. 38263/08, § 64, 13 December 2011; *Ukraine v. Russia* (dec) [GC], nos. 20958/14 and 38334/18 § 265, 16 December 2020; *Slovenia v Croatia* (dec), no. 54155/16, §§ 41, 18 November 2020.

⁵⁶ *Slovenia v Croatia* (dec), no. 54155/16, § 41, 18 November 2020.

⁵⁷ *Slovenia v Croatia* (dec), no. 54155/16, § 41, 18 November 2020. See also *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, at pp. 161-162.

⁵⁸ *Slovenia v Croatia* (dec), no. 54155/16, § 41, 18 November 2020.

⁵⁹ *Georgia v. Russia (II)* (dec), no. 38263/08, § 65, 13 December 2011; *Ukraine v. Russia* (dec) [GC], nos. 20958/14 and 38334/18, § 265, 16 December 2020.

⁶⁰ *Ukraine v. Russia* (dec) [GC], nos. 20958/14 and 38334/18, §§ 265, 352, 16 December 2020.

⁶¹ *Ukraine v. Russia* (dec) [GC], nos. 20958/14 and 38334/18, §§ 265, 352, 16 December 2020.

⁶² *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, nos. 9940-9944/82, Commission decision of 6 December 1983, Decisions and Reports 35, p. 162.

that there was an administrative practice in relation to each of the complaints made by the applicant Government.⁶³ In another recent case the Court has decided, at the admissibility stage, on the question whether the scope of Article 33 of the Convention allows an applicant Government to vindicate the rights of an organisation which is not “non-governmental” for the purposes of Article 34 (this question falling outside the scope of any of the admissibility criteria set out in Article 35 of the Convention and rather being a matter which goes to the Court’s jurisdiction within the meaning of Article 32 § 2 of the Convention).⁶⁴

48. Moreover, the Convention institutions have examined the contents of inter-State applications despite the fact that the Convention does not allow an inter-State application to be rejected at the admissibility stage as constituting an abuse of the right to petition. The Commission did so in the light of a general principle according to which the right to bring proceedings before an international instance must not be manifestly misused, on the assumption that such general principle existed.⁶⁵ In this regard the Commission has decided on allegations that the inter-State application constitutes an abuse of the procedure provided by the Convention in that they contain accusations of a political nature.⁶⁶ More recently, while examining whether an inter-State application lacked the requirements of a genuine application on the ground that it put before the Court political questions, the Court took into account the legal nature of the issues raised before it by the applicant Government.⁶⁷ While these questions have inevitably political aspects, this fact alone does not suffice to deprive them of their character as legal questions; the Court has never refused to decide a case brought before it merely because it had political implications.⁶⁸

49. The admissibility criterion of proving **victim status** is applicable only to individual applications and not to inter-State applications. The Court has recently examined the question whether the scope of Article 33 of the Convention allows an applicant Government to vindicate the rights of an organisation which is not “non-governmental” for the purposes of Article 34.⁶⁹ In considering the preliminary issue whether it may examine such an application, the Court has noted that the applicant Government is entitled to submit an inter-State application under Article 33 of the Convention without having to be in any way, even indirectly, aggrieved by the alleged violations.⁷⁰

50. The Court determined that there is, however, a direct systemic correlation between Articles 33 and 34 of the Convention in that an organisation which is not “non-governmental” within the meaning of Article 34 cannot have its rights protected by a government through the mechanism of Article 33.⁷¹ In other words, Article 33 of the Convention does not allow an applicant Government to vindicate the rights of a legal entity which would not qualify as a “non-governmental organisation” and, therefore, would not be entitled to lodge an individual application under Article 34.⁷²

51. The DH-SYSC notes that a question arises concerning victim status, that is whether it is necessary and how to distinguish between, on the one hand, the procedural right of a State

⁶³ *Ukraine v. Russia* (dec) [GC], nos. 20958/14 and 38334/18, § 367, 16 December 2020.

⁶⁴ *Slovenia v Croatia* (dec), no. 54155/16, §§ 43, 44, 18 November 2020.

⁶⁵ *Cyprus v. Turkey*, nos. 6780/74 and 6950/75, p.138, 26 May 1975; *Cyprus v. Turkey* no. 8007/77, Dec. 3.10.78, D.R. 13 p. 78, para. 56 at p. 156; *Cyprus v. Turkey*, no. 25781/94, p. 135, 28 June 1996.

⁶⁶ *Cyprus v. Turkey*, nos. 6780/74 and 6950/75, p.138, 26 May 1975; *Cyprus v. Turkey* no. 8007/77, Dec. 3.10.78, D.R. 13 p. 78, para. 56 at p. 156.

⁶⁷ *Ukraine v. Russia* (dec) [GC], nos. 20958/14 and 38334/18, § 271, 16 December 2020.

⁶⁸ *Ukraine v. Russia* (dec) [GC], nos. 20958/14 and 38334/18, § 272, 16 December 2020.

⁶⁹ *Slovenia v Croatia* (dec), no. 54155/16, §§ 46-70, 18 November 2020.

⁷⁰ *Slovenia v Croatia* (dec), no. 54155/16, § 43, 18 November 2020.

⁷¹ *Slovenia v Croatia* (dec), no. 54155/16, § 76, 18 November 2020.

⁷² *Slovenia v Croatia* (dec), no. 54155/16, § 70, 18 November 2020.

Party under Article 33 to lodge an inter-State application for the violations of substantive rights of the Convention of particular victim(s) (standing under Article 33) and the victim status of an applicant for purposes of an individual application under Article 34 (standing under Article 34 of the Convention). The Drafting Group, under the authority of the DH-SYSC, will continue to engage with this question.

3. Procedural questions

52. The DH-SYSC notes that the Court's case-law as well as the Court's observations⁷³ have not acknowledged or identified the different admissibility criteria as posing challenges with regard to the parallel processing of inter-State applications and linked individual applications.

53. The admissibility requirements applicable to applications lodged under Article 33 of the Convention, as they have been set out in Article 35 § 1, reflect the inherent features and the specific function of inter-State applications in the Convention system, which enable the State Parties to protect the public order of Europe within the framework of collective responsibility under the Convention. Inter-State applications remain ultimately concerned with the protection of the fundamental rights of individuals. In lodging an inter-State application, a State is not so much exercising a right of action for the purpose of enforcing its own rights, but rather as bringing before the Court an alleged violation of the public order of Europe (see section IV/1 above).

54. However, a set of procedural questions is raised by one delegation which point to various aspects of the parallel examination of related inter-State applications and individual applications.⁷⁴

55. Firstly, the said delegation raises the question whether an inter-State application may be permitted to be lodged if individual applications in the connection with the same events are pending before the Court.⁷⁵

56. The DH-SYSC notes that the Court has held that an inter-State application does not deprive individual applicants of the possibility of introducing or pursuing their own claims.⁷⁶ It is the Court's recent prioritisation 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.⁷⁷ This does not mean that the Court puts these cases aside. The Court instead identifies and examines in a systematic manner individual applications relating to inter-State cases in parallel with inter-State applications as well as individual applications relating to inter-State cases or conflicts (in the absence of inter-State cases) and may make decisions it considers appropriate such as declaring inadmissible those which are manifestly ill-founded.⁷⁸

57. 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

⁷³ See document [CDDH\(2019\)22](#)

⁷⁴ See comments of the Russian Federation contained in documents CDDH(2019)12, §§ 3.1. and 3.2; DH-SYSC-IV(2020)05Rev and DH-SYSC-IV(2020)06REV.

⁷⁵ See comments of the Russian Federation contained in document [CDDH\(2019\)12](#), §§ 3.1. and 3.2.

⁷⁶ [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, §§ 118 and 119, 18 September 2009.

⁷⁷ See Copenhagen Declaration, § 45. See also [Berdzenishvili and Others v. Russia](#), nos. 14594/07 and 6 others, § 4, 20 December 2016; and See [Press Release](#) "The ECHR to adjourn some individual applications on Eastern Ukraine pending Grand Chamber case in related inter-State case" ECHR 432 (2018), 17 December 2018.

⁷⁸ [Lisnyy and others v. Ukraine and Russia](#) nos. 5355/15, 44913/15 and 50852/15, 5 July 2016.

communicated to the appropriate respondent Government or Governments for observations in parallel with the inter-State case. After receiving the Governments' and applicants' observations in reply, the Court intends to record an adjournment for each case, pending a judgment in the inter-State case, with a view to having the files complete and ready for decision or judgment as soon as possible thereafter.⁷⁹

58. Other practices of the Court which seek efficiency in the processing of inter-State applications are concerned with the adjustment of such processing according to geographical or time criteria or the legal questions raised.⁸⁰ The Court decided to join to the inter-State application *Ukraine v. Russia (re Eastern Ukraine)*, no. 8019/16, two inter-State applications, *Ukraine v. Russia (II)*, no. 43800/14, and *The Netherlands v. Russia*, no. 28525/20, which were pending before a Chamber. This decision was taken in accordance with Rules 42 § 1 and 71 § 1 of the Court's Rules of Court in the interests of the efficient administration of justice.⁸¹ In another inter-State case the Court has dissected the object of the application (i.e. the specific allegation of the existence of a pattern of human rights violations) while distinguishing it from issues related to specific events that it considered as not being an essential part of the factual and evidential basis, not having a direct material bearing on the issue to be decided by the Court or not constituting the subject matter of the dispute before the Court.⁸² Furthermore, the Court considered that such specific events were the subject of a number of individual applications pending before the Court.⁸³

59. The DH-SYSC takes note of the Court's practices of prioritisation of inter-State cases and adjournment of parallel individual applications as well as the evolving practices of adjustment of processing of inter-States according to geographical or time criteria or the legal questions raised. The DH-SYSC-IV will continue to examine, under the authority of the DH-SYSC, the desirability of formalising such practices and it will continue to examine the question of exchange of stances in respect of individual applications during the period of time until a decision on admissibility or a judgment on the merits of a related inter-State case is delivered.

60. **Secondly**, a question is raised with regard to the **potential risks of duplication and inconsistencies** stemming from the processing in parallel of inter-State and individual applications lodged in connection with the same events.⁸⁴

61. The Convention only entails a prohibition of "double jeopardy of [the respondent] state" in so far as pursuant to Article 35 § 2 (b) of the Convention the Court shall not deal with any individual application that "is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information"⁸⁵. For an application to be "substantially the same", the Court considers whether the two applications brought before it by the applicants relate essentially to the same persons, the same facts and the same complaints.⁸⁶ As regards the examination of the second limb of Article 35 § 2 (b) see section V/1 below.

⁷⁹ See [Press Release](#) "The ECHR to adjourn some individual applications on Eastern Ukraine pending Grand Chamber case in related inter-State case" ECHR 432 (2018), 17 December 2018.

⁸⁰ See document [CDDH\(2019\)22](#), § 25.

⁸¹ See [Press Release](#) "European Court joins three inter-State cases concerning Eastern Ukraine", ECHR 354 (2020), 4 December 2020.

⁸² *Ukraine v. Russia (dec)* [GC], nos. 20958/14 and 38334/18, § 236-245, 16 December 2020.

⁸³ *Ukraine v. Russia (dec)* [GC], nos. 20958/14 and 38334/18, § 240, 16 December 2020.

⁸⁴ See comments of the Russian Federation contained in document [CDDH\(2019\)12](#), §§ 3.1. and 3.2.

⁸⁵ *Ibid.* §§ 46, 47.

⁸⁶ *Vojnović v. Croatia* (dec.), no. 4819/10, 26 June 2012, § 28; *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], § 63; *Amarandei and Others v. Romania*, no. 1443/10, 26 July 2016, §§ 106-111 (French only).

62. The Court's practices explained in the paragraphs 53 and 55 above aim at avoiding potential duplication and inconsistencies in addition to managing resources more efficiently.

63. Moreover, the Court's methodology to take into account findings or conclusions reached in inter-State proceedings in related individual applications is also conducive to avoiding any potential inconsistencies and duplications. For example, as explained above a previous finding of administrative practice in contravention of the Convention may render the rule of exhaustion of domestic remedies inapplicable to both inter-State and individual applications (see paragraph 41 above). The establishment of the existence of an administrative practice in an inter-State case may also have a bearing on the Court's subsequent 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.⁸⁷

64. On one view,⁸⁸ another set of questions stemming from the different requirements of admissibility in inter-State cases compared to individual applications points to potential issues of identification and representation of alleged victims of violations of the Convention by the State. The DH-SYSC notes, however, that the admissibility criteria of proving victim status is, pursuant to Article 35 § 3 (b), applicable only to individual applications and not to inter-State applications (see paragraph 47 above). Furthermore, the Court has developed a standard practice with respect to the identification of victims.⁸⁹

V. QUESTIONS REGARDING THE PLURALITY OF INTERNATIONAL PROCEEDINGS

65. Conceptually, duplications or even conflicting outcomes in respect of cases relating to inter-State disputes may materialise in two main scenarios. The first concerns the existence of an individual application relating to an inter-State dispute before the Court and the existence of an individual case between the same parties, the same facts and the same or similar claims before another international dispute settlement mechanism. The second scenario concerns the existence of an inter-State case before the Court and an inter-State case between the same parties, on the same facts and bringing the same or similar claims before another international dispute settlement mechanism.⁹⁰ These two scenarios are approached from the perspective of the applicable Convention requirements, respectively Article 35 § 2 (b) and Article 55, as well as the relevant Court's practice, highlighting wherever applicable cases in which issues of multiple or parallel international proceedings have arisen in practice.

⁸⁷ *Berdzenishvili and Others v. Russia*, quoted above, § 49.

⁸⁸ See comments of the Russian Federation contained in document CDDH(2019)12, § 3.2.

⁸⁹ *Georgia v. Russia (I)* (just satisfaction) [GC], no. 13255/07, § 48-72.

⁹⁰ Such mechanisms could include procedures established on the basis of international human rights instruments which range from negotiation and conciliation to resolution of disputes by the committees established by such instruments. Some mechanisms addressing inter-State complaints include the Human Rights Committee (HRC) which monitors the United Nations International Covenant on Civil and Political Rights (ICCPR); the Committee Against Torture (CAT) monitoring the implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Article 21); the Committee on Economic, Social and Cultural Rights monitoring the implementation of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (Article 10) and the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (Article 12). International dispute settlement mechanisms also encompass other dispute resolution mechanisms not exclusively established under a human rights treaty such as the ICJ and fact-finding commissions.

1. Individual applications relating to inter-State disputes submitted to the Court and another international procedure

66. The second limb of Article 35 § 2 (b) provides that the Court shall not deal with any individual application where it “has already been submitted to another procedure of international investigation or settlement”. This provision intends to avoid a situation where several international bodies would be simultaneously dealing with applications which are substantially the same. This would be incompatible with the spirit and the letter of the Convention, which seeks to avoid a plurality of international proceedings relating to the same cases.⁹¹ The Court examines this matter on its own motion.⁹² In determining whether its jurisdiction is excluded by virtue of Article 35 § 2 (b) the Court decides whether the case before it is substantially the same as a matter that has already been submitted to a parallel set of proceedings and, if that is the case, whether the simultaneous proceedings may be seen as “another procedure of international investigation or settlement” within of Article 35 § 2 (b).⁹³

67. The Court verifies whether the individual applications to the different international institutions concern substantially the same persons, facts and complaints.⁹⁴ If the complainants before the two institutions are not identical, the application to the Court cannot be considered as being “substantially the same as a matter that has been submitted to another procedure of international investigation or settlement”.⁹⁵ The Court’s examination of the concept of another procedure of international investigation or settlement ascertains whether the nature of the supervisory body, the procedure it follows and the effect of its decisions are such that the Court’s jurisdiction is excluded by virtue of the second limb of Article 35 § 2 (b).⁹⁶ The Court has held that a procedure before the United Nations Working Group on Arbitrary Detention was indeed a “procedure of international investigation or settlement”.⁹⁷ Whereas proceedings before the European Commission pursuant to Article 258 of the Treaty on the Functioning of the European Union (TFEU) could not be understood as constituting procedures of investigation or settlement within the meaning of Article 35 § 2 (b) of the Convention.⁹⁸ The Court has found the Inter-Parliamentary Union to be a non-governmental organisation that does not qualify as “another procedure”; the term “another procedure” referred to judicial or quasi-judicial

⁹¹ [OAO Neftyanaya Kompaniya Yukos v. Russia](#), no. 14902/04, § 520, 20 September 2011; [Eğitim ve Bilim Emekçileri Sendikası v. Turkey](#), no. 20347/07, § 37, 5 July 2016 (French only).

⁹² [POA and Others v. the United Kingdom](#) (dec.), no. 59253/11, § 27, 21 May 2013.

⁹³ [OAO Neftyanaya Kompaniya Yukos v. Russia](#), quoted above, § 520; [Gürdeniz c. Turquie](#) (dec.) (French only), no. 59715/10, §§ 39-40, 18 March 2014; [Doğan and Çakmak v. Turkey](#) (dec.) (French only), nos. 28484/10, 58223/10, § 20, 14 May 2019.

⁹⁴ [Patera v. the Czech Republic](#) (dec.), no. 25326/03, 26 April 2007; [Karoussiotis v. Portugal](#), no. 23205/08, § 63, 1 February 2011; [Gürdeniz v. Turkey](#) (dec.), quoted above §§ 41-45; [Pauger v. Austria](#) (Commission decision), no. 24872/94, 9 January 1995.

⁹⁵ [Folgerø and Others v. Norway](#) (dec.), no. 15472/02, 14 February 2006; [Savda c. Turquie](#) (French only), no. 42730/05, § 68, 12 June 2012; [Gürdeniz c. Turquie](#) (dec.) (French only), no. 59715/10, § 37, 18 March 2014; [Kavala v. Turkey](#), no. 28749/18, 10 December 2019. However, the Court has held that a complaint brought by a trade union under the procedure of the International Labour Organisation was substantially the same as an individual application brought under the Convention by officers of the union in their own names. The Court based its findings on the close association of the substance of the proceedings and also the status of the individuals as officers of the trade union. Allowing them to maintain their action before the Court would therefore have been tantamount to circumventing Article 35 § 2 (b) of the Convention; see [POA and Others v. the United Kingdom](#) (dec.), no. 59253/11, §§ 2730-32, 21 May 2013.

⁹⁶ [OAO Neftyanaya Kompaniya Yukos v. Russia](#), quoted above, § 522; [De Pace v. Italy](#) (French only), no. 22728/03, §§ 25-28, 17 July 2008; [Karoussiotis v. Portugal](#), §§ 62 and 65-76; [Doğan and Çakmak v. Turkey](#) (dec.) (French only), quoted above, § 2.

⁹⁷ [Peraldi v. France](#) (dec.), no. 2096/05, 7 April 2009; [Gürdeniz c. Turquie](#) (dec.) (French only), no. 59715/10, § 37, 18 March 2014; [Selahattin Demirtaş v. Turkey](#) (no. 2) n°14305/17, 20 November 2018; [Kavala v. Turkey](#), no. 28749/18, 10 December 2019.

⁹⁸ [Karoussiotis v. Portugal](#), no. 23205/08, 1 February 2011.

proceedings similar to those set up by the Convention, and the term “international investigation or settlement” denoted institutions and procedures set up by States, thus excluding non-governmental bodies.⁹⁹

68. Despite the provisions of Article 35 § 2 (b) and the relevant jurisprudence of the Court, the potential risk of duplication and/or diverging decisions may arise when another international human rights mechanism examines communications on cases substantially the same as the cases decided upon by the Court. For example, the Human Rights Committee (HRC) may examine communications raising complaints that have already been examined by the Court or other international bodies.¹⁰⁰ In order to prevent the possibility of successive applications, 18 Council of Europe member States have made reservations against the competence of the HRC to re-examine communications already considered under an alternative international procedure.¹⁰¹

69. The HRC’s long-standing jurisprudence regarding cases when the complainant has lodged a communication concerning the same events as an application lodged with the Court is that the HRC does not consider it as a matter that has been examined by another international body within the meaning of respective reservations to Article 5 (2) (a) of the Optional Protocol if the case has previously been declared inadmissible by the Court solely on procedural grounds. When the Court has based its decision on inadmissibility not solely on procedural grounds but also on reasons that include a certain consideration of the merits of a case, then the matter should be deemed to have been examined within the meaning of the respective reservations to article 5 (2) (a) of the Optional Protocol.¹⁰²

70. Based on this interpretation of Article 5 (2) (a) of the Optional Protocol the HRC has indeed proceeded with the consideration of the merits of complaints concerning the same facts, applicants and rights which had been previously declared inadmissible by the Court.¹⁰³ With regard to an individual application – not related to an inter-State case or conflict – concerning a violation of Article 6 § 3 (c) of the Convention the Court has reached conclusions that differed from those of the HRC, which had previously found a violation of Article 14 § 3 (d) ICCPR in respect of the same facts and complainant.¹⁰⁴

71. The CDDH has already analysed in depth issues related to overlapping jurisdiction of the Court and the UN treaty bodies, one or possibly several of them, as a case may easily fall under both the comprehensive treaties (the Convention and the ICCPR), but also under subject-

⁹⁹ [Lukanov v. Bulgaria](#), no. 21915/93, Commission decision of 12 January 1995, Decisions and Reports 80-A, p. 108; [Selahattin Demirtaş v. Turkey](#) (No. 2) n°14305/17, 20 November 2018.

¹⁰⁰ Article 5 (2) (a) of the Optional Protocol provides that the Human Rights Committee shall not consider any communication from an individual unless it has ascertained that the same matter is not being examined under another procedure of international investigation or settlement. State Parties to the ICCPR may and have indeed entered reservations to this provision.

¹⁰¹ https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4

¹⁰² See Communication [CCPR/C/123/D/2807/2016](#), 17 October 2018, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2807/2016 submitted by Miriana Hebbadj, State Party France, see paragraph 6.3. See also [CCPR/C/123/D/2747/2016](#), 7 December 2018, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2747/2016, submitted by Sonia Yaker, State Party France, paragraph 6.2. At the time of ratification of the ICCPR France entered the following reservation: “France makes a reservation to article 5, paragraph 2 (a), specifying that the Human Rights Committee shall not have competence to consider a communication from an individual if the same matter is being examined or has already been considered under another procedure of international investigation or settlement.”

¹⁰³ See Communication [CCPR/C/86/D/1123/2002](#) Views adopted by the Human Rights Committee concerning communication No. 1123/2002 submitted by Carlos Correia de Matos, State Party Portugal; [CCPR/C/123/D/2807/2016](#); [CCPR/C/123/D/2807/2016](#).

¹⁰⁴ [Correia de Matos v. Portugal](#) [GC], no. 56402/12, 4 April 2018.

specific UN conventions.¹⁰⁵ Whilst it has noted that the existence of parallel human rights protection mechanisms was often a source of enrichment and enhancement of the universal protection of human rights, it could also lead to certain problems in respect of individual applications. These include the potential for duplication and/or conflicting findings; forum shopping; as well as the legal uncertainty for State parties on how to best fulfill their human rights commitments under the Convention and other international instruments. The CDDH has concluded that it is important that the Court continues to endeavor to interpret the Convention in harmony with other international rules for the protection of human rights in particular those binding upon the Council of Europe member States, such as the (majority of) the UN conventions, and seeks to avoid the fragmentation of international law. More consistent reference by the UN treaty bodies to regional courts, and in-depth discussion of the latter's jurisprudence would facilitate the development of consistent international human rights principles. The intensification of encounters between the members of the Court and the UN treaty bodies is also underlined as a way to increase interaction between the systems of the Court and the UN system of human rights protection.¹⁰⁶

72. The DH-SYSC notes that the CDDH report on the place of the European Convention on Human Rights in the European and international legal order as a whole will be the basis for any possible future consideration of questions raised regarding the Court's interpretation of and application of the Convention in a manner which is consistent with the framework of international law.

2. Inter-State applications submitted to the Court and another means of dispute settlement

73. Article 35 § 2 (b) of the Convention does not apply to inter-State cases.¹⁰⁷ However, objections as to the admissibility of an inter-State application by the Court on account of settling a dispute arising out of the interpretation or application of the Convention by means of other international procedures may be raised under Article 55 of the Convention.¹⁰⁸ According to this provision of the Convention, State Parties are prevented from submitting 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 except by special agreement. In practice, such disputes relate primarily to the inter-State application procedure.¹⁰⁹ According to Article 55, the State Parties to the Convention should utilise only the procedure established by the Convention in respect of complaints against another Contracting Party to the Convention relating to an alleged violation of a right which in substance is covered both by the Convention (or its protocols) and by other international treaties, notably the ICCPR.¹¹⁰ While the case-law of the Court on Article 55 is not

¹⁰⁵ See [CDDH\(2019\)R92Addendum1](#) Report on the place of the European Convention of Human Rights in the European and international legal order. See section III, pg 109.

¹⁰⁶ [CDDH\(2019\)R92Addendum1](#) § 346-355

¹⁰⁷ [Georgia v. Russia \(II\) \(dec.\)](#), no. 38263/08, § 79, 13 December 2011.

¹⁰⁸ 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.

¹⁰⁹ 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'.

¹¹⁰ See 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

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 Party concerned is given only upon the consent of both parties concerned and in exceptional circumstances.¹¹¹

74. The principle established in Article 55 is that the Convention institutions have a monopoly on 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.¹¹² 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 a barrier for State Parties which are not satisfied with the judgments of the Court in an inter-State case to “appeal” such judgments to another international body.

75. It should also be pointed out that the Court will take into account the decision or investigation results of other international bodies and seek to remain within the confines of its jurisdiction when dealing with inter-State cases and to avoid as far as possible encroaching upon the jurisdiction of other international bodies.¹¹³

VI. THE ESTABLISHMENT OF THE FACTS

76. A number of challenges relating to the establishment of facts are specific to the processing and resolution of inter-State cases which are complex as a result of their nature and dimension, in particular when they concern armed conflicts. These include the obtaining of necessary evidence *inter alia* by fact-finding missions and witness hearings as well as the different sources of information and the assessment of the evidence by the Court.

77. Recently, the Court has noted specific challenges in cases concerning allegations of the existence of an administrative practice as the Court is almost inevitably confronted with the same difficulties in relation to the establishment and assessment of the evidence as are faced by any first-instance Court.¹¹⁴ It is particularly difficult to establish the facts in the context of an inter-State case which concerns an armed conflict and its consequences, involving thousands of people and taking place over a significant period of time across a vast geographical area.¹¹⁵ The Court has also observed a number of other difficulties related to instances when the Court has to act as a court of first instance. These include the examination of the effectiveness and accessibility of domestic remedies as additional evidence of whether an administrative practice

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.”

¹¹¹ [Cyprus v. Turkey](#), no. 25781/94, decision of the Commission, part III.

¹¹² *Ibid.*

¹¹³ See document [CDDH\(2019\)22](#), §§ 26 and 27.

¹¹⁴ [Ukraine v. Russia \(dec\) \[GC\]](#), nos. 20958/14 and 38334/18, § 254, 16 December 2020. See also document [CDDH-BU\(2019\)R101 Addendum](#), § 87.

¹¹⁵ [Georgia v. Russia \(II\) \(merits\) \[GC\]](#) no. 38263/08, § 61, 21 January 2021.

exists; the length of parties' observations and annexes; and, the failure of the respondent Governments to provide the Court with all the necessary facilities to enable it to establish the facts as well as witness and expert hearings.¹¹⁶ Some of the difficulties in establishing the facts have been highlighted in the recent judgment *Georgia v. Russia (II)*, when the Court answered in the negative the question whether the events which occurred during the active phase of hostilities in the context of an international armed conflict outside the territory of the respondent State fell within the jurisdiction of that State.¹¹⁷

78. This Chapter approaches these challenges from the perspective of the general principles applied by the Court regarding the admissibility and assessment of evidence, the State Parties' duty to co-operate with the Court under Article 38 of the Convention (sections 1-3) as well as the Court's current fact-finding practice (section 4). As regards the assessment of the evidence and the application of Article 38, the Court does not distinguish principles that apply specifically or exclusively to inter-State applications or to individual applications. Instead, the principles developed regarding individual applications are applied *mutatis mutandis* to inter-State applications and vice-versa.

1. Principles on the admissibility and evaluation of evidence

79. Neither the Convention nor the Rules of Court seek to regulate how evidence is to be admitted or assessed by the Court.¹¹⁸ The Court examines all the material before it, whether originating from the parties or other sources, and, if necessary, obtains material *proprio motu*.¹¹⁹ There are **no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment**; the Court adopts the conclusions that are, in its view, supported by the free evaluation of all evidence including such inferences as may flow from the facts and the parties' submissions.¹²⁰

80. **Proof** may follow from the coexistence of sufficiently strong, clear and concordant inferences or of 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 is also attentive to the seriousness that attaches to a ruling that a Contracting State has violated fundamental rights.¹²¹

81. Being the master of its own procedure and its own rules, the Court has complete freedom in assessing not only the admissibility and relevance but also the **probative value** of each item of evidence before it.¹²² It has often attached importance to the information contained in recent reports from independent international human rights protection associations or governmental sources.¹²³ 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

¹¹⁶ See document [CDDH\(2019\)22](#), §§ 20 and 24.

¹¹⁷ *Georgia v. Russia (II)* (merits) [GC] no. 38263/08, § 141, §144 et al., 21 January 2021.

¹¹⁸ This is without prejudice to the fact that the Rules of the Court contain detailed provisions concerning investigatory measures and the obligations of the parties in this respect, see Annex 1 to the [Rules of the Court](#).

¹¹⁹ *Ireland v. United Kingdom*, no. 5310/71, § 160, 18 January 1978.

¹²⁰ *Nachova and Others v. Bulgaria*, nos. 43577/98 and 43579/98, § 147, 6 July 2005, ECHR 2005-VII.

¹²¹ *Georgia v. Russia (I)*, quoted above § 94.

¹²² *Ireland v. United Kingdom*, no. 5310/71, § 210, 18 January 1978; *Georgia v. Russia (I)*, quoted above, § 138; *Georgia v. Russia (II)* (merits) [GC] no. 38263/08, § 59, 21 January 2021.

¹²³ *Georgia v. Russia (I)*, quoted above, § 138; *Georgia v. Russia (II)* (merits) [GC] no. 38263/08, § 59, 21 January 2021.

corroborated by other sources.¹²⁴ The Court may hold a hearing with witness to test the veracity of the evidence set out in the reports by international organisations concerning certain aspects of the application.¹²⁵ Reports or statements by international observers, non-governmental organisations or the media, or the decisions of other national or international courts, are often taken into account to, in particular, shed light on the facts, or to corroborate findings made by the Court.¹²⁶

82. The Court establishes the facts primarily based on **documentary evidence** which includes not only the documents submitted by the Parties but also reports from international governmental and non-governmental organisations.¹²⁷ That explains the Court's approach to recognise its subsidiary role, and to defer to national courts which have had the opportunity of seeing and hearing the relevant witnesses and, thus, the chance to assess their credibility. While the Court is not bound by the findings of facts of domestic courts, it will require "cogent elements" for it to depart from such findings.¹²⁸

83. The Court may **draw adverse inferences** from the failure of the Parties to observe their obligation to furnish all necessary facilities for the Court's examination of the case under Article 38 of the Convention. This principle is also explicitly foreseen in Rule 44C of the Rules of Court which 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". In describing the character and content of the obligation to furnish all necessary facilities under Article 38 of the Convention references are made to the principles that the Court has established in individual applications concerning the procedural obligation not to hinder the effective exercise of the right of petition under Article 34 given the fact that the Court applies such principles to inter-State applications.¹²⁹

84. The **obligation to furnish all necessary facilities** is of utmost importance for the effective operation of the system of individual petition instituted under Article 34 of the Convention and it applies when the Court performs its general duties as regards the examination of applications or when it carries out a fact-finding investigation.¹³⁰ The obligation under Article 38 is corollary to the obligation under Article 34 but autonomous in character.¹³¹ Both provisions work together to guarantee the efficient conduct of the judicial proceedings and they relate to matters of procedure rather than to the merits of the applicants' grievances under the substantive provisions of the Convention or its Protocols.¹³² It has been customary for the Court to examine the Government's compliance with their procedural obligations under Article 38 of the Convention at the outset, especially if negative inferences are to be drawn from the Government's failure to submit the requested evidence.¹³³ The Court may establish a failure by

¹²⁴ *Georgia v. Russia (I)*, quoted above, § 138; *Georgia v. Russia (II)* (merits) [GC] no. 38263/08, § 59, 21 January 2021.

¹²⁵ *Georgia v. Russia (II)* (merits) no. 38263/08, § 74, 21 January 2021.

¹²⁶ *Ukraine v. Russia (dec)* [GC], nos. 20958/14 and 38334/18 § 257, 16 December 2020.

¹²⁷ *Georgia v. Russia (I)*, quoted above, §§ 83-84. *Georgia v. Russia (II)* (merits) no. 38263/08, §§ 63-66, 21 January 2021.

¹²⁸ See Philip Leach, Costas Paraskeva, Gordana Uzelac, International Human Rights and Fact-Finding; An Analysis of the fact-finding missions conducted by the European Commission and the European Court of Human Rights, Human Rights and Social Justice, Research Institute, February 2009, pg 13.

¹²⁹ *Georgia v. Russia (I)*, quoted above, § 59; *Georgia v. Russia (II)* (merits) [GC] no. 38263/08, § 341, 21 January 2021.

¹³⁰ *Bazorkina v. Russia*, no. 69481/01, § 170, 27 July 2006; *Tahsin Acar v. Turkey* [GC], no. 26307/95, § 253, 8 April 2004; *Janowiec and Others v. Russia* [GC], nos. 55508/07 and 29520/09, § 202; *Georgia v. Russia (I)*, quoted above, § 99.

¹³¹ *Janowiec and Others v. Russia* [GC], nos. 55508/07 and 29520/09, § 209.

¹³² *Janowiec and Others v. Russia* [GC], nos. 55508/07 and 29520/09, § 209.

¹³³ *Janowiec and Others v. Russia* [GC], nos. 55508/07 and 29520/09, § 209.

the respondent Government to comply with its procedural obligations even in the absence of any admissible complaint about a violation of a substantive Convention right. Furthermore, it is not required that the Government's alleged interference should have actually restricted, or had any appreciable impact on, the exercise of the right of individual petition. The Contracting Party's procedural obligations under Articles 34 and 38 of the Convention must be observed irrespective of the eventual outcome of the proceedings and in such a manner as to avoid any actual or potential chilling effect on the applicants or their representatives.¹³⁴

85. The obligation to furnish the evidence requested by the Court is binding on the respondent Government from the moment such a request has been formulated, whether it is on initial communication of an application to the Government or at a subsequent stage in the proceedings.¹³⁵ It is a fundamental requirement that the requested material be submitted in its entirety, if the Court has so directed, and that any missing elements be properly accounted for.¹³⁶ In addition, any material requested must be produced promptly and, in any event, within the time-limit fixed by the Court, because a substantial and unexplained delay may lead the Court to find the respondent State's explanations unconvincing.¹³⁷

86. The notion of furnishing the necessary facilities under Article 38 includes *inter alia* submitting documentary evidence to the Court, identifying, locating and ensuring the attendance of witnesses at hearings and replying to questions asked by the Court. Not every failure to co-operate 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.¹³⁸

87. When the Court considers that the respondent Government has exclusive access to information capable of corroborating or refuting the applicant Government's allegations, any lack of cooperation by the Government without a satisfactory explanation may give rise to the drawing of inferences as to the well-foundedness of the applicant Government's allegations¹³⁹ and may also reflect negatively on the level of compliance by a respondent State with its obligations under Article 38 of the Convention.¹⁴⁰ When applicants are unable to obtain certain documents to submit evidence to the Court in support of their allegations and where it is clear that such documents can only be obtained with the assistance of the national authorities, the Court may request the representatives of the respondent State to obtain them from the national authorities and make them available to the Court. Furthermore, in the light of the information already in its possession, the Court itself may also identify and request further documents from the respondent Government. The Court has found that a respondent Government has not complied with the requirements of Article 38 where it failed to submit the requested documents, or if they are not submitted within the requested time and did not provide an explanation for the refusal to submit documents to the Court¹⁴¹ or where it submitted an incomplete or distorted copy while refusing to produce the original document for the Court's inspection.¹⁴²

¹³⁴ [Janowiec and Others v. Russia](#) [GC], quoted above, § 209.

¹³⁵ [Janowiec and Others v. Russia](#) [GC], quoted above § 203; [Enukidze and Girgvliani v. Georgia](#), no. 25091/07, § 295, 26 April 2011; [Bekirski v. Bulgaria](#), no. 71420/01, §§ 111-13, 2 September 2010.

¹³⁶ [Janowiec and Others v. Russia](#) [GC], quoted above, § 203.

¹³⁷ [Janowiec and Others v. Russia](#) [GC], quoted above, § 203.

¹³⁸ See for example case of [Musayev and others v. Russia](#), nos. 57941/00, 58699/00 and 60403/00, §183, 26 July 2007.

¹³⁹ [Georgia v. Russia \(I\)](#), quoted above § 104

¹⁴⁰ [Timurtas v. Turkey](#), no. 23531/94, §§ 66 and 70. [Tahsin Acar v. Turkey](#) [GC], *ibid.*, § 254; [Imakayeva v. Russia](#), no. 7615/02, § 200, 9 November 2006; [Janowiec and Others v. Russia](#) [GC], nos. 55508/07-29520/09, § 202, 21 October 2013; [Georgia v. Russia \(I\)](#), quoted above, § 99. [Georgia v. Russia \(II\)](#) (merits) [GC] no. 38263/08, § 341, 21 January 2021.

¹⁴¹ [Maslova and Nalbandov v. Russia](#), no. 839/02, §§ 128-29, 24 January 2008

¹⁴² [Trubnikov v. Russia](#), §§ 50-57, 5 July 2005.

88. If the respondent Government advances confidentiality or security considerations as the reason for its failure to produce the evidence requested, the Court has to convince itself that reasonable and solid grounds exist for treating the documents in question as secret or confidential.¹⁴³ The Court may also propose practical arrangements or consider such proposed arrangements by the Parties to submit non-confidential extracts when the respondent Government refuses to submit documents requested by the Court on the grounds that the documents in question constituted a State secret.¹⁴⁴

89. Where documents are classified as state secret the respondent Government may not be able to base itself on provisions of domestic law to justify its refusal to comply with the Court's request for the production of the evidence but should instead provide an explanation for the secrecy of the information.¹⁴⁵ The Court may review the nature of the information that is classified as secret taking into account whether the document was known to anyone outside the secret intelligence and the highest State officials.¹⁴⁶ In one particular case the Court was not convinced that the domestic law did not lay down a procedure for communicating classified information to an international organisation. The Court pointed out that, if there existed legitimate national security concerns, the Government should have edited out the sensitive passages or supplied a summary of the relevant factual grounds. The supposedly highly sensitive nature of information was cast into doubt once it became clear that lay persons, such as counsel for the claimant in a civil case, could take cognisance of the document in question.¹⁴⁷ Rule 33 of the Rules of Court regulates issues regarding public access and restrictions to documents submitted by the Parties to the Registry of the Court.¹⁴⁸

2. Standard of proof

90. At the **stage of admissibility**, the Court holds that the appropriate standard of proof of an inter-State application regarding allegations of an administrative practice of human rights violations is substantiated *prima facie* evidence.¹⁴⁹ This threshold needs to be satisfied in order to render the exhaustion of remedies requirement inapplicable to such inter-State complaints. Only if both component elements of the alleged “administrative practice” (the “repetition of acts” and “official tolerance”) are sufficiently substantiated by *prima facie* evidence, the exhaustion rule under Article 35 § 1 of the Convention does not apply. In the absence of such evidence, it will not be necessary for the Court to go on to consider whether there are other grounds, such as the ineffectiveness of domestic remedies, which exempt the applicant Government from the exhaustion requirement. In that event, as noted above, the complaint of an administrative practice cannot on substantive grounds be viewed as admissible and warranting the Court's

¹⁴³ [Janowiec and Others v. Russia](#), quoted above, § 205

¹⁴⁴ [Georgia v. Russia \(II\)](#) (merits) [GC] no. 38263/08, § 345, 21 January 2021.

¹⁴⁵ [Davydov and Others v. Ukraine](#), nos. 17674/02 and 39081/02, § 170, 1 July 2010; [Nolan and K. v. Russia](#), no. 2512/04, § 56, 12 February 2009; and [Janowiec and Others](#), quoted above, § 206

¹⁴⁶ [Nolan and K. v. Russia](#), no. 2512/04, § 56, 12 February 2009 and [Janowiec and Others](#), quoted above, § 206

¹⁴⁷ *Ibid.* See also [Janowiec and Others v. Russia](#), quoted above, § 207.

¹⁴⁸ Rule 33 states that “1. All documents deposited with the Registry by the parties or by any third party in connection with an application, except those deposited within the framework of friendly-settlement negotiations as provided for in Rule 62, shall be accessible to the public in accordance with arrangements determined by the Registrar, unless the President of the Chamber, for the reasons set out in paragraph 2 of this Rule, decides otherwise, either of his or her own motion or at the request of a party or any other person concerned. 2. Public access to a document or to any part of it may be restricted in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties or of any person concerned so require, or to the extent strictly necessary in the opinion of the President of the Chamber in special circumstances where publicity would prejudice the interests of justice. 3. Any request for confidentiality made under paragraph 1 of this Rule must include reasons and specify whether it is requested that all or part of the documents be inaccessible to the public.”

¹⁴⁹ [Georgia v. Russia \(I\)](#) (dec.), no. 13255/07, § 41, 30 June 2009 and [Georgia v. Russia \(II\)](#) (dec.), 38263/08, § 86, 13 December 2011. [Ukraine v. Russia](#) (dec) [GC], nos. 20958/14 and 38334/18 § 263, 16 December 2020.

examination on the merits.¹⁵⁰ Any conclusion by the Court as to the admissibility of the complaint of an administrative practice is without prejudice to the question whether the existence of an administrative practice is at a later stage established on the merits “beyond reasonable doubt”, and if so, whether in this respect any responsibility under the Convention could be attributed to the respondent State. These are questions which can only be determined after an examination of the merits.¹⁵¹

91. Where the Court examined, at the admissibility stage, the question whether the matters complained of by the applicant Government (specific allegations of an administrative practice adopted by the respondent State in violation of the Convention) fall within the jurisdiction of the respondent Government, the Court has found that the issue of the respondent State’s jurisdiction under Article 1 of the Convention must be examined to the “beyond reasonable doubt” standard of proof.¹⁵² It is understood that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact.¹⁵³ The Court’s decision on this preliminary issue at this stage of the proceedings is without prejudice to the issues of attribution and responsibility of the respondent State under the Convention for the acts complained of, which fall to be examined at the merits phase of the proceedings.¹⁵⁴ The Court’s conclusion at the admissibility stage that the alleged victims of the administrative practice complained by the applicant fall within the jurisdiction of the respondent State and that the Court, therefore, has competence to examine the application is without prejudice to the question of whether the respondent State is responsible under the Convention for the acts which form the basis of the applicant Government’s complaints which belongs to the merits phase of the Court’s procedure.¹⁵⁵

92. The standard of proof is not explicitly addressed in the provisions of the Convention or in the Rules of Court. In its first inter-State cases, the Court has adopted the standard of proof “**beyond reasonable doubt**” which has become part of its established case-law.¹⁵⁶ This standard is not to be equated with the same standard applied in criminal proceedings¹⁵⁷ but it has a rather independent meaning assigned to it by the Court which reflects the Court’s core role that is not to rule on guilt under criminal law or on civil liability but on the Contracting States’ responsibility under the Convention.¹⁵⁸ The specificity of the Court’s task under Article 19 of the Convention – to ensure the observance by the High Contracting Parties of their engagements to secure the fundamental rights enshrined in the Convention – conditions its approach to the issues of evidence and proof.¹⁵⁹

3. Burden of proof

93. The Court holds that, as a **general principle of law**, the initial burden of proof in relation to an allegation is borne by the party which makes the allegation in question (*affirmanti incumbit*

¹⁵⁰ *Ukraine v. Russia* (dec) [GC], nos. 20958/14 and 38334/18, § 363, 16 December 2020.

¹⁵¹ *Ukraine v. Russia* (dec) [GC], nos. 20958/14 and 38334/18, § 368, 16 December 2020.

¹⁵² *Ukraine v. Russia* (dec) [GC], nos. 20958/14 and 38334/18, § 265, 16 December 2020.

¹⁵³ *Ukraine v. Russia* (dec) [GC], nos. 20958/14 and 38334/18, § 265, 16 December 2020.

¹⁵⁴ *Ukraine v. Russia* (dec) [GC], nos. 20958/14 and 38334/18, § 266, 16 December 2020.

¹⁵⁵ *Ukraine v. Russia* (dec) [GC], nos. 20958/14 and 38334/18, § 352, 16 December 2020; *Georgia v. Russia* (II) (merits) no. 38263/08, § 162, 21 January 2021.

¹⁵⁶ *Ireland v. the United Kingdom*, 18 January 1978, § 161, : *Cyprus v. Turkey* [GC], no. 25781/94, § 113; *Georgia v. Russia* (I), quoted above, § 94; *Georgia v. Russia* (II) (merits) [GC] no. 38263/08, § 59, 21 January 2021.

¹⁵⁷ See in detail: Seibert-Fohr, Human Rights Law Journal, 38 (2018) 8 (12).

¹⁵⁸ *Georgia v. Russia* (I), quoted above, § 94; *Georgia v. Russia* (II) (merits) [GC] no. 38263/08, § 59, 21 January 2021.

¹⁵⁹ *Nachova and Others v. Bulgaria*, nos. 43577/98 and 43579/98, § 147, 6 July 2005, ECHR 2005-VII; *Georgia v. Russia* (I), quoted above, § 94. *Georgia v. Russia* (II) (merits) no. 38263/08, § 59, 21 January 2021.

probatio).¹⁶⁰ The Court has, however, recognised that a strict application of this principle is not always appropriate.¹⁶¹ Its approach to the distribution of the burden of proof takes into account circumstances in which the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities of the respondent State and only the respondent Government has access to information capable of corroborating or refuting the applicant's allegations.¹⁶² The burden of proof will only shift in this way where there are already concordant inferences supporting the applicant's allegations.¹⁶³ 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.¹⁶⁴ Reports or statements by international observers, non-governmental organisations or the media, or the decisions of other national or international courts, are often taken into account to, in particular, shed light on the facts, or to corroborate findings made by the Court.¹⁶⁵ In the context of inter-State cases, with specific regard to the issue of establishing the existence of an administrative practice, the Court does not rely on the concept that the burden of proof is borne by one or other of the two Governments concerned, but it rather studies all the material before it, from whatever source it originates.¹⁶⁶ In addition, the conduct of the parties in relation to the Court's efforts to obtain evidence may constitute an element to be taken into account.¹⁶⁷

94. In the context of inter-State applications, the Court has held that, ***in the area of the exhaustion of domestic remedies***, there is a distribution of the burden of proof¹⁶⁸ with Article 35 § 1 providing for such distribution.¹⁶⁹ It is incumbent on the respondent Government claiming non-exhaustion to satisfy the Court that the remedies were effective and available in theory and in practice at the relevant time¹⁷⁰, that is to say, that they were accessible, capable of providing redress in respect of the aggrieved individuals' complaints and offered reasonable prospects of success.¹⁷¹ Once this burden of proof has been discharged, however, it falls to the applicant – in this case to the applicant Government – to establish that the remedies or the aggregate remedies advanced by the respondent Government were in fact exhausted or were for some reason inadequate and ineffective in the particular circumstances of the case,¹⁷² or that there existed special circumstances absolving the persons concerned from the requirement of exhausting that remedy.¹⁷³ One such reason may be constituted by the national authorities remaining totally passive in the face of serious allegations of misconduct or infliction of harm by State agents, for example where they have failed to undertake investigations or offer assistance. In such circumstances, it can be said that the burden of proof shifts once again, so

¹⁶⁰ *Ukraine v. Russia (dec) [GC]*, nos. 20958/14 and 38334/18, § 255, 16 December 2020.

¹⁶¹ *Ukraine v. Russia (dec) [GC]*, nos. 20958/14 and 38334/18, § 256, 16 December 2020.

¹⁶² *Ukraine v. Russia (dec) [GC]*, nos. 20958/14 and 38334/18, § 256, 16 December 2020.

¹⁶³ *Ukraine v. Russia (dec) [GC]*, nos. 20958/14 and 38334/18, § 256, 16 December 2020.

¹⁶⁴ *Georgia v. Russia (I)*, quoted above, § 94; *Ukraine v. Russia (dec) [GC]*, nos. 20958/14 and 38334/18, § 257, 16 December 2020.

¹⁶⁵ *Ukraine v. Russia (dec)*, nos. 20958/14 and 38334/18 § 257, 16 December 2020.

¹⁶⁶ *Ireland v. the United Kingdom*, 18 January 1978, § 161; *Cyprus v. Turkey [GC]*, no. 25781/94, § 113; *Georgia v. Russia (I)*, quoted above, § 95; *Georgia v. Russia (II) (merits)* no. 38263/08, § 59, 21 January 2021.

¹⁶⁷ *Ireland v. United Kingdom*, no. 5310/71, § 161, 18 January 1978; *Georgia v. Russia (I)*, quoted above, § 95; *Georgia v. Russia (II) (merits)* no. 38263/08, § 59, 21 January 2021.

¹⁶⁸ *Cyprus v. Turkey [GC]*, no. 25781/94, § 116.

¹⁶⁹ *Georgia v. Russia (I) (dec.)*, no. 13255/07, § 48, 30 June 2009; *Georgia v. Russia (II) (dec.)*, no. 38263/08, § 91.

¹⁷⁰ *Georgia v. Russia (I) (dec.)*, no. 13255/07, § 48, 30 June 2009; *Georgia v. Russia (II) (dec.)*, no. 38263/08, § 91.

¹⁷¹ *Cyprus v. Turkey [GC]*, no. 25781/94, § 116.

¹⁷² *Georgia v. Russia (I) (dec.)*, no. 13255/07, § 48, 30 June 2009; *Georgia v. Russia (II) (dec.)*, no. 38263/08, § 91.

¹⁷³ *Cyprus v. Turkey [GC]*, no. 25781/94, § 116.

that it becomes incumbent on the respondent Government to show what the authorities have done in response to the scale and seriousness of the matters complained of.¹⁷⁴

95. In certain ***specific circumstances*** the Court has accepted to shift the burden of proof from the applicant to the respondent Government. In the judgment on just satisfaction in the case of *Georgia v. Russia*, the Court held that “[h]aving regard to the general numerical framework on which the Court relied in its principal judgment to conclude that there had been violations of the Convention [...], it proceeds on the assumption that the people named in the applicant Government’s list can be considered victims of violations of the Convention for which the respondent Government have been held responsible. Having regard to the fact that the findings of a violation of Articles 3 and 5 § 1 of the Convention and of Article 4 of Protocol No. 4 concern individual victims and are based on events which occurred on the territory of the respondent Government, the Court considers that in the particular circumstances of the present case the burden of proof is on the respondent Government to convincingly show that the individuals appearing in the applicant Government’s list do not have victim status. Accordingly, where the preliminary examination has enabled the Court to satisfactorily conclude that a person has been the victim of one or more violations of the Convention, and the respondent Government have failed to show that the person in question did not have victim status, that person will be included in the final internal list for the purposes of determining the total sum to be awarded in just satisfaction.”¹⁷⁵

4. *The fact-finding function of the Court*

4.1. *Investigative powers*

96. As stated above, the Court generally establishes the facts based on documentary evidence before it which includes among others reports from international governmental and non-governmental organisations (see paragraph 84 above).¹⁷⁶ However, the Court may have to act 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, therefore, decide to resort to fact-finding procedures such as hearings with witnesses or on-site investigations. It is reported that, among the key factors for such a decision are the failure of national authorities to fully establish the relevant facts of a case, systematic failures in the functioning of domestic courts, the potential of the fact-finding hearing to lead to the establishment of a violation of the Convention, and in the case of an on-site visit the amount of time which has lapsed since the events in question took place.¹⁷⁷

97. The decision as to whether to resort to investigation measures is at the discretion of the Court and may be taken on its own motion or upon the request of one of the parties. A Government’s effective denial of cooperation in a case will be a considerable disincentive for the Court to hold a fact-finding mission.¹⁷⁸ A well-justified request for a fact-finding hearing submitted by a party may have considerable influence on the Court’s decision-making process and a list of witnesses (including information about the relevance of their expected testimony) is

¹⁷⁴ *Cyprus v. Turkey [GC]*, no. 25781/94, § 116.

¹⁷⁵ *Georgia v. Russia (I) (just satisfaction)*, no. 13255/07, § 69, 31 January 2019

¹⁷⁶ *Georgia v. Russia (I)*, quoted above, §§ 83-84. *Georgia v. Russia (II) (merits)* no. 38263/08, §§ 63-66, 21 January 2021.

¹⁷⁷ See Philip Leach, Costas Paraskeva, Gordana Uzelac, *International Human Rights and Fact-Finding; An Analysis of the fact-finding missions conducted by the European Commission and the European Court of Human Rights*, Human Rights and Social Justice, Research Institute, February 2009, pg 45.

¹⁷⁸ *Ibid.*

an essential part of a well-argued request for a fact-finding mission.¹⁷⁹ The Convention does not explicitly address the issue of the timing of fact-finding activities. However, the Rules of Court specify that fact-finding takes place after a case has been declared admissible, or exceptionally, before the decision on admissibility.¹⁸⁰

98. The investigation powers of the Court are based on Article 38 of the Convention and are exercised pursuant to the Rules of Court (Annex Rules A1 to A8) which contain detailed provisions concerning investigative measures and the obligations of the parties in this respect. After a case has been declared admissible or, exceptionally, before the decision on admissibility, the Chamber may appoint one or more of its members or of the other judges of the Court, as its delegate or delegates, to conduct an inquiry, carry out an on-site investigation or take evidence in some other manner. The Chamber may also appoint any person or institution of its choice to assist the delegation in such manner as it sees fit.¹⁸¹

4.2. Hearings with witnesses

99. As mentioned above (see paragraph 83) the Court may hold a hearing with witness and experts not only with the purpose of establishing the facts but also with the purpose of testing the veracity of the evidence submitted by the parties and the evidence set out in the reports by international organisations concerning certain aspects of the application.¹⁸² Obtaining the necessary evidence by witness hearings is one of the challenges that the Court often faces in relation to inter-State applications and related individual applications.

100. Witnesses are summoned by the Court's Registrar,¹⁸³ while the Contracting State in whose territory the witness resides is responsible for serving any summons sent to it by the Court.¹⁸⁴ Each Party can propose witnesses to be heard at a 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.¹⁸⁵

101. 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.¹⁸⁶

102. Until now, generally speaking, there have 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.¹⁸⁷ This approach has advantages for the Court in respect of the availability of legal staff, recording equipment and

¹⁷⁹ Ibid.

¹⁸⁰ Annex to the [Rules of Court](#), Rule A1 (3)

¹⁸¹ Rule A1 § 3 of the Annex to the [Rules of Court](#).

¹⁸² *Georgia v. Russia* (II) (merits) no. 38263/08, § 74, 21 January 2021.

¹⁸³ Ibid., Rule A5 § 1; the same rule applies to experts and other persons as well.

¹⁸⁴ See Rule 37 § 2 of the [Rules of Court](#) and Rule A5 § 4 of the Annex.

¹⁸⁵ Ibid., Rule A4 § 2 of the Annex.

¹⁸⁶ *Cyprus v. Turkey* [GC], quoted above, §§ 110 and 339.

¹⁸⁷ In the case of *Georgia v. Russia* (II) the Court heard a total of 33 witnesses; 15 had been called by the applicant Government, 12 by the respondent Government and 6 directly by the Court. *Georgia v. Russia* (II) (merits) no. 38263/08, § 74, 21 January 2021.

interpreters. It must also be noted that where a witness is summoned at the request of or on behalf of a Contracting Party, the costs of their appearance shall be borne by that Party unless the Chamber decides otherwise.¹⁸⁸ 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.

103. Member States are obliged to ensure freedom of movement and adequate security for, among others, witnesses and experts.¹⁸⁹ Issues related to the protection of witnesses as well as States' failure to cooperate with the Court in this respect have been identified as challenging aspects of the Court's fact-finding function.¹⁹⁰ 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.¹⁹¹ 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.¹⁹²

104. Witnesses' failure to appear before the Court has been considered as one of the most significant problems encountered during fact-finding hearings. 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 (as regards the States' obligation in this respect see Rule A5 § 4 of the Annex to the Rules of Court).¹⁹³ A study of the fact-finding function of the Court which was based on interviews with relevant members of the Registry suggested that "there are clear distinctions between the reasons for non-attendance of applicants' witnesses and state witnesses. The reasons why applicants' witnesses fail to appear are usually related to issues of fear and pressure, whereas the explanations for the non-attendance of State witnesses have been more diverse".¹⁹⁴ The Court on the other hand has no means to compel witnesses to attend its hearings.

105. Nevertheless, the Court draws its own conclusions when witnesses, notably those who are police officers or public prosecutors, fail to appear. The Court considers that the State parties' commitment under Article 38 to furnish all the necessary facilities for the effective conduct of the Court's investigations includes identifying, locating and ensuring the attendance of witnesses.¹⁹⁵ Consequently, the Court has developed the practice of requiring the respondent Governments to provide reasons for non-attendance of witnesses that it has requested. In this

¹⁸⁸ See Rule A5 § 6 of the Annex to the [Rules of Court](#).

¹⁸⁹ *Ibid.*, Rule A2 § 2.

¹⁹⁰ See comments by Cyprus contained in document [CDDH\(2019\)12](#); 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.

¹⁹¹ Rule A7 § 4 of the Annex to the [Rules of Court](#),

¹⁹² See [Commission's report](#) in the case of *Cyprus v. Turkey*, §§ 33-47 and the judgment in the same case, §§ 105-118.

¹⁹³ [Georgia v. Russia \(I\)](#), quoted above, §§ 90-92.

¹⁹⁴ See Philip Leach, Costas Paraskeva, Gordana Uzelac, International Human Rights and Fact-Finding; An Analysis of the fact-finding missions conducted by the European Commission and the European Court of Human Rights, Human Rights and Social Justice, Research Institute, February 2009, pg 82.

¹⁹⁵ [Taş v. Turkey](#), quoted above, § 54.

regard the Court may draw conclusions as to whether the respondent State has met its obligations under Article 38 of the Convention.¹⁹⁶ In addition, the Court may draw inferences from a respondent Government's conduct in respect of not advancing any, or any convincing, explanation for its delays and omissions in response to Court's requests for witnesses.¹⁹⁷ This practice is reflected in the Rules of Court which provide that where 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.¹⁹⁸

106. The Rules of Court do not explicitly provide for hearing of witnesses through remote participation or information technology means. This method could indeed present cost-efficiency advantages. The desirability and feasibility of organising witness hearings in this way is worthy of further reflection.

4.3. On-the-spot investigations

107. The Convention institutions carried out on-the-spot investigations in respect of inter-State applications in limited cases, which all date back to the pre-Protocol 11 period of time. For example, in the case of *Denmark, Norway, Sweden and the Netherlands v. Greece*,¹⁹⁹ 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. 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.²⁰⁰ Since the entry into force of Protocol 11 the Court has not carried out fact-finding missions but rather conducted hearings of witnesses which took place in Strasbourg (*Georgia v. Russia (I)* and *(II)*). The Court's tendency not to carry out fact-finding missions is reportedly primarily related to cost and time factors; the increase in the Court's caseload and length of proceedings have seemingly a bearing on the practicability of carrying out fact-finding hearings in all the cases in which they would otherwise be justified.²⁰¹

108. On-the-spot investigations have a crucial role in some cases, especially where the facts have not been established by the domestic courts. However, they are 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 is a potential issue.

109. The effectiveness of on-the-spot investigations depends to a large extent on the full cooperation of the respondent State. Some of the difficulties which have emerged in the context of on-the-spot investigations relate to the reluctance, and at times the unwillingness of the respondent State's authorities to ensure the Court's delegation's access to the territory²⁰² or to

¹⁹⁶ Ibid. The Court found that the respondent State fell short of its obligations to furnish all the necessary facilities under Article 38 of the Convention due to the late submission of the information which had been requested repeatedly by the Commission which in turn deprived the Commission of the opportunity to summon witnesses with potentially significant evidence.

¹⁹⁷ *Orhan v. Turkey*, no. 25656/94, § 274, 18 June 2002.

¹⁹⁸ Rule 44 C inserted by the Court on 13 December 2004.

¹⁹⁹ *Denmark, Norway, Sweden and the Netherlands v. Greece*, quoted above.

²⁰⁰ *Cyprus v. Turkey*, nos. 6780/74 and 6950/75, 26.5.75 *et seq.*, Commission Report of 10.7.76

²⁰¹ See Philip Leach, Costas Paraskeva, Gordana Uzelac, International Human Rights and Fact-Finding; An Analysis of the fact-finding missions conducted by the European Commission and the European Court of Human Rights, Human Rights and Social Justice, Research Institute, February 2009, page 45.

²⁰² *Cyprus v. Turkey*, nos. 6780/74 and 6950/75, 26.5.75 *et seq.*, Commission Report of 10.7.76;

premises relevant to the case.²⁰³ Pursuant to Rule A1 (1) the Court may decide on its own motion to carry out a fact-finding mission and does not, therefore, need to obtain the consent of the State concerned. The effectiveness of fact-finding may, however, be jeopardised in practice if the respondent State is not willing to cooperate. On occasion the Court has had to abandon a planned fact-finding mission where it has been unable to persuade the respondent State to adopt a more cooperative attitude. In such cases, the Court has instead proceeded with preparation of the judgment on the basis of the evidence before it.²⁰⁴

110. Under the authority of the DH-SYSC, the DH-SYSC-IV will continue to engage with the question whether it is feasible and/or desirable that fact-finding missions are organised by the Court in inter-State cases and the application of States Parties obligations under Article 38 in this context.

VII. JUST SATISFACTION IN INTER-STATE CASES

111. Article 41 of the Convention does not explicitly refer to proceedings under Article 33 or Article 34. According to the jurisprudence of the Court, Article 41 applies to both inter-State and individual applications. In the case of *Cyprus v. Turkey*²⁰⁵ 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. Bearing in mind the specific nature of Article 41 of the Convention as *lex specialis* in relation to the general rules and principles of international law, the Court drew on the principles of public international law relating to state liability, the *travaux préparatoires* of the Convention as well as the International Law Commission Draft Articles on Diplomatic Protection.²⁰⁶ The Court has noted, “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.”²⁰⁷

112. The Rules of Court reflect the Court’s jurisprudence on the applicability of Article 41 to inter-State cases. Accordingly, 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, *inter alia*, 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.²⁰⁸ The claims of the applicant for just satisfaction, including itemized particulars of all claims, together with any relevant supporting documents, within the time-limit fixed for the submission of the applicant’s observations on the merits, are transmitted to the respondent Contracting Party for comment.²⁰⁹

113. The granting of just satisfaction to an applicant State 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

²⁰³ [Commission Report](#) in the case of *Denmark, Norway, Sweden and the Netherlands v Greece*, no.3321/67, no.3322/67, no. 3323/67, no.3344/67, 5 November 1969.

²⁰⁴ [Shamayev v. Georgia and Russia](#), no. 36378/02, §§ 26-49, 12 April 2005.

²⁰⁵ [Cyprus v. Turkey \(just satisfaction\) \[GC\]](#), no. 25781/94, 12 May 2014.

²⁰⁶ *Ibid.*, §§ 40-46.

²⁰⁷ *Ibid.*, §§ 43-45, 12 May 2014. See also [Georgia v. Russia \(I\) \(just satisfaction\)](#), no. 13255/07, § 22, 31 January 2019.

²⁰⁸ Rule 46 (e).

²⁰⁹ Rule 60 as amended by the Court on 13 December 2004.

to the Court.²¹⁰ The Court acknowledges that an application brought before it under Article 33 of the Convention may contain different types of complaints 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.²¹¹

114. The application of Article 41 of the Convention requires identification of the individual victims concerned.²¹² 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.²¹³ In the case of *Georgia v. Russia (I)*, in which the finding of the existence of an administrative practice contrary to the Convention was based on individual administrative decisions expelling Georgian nationals from the Russian Federation during the autumn of 2006, the Court considered that the parties must be in a position to identify the Georgian nationals concerned and to furnish it with the relevant information.²¹⁴ In accordance with Rule 60 § 2 of the Rules of Court, it invited the applicant Government to submit a list of its nationals who had been victims of the “coordinated policy of arresting, detaining and expelling Georgian nationals” put in place in the Russian Federation in the autumn of 2006.²¹⁵ It also asked the respondent Government to submit all relevant information and documents (in particular expulsion orders and court decisions) concerning Georgian nationals who had been victims of that policy during the period in question.²¹⁶ In this case the respondent Government asked the Court to identify each of the individual victims of the violations it found in adversarial proceedings, on the ground that the task of establishing the facts fell within the exclusive power of the Court. In this respect the Court noted that the parties had exchanged observations on the question of just satisfaction in compliance with the adversarial principle. Moreover, the Court observed that in cases concerning systematic violations of the Convention it is not a court of first instance; it does not have the capacity, nor is it appropriate to its function as an international court to adjudicate on large numbers of cases which require the finding of specific facts or the calculation of monetary compensation – both of which should as a matter of principle and effective practice, be the domain of domestic jurisdictions.²¹⁷ Also, in the case of *Georgia v. Russia (I)* the Court considered that, *inter alia*, a number of persons included in the list of victims submitted by the applicant Government could not be regarded as such or could not be awarded just satisfaction in that procedure because they had lodged individual applications before the Court.²¹⁸

²¹⁰ [Cyprus v. Turkey \(just satisfaction\) \[GC\]](#), no. 25781/94, §43, 12 May 2014; *Georgia v. Russia (I)* (just satisfaction) [GC], no. 13255/07, § 20, 29 January 2019; *Georgia v. Russia (II)* (merits) no. 38263/08, § 350, 21 January 2021.

²¹¹ *Ibid.*, §§ 43. See also [Georgia v. Russia \(I\) \(just satisfaction\)](#), no. 13255/07, § 22, 31 January 2019.

²¹² [Georgia v. Russia \(I\) \(just satisfaction\)](#), no. 13255/07, § 55, 31 January 2019.

²¹³ *Ibid.*, § 28.

²¹⁴ [Georgia v. Russia \(I\) \(just satisfaction\)](#), no. 13255/07, §§ 56, 57, 31 January 2019.

²¹⁵ In the principal judgment the Court held that in the autumn of 2006 a “coordinated policy of arresting, detaining and expelling Georgian nationals” had been put in place in the Russian Federation “which amounted to an administrative practice for the purposes of Convention case-law”, see [Georgia v. Russia \(I\)](#), cited above, § 159.

²¹⁶ [Georgia v. Russia \(I\) \(just satisfaction\)](#), quoted above § 58.

²¹⁷ *Ibid.*, §§63-65.

²¹⁸ [Georgia v. Russia \(I\) \(just satisfaction\)](#), quoted above § 70, footnote 3: “23 applicants lodged 10 individual applications related to the case of *Georgia v. Russia (I)* before the Court, which ruled as follows:

- In a judgment of 3 May 2016 the Court struck out of the list the application lodged by Mr Shakhi Kvaratskhelia and Mr Shakhi Kvaratskhelia (no. 14985/07), the father and son respectively of Mrs Manana Jabelia, following a friendly settlement reached between the applicants and the respondent Government;
- In a judgment of 20 December 2016 the Court held that there had been a violation of Articles 2 and 3 of the Convention, and of Article 13 taken in conjunction with Article 3, and awarded 40,000 euros in just satisfaction concerning the application lodged by Mrs Nino Dzidzava (no. 16363/07), wife of Mr Tengiz Togonidze.
- With regard to the other applications, the Court grouped them together and delivered a judgment on the merits (*Berdzenishvili and Others*, no. 14594/07) on 20 December 2016. In that judgment it held that there had been no

115. The Court has observed that the Article 41 procedure is normally very complex; it is important to ask the applicant Government from the outset to submit lists of clearly identifiable individuals.²¹⁹ The DH-SYSC notes that further discussion is necessary as to whether such lists should be submitted at the outset of the just satisfaction procedure or at the time when an inter-State application is lodged.

116. The Court reiterates that the States' duty to cooperate with the Court, which is set forth in Article 38 of the Convention and Rule 44A of the Rules of Court, is particularly important for the proper administration of justice where the Court awards just satisfaction under Article 41 of the Convention in inter-State cases. It applies to both Parties: the applicant Government, who, in accordance with Rule 60 of the Rules of Court, must substantiate their claims, and also the respondent Government, in respect of whom the existence of an administrative practice in breach of the Convention has been found in the principal judgment.²²⁰ 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, 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 satisfaction²²¹ in order to avoid long intervals of time between the judgment on the merits and the judgment on just satisfaction.²²² In the recent judgment on the merits in the case of *Georgia v. Russia (II)*, the Court fixed a time-limit of twelve months for the parties to submit in writing their observations on just satisfaction.²²³

117. In respect of criteria to be applied for an award of just satisfaction for non-pecuniary damage the Court has consistently held that there is no express provision for awards in the Convention.²²⁴ The Court, however, has developed gradually a number of principles regarding the award of non-pecuniary damage. Situations where the applicant has suffered evident trauma, whether physical or psychological, pain and suffering, distress, anxiety, frustration, feelings of injustice or humiliation, prolonged uncertainty, disruption to life, or real loss of opportunity can be distinguished from those situations where the public vindication of the wrong suffered by the applicant, in a judgment binding on the Contracting State, is an appropriate form of redress in itself. In some situations, where a law, procedure or practice has been found to fall short of Convention standards this is enough to put matters right. In other situations, however, the impact of the violation may be regarded as being of a nature and degree as to have impinged so significantly on the moral well-being of the applicant as to require something further. Such elements do not lend themselves to a process of calculation or precise quantification. Nor is it the Court's role to function akin to a domestic tort mechanism court in

violation of the Articles of the Convention relied on by Mrs Nato Shavshishvili on the ground that her complaints had not been sufficiently substantiated. With regard to the applications in respect of which the Court found a violation of the Convention, it reserved the question of the application of Article 41 pending the adoption of the present just satisfaction judgment." In the judgment on just satisfaction in *Berdzenishvili and Others* the Court clarified "that for the calculation of the awarded lump-sum it had awarded in the inter-State case concerning just satisfaction (*Georgia v. Russia (I)*) it had excluded from the list of victims, *inter alia*, all individuals who had lodged individual applications against Russia concerning the application of the above-mentioned administrative practice in the autumn of 2006 (*ibid*, § 70)." See *Berdzenishvili and Others v. Russia (just satisfaction)*, § 7, nos. 14594/07 and 6 others, 26 June 2019.

²¹⁹ See document [CDDH\(2019\)22](#), § 31

²²⁰ *Georgia v. Russia (I)* (just satisfaction) [GC], no. 13255/07, § 60, 29 January 2019; *Georgia v. Russia (II)* (merits) no. 38263/08, § 351, 21 January 2021.

²²¹ See document [CDDH\(2019\)22](#), § 31

²²² It should be noted that in the case of *Cyprus v. Turkey (IV)*, Application no. 25781/94, 22.11.1994 the Judgment on the merits was issued on 10 May 2001 whereas the judgment on just satisfaction on 12 May 2014. In the case of *Georgia v. Russian Federation (I)*, Application no. 13255/07, 26.03.2007: the judgment on the merits was issued on 3 July 2014 and the judgment on just satisfaction on 31 January 2019.

²²³ *Georgia v. Russia (II)* (merits) no. 38263/08, §16 of the operative part, 21 January 2021.

²²⁴ *Cyprus v. Turkey (just satisfaction)* [GC], quoted above § 56. [Georgia v. Russia \(I\) \(just satisfaction\)](#), quoted above § 73.

apportioning fault and compensatory damages between civil parties. Its guiding principle is equity, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred. Its non-pecuniary awards serve to give recognition to the fact that non-pecuniary damage occurred as a result of a breach of a fundamental human right and reflect in the broadest of terms the severity of the damage.²²⁵

118. With regard to calculating the level of just satisfaction to be awarded, the Court has a discretion having regard to what it finds equitable. The Court reiterates in this regard that it has in the past always declined to make any awards of punitive or exemplary damages even where such claims are made by individual victims of an administrative practice.²²⁶

VIII. FRIENDLY SETTLEMENT

1. The practice of the Court and potential for further development

119. The Court may at any stage of the proceedings, pursuant to Article 39 of the Convention, place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and Protocols thereto. The Court does not automatically strike a case out of the list when a friendly settlement has been reached. It may indeed decide, pursuant to Article 37 § 1 of the Convention, to continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires. The mission of the system of the Convention is, in addition to providing individual relief to “determine issues on public policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of Convention States.”²²⁷ The Court may, however, be satisfied with the content of a friendly settlement agreement even when the respondent State explicitly does not recognise a violation of the Convention in particular when the Court considers that it has specified the nature and scope of obligations of the respondent State in previous judgments concerning similar issues.²²⁸

120. The proceedings conducted in connection with friendly settlement are confidential. If a friendly settlement is reached and the Court decides to strike the case out of its list by means of a decision, the latter will be confined to a brief statement of the facts and the solution reached. The decision is transmitted to the Committee of Ministers, which shall supervise the execution of the terms of the friendly settlement as set out in the decision. Normally in individual applications the Registrar enters into contact with the parties with a view to securing a friendly settlement once an application has been declared admissible. The friendly-settlement negotiations shall be confidential and without prejudice to the parties’ arguments in the contentious proceedings. No written or oral communication and no offer or concession made in the framework of the attempt to secure a friendly settlement may be referred to or relied on in the contentious proceedings.²²⁹

²²⁵ [Georgia v. Russia \(I\) \(just satisfaction\)](#), quoted above § 73.

²²⁶ *Ibid.* § 75.

²²⁷ [Konstantin Martin v. Russia](#), no. 30078/06, §89, §90-92, 22 March 2012. The Court has also refused to strike out cases when the applicants wish to withdraw their applications when it considered that the case raised questions of general character affecting the observance of the Convention, see for example [Tyrer v. United Kingdom](#), no. 5856/72, 25 April 1978.

²²⁸ [Quattrini v. Italy](#), no. 68189/01, 8 December 2005 (French only).

²²⁹ Rule 62 of the Rules of the Court, as amended by the Court on 17 June and 8 July 2002 and 13 November 2006.

Any breach of confidentiality from the applicant's side may lead to the case being declared inadmissible on grounds of abuse of the right of application.²³⁰

121. In 2020, 1375 individual applications were struck out of the list by a Chamber or a Committee, in a decision following a friendly settlement which represents a 19% decrease compared to 2019 (1668).²³¹

122. With particular regard to inter-State proceedings, it is worth noting that a number of these were terminated following political agreements or settlements reached by the Parties, primarily before Protocol 11. In the case of *Greece v. United Kingdom (I)*, the Sub-commission invited the Parties to examine the possibilities of a friendly settlement, pursuant to Article 28 § b) (current Article 39) of the Convention but these efforts were not successful.²³² The Commission in its report under the terms of former Article 31 § 3 of the Convention stated that following its various decisions the question of formulating specific proposals with a view to redressing any breach of the Convention does not arise in the specific case.²³³ The Commission noted that the full enjoyment of human rights in Cyprus is closely connected with the solution of the wider political problems relating to the constitutional status of the island. Once these political problems have been solved no reason is likely to subsist for not giving effect to the human rights and freedom in Cyprus. Some of the factors which the Commission had found to constitute a public emergency threatening the life of the nation under the terms of Article 15 of the Convention also seemed to be at the root of the wider political differences. The Commission concluded by expressing the firm conviction that the Committee of Ministers of the Council of Europe could make no greater contribution to restoring the full and unfettered enjoyment of human rights in Cyprus than by lending its aid in promoting a settlement of the Cyprus problem in all its aspects in accordance with the spirit of true democracy. The report was then transmitted to the Committee of Ministers, which having taken note of the final settlement of the Cyprus question that had since been achieved, resolved that no further action was called for.²³⁴

123. In the case of *Greece v. United Kingdom (II)*²³⁵ the Commission finalised its report indicating that the case did not appear to fall exactly within the terms of either former Article 30 or Article 31 of the Convention. Before the examination of the application had been completed, Greece and the United Kingdom, acting in concert, requested the Commission to allow the proceedings to be terminated because of "a fundamental change in the situation of the island through the conclusion of the Zurich and London Agreement for the final settlement of the problem of Cyprus". Having regard to the request of the Parties and especially to the importance of the political settlement reached at Zurich and London as a means of restoring to the people of Cyprus the full and perfect enjoyment of their rights and freedoms, and having regard to the information received that the provisions of the Convention are again being fully executed in Cyprus, the Commission decided to terminate the proceedings and to report this decision to the Committee of Ministers.²³⁶ The report of the Commission was made public by the Committee of Ministers in 2006.²³⁷ The Committee of Ministers having taken note of the reasons why the Commission, at the request of the Parties, had decided to terminate the proceedings without entering upon the substance of the application, having regard, in particular, to the Zurich and

²³⁰ See, for example, *Hadrabová and Others v. Czech Republic* (dec), nos. 42165/02 and 466/03, 25 September 2007 and *Miro lubovs and Others v. Latvia*, no. 798/05, 15 September 2009.

²³¹ https://www.echr.coe.int/Documents/Stats_analysis_2019_ENG.pdf

²³² *Greece v. United Kingdom*, no. 176/56, *Report of the Commission* (volume I), 26 September 1958, para. 68. After several unsuccessful attempts regarding friendly settlement it concluded it will not proceed further with its efforts in this respect.

²³³ *Ibid.*

²³⁴ *Resolution (59) 12*, 20 April 1959, adopted by the Committee of Ministers Human Rights (Application No. 176/56).

²³⁵ *Greece v. United Kingdom (II)*, no. 299/57

²³⁶ *Greece v. United Kingdom (II)*, no. 299/57, *Report of the Commission*, 8 July 1959

²³⁷ Resolution of the Committee of Ministers, *ResDH(2006)24*, 5 April 2006

London Agreements for the final settlement of the problem of Cyprus, resolved that no further action was called for.²³⁸

124. Another case was settled by the Parties, namely the application lodged by *Denmark, Norway, Sweden v. Greece (the second Greek case)*. This case concerns the criminal proceedings against 34 individuals accused of subversive activities and the subsequent trial before the extraordinary court martial, during the military dictatorship. The applicant Governments alleged violations of Articles 3 and 6 of the Convention.²³⁹ Following Greece's denunciation of the Convention and its ceasing to be a Party to the Convention on 13 June 1970 the Commission declared that it could not adequately continue its functions. The Committee of Ministers took note of the Commission's report in 1971. However, on 28 November 1974, after the restoration of democracy, Greece rejoined the Council of Europe and became again a Contracting Party. Subsequently, all Parties requested that the proceedings should be closed by the Commission. The applicant Governments presumed that all the individuals were no longer detained or imprisoned. The Commission consequently decided to accede to the Parties' concordant requests to close the proceedings and to strike out the application off its list.²⁴⁰

125. In 1982, the first friendly settlement was reached according to ex-Article 28 § b) in the case *Denmark, France, Norway, Sweden and the Netherlands v. Turkey*.²⁴¹ The applications related to the situation in Turkey between 12 September 1980 and 1 July 1982. The applicant Governments alleged violations of Articles 3 of the Convention (torture and inhuman and degrading treatment of detainees constituting a systematic practice), Articles 5 and 6 (detention and criminal proceedings under martial law) and Articles 9, 10 and 11 (restrictions on political parties, trade unions and the press). The Commission declared the application admissible in 1983.²⁴² In 1985, the Parties presented, in the light of the developments in Turkey with a view to re-establishing effective democracy and securing compliance with the Convention, their joint proposal for a settlement of the case and informed the Commission that they had reached a friendly settlement. The Commission decided to discontinue the contentious proceedings under former Article 28 b).²⁴³ It noted in particular a number of measures taken by Turkey regarding criminal prosecutions and convictions concerning cases of torture, progressive lifting of the martial law in the country and that the friendly settlement provided for further progress in relation to the matters raised in the case namely conditions and procedures of detention, further implementation of personal rights and freedoms and the issue of amnesty. Noting the willingness of the five applicant Governments, including the measures taken by Turkey with a view to reestablishing an effective democracy and securing compliance with the rights and freedoms in the Convention and having special regard to the fact that the terms of the settlement provides for further progress and continued information to the Commission. Therefore, it concluded that the settlement reached was secured, in the sense of Article 28 § b).

126. The Court has accepted the friendly settlement reached between the Parties in the inter-State case, *Denmark v. Turkey*.²⁴⁴ The applicant Government lodged an inter-State application against Turkey alleging the ill-treatment of a Danish citizen while in custody in Turkey, in contravention of Article 3 of the Convention. In 1999, the Court declared the

²³⁸ [Resolution \(59\) 32](#), 14 December 1959, adopted by the Committee of Ministers, Human Rights Application No. 229/57.

²³⁹ *Denmark, Norway, Sweden v. Greece (II)*, no. 4448/70, [Report of the Commission](#), 4 October 1976.

²⁴⁰ *Ibid.*

²⁴¹ *Denmark, France, Norway, Sweden and the Netherlands v. Turkey*, nos. 9940-44/82

²⁴² *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, nos 9940-44/82, [admissibility decision](#), 6 December 1983

²⁴³ *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, nos 9940-44/82, [report of the Commission](#), 7 December 1985 (friendly settlement)

²⁴⁴ *Denmark v. Turkey*, no. 34382/97, 5 April 2000.

application admissible. In 2000, the agents of the Danish and Turkish governments submitted formal declarations according to which they had reached a friendly settlement, under Article 39 of the Convention. The Court took note of the friendly settlement reached between the parties observing that the parties had agreed to the payment of a sum of money to the applicant Government, a statement of regret was made by the respondent Government, changes had been introduced to the Turkish legal and administrative framework in response of torture and ill-treatment and that the respondent Government had undertaken to make further improvements concerning the occurrence of incidents of torture and ill-treatment and to continue their co-operation with international human rights bodies, in particular the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.²⁴⁵

127. Some authors have argued that while the feasibility of friendly settlements as a solution to inter-State cases depends on the nature of the application and that the Court may not be able to assume a leading role in friendly-settlement negotiations, the Court can, nonetheless, assist by providing the initial impetus and creating a suitable framework for the negotiations.²⁴⁶ The most essential features of the Court's assistance would be to provide the parties with procedural stability and a balanced framework as a starting point for their negotiations. This would require a roadmap that sets out the necessary elements and a clear timetable for negotiations. Such a roadmap would need to be standardised so that it can be adapted to different situations and ease the Court's workload as much as possible. The conduct of the negotiations would fall on the State Parties themselves.²⁴⁷ In this view, the Court's roadmap could also include models for friendly settlement in individual applications relating to inter-State applications, according to which applicants would be incentivised to accept friendly settlement by being offered a slightly higher sum of money than what a violation judgment would provide. In order to make this mechanism as effective as possible, a clause would have to be included in the inter-State friendly settlement according to which the States Parties should strongly encourage the affected individuals to accept the model friendly settlement.²⁴⁸

2. Other aspects

128. Where an applicant refuses the terms of a friendly-settlement proposals pursuant to Rule 52 of the Rules of Court, the Party concerned may file with the Court a request to strike the application out of the list in accordance with Article 37 § 1 of the Convention. Such request shall be accompanied by a **unilateral declaration** under Rule 62 A of the Rules of Court, acknowledging that there has been a violation of the Convention in the applicant's case together with an undertaking to provide adequate redress and, as appropriate, to take necessary remedial measures. The submission of a unilateral declaration is public and adversarial proceedings are conducted separately from and with due respect for the confidentiality of any friendly-settlement proceedings. Exceptionally a request and accompanying declaration may be filed with the Court even in the absence of a prior attempt to reach a friendly settlement. The Court may strike an application out of its list, if it is satisfied that the declaration offers a sufficient basis for assuming that respect for human rights as defined in the Convention and the Protocols thereto does not require it to continue its examination of the application.

²⁴⁵ [Denmark v. Turkey](#), no. 34382/97, 5 April 2000.

²⁴⁶ *Helen Keller Réka Piskóty* Friendly Settlements as the Sleeping Beauty in Inter-State Cases: Opportunities and Risks for the European Court of Human Rights, *Völkerrechtsblog*, 28.04.2021, doi: [10.17176/20210428-181222-0](https://doi.org/10.17176/20210428-181222-0)

²⁴⁷ *Helen Keller Réka Piskóty* Friendly Settlements as the Sleeping Beauty in Inter-State Cases: Opportunities and Risks for the European Court of Human Rights, *Völkerrechtsblog*, 28.04.2021, doi: [10.17176/20210428-181222-0](https://doi.org/10.17176/20210428-181222-0)

²⁴⁸ *Helen Keller Réka Piskóty* Friendly Settlements as the Sleeping Beauty in Inter-State Cases: Opportunities and Risks for the European Court of Human Rights, *Völkerrechtsblog*, 28.04.2021, doi: [10.17176/20210428-181222-0](https://doi.org/10.17176/20210428-181222-0)

129. The Court has considered in the context of individual applications that, under certain circumstances, it may be appropriate to strike out an application under Article 37 § 1 (c) of the Convention on the basis of a unilateral declaration by the respondent Government. In this respect, in determining whether the unilateral declaration offers a sufficient basis for finding respect for human rights as defined in the Convention, the Court will look at a number of factors such as whether the facts are in dispute between the parties, whether there is an admission of responsibility or liability for any violation of the Convention alleged by the applicant, and whether the applicant's grievances under the Convention are adequately addressed.²⁴⁹ Also, the Court rejects requests for striking cases out of the list on the basis of unilateral declarations when it considers the serious nature of the allegations of human rights violations²⁵⁰ or that accepting the request would contribute to keep the situation unchanged without a guarantee that a solution would be found in the near future; which would not help the Court accomplish its role under Article 19 of the Convention, that is ensuring the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto.²⁵¹

130. The number of unilateral declarations in 2020 was 402, representing a decrease by 73% compared to 2019, with 1 511 declarations.²⁵²

131. As regards individual applications relating to inter-State disputes, mention can be made of the **pilot judgment** in the case of *Xenides-Arestis v. Turkey*.²⁵³ The Court found that the violation of the applicant's rights under Article 8 of the Convention and Article 1 of Protocol No. 1 originated in a widespread problem affecting large numbers of people, namely the unjustified hindrance of her "respect for her home" and "peaceful enjoyment of her possessions" as a matter of "Turkish Republic of Northern Cyprus" ("TRNC") policy.²⁵⁴ In this connection the Court noted that approximately 1.400 property cases which were pending before it were brought primarily by Greek Cypriots against Turkey.²⁵⁵ The Court considered that the respondent State must introduce a remedy which secures genuinely effective redress for the Convention violations identified in the judgment in relation to the present applicant as well as in respect of all similar applications pending before it, in accordance with the principles for the protection of the rights laid down in Article 8 of the Convention and Article 1 of Protocol No. 1 and in line with its admissibility decision of 14 March 2005. Such a remedy should be available within three months from the date on which the judgment was delivered and redress should be afforded three months thereafter.²⁵⁶

132. Following the pilot judgment in the *Xenides Arestis* case, an Immovable Property Commission (IPC) was set up in the northern part of Cyprus under Law No. 67/2005 on the compensation, exchange or restitution of immovable property. In its inadmissibility decision in *Demopoulos and others v. Turkey*, the Court found that Law No. 67/2005 "provides an accessible and effective framework of redress in respect of complaints about interference with

²⁴⁹ *Tahsin Acar v. Turkey* [GC], no. 26307/95, §§ 78, 79, 83

²⁵⁰ *Rantsev v. Cyprus and Russia*, no. 25965/04, 7 January 2010: The Court rejected a unilateral declaration proposed by the Cypriot Government, which concerned the death of the applicant's daughter in Cyprus despite the acknowledged violations of Articles 2, 3 and 4 of the Convention and offer of compensation, in light of the serious nature of the allegations of human trafficking and the paucity of case-law under Article 4 ECHR.

²⁵¹ *Tomov and others v. Russia*, nos. 18255/10 and others, §100, 9 April 2019.

²⁵² https://www.echr.coe.int/Documents/Stats_analysis_2020_ENG.pdf In 2015, 2,970 unilateral declarations were accepted by the Court. The number fell in 2016 to 1,766, and significantly decreasing again in 2017 to 754 UD's. In 2018 there were 865 declarations.

²⁵³ *Xenides-Arestis v. Turkey*, no. 46347/99, §§ 39, 40, 22 December 2005

²⁵⁴ *Xenides-Arestis v. Turkey*, no. 46347/99, § 38, 22 December 2005, with the Court seeing no reason to depart from the findings in *Loizidou v. Turkey*, Preliminary objections, judgment of 23 March 1995, Series A no. 310; merits, judgment of 18 December 1996, *Reports of Judgments and Decisions* 1996-VI; Article 50, judgment of 29 July 1998, *Reports* 1998-IV; and the findings in *Cyprus v. Turkey*, *Cyprus v. Turkey* [GC], no. 25781/94, ECHR 2001-IV.

²⁵⁵ *Xenides-Arestis v. Turkey*, no. 46347/99, § 38, 22 December 2005.

²⁵⁶ *Xenides-Arestis v. Turkey*, no. 46347/99, § 40, 22 December 2005.

the property owned by Greek Cypriots”.²⁵⁷ In the inter-State case *Cyprus v. Turkey* on 12 May 2014, the Court considered that “the decision in the case of *Demopoulos and Others*, cited above, to the effect that cases presented by individuals concerning violation-of-property complaints were to be rejected for non-exhaustion of domestic remedies, cannot be considered, taken on its own, to dispose of the question of Turkey’s compliance with Part III of the operative provisions of the principal judgment in the inter-State case.”²⁵⁸

133. The potential of the pilot judgment procedure in cases relating to inter-State disputes as a means of facilitating their friendly settlement is an area of inquiry worth exploring further. The pilot judgment procedure was developed and is employed by the Court where the facts of an application reveal the existence of a structural or systemic problem or other similar dysfunction in the State concerned which has given rise or may give rise to similar applications.²⁵⁹

134. Some authors argued that the method of pilot judgment should be used also in the context of inter-State applications, which address systemic human rights violations.²⁶⁰ The pilot judgment approach allows addressing large-scale human rights violations through managerial methods, thus, in a cooperative and sovereignty-preserving manner rather than with sanctions. It is argued that a constructive legal dialogue is a worthwhile option and thus should be open to the Court in inter-State cases. This methodology should not be the only means for the Court to resolve the dispute. So far, no pilot judgment has been adopted in connection with an inter-State case.

IX. CONCLUSIONS

135. Processing inter-State cases and the high number of individual applications when they concern inter-State cases or conflicts raises exceptional challenges for the Court and States-Parties to the dispute as these cases are particularly time-consuming and complex as a result of their nature and dimension. While the Convention does not specifically address the relationship between inter-State cases and related individual applications, the Court’s practices seek to ensure efficiency in the processing of these applications. For example, where an inter-State case is pending, 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. The Court also adjusts the processing of inter-State cases according to geographical or time criteria or the legal questions raised. The DH-SYSC will continue to examine the desirability and feasibility of supporting the formalisation of such practices and will engage with the questions raised, in particular the exchange of stances in respect of individual

²⁵⁷ *Demopoulos and others v. Turkey* (dec) nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04, 21819/04, §127, 1 March 2010.

²⁵⁸ *Cyprus v. Turkey (just satisfaction)* [GC], no. 25781/94, 12 May 2014, § 63.

²⁵⁹ Rule 61§1 of the Rules of the Court. In a pilot judgment, the Court’s task is not only to decide whether a violation of the Convention occurred in the specific case but also to identify the systemic problem and to give the Government clear indications of the type of remedial measures needed to resolve it. A key feature of the pilot procedure is the possibility of adjourning, or “freezing,” related cases for a period of time on the condition that the Government act promptly to adopt the national measures required to satisfy the judgment. The Court can, however, resume examining adjourned cases whenever the interests of justice so require.

²⁶⁰ L. Wildhaber, Pilot judgment in cases of structural or systemic problems on the national level in R. Wolfrum, U. Deutsch, The European Court of Human Rights Overwhelmed by applications: Problems and possible solutions; P. Leach, Responding to systemic human rights violations: an analysis of pilot judgments of the European Court of Human Rights and their impact at national level; A Buyse, Airborne or Bound to Crash? The rise of pilot judgment and their appeal as a tool to deal with the aftermath of conflict.

applications before a decision on admissibility or a judgment on the merits of the related inter-State case is delivered.

136. The DH-SYSC notes that, on one view, it is suggested that a new admissibility criterion for inter-State applications be introduced according to which an inter-State application may be lodged only under the condition that the applicant State has reasonably explained why the affected individuals or legal entities cannot apply to the Court independently. On this view, an inter-State application or part thereof would have to be declared inadmissible if at least one similar application from a concrete person is pending before the Court. Noting that this point of view would imply amendments to the Convention, the DH-SYSC will continue to examine whether a new admissibility criterion is necessary.

137. In practice few inter-State cases relating to the same events or the same subject-matter have been brought in parallel before the Court and other international bodies or have raised questions regarding the possibility of diverging or conflicting decisions. However, such risks should not be excluded in the future and when they arise, they should be mitigated. Situations of diverging or conflicting jurisprudence between the Court and other international bodies, notably the HRC, in cases involving the same facts, parties and subject-matter have occurred in practice with respect to individual applications. This has raised concerns about legal certainty for States Parties on how to respect their human right obligations, for individuals as regards the scope of their rights, and potentially undermining the coherence of human rights law and/or the credibility of human rights institutions. Hence, the Court should continue to ensure, to the extent possible, a harmonious interpretation of substantive rights under the Convention with other international human rights protection regimes and continue its judicial dialogue with other international bodies. The DH-SYSC notes that the CDDH report on the place of the European Convention on Human Rights in the European and international legal order, will, in its entirety, be the basis for any possible future consideration of questions raised regarding the Court's interpretation and application of the Convention in manner which is consistent with international law.

138. One of the challenges arising in relation to the establishment of the facts in inter-State cases is that a number of witnesses summoned fail to attend the hearing. While the Court approaches this issue in terms of assessing whether the respondent State has met its co-operation obligations and drawing, where appropriate, adverse inferences, member States should consider the question of what steps they need to take to ensure the attendance of witnesses at the Court's hearings pursuant to Article 38 of the Convention. The DH-SYSC will continue to examine this issue from the perspective of the States Parties obligations under Article 38 and will engage closer with the question of the desirability and feasibility of organising hearings with witnesses by means of information technology.

139. The approach of the Court nowadays is not to carry out on-the-spot investigations due to the fact that they are time consuming and expensive. Also, in some cases there are practical difficulties which may ultimately influence the Court's ability to ensure that its proceedings are fair to all the parties. With particular regard to on-the-spot investigations, challenges arise as a result of the possible reluctance of national authorities to support and facilitate the activities of the Court's delegation. The DH-SYSC will continue to engage with the question whether it is feasible and/or desirable that fact-finding missions are organised by the Court in inter-State cases and the application of States Parties obligations under Article 38 in this context.

140. When applying Article 41 of the Convention to inter-State cases, 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 the violations found. In practice the Court invites the applicant government to submit a list of identifiable individuals

who are the victims of violations at the just satisfaction phase of the proceedings. The DH-SYSC notes that on one view the list should be submitted at the outset of the inter-State procedure. The DH-SYSC will discuss this point further in conjunction with its discussion on the desirability and feasibility of a formalisation of the Court's current practices, notably in the Rules of Court. Particular attention will be given to the discharge of the States Parties obligations under Article 38 as a means of mitigating risks of awarding just satisfaction to individuals who are not eligible for such an award due to various reasons could be decreased. The submission of the observations on just satisfaction by the States Parties concerned within the time-limits fixed by the judgment on the merits for the parties' exchange of such observations, can help to handle inter-State cases more efficiently and avoid undue delays between the judgment on the merits and the just satisfaction judgment.

141. The analysis of the Court's practice reveals that the friendly settlement mechanism enshrined in Article 39 of the Convention offers potential for the State Parties in cases related to inter-State disputes to engage in dialogue and undertake negotiations with a view to reaching a friendly settlement of the matter. Respect for the human rights is guaranteed by the involvement of the Court. The friendly settlement procedure, which is carried out by the consent of both parties and which has to remain fully confidential, creates opportunities for a variety of measures to be adopted to remedy the alleged violations of the Convention. Also, the application of the pilot judgment procedure in individual applications related to inter-State disputes may hold potential for facilitating their resolution through friendly settlement. In addition to providing redress to the victims, friendly settlements may provide for measures that have a wide impact on society in terms of effecting change by protecting and promoting compliance with the Convention. Therefore, the DH-SYSC will continue its reflections on how to promote recourse to the friendly settlement mechanism of the Convention.

142. This report provides a basis for further consideration of matters falling within the mandate of DH-SYSC, subject to the final adoption of its terms of reference for the quadrennium 2022-2025 by the Committee of Ministers and, does not limit further discussions within DH-SYSC and/or DH-SYSC-IV.